



REPLY TO:  
111 - 19th Street  
Wheeling, WV 26003  
Telephone: 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

NASIA BUTCHER

v.

Docket No. 89-11-642

GILMER COUNTY BOARD OF EDUCATION

DECISION

Grievant Nasia Butcher had been employed as a substitute teacher by respondent Gilmer County Board of Education (GCBE) for the 1987-88 and 1988-89 school years. On November 3, 1989, she advanced a grievance to level four in which she protested GCBE's actions when it did not employ her for a teaching vacancy at Gilmer County High School (GHS), effective the 1989-90 school year. Grievant asked that the matter be decided based on the record developed below, but GCBE requested a hearing to take the testimony of its individual members. Hearing was conducted January 5, 1990, and briefing was completed by the parties January 30, 1990.<sup>1</sup>

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<sup>1</sup>The grievance, originally filed in September 1989, was remanded for procedural deficiency to level three where hearing was held October 24, 1989. Grievant refiled at level four following GCBE's adverse decision. The transcript and exhibits of the level three hearing are part of the record herein.

The dispute in this grievance pits GCBE's members against its ranking administrators, School Superintendent James Lambert, installed May 15, 1989, and GHS Principal and Vocational Director, Dr. Richard Butler, on the job since October 1988. Although GCBE had delegated the selection responsibilities to Mr. Lambert and Dr. Butler, it did not follow their recommendations to hire grievant for the language arts position in question.

Before the merits of the case can be addressed, an initial issue must be resolved. GCBE maintains that grievant does not have standing to bring this grievance and relies on the definition of "employee" of W.Va. Code §18-29-2(c). The statute provides,

"Employee" means any person hired by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

GCBE claims that substitute teachers cannot avail themselves of the grievance procedure under W.Va. Code §§18-29-1 et seq. and in any event, that grievant was not in its employ in July 1989 since its substitute teachers' contracts are in effect from July 1 until June 30, and it did not act on approving the 1989-90 substitute list until August 1989. The challenge to grievant's standing is rejected.

Subsequent to her rejection for the vacancy in question, grievant was employed for the 1989-90 school year by the Calhoun-Gilmer Joint Vocational Council for a split assignment teaching at both Calhoun County High School and GHS. She argues

that she has standing in this grievance matter on that basis alone since she is clearly bound by GCBE's rules, policies and procedures when she is on site at its high school. She also argues that, since GCBE would have retained her on the 1989-90 substitute list retroactively to July 1 had she not attained permanent employment with the Council, her status in July on GCBE's substitute list for the 1989-90 school year was secure; therefore, whether said appointment had or had not been acted upon at the time she filed her grievance is without import.

Grievant's arguments are persuasive and reasonable. For one, GCBE's unseasonable action on its substitute list appears to be a mere formality. The fact that it approves substitute contracts retroactively to July 1 bears this out.<sup>2</sup> The alternative that GCBE's substitute staff are in some kind of employment limbo from June 30 until action on their contracts is unreasonable. Inasmuch as grievant's substitute contract was not adversely acted upon prior to her applying for the disputed position and GCBE's subsequent non-selection of her, and given that GCBE's delayed approval on substitute contracts are a mere formality, it is determined that grievant remained a substitute teacher at all times relevant to the grievable event and

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<sup>2</sup>Mr. Lambert testified that one-year substitute contracts run from July 1 to June 30, T4.55,56.

properly prosecuted the matter in accordance with W.Va. Code §§18-29-1 et seq.<sup>3</sup>

Having found grievant to be a substitute employee for the purposes of her grievance, GCBE's further debate on the matter is also rejected. This Board has previously ruled that a substitute teacher may prosecute his or her non-selection on the basis of W.Va. Code §18A-4-8b(a). Karr v. Jackson Co. Bd. of Educ., Docket No. 18-86-297-1 (Feb. 25, 1987); Ramey v. Cabell Co. Bd. of Educ., Docket No. 89-06-177 (June 21, 1989). Whether the grievant can prevail on the merits of her case is another matter.

The underlying facts of this grievance are not in contention. GHS is a combination junior-senior high school which includes grades seven through twelve. In January 1989, the seventh and eighth grade Language Arts<sup>4</sup> teacher resigned and a substitute filled the position during the spring semester. Dr.

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<sup>3</sup>It could be said that GCBE did not act properly on raising this issue. The grievance was initially waived to level four, see n.1, without any legal determinations. On remand to level three, the level vested with authority to grant relief, GCBE was ordered to conduct a hearing "and furthermore issue proper findings of fact and conclusions of law within ten (10) days thereafter." GCBE had every opportunity to raise the issue of grievant's standing and rule accordingly. While the matter of grievant's employment status was alluded to by its counsel at level three, GCBE denied the grievance on the merits of the selection dispute only and voiced no contest to grievant's standing.

<sup>4</sup>According to the testimony, requirements for the language arts certification includes training for teaching journalism and school-related publications.

Butler prepared the vacancy notice, posted July 7, 1989, which read in relevant part:

POSITION: Language Arts/Developmental Reading  
Teacher  
Gilmer County High School 7-12

RESPONSIBILITIES: Language Arts and Developmental  
Reading Classes  
Other duties as assigned by the  
Principal to facilitate the smooth  
operation of the school and the  
instructional program.

QUALIFICATIONS: [W.Va.] Certification in Language  
Arts  
Teaching experience in Language Arts  
specializations preferred.

According to grievant's testimony, Mr. Lambert and Dr. Butler jointly interviewed her for the position. Subsequent to Dr. Butler's letter of support for grievant, Mr. Lambert recommended her for the position at GCBE's July 13 meeting. A motion was made on the recommendation, but it died for a lack of a second. On August 14, Mr. Lambert recommended Tina Lou Duelley for the position; four of GCBE's five members cast approving votes.

Grievant's academic and employment credentials are impressive. She first graduated from West Virginia University with a bachelors degree in journalism and a masters in education administration, although her emphasis in that field was not made part of the record. She made no claim to possessing a principal's administrative certification, thus, it seems unlikely that her emphasis was in the public-school domain and more plausible that she concentrated in higher-education administration, especially in light of her initial work experiences in that

field. She was employed as an administrative assistant at a community college for one year and then took a position at Glenville State College as its public relations director until 1985. She completed additional studies in an undergraduate education program at Glenville in December 1987. Although a copy of her certificate was not made part of the record, the grievant testified that she had certification for English/Language Arts grades 5-12, T2.4. During her two-year tenure with GCBE, she substituted approximately 100 days, mainly in language arts, according to her. At the time of the posting, she was one course shy of the requirements for a developmental reading endorsement.

Tina Duelley is credited with fifteen hours beyond a bachelors degree, according to her Professional Teaching Certificate. She was certified in elementary education, 1-6, and language arts, 5-8. She met the requirements for a developmental reading authorization but had not completed the paperwork at the time of the posting. Ms. Duelley had five years' teaching experience for GCBE, and taught seventh and eighth grade language arts at Troy Elementary School prior to her bid for the GHS position. According to the testimony, she had very good professional evaluations.

Dr. Butler testified extensively at level two about his role in selecting grievant for the contested position. He was asked by grievant's representative to describe what kind of person he was looking for and the courses to be taught:

A: Initially, I needed someone to teach eighth grade language arts. Specifically literature[] and perhaps

developmental reading. In addition to that, an eighth [grade] newspaper production was a goal of mine, an intent, a duty. And also journalism in a sense of a production of a yearbook. That was the immediate need. . . . , I believed I needed someone [on] staff who in the future could take us a little further in the field of journalism and by producing a quality high school newspaper and offer some journalism classes.

Q: So it is safe to say then, that you were looking for someone who had the educational background or certification that you could use with some flexibility.

A: Yes sir. . . .

He next discussed his selection of grievant:

A: Really, two major reasons. One of course is the certification issue. At the time that I recommended [grievant] to [GCBE], I felt that she was certified in all areas, including developmental reading. That I was looking for someone, I had information to that end. As a matter of fact, I had had a phone conversation with John Pisapia, State Superintendent of Schools, where [grievant] had contacted him and he had expressed that she was or could be authorized to teach developmental reading. So, I clearly felt that she was the most certified. One reason was certification, but probably the overriding, as far as I am concerned, is throughout the interview process, and reading the resumes and background, she was articulate in the interview, enthusiastic about all aspects of the job, not just the yearbook and newspaper. My impression of all the candidates, and there were several good candidates, was that she would be most fitted to the needs of our school.

T2.21,22. Dr. Butler complained that his present staff of language arts teachers refused to get involved with the yearbook project. Because of that problem, production was taken over by a social studies teacher and the classwork involved had to be credited as a historical research instead of as a journalism class. He claimed he was not in error in not listing the yearbook requirement on the posting because such an endeavor was within the educational training and realm of duties expected of

a language arts teacher, and he noted in the posting that "other duties" could be part of the assignment.

Mr. Lambert testified at level two that he recommended grievant for the contested position based on her Language Arts certification, background, extensive schooling and related areas, quality of her interview and resume. T2.26. He stated at the level four hearing that he still believed she was the most qualified applicant.

Four of GCBE's members testified generally that they voted for Ms. Duelley because they felt she was the most qualified applicant on the basis of her in-county seniority, full-time teaching experience in language arts and eligibility for the reading endorsement. They seemed to feel that it was prudent to hire within the school system's regular professional staff and not add new hires.

One GCBE member testified that he did not vote for Ms. Duelley because he believed a third applicant with the most seniority should have been hired. He stated that he consulted with several West Virginia Education Association (WVEA) officials who told him Sue Wagner, as the most senior applicant, would be the "best" qualified.<sup>5</sup>

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<sup>5</sup>Ms. Wagner, apparently the only other candidate, was certified, but she had never taught language arts and did not file a grievance over her non-selection.

The witness also referred to "Patsy Dillon versus Wyoming County," presumably, Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986). A local WVEA officer gave him a copy of Dillon, he testified, "[a]nd it stated right in (Footnote Continued)



Grievant claims to be most qualified candidate for the position based on her perception of the duties the contested assignment entailed as set forth on the posting and in relation to what Dr. Butler told her. She moreover asserts, among other things, that the hiring of the successful candidate was politically motivated because she is a member of the "Burke" faction while GCBE's members were from another faction.<sup>6</sup> On her complaint filed at level four, grievant requested as relief that she be immediately instated. However, she testified at level four that, should she prevail on the grievance, she would defer immediate instatement and assume the position beginning the 1990-91 school year so as not to disturb and compromise the activities and programs of her present employment.

Grievant has not met her burden of proof in this matter. For one, her allegations that her non-selection was politically motivated cannot be supported by mere assertions that she belonged to one political faction while GCBE members belonged to another. The testimony of GCBE's members that political motivation did not influence the selection process was believable.

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(Footnote Continued)

there not to displace seniority." T4.24. He, of course, was either given inaccurate information or erroneously interpreted the case. Dillon requires that the most qualified candidate be employed.

<sup>6</sup>No further information was given about the opposing political factions. However, in this vein, grievant also claimed that she and her husband's family supported issues not favored countywide.

GCBE's members appeared to be sincere and were not otherwise shown to be unreliable.

Further, grievant's challenge of the posting and arguments thereto do not tip the balance in her favor. The notation "Gilmer County High School 7-12" on the posting does not lend special significance in this dispute because the phrase simply describes the job site, not the grade levels to be taught.<sup>7</sup> Also not persuasive was grievant's contention that because the posting failed to state a certification requirement for the developmental reading duty, GCBE was precluded from considering her lack of the endorsement to perform the duty. The oversight in the posting does not represent a fatal flaw because teachers as well as administrators should know that certification or endorsement is required for all teaching assignments.<sup>8</sup> W.Va. Code §§18A-2-1, 18A-3-1.

Finally, while grievant's academics were impressive, the relationship between those accomplishments and teaching language arts to seventh and eighth graders is not particularly telling

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<sup>7</sup>Despite Dr. Butler's stated desire to acquire a teacher who could perhaps one future day serve the upper-grade levels at GHS, it is clear from West Virginia Board of Education (WVBE) Policy 2510, Gr. Ex.2, that WVBE envisions a "Thorough and Efficient System of Education" to be comprised of three distinct education modules, grades K-4, early childhood; grades 5-8, middle childhood; and grades 9-12, adolescent education. There was no dispute that the posted position was for the middle childhood or junior high school level.

<sup>8</sup>A fully certified candidate is preferred to one holding only a permit, see State ex rel. Oser v. Haskins, 374 S.E.2d 184, 186, (W.Va. 1988), and this presumably would hold true with regard to a candidate holding a required endorsement as well.

given her lack of teaching experience. See McCool v. Hancock Co. Bd. of Educ., Docket No. 89-15-018 (Aug. 25, 1989). Likewise, grievant's work experiences, e.g., several years in higher education, bore little relevance to the position she sought and did not particularly enhance her qualifications for employment as a classroom teacher. See generally McCool; Russell v. Doddridge Co. Bd. of Educ., Docket No. 89-09-297 (Dec. 8, 1989); Pockl v. Ohio Co. Bd. of Educ., Docket No. 35-88-220 (April 28, 1989).

Ms. Duelley's teaching experience must be given great deference in this matter, especially when grievant, the party challenging her entitlement, had no regular or long-term teaching experience. Under those circumstances, it cannot be found that GCBE erred when it reasoned that Ms. Duelley was the most qualified applicant.<sup>9</sup>

In addition to the foregoing factual and legal determinations, the following specifics are appropriate.

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<sup>9</sup>Grievant's argument that the selection process was flawed because all GCBE's members did not vote on her nomination cannot be taken seriously. By its inaction on seconding the motion that she be employed, it fulfilled its obligation to make a definite decision on the recommendation per its policy 4111.

## FINDINGS OF FACT

1. Grievant was employed as a substitute teacher by GCBE for the 1987-88 and 1988-89 school years and her contract of employment was not adversely acted upon prior to July 1989; therefore, but for a mere technicality, she would have been in GCBE's employ at all times relevant to the posting and filling of the language arts position at GHS in contention herein.

2. While grievant had commendable credentials, her academic accomplishments beyond certification requirements were not necessarily relevant to the teaching position at issue. Moreover, she had no full-time public school teaching experience, had acquired less than a hundred days' experience substitute teaching and was only eligible for permit status for a developmental reading endorsement.

3. GHS's principal and GCBE's superintendent believed that grievant was the most qualified applicant for the vacant teaching position. That belief was based, in part, on an inordinate consideration of grievant's potential at GHS for possible future extracurricular endeavors in the senior high school realm and not what the posted and vacant junior high teaching position entailed.

4. In consideration of Tina Duelley having met all certification requirements and her five years' experience as a successful teacher in its employ, GCBE correctly reasoned she was most qualified candidate for the seventh and eighth grade teaching position.

### CONCLUSIONS OF LAW

1. "As a substitute teacher [the grievant] had standing under W.Va. Code §18-29-2(c) to grieve [GCBE's] denying [her] a full-time teaching position for which [s]he applied." Ramey v. Cabell Co. Bd. of Educ., Docket No. 89-06-177 (June 21, 1989).

2. It is incumbent upon the grievant to prove the allegations of the complaint by a preponderance of the evidence. Russell v. Doddridge Co. Bd. of Educ., Docket No. 89-09-297 (Dec. 8, 1989).

3. County boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel but the discretion must be exercised reasonably, in the best interests of the school system and not in an arbitrary or capricious manner. State ex rel. Hawkins v. Tyler Co. Bd. of Ed., 275 S.E.2d 911 (W.Va. 1980); Beverlin v. Bd. of Educ., 216 S.E. 2d 554 (W.Va. 1975); Myles v. Ohio Co. Bd. of Educ., Docket No. 35-88-081 (August 1, 1988).

4. A county board of education is obligated to fill a vacant professional position with the most qualified applicant therefor. W.Va. Code §18A-4-8b(a); Dillon v. Bd. of Educ. of the Co. of Wyoming, S.E. 2d 58 (W.Va. 1986); Russell.

5. When a county board of education does not directly participate in the evaluation process and delegates the responsibility for a determination of the most qualified applicant for a particular position to the superintendent of schools, it must either accept that determination or conduct a reasonable and

rational evaluation of all applicants for said position. Milam v. Kanawha Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988).


6. GCBE reasonably evaluated the candidates and determined that Tina Duelley was more qualified than grievant herein because of Ms. Duelley's five years' teaching experience compared to grievants' lack thereof. See McCool v. Hancock Co. Bd. of Educ., Docket No 89-15-018 (August 25, 1989).

7. Grievant did not establish that GCBE acted arbitrarily and capriciously in this grievance matter or otherwise erred in its determination that Tina Duelley was the most qualified applicant for seventh and eighth grade language arts and developmental reading teacher at GHS. Accordingly, grievant did not establish a violation of W.Va. Code §18A-4-8b(a) or any other flaw in the selection process.

The grievance is therefore **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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: April 24, 1990

  
NEDRA KOVAL  
Hearing Examiner