



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

DONALD ENOCH

v.

DOCKET NO. 89-54-540

WOOD COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Donald Enoch is employed by the respondent Wood County Board of Education (WCBE) as a teacher assigned to Williamstown Elementary School. On or about June 20, 1989, he filed a level one grievance alleging violation of W.Va. Code §18-5-39 in that he, being the most senior qualified applicant, did not receive a summer teaching position at Martin School, a special-education facility. After adverse decisions at levels one through three June 20, August 28 and September 5, 1989, respectively, he advanced his complaint to level four September 13, 1989, where hearing was held November 1, 1989.¹

¹At level four, the parties presented evidence to supplement the October 25, 1989, level two hearing. That transcript and exhibits thereto are part of the record herein. The parties completed submissions of fact/law proposals and briefs by January 3, 1990.

This grievance poses a question about WCBE's employment of teachers for courses and classes in educational programs offered after the end of the regular school term, more specifically, the "extended year" summer program conducted for a targeted group of special-education students. Grievant contends that the Martin positions were subject to Code §18-5-39 which provides that summer school positions be filled on the basis of certification and summer school teaching seniority. §18-5-39 states, in relevant part:

Inasmuch as the present county school facilities for the most part lie dormant and unused during the summer months, and inasmuch as there are many students who are in need of remedial instruction and others who desire accelerated instruction, it is the purpose of this section to provide for the establishment of a summer school program, which program is to be separate and apart from the full school term as established by each county.

The board of education of any county shall have authority to establish a summer school program utilizing the public school facilities and to charge tuition for students who attend such summer school, such tuition not to exceed in any case the actual cost of operation of such summer school program: Provided, That any deserving pupil whose parents, in the judgment of the board, are unable to pay such tuition, may attend at a reduced charge or without charge. The county board of education shall have the authority to determine the term and curriculum of such summer schools based upon the particular needs of the individual county. The curriculum may include, but is not limited to, remedial instruction, accelerated instruction, and the teaching of manual arts. The term of such summer school program may not be established in such a manner as to interfere with the regular school term.

The county boards may employ as teachers for this summer school program any certified teacher. Certified teachers employed by the county board to teach in the summer school program shall be paid an amount to be determined by the county board and shall enter into a contract of employment in such form as is prescribed by the county board: . . .

Any funds accruing from such tuitions shall be credited to and expended within the existing framework of the general current expense fund of the county board.

Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. In the event that no employee who has been previously employed in the summer school program holds a valid certification or licensure, a board shall fill the position as a classroom teaching position in accordance with . . . [Code §18A-4-8b]. [(Emphasis added.)]

Conversely, WCBE asserts that Martin's extended-year summer curriculum is "based . . . upon the federal and state policies which require that the extended-year program offer individualized instruction based upon student IEP's and upon predetermined standards for programs of study and program delivery," WCBE Brief, p.18, and therefore does not come within the purview of Code §18-5-39.

As will be hereinafter discussed, the evidence and law in this matter support the grievant's position. Although the nature of the summer offerings at Martin School is the crux of the controversy herein, the basic facts in this grievance are not in contention.

The grievant is certified in special education, mentally retarded (MR), K-12, and elementary education, 1-6. At the time of the grievance, he had six years' seniority with WCBE and had

taught special education exclusively.² Immediately prior to his current assignment at Williamstown, grievant taught at Martin School. Martin is the school system's new "state-of-the-art" special-education facility, according to WCBE.³ In past years, grievant taught special-education students in summer sessions in the areas of trainable mentally impaired (TMI), educable mentally impaired (EMI), physically handicapped and "severe and profound" handicapped. Grievant's summer assignments for two years were at Beechwood and Sumner Schools and for one and one-half years at Martin, after its inception, while he was assigned to those schools during the regular term.

After he transferred to Williamstown, grievant applied but was not employed for Martin's summer offerings.⁴ In 1989, summer teaching at Martin was offered to all employees, countywide.⁵ Accordingly, WCBE posted available "summer school" openings for Parkersburg High School, presumably as it had for

²In WCBE's schools, the needs of each special-education student are dictated by a written Individualized Educational Program (IEP), WCBE Exs.16,17.

³Impaired and handicapped students who cannot successfully be served at other less-restrictive educational environments are likely to be placed at Martin.

⁴Although he inquired about his non-selection, grievant stated that he never received a formal response "only that someone felt that it could be given only to employees of Martin School and it didn't have to be offered to anyone outside," T2.12.

⁵WCBE claimed that the decision to offer the Martin summer positions via traditional postings was in response to prevailing understanding of recent court cases that such was required, and the measure was instituted to prevent grievances on the subject.

past years, and "extended year" offerings at Martin School for the upcoming season, both of those sessions to be conducted June 12 through July 21, 1989.

The purpose of an extended-year program is to deal with special-education students' regression/recoupment difficulties.⁶ Summer program goals are described in the literature, WCBE Ex.8:

Since the minimum goal of the summer program is to prevent losses in self-sufficiency skills, it is those skill areas which would be emphasized during the summer program. . . . Typical skill areas for instruction would include muscular control, toileting, feeding, dressing, physical mobility, personal hygiene, impulse control, basic communication and interaction with peers and/or adults.

As noted on a West Virginia Department of Education (WVDE) advisory, WCBE Ex.7, extended-year programming was intended to be initiated in West Virginia on September 1, 1981. Targeted students were

[s]tudents who have handicaps which are severe in nature are entitled to an educational program in excess of 180 days per year if regression caused by interruption in educational programming and the

⁶Among WCBE's thirty-four level two exhibits are several documents, none specifically identified as state or federal policy or regulation, which impart unrebutted information about the extended-year requirements and goals for certain handicapped students. The literature, WCBE Ex.8, describes "regression/recoupment disability" as such:

This phenomenon is marked by the individual experiencing a significant regression in basic behavioral patterns or skills related to self-sufficiency which were acquired prior to the interruption of an appropriate program of special education and related services. The demonstrated level of regression continues after the resumption of the appropriate program to the extent that reasonable progress in the behavioral patterns or skills related to self-sufficiency, beyond that attained prior to the break in programming, is problematic or unlikely.

limited recoupment capacity render it unlikely that the students will attain a level of self-sufficiency and independence from the caretakers that would be expected in view of the handicapping situation.

WCBE Ex.10. The advisory noted that the Placement Advisory Committee (PAC) would designate on the IEP the specifics of the special education and services to be delivered. No information was given about staffing, but it is assumed that certified teachers would be required as in all teaching employments.

With respect to WCBE's 1989 Summer program, according to data compiled by Marie Held, Principal at Martin until mid-Summer 1989, assessments were made of student needs which resulted in, among other things, two offerings in early childhood, one mild and moderate (MM) and one severe and profound (SP); three in middle childhood, one MM and two SP; and six adolescent, one MM and five SP, WCBE Ex. 21. The posting identified the following relevant vacancies and qualifications:

- Persons must have experience with special needs and MI population and familiarity with implementation of IEP's and programs with emphasis on maintenance of skills to minimize regression and recoupment as specified in state Policy 2419.

- Consideration will be given to employees with knowledge of the student population at Martin School with qualification being the first criteria considered.

. . . .

- 8- Severe and Profound [SP] certification.

- 3- M.R. [MR] certification.

. . . .

According to the evidence, WCBE Exs. 21/22/27/31, of the thirteen persons who vied for the eleven SP and MM-MR

positions,⁷ ten were Martin regular staff, and three were from outside schools, Chris Price, SP certification; Linda Howard, MR certification; and grievant herein. Ms. Held testified that she reviewed the applicants' qualifications and conducted interviews questioning each candidate about his or her relevant experiences and skills. To arrive at her employment determinations, Ms. Held said, she subsequently devised a matrix to rank and comparatively assess the applicants' abilities, gleaned from the credentials review and interview responses, in relation to the students' needs. Ms. Held then forwarded to the superintendent her recommendations for the summer positions in her school; grievant was not selected for any of the MR openings.

All ten Martin applicants were awarded positions and the remaining assignment, a SP class, was awarded to Mr. Price. Of the three successful Martin MM-MR applicants, Connie Allen, Mary Pratt and Richard Kirkbridge, Ms. Allen had had no previous experience in WCBE's special-education summer program. One of the successful SP applicants, Jane McCabe, also had no prior WCBE summer teaching. In fact, Ms. Allen and Ms. McCabe were first-year teachers with WCBE, although McCabe had previous MR

⁷As reflected by the numerous documents of record, including the Martin posting, several other specialized positions were advertised and filled. Due to the nature of those offerings, e.g., physical education, preschool handicapped, and nurse positions, none which had any bearing on the issues herein, only the challenged eleven positions and applicants thereto for the traditional MR classes will be addressed herein.

teaching experience in another county while Allen had no prior experience with any county, T2.14.

Grievant asked that a determination be made that he was entitled to one of Martin's summer positions on the basis of his certification and three and one-half years' summer teaching seniority. As relief, he requested that he be awarded appropriate back wages with interest, seniority and any and all other benefits of the position.

WCBE maintained that, because federal law mandates that programs be offered to special-education students with regression/recoupment problems, such programs were distinguished from discretionary-based summer school. It asserted that the extended-year program is also different from traditional summer school in that the courses are not remedial or accelerated in nature, that no tuition may be charged to students enrolled in the program, and that the WVDE does not subject such programs to approval procedures required of traditional summer school remedial or enrichment programs.

It argued that, since the extended-year program is not §18-5-39 summer school, the statute is not applicable or controlling for employment of the program's summer personnel for the program. The applicants, it urged, were instead properly considered and employed for the positions on the basis of

qualifications per Code §18A-4-8b(a).⁸ WCBE furthermore urged that grievant did not meet his burden of proof that he was entitled to a Martin position under §18-5-39's summer school seniority or §18A-4-8b(a)'s most-qualified criteria in relation to other applicants.

Conversely, grievant argued that school law provides for a "regular full school term," per W.Va. Code §18-5-15[a]:⁹

The board shall provide a school term for its schools which shall be comprised of (a) an employment term for teachers, and (b) an instructional term for pupils. Nothing in this section shall prohibit the establishment of year-round schools in accordance with rules to be established by the state board.

The employment term for teachers shall be no less than ten months, a month to be defined as twenty employment days exclusive of Saturdays and Sundays:

⁸Code §18A-4-8b(a) provides in pertinent part:

A county board of education shall make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications. If the applicant with the most seniority is not selected for the position a written statement of reasons shall be given to the applicant with the most seniority with suggestions for improving the applicant's qualifications.

While WCBE professed that it used §18A-4-8b(a)'s qualifications standard for selecting Martin's summer staff, the record is unclear whether it complied with the statute's directive to furnish the most senior non-selected applicant with suggestions for improvement. Certainly, Ms. Held's June 8, 1989, letter to grievant did not suffice for she simply thanked him for his interest, stated that "[u]nfortunately, there were not enough positions available to ensure one for each applicant" and basically recited the original posted requirements without any direct reference to him. WCBE Ex.29.

⁹Interestingly, WCBE did not attempt to define its program in terms of this statute, despite grievant's analysis, but instead forcefully argued only that the extended-year program is not a Code §18-5-39 summer school.

Provided, That the board may contract with all or part of the personnel for a longer term. The employment term shall be fixed within such beginning and closing dates as established by the state board: Provided, however, That the time between the beginning and closing dates does not exceed forty-three weeks.

Within the employment term there shall be an instructional term for pupils of not less than one hundred eighty nor more than one hundred eighty-five instructional days: . . . The instructional term shall commence no earlier than the first day of September and shall terminate no later than the eighth day of June.

. . .

The board may extend the instructional term beyond one hundred eighty-five instructional days provided the employment term is extended an equal number of days. . . .

Grievant maintained that the summer sessions scheduled at Martin "must fit into one of the school terms as defined by the law." He reasoned that WCBE's "summer session at Martin is not part of the regular school term" per §18-5-15 and instead is "separate and apart from the regular full school term" per Code §18-5-39; therefore, "§18-5-39 would apply when filling vacancies." Gr. Brief, pp.4-5.

Grievant's view that the Martin extended-year summer program is akin to summer school is reasonable. Irrespective of whether federal law mandates that extended classes be offered to targeted students, attendance by the eligible students is voluntary, as is attendance for traditional summer school. As grievant noted, the tuition-free basis for extended-year classes is not significant since charging tuition for summer school is

not mandated by §18-5-39.¹⁰ Further, it is obvious that the extended classes would not need to be offered if none of the special-education students were qualified for admission on the needs basis of regression/recoupment problems. Finally, it is the needs basis factor in scheduling the school's classes that purportedly precluded WCBE from awarding Martin's staff longer contracts, a device which, if used, would have legitimately retained the positions for those teachers in accordance with Code §18-5-15's provisions for extended employment contracts for teachers and/or extended instructional and employment terms. Accordingly, the grievant does not have a "most qualified"

¹⁰ According to a March 28, 1989, memorandum to county superintendents from then-State Superintendent John Pisapia, WCBE Ex.4, WVDE's requirement, initiated in 1985, that permission be sought to operate summer schools is grounded in State Board Policy 2444.01, Graduation Requirements, and presumably seeks assurance that courses offered for graduation credit meet certain standards. Code §18-5-39 authorizes that summer school be "based on the particular needs of the individual county," including, for example, "the teaching of manual arts," and, more importantly, does not limit the type of curriculum to be offered. Notably, the statute does not address graduation credit requirements; therefore, it is reasonable that WVDE would need to monitor programs of that nature. Accordingly, the permission factor for credit-granting summer school does not appear to be particularly significant in this grievance.

burden of proof in this case,¹¹ because §18-5-39 is controlling.¹²

Furthermore, WCBE has not shown grievant to be unqualified for a summer assignment at Martin, although considerable argument was directed in that vein. Ms. Held testified that she placed much emphasis on the candidates' ability to "sign," a method to communicate with certain non-hearing-impaired disabled students. She stated that she asked grievant about his signing capabilities and he told her that he was proficient in fifteen signs; most applicants said they knew a hundred or more signs. She explained that without communication, learning cannot occur.

However, the signing proficiency, declared a "decisive qualification" and "crucial ability," WCBE Brief, pp.7,8, was not stated as a qualification or requirement on the posting.

¹¹In its level four brief, WCBE stated that grievant did not prove that "he was one of the three most qualified of the applicants for the positions in question." At some point in the level two proceedings, grievant did seem to challenge positions held by Mr. Tennent, Ms. McCabe and Ms. Allen; however, he had done so on the basis of their summer teaching seniority. Due to the ultimate disposition of this case, those persons' summer positions and grievant's challenge to them need not be further addressed in the context of a most-qualified standard.

¹²At level two, grievant relied on §18-5-39's entitlement for a summer teaching position and did not address whether he met a most-qualified standard. At level four he asserted that, if the statute was not applicable, he was clearly as qualified as Ms. Allen and therefore should have been selected for a position on the basis of his greater county seniority in accordance with Code §18A-4-8b(a).

It is noted that grievant's special education teaching experience, some at Martin during both the traditional school year and the summer extended program, should be given great weight in a comparative analysis of qualifications.

Altering requirements on a posting or considering "decisive" qualifications not made known to applicants thereon has been held to be unfair and arbitrary. Dillon v Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986); Rogucki v. Gilmer Co. Bd. of Educ., Docket No. 11-87-260-2 (Feb. 17, 1988). More importantly, grievant had successfully worked with and taught members of Martin's student population and had accommodated his previous students' signing needs on a student-by-student basis, according to his unrebutted testimony.

In addition, the evidence in this dispute did not demonstrate a blanket need that Martin's staff be given priority for the summer staffing. However, Ms. Held did testify that she felt Ms. McCabe would be best-suited for the five-member, adolescent SP class since one of the students was accustomed to her and needed a consistent environment, if possible. Although it appears that the need was somewhat established for Ms. McCabe to administer to that particular student, there was no compelling testimony that other students were necessarily in need of such special treatment.¹³ The record as a whole, in fact, did not generally establish or otherwise justify the employment of

¹³Notice can be taken that no student can ever be guaranteed a specific teacher, provider of services or other care-giver, regardless of need or good intentions.

the entire Martin staff,¹⁴ especially first-year WCBE teachers to the exclusion of other non-Martin qualified teachers.

Grievant's burden to show that he was entitled to a summer teaching position at Martin on the basis of his certification and summer teaching seniority was clearly met.¹⁵ While he did not ascertain such seniority for all of the applicants, he was one of thirteen candidates, from within and without Martin, for eleven positions, and he did establish that two successful applicants, Ms. McCabe and Ms. Allen, had no summer seniority. With their elimination, and all other factors being equal, his placement on the summer staff at Martin was assured regardless of the summer teaching seniority, if any, of other applicants.

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

¹⁴Ms. Held testified at level four that her interviews of the candidates for the eleven MR positions were not conducted with any specific position in mind. Moreover, the evidence clearly demonstrates that Ms. Held first filled all available positions with applicants from Martin's regular staff and then selected a teacher for one remaining unfilled position from a separate listing of non-Martin applicants, see WCBE Exs.24,25.

¹⁵WCBE's reliance on Kelps v. Jackson Co, Bd. of Educ., Docket No. 18-88-217 (March 16, 1989) was also misplaced. In Kelps, the employment of an applicant for "a specialized position in a designated school" was upheld because the position included teaching duties for which no certification had been established, and she demonstrated she possessed the necessary skills to teach the subject. The same circumstances do not exist in the instant case, and grievant herein was appropriately certified.

FINDINGS OF FACT

1. WCBE posted openings countywide for "summer school" classes at Parkersburg High School and "extended year" summer assignments at Martin School, a special-education facility, both programs scheduled for June 12 through July 21, 1989. Grievant was one of three non-Martin teachers who applied for eleven relevant positions.

2. Martin's then-Principal Held was responsible for selecting summer personnel for the school's extended-year program. Through her efforts, ten of the eleven MR-MM/SP vacancies, early education through adolescent, were filled with the ten Martin applicants, and the remaining class was filled with one of the three non-Martin applicants.

3. Grievant was not selected for any of those openings although he was qualified with the appropriate MR certification and met the rest of the posted qualifications for at least three MR positions. In addition, he had six years' experience teaching special education, including severely handicapped students; had previously taught at Martin and other of WCBE's special education schools; and had three and one-half years' experience in WCBE's extended-year summer program in special education.

4. Grievant filed a grievance over his non-selection, but the other unsuccessful non-Martin teacher did not.

5. Two of Martin's staff who were awarded positions had only one year's seniority and experience in WCBE's employ and had never been part of WCBE's extended-year program.

6. Although WCBE went through the motions of posting the Martin positions for the consideration of qualified countywide teachers, it is clear from the record that all interested Martin staff were given preference over outside teachers.

CONCLUSIONS OF LAW

1. A school board must set a regular school term and employment term for teachers, W.Va. Code §18-5-15, and summer school programs are "separate and apart from the full school term as established by each county." Code §18-5-39.

2. Although WCBE's "extended year" special-education program may be mandated by state and federal regulations, such a program is "needs based" and would not otherwise be necessary. It offers remediation to the extent that special education is somewhat remedial in nature and basically conforms to the statutory description of a summer school program.

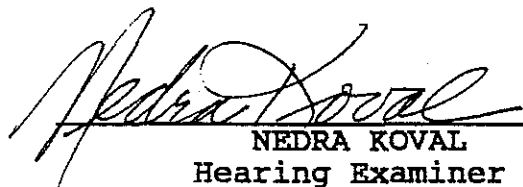
3. Boards of education shall fill professional positions for summer school programs on the basis of certification and the length of time the professional has been employed in the county summer school program. W.Va. Code §18-5-39.

4. On the basis of his certification and summer employment seniority, the grievant was entitled to an extended-year position at Martin for the 1989 summer session and is entitled to backpay thereof.

Accordingly, this grievance is GRANTED in its entirety. The respondent Wood County Board of Education is ORDERED to pay grievant appropriate back wages and accrual of benefits as if he had taught Summer 1989.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 10, 1990


NEDRA KOVAL
Hearing Examiner