



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: ~~338-1040~~
238-1040

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

RANDY ELLIOTT

v.

Docket No. 15-86-262

HANCOCK COUNTY BOARD OF EDUCATION

DECISION

Grievant Randy Elliott is presently regularly employed by the respondent Hancock County Board of Education and assigned to teach history at Weir Junior High School (WJHS). On September 19, 1988 he filed a grievance in which he alleged a violation of W.Va. Code §18A-4-8b: "I applied for the vacant position, and it was not filled." Denied at level one on September 28, 1988 and level two on November 14, 1988, the grievance was thereafter waived "to the hearing examiner" by the respondent board on December 5, 1988. Grievant appealed to level four December 22, 1988, and a hearing was conducted February 8, 1989;¹ the parties filed proposed findings of facts and conclusions of law on March 9 and 14, 1989.

¹The transcript of the November 3, 1988 level two hearing was submitted to the hearing examiner at that time.

Grievant, certified in social studies comprehensive, 7-12, entered his fourth year of employment with respondent during the 1987-88 school year and was assigned to Weir High School. He was timely noticed of a reduction in force (RIF) action, effective at the conclusion of the term, because of declining enrollment and, presumably, his lack of seniority, and was eventually placed on the preferred recall list.

Grievant was not regularly hired during the summer months. After the 1988-89 school year officially began for teachers, but prior to the return of students, grievant received a call from respondent's administrative office. He was offered a full-time substitute position to teach five unassigned social studies classes at WJHS, which he accepted at substitute status wages.

The grievance issue herein involves, in part, a factual determination of whether a position opening occurred at WJHS prior to the 1988-89 school year which was not properly or timely filled.

None of the parties to the grievance really established an accurate chronology of social studies personnel movement at WJHS during the school year 1987-88 and beyond. However, through the disjointed testimony of several witnesses, an overall picture emerged.

Sometime during the school year, WJHS history teacher, Ed Samuari, "transferred to the high school." A Mr. Watson was employed for the vacated position the rest of the year and then he transferred out. Ms. Hofs, another history teacher, transferred to the high school and her position was offered to a Mr.

Zelinski, who declined. That particular position was probably an August 15, 1988 vacancy that an employed teacher from another school, Donna Durkin, bid upon and received inasmuch as she was more eligible than grievant who was on the preferred recall list.² Five history classes remained unassigned because Mr. Donald Licker, a WJHS Physical Education staffer with social studies certification, refused on several occasions, once in June and again in late August, to take the assignment and threatened a grievance on untimely transfer.

Although the testimony was confusing during both the level two and four hearings, apparently several vacancies in grievant's discipline opened in various county schools during Summer 1988. Of record is a letter to grievant dated June 20, 1988, from Superintendent Russell Slack advising him of an opening; however, Mr. Slack did not state the particular school involved. Also made part of the record was the August 15, 1988 posting which listed the vacancy for a social studies position at WJHS with a directive to apply by August 19, 1988.

Grievant stated he was in summer school but he came home to apply for the position described by Mr. Slack in June. He then submitted an open-ended application for any position that would

²Teachers not retained, RIFed for insufficient seniority and placed on a preferred recall list, do not have preference over currently employed teachers for a position vacancy. W.Va. Code §18A-4-8b(a). Hence, during Summer 1988, position vacancies, created in part by RIF actions, were filled by present staff desiring a different school assignment.

come open thereafter, but was informed that all posted vacancies were filled by others.

Grievant contended at level two that the five social studies classes he was employed to teach on a full-time substitute basis constituted a vacant position never filled by respondent. He believed that the June posting was for WJHS and that the WJHS vacancy posted August 15 was not filled. However, he admitted that he was out of town part of the summer and he knew of at least three position vacancies at various schools for which he was considered over the summer months were filled by personnel more eligible than he. He stated that it was possible the August 15 WJHS position could have been filled by another teacher and he was not absolutely sure the June opening referred to in Mr. Slack's letter was for WJHS (T2.11-14). Nevertheless, he insisted that he knew of two available position vacancies that opened at WJHS because of teacher movement.

His request for relief at level two was that he be regularly employed on a continuing contract in the position for which he was employed on a substitute basis. He also agreed with respondent's counsel that if the August 15 WJHS position had been filled by a more eligible teacher than he, his present (substitute) position should be posted as continuing (after) 60 days into the semester and "the position is made available again and you have to take the bidding process." T2.14.

The parties referred to a 1988 amendment to W.Va. Code §18A-4-8b(a) which modified job posting requirements under certain circumstances, to-wit:

Boards shall be required to post and date notices of all openings. . .

. . . .

Provided, no vacancy which occurs after the beginning of the semester instructional term shall be required to be posted until the sixtieth day of the semester at which time all job openings shall be posted with the successful applicant assuming the position at the beginning of the next semester.

Thus, according to respondent at level two, grievant was properly hired as a substitute teacher to teach the five classes characterized by it in its level two decision as "a newly created position" to be posted in 60 days, pursuant to W.Va. Code §18A-4-8b(a).

At level four, grievant related that the status of his case had changed. Subsequent to grievant's initial filing of the instant matter and the level two decision, the "substitute" position he had filled was eventually posted and he bid on and received the position. He was regularly hired effective January 4, 1989, and his continuing contract was restored. Respondent did not object to grievant's modification of his requested relief, i.e., that he be awarded back wages and benefits to the start of the school year.

After discussion by the parties at level four it was determined that grievant lost no out-of-pocket money with respect to medical benefits, although it was not made perfectly clear about his pension situation, but had lost approximately \$70.00 on wage differential and an undetermined amount with

respect to paid school holidays. While admitting to no wrongdoing in the situation, respondent offered the \$70.00 wage differential to grievant as settlement but grievant declined as he felt his legal position was correct and he should also receive the holiday pay.³

Discussion:

The record in this grievance establishes that it was known by school officials for some time that WJHS was overstaffed due to declining student enrollment over the years. According to Superintendent Slack, the situation was especially critical in the physical education (PE) area inasmuch as there were too few students and PE curriculum needs to justify the continued employment of all of the staff and/or the continued assignment of PE staff members, also certified in social studies, to teach physical education classes exclusively.⁴

Thus, as Superintendent Slack testified, there was no need to hire additional teachers at WJHS. Based on that line of reasoning, there was no position opening, and grievant herein is fortunate to even have a position this 1988-89 school year as Mr. Slack contended (T4.__).

³In his level four proposals, grievant contended that respondent owed him \$1693.44 for paid non-instructional days and holidays per a \$94.08 daily rate, in addition to the \$70.50 substitute teaching adjustment for a total amount of \$1763.94.

⁴It appeared that most of the PE staff had been at WJHS for quite a time and none wanted to be transferred out to another school and the multi-certified PE teachers wanted to teach only PE and not social studies.

However, as is also evident from the record, during 1987-88, WJHS's principal failed to timely remedy an over-staffing situation long known to him, by whatever means necessary. He apparently wanted to satisfy the desires of present PE staff to remain at WJHS and realign multi-certified personnel into subject areas of need when the opportunity arose. With this in mind, staff loss of social studies personnel would not precipitate a need to hire new staff or even a need to reshuffle PE personnel, per se, but it created the opportunity to do so and to reduce the overpopulated PE area.

When personnel movement occurred which resulted in a social studies class overage, but much too late for formal action, the principal tried to get at least one PE staff member holding social studies certification, Donald Licker, to agree to teach social studies classes, which Mr. Licker resisted on several occasions. All of this time the principal assured Mr. Slack that he could handle the situation and assign the classes to present staff. When the start of school approached and the principal failed to accomplish what he promised to do, he notified Mr. Slack that he would need a substitute to cover five social studies classes.

Mr. Slack testified that five classes constituted a full-time position; thus, as grievant had consistently maintained, there was a position opening at WJHS prior to the start of the semester.

Respondent's failure to timely resolve the overstaffing situation⁵ at WJHS cannot justify its invocation of the 60-day delayed hiring provision of W.Va. Code §18A-4-8b(a). Some circumstances which would warrant application of the provision would be a sudden resignation or incapacitation of an already scheduled teacher to the duties of the position. In the instant grievance, the five social studies classes, known for an extensive period of time to need coverage, had never been assigned.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

⁵Whether WJHS is overstaffed or not and grievant's employment unnecessary, as Mr. Slack suggested, the entire situation could have been avoided by prompt and proper administrative action. Besides RIF or transfer or unneeded PE staff at WJHS, an alternative could be to deploy existing staff in one discipline, via timely transfer, to teach other courses for which they hold certification. Members of the physical education staff who hold social studies certification could be "transferred" to another area of held certification in this manner to equitably distribute the five classes to all.

Note, however, an in-house transfer of a teacher in one discipline/department to a full-time vacant position in another discipline/department (all five classes as applicable herein) would be contrary to the notice and hiring requirements of W.Va. Code §18A-4-8b(a).

FINDINGS OF FACT

1. Grievant, certified in secondary social studies, had entered his fourth year of teaching during 1987-88 but, due to declining student enrollment in the county, his employment was terminated via a RIF action for the 1988-89 school year and he was placed on a preferred recall list.

2. During Summer 1988 grievant was in graduate school and in June was notified of a job vacancy in the county. He made application for that vacancy or anything else that may come up in the future. He was not employed for several vacancies, even as late as August, 1988, because other more eligible county teachers were awarded those positions.

3. Several WJHS history (social studies) teachers transferred out during and/or after the completion of the 1987-88 school year and at least one history vacancy was properly filled, but some classes were scheduled but not assigned.

4. WJHS did not necessarily need additional staff. Due to loss of student enrollment over the years, the PE department had more teachers than was justified by students and class offerings. Because the department had personnel with multi-certification in social studies as well as PE, the principal hoped to reassign and redistribute history classes to qualified PE staffers. The multi-certified PE staff members would rather

teach PE than social studies and apparently all PE staff wished to remain at WJHS.

5. The principal at WJHS failed to remedy long known PE overstaffing via whatever action necessary such as timely RIF or transfer from WJHS of PE staff or in-house transfer of qualified, multi-certified PE teachers to areas of need. When threatened with untimely reassignment to teach five unassigned social studies classes created by social studies staff movement out of WJHS, one such PE staff member refused to agree to teach the classes as early as June and as late as August, 1988, but prior to the start of the 1988-89 first semester.

6. Although at least one social studies position was filled at WJHS, five history classes were not assigned when school was ready to start due to the inability of the principal to remedy the staffing situation over the summer months. After school began, grievant was asked to teach the classes on a full-time substitute status. Although grievant was not contacted or employed on the substitute basis until after teachers began their duties several days before students reported, the "vacancy" for the unassigned five history classes was ongoing during the summer months and did not become a newly created position after the semester began.

7. Respondent made salary adjustments during grievant's substitute employment after a certain period but he still lost

some wage differential and holiday pay as a substitute teacher before he was regularly employed by respondent in January 1989 for the WJHS position vacancy.

CONCLUSIONS OF LAW

1. Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. W.Va. Code §18A-4-8b(a).

2. Pursuant to W.Va. Code §18A-4-8b(a), a teaching vacancy which occurs after a school semester begins is not required to be posted until the 60th day of the semester (60-day provision) and the successful applicant will assume said position at the start of the next semester.

3. Five instructional classes, considered by a board of education to be a full-time teaching assignment and known to be unassigned for a considerable period prior to the beginning of school, comprises a vacancy which must be posted before the semester begins and is not a vacancy as contemplated by the 60-day provision of Code §18A-4-8b(a).

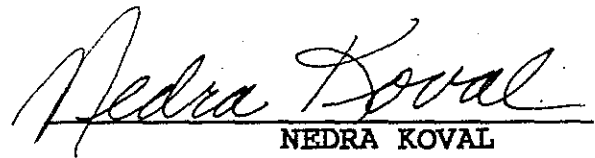
4. According to the record in the instant grievance, grievant was wrongfully hired as a substitute teacher after the

semester began to teach five classes known to be unassigned prior to the start of the semester.

This grievance is **GRANTED** in its entirety and the respondent board is Ordered to pay grievant all lost wages, including holiday pay, and any and all lost benefits to the beginning of the 1988-89 school year.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: March 21, 1989


NEDRA KOVAL
Hearing Examiner