

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**BEVERLY CHERYL BAILEY,  
Grievant,**

**v.**

**Docket No. 2018-1473-CONS**

**MINGO COUNTY BOARD OF EDUCATION,  
Respondent.**

## **DECISION**

Grievant, Beverly Cheryl Bailey, works for Respondent, Mingo County Board of Education, ("Board"), as a school administrator. She filed a level one grievance form dated January 11, 2018, alleging that Respondent posted her principal position for the next school year but the position was not vacant. Grievant alleges violation of W. VA. CODE §§ 18A-2-2, 18A-4-7a, 18A-4-8f, 18A-4-19, 18A-2-9, 18A-2-7, and 6C-2-2 (Discrimination, Reprisal, and Favoritism), as well as violation of established past practice. As relief Ms. Bailey seeks to be "[r]eturned to the position of Principal of Gilbert Middle/Pk-8 and any related benefits."<sup>1</sup> A level one conference was held as requested and a decision denying the grievance was issued May 7, 2018. Grievant appealed her decision to level two May, 14, 2018. A mediation was conducted on July 25, 2018, and Grievant appealed to level three on August 1, 2018.

In the interim, Ms. Bailey filed a second level one grievance form dated April 30, 2018, alleging violation of W. VA. CODE §§ 18A-2-2, 18A-4-7a, and 6C-2-2 Reprisal; and stated:

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<sup>1</sup> This grievance was assigned docket number 2018-0890-MinED.

Mingo county board of education notified the grievant of changes in her contract and assignment. Grievant requested hearing on the proposal. Hearing was a sham and had no meaning as the decision to repost her job and fill it with someone else had occurred before the hearing was held.<sup>2</sup>

The same relief of reinstatement is sought for this grievance.

On September 21, 2018, the parties requested that these grievances be consolidated for hearing and decision. An order consolidating the grievances was entered on September 25, 2018, and the consolidated grievances were assigned docket number 2018-1473-CONS. A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on January 31, 2019. Grievant personally appeared and was represented by Ben Barkey, West Virginia Education Association. Respondent appeared by Donald Spence and was represented by Leslie Tyree, Esquire. This matter became mature for decision on March 12, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Respondent closed an elementary school and combined it with a middle school in the middle school building. Respondent labeled the school as a new school, abolished Grievant's principal position and gave the new principal position to another employee. Grievant proved that her position as principal of the merged school should not have been posted or eliminated. Grievant also proved that Respondent abolished Grievant's position and assigned her to a new position before giving her notice and an opportunity to be heard in violation of W. VA. CODE §§ 18A-2-7 and 18A-4-7a, rendering those actions void.

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<sup>2</sup> Statement is set out herein as it appeared on the grievance form. This grievance was assigned docket number 2018-1159-MinED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Beverly Cheryl Bailey, Grievant, has been employed as a professional educator by Respondent, Mingo County Board of Education, for twenty-nine years. For four and a half years she was an assistant principal at Mingo Central High School, as well as Gilbert Middle and Gilbert Elementary schools.

2. For a year and a half, immediately preceding this grievance, Grievant served as the Principal of Gilbert Middle School.

3. Grievant is fully certified as a principal for grades Pre-K through 12.

4. The Board decided to close Gilbert Elementary School at the end of the 2017-2018 school year and combine that school with Gilbert Middle School at the existing middle school building to form Gilbert PreK-8.<sup>3</sup> The decision to combine the two schools to create Gilbert PreK-8 was approved by the Board at its December 8, 2017 meeting.

5. The Board took mandatory statutory steps to close Gilbert Elementary School but did not follow that process regarding Gilbert Middle School.<sup>4</sup>

6. On January 9, 2018, the position of Principal of Gilbert PreK-8 was posted. This action had the effect of posting the position held by Grievant as Principal at Gilbert Middle School.

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<sup>3</sup> “PreK– 8” indicates that the school contains Pre-Kindergarten and Kindergarten classes, as well as grade levels first through eighth inclusively.

<sup>4</sup> See W. VA. CODE § 18-5 13a which sets forth a process for closing a school which includes *inter alia* giving public notice and holding public hearings.

7. Grievant applied for the position along with other candidates. Grievant was not recommended to fill the position.

8. At the regular meeting of the Board dated January 23, 2018, the Board voted to employ Daniel Mark Dean, II as Principal for Gilbert PreK-8 effective July 2, 2018. (Grievant Exhibit 1).

9. On January 30, 2018, the Board posted the position of Assistant Principal at Gilbert PreK-8. At the regular meeting held February 20, 2018, the Board voted to employee Grievant into this position with the effective date of July 2, 2018.

10. At the February 20, 2018 meeting, the Board filled the positions at the Gilbert PreK-8 School which were created by the influx of students from the closed Gilbert Elementary School.<sup>5</sup>

11. None of the positions held by the teachers at Gilbert Middle School were eliminated or posted. The teachers who were teaching the middle school classes remained in the positions for the 2018-2019 school year.

12. By letter dated March 27, 2018, Mingo County Superintendent, Donald Spence, notified Grievant that pursuant to W. VA. CODE §§ 18A-2-7 and 18A-4-7a<sup>6</sup> he was going to recommend to the Board that her position as Principal of Gilbert Middle School

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<sup>5</sup> No evidence was provided regarding whether a mandatory vote was held pursuant to W. VA. CODE § 18A-4-8f to determine whether the teachers in the closed school received preference in filling the positions created in Gilbert PreK-8 by the influx of students from the closed school.

<sup>6</sup> W. VA. CODE § 18A-2-7 relates to transfer and requires that “an employee shall be notified in writing by the superintendent on or before April 1 if he or she is being considered for transfer or to be transferred.” The statute also provides that upon written request the employee is entitled to a hearing before the board of education before the board votes on the recommended reassignment. W. VA. CODE § 18A-4-7a relates to similar requirements in the case of a reduction in force.

be abolished, and she be reassigned to the position of Assistant Principal of Gilbert PreK-8. Grievant was notified that she was entitled to a hearing before the Board “on this proposed reassignment” prior to the recommendation being made. (Grievant Exhibit 3).

13. Grievant Bailey requested a hearing on the proposed reassignment, and one was scheduled to be held at the Board’s regular meeting on April 16, 2018. *Id.*

14. The hearing regarding Grievant’s proposed reassignment was held at the meeting as scheduled. After the hearing, the Board voted to “reassign or transfer” Grievant from Principal of Gilbert Middle School to Assistant Principal Gilbert PreK-8.

15. At the April 16, 2018, regular Board meeting the Board voted to abolish all the professional educator positions and extracurricular assignments for Gilbert Elementary School which was slated to be closed. This included *inter alia* the positions of the Principal and Assistant Principal, as well as all the teaching positions. No teaching positions at Gilbert Middle School were abolished.

16. Superintendent Spence viewed Gilbert Middle and Elementary Schools to be closed and a new school was created called Gilbert PreK-8. He recommended the elimination of the Gilbert Middle School Principal position be abolished because the new school would have a different philosophy for curriculum.

17. Superintendent Spence acknowledged that Grievant is fully certified to serve as Gilbert PreK-8 Principal, is a good employee and a capable school administrator. He recommended Mr. Dean for the Principal position because he had been principal at one of the feeder elementary schools for Gilbert Middle School and familiar with the community.

## Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant argues moving Gilbert Elementary School ("GES") into Gilbert Middle School ("GMS") was a classic merger for purposes of personnel actions. GES was closed and all the professional personnel in that school were notified that their positions were eliminated. They were also notified that they would either be transferred to other elementary positions throughout Mingo County, or they would be dismissed in a reduction in force. All the students and classes from GES were moved to the existing GMS building. All the students and classes in GMS would stay in that school. All the personnel in GMS except Grievant remained in their positions and received no notice of recommended transfer or reduction in force.

In *Board of Educ. v. DeFazio*, 180 W. Va. 614, 616, 378 S.E.2d 656, 658 (1989), the West Virginia Supreme Court of Appeals gave guidance regarding how personnel moves should be made in merger situations. In that case, two elementary schools were closed, and their students were moved to two receiving elementary schools. The board decided to give preference in filling any positions in the receiving schools created by the influx of the students from the closed schools to teachers from the closed schools without

posting. The Supreme Court repeated its prior ruling in *Marion County Bd. of Educ. v. Bonfantino*, 179 W. Va. 202, 366 S.E.2d 650, (1988), that West Virginia statutes require all vacancies in existing positions and newly created positions are required to be posted so all interested employees may apply and be considered. The Court disagreed with the board's position and stated: "[We] conclude that teaching vacancies, created by the influx of additional pupils caused by the closing of schools, are subject to the posting requirements of W.Va. Code, 18A-4-8b(a)<sup>7</sup> [1988]." *DeFazio*, 180 W. Va. at 616, 378 S.E.2d at 658. Significantly, none of the preexisting positions in the receiving schools were required to be posted, only the positions created by the influx of new students. As noted in the case of *Rollyson & Ward v. Mingo County Bd. of Educ.*, Docket No. 04-29-140 (Aug. 30, 2004). If schools are closed and consolidated to create an "entirely new institution, built from scratch," all the positions would be considered newly created and required to be posted. *Id.*<sup>8</sup>

The Legislature passed W. VA. CODE § 18A-4-8f allowing school employees in counties where consolidations and mergers are taking place to vote on whether employees in the closed schools would be given preference in filling the positions created in schools by the influx of new students. For the purpose of deciding how the personnel decisions should be processed in these situations the statute defines "consolidation" and "merger" as follows:

- (1) A consolidation means that one or more schools are closed, or one or more grade levels are removed from one or

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<sup>7</sup> Now W. VA. CODE § 18A-4-7a(o).

<sup>8</sup> One notable example is the closure of Charleston High School and Stonewall Jackson High School and consolidating them into a newly built Capitol High School in 1988.

more schools, and the students who previously attended the closed schools or grade levels are assigned to a new school.

(2) A merger means that one or more schools are closed, or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to another existing school.

Pursuant to the Courts ruling in *DeFazio* and subsequent rulings by the Grievance Board such as *Rollyson & Ward*,<sup>9</sup> without the vote provided in this section all positions in the new school created by consolidation must be posted, but in a merger only the positions created in an existing school by the influx of new students need to be posted.

In the present case Respondent claims that the Board closed both GES and GMS to create a completely new school, Gilbert PreK-8. This position was reiterated in the “reassignment” notice sent to Grievant which stated that Grievant’s principal position was being abolished due to the “impending closure of Gilbert Middle School.”<sup>10</sup> The theory is that because this new school was created by the closure of the two existing schools the principal position is newly created and must be posted. This thesis is not supported by the facts.

First the Board held hearings and followed the statutory procedures set out in W. VA. CODE § 18-5 13a for closing GES. No such actions were taken to close GMS.<sup>11</sup> Had a new school been created for personnel purposes that would have resulted in all the positions in the school being newly created requiring them all to be posted and filled as

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<sup>9</sup> See also *Swope v. Kan. Cty. Bd. of Educ.*, Docket No, 90-20-361 (Oct. 31, 1990).

<sup>10</sup> Grievant Exhibit 3.

<sup>11</sup> Consequently, even if the Board intended to close GMS that action would be voidable due to the Board’s failure to meet the statutory mandated procedures to accomplish that goal.



in a consolidation. That is not what happened. The board did not give any “reassignment” notices to any teachers at GMS. None of the positions at GMS were eliminated and the teachers remained in the same positions teaching the same subjects they had prior to the closure of GES. GMS remained in the same building. The only change occurring at GMS was the influx of students and classes from the closed GES. The fact that the administration planned to implement a new curriculum did not make this a new school.<sup>12</sup>

Respondent puts forth a line from *Rollyson & Ward* to support the position that Grievant’s position was a newly created position to be posted. In that decision the Administrative Law Judge (“ALJ”) wrote: “the pivotal question is not whether Gilbert PK-6 is a new school. The real question is whether the secretarial assignment at issue is a newly created position.” Respondent draws from this that whether the position was newly created depends not on whether there was a consolidation or merger but how the Board decided to characterize it. Ironically, in *Rollyson & Ward* this same board was taking the position that moving two closed elementary schools into Gilbert Middle School and moving two grade levels out of the middle school into the high school did not create a new school. Consequently, the secretary position at the middle school already existed and did not need to be posted.

The ALJ noted that the Board produced a factual record supporting the fact that the middle school secretary positions was not newly created.

In support of its position that Gilbert Middle School is merely being “reconfigured” into Gilbert PK-8, BOE notes that the Gilbert Middle School building is being utilized, albeit with some level of renovation. BOE also notes that two of the

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<sup>12</sup> With the various school reform movements which have been initiated in the last half century, school curriculums are changed on the national, state and local levels more frequently than it rains in April.

grade levels that comprised Gilbert Middle School will remain in that building to attend Gilbert PK-8. Around this central core of two grade levels and a building, BOE perceives Gilbert PK-8 as a modified version of Gilbert Middle School, rather than a new entity.

*Rollyson & Ward supra.* Based upon this set of facts the ALJ found that the Board's determination that reconfigured school was not a new school and the middle school secretary position was not newly created was "reasonable and factually supportable."

The present reconfiguration of Gilbert Middle School is not nearly as involved. New grade levels are added but none of the students and classes at GMS are being moved. Unlike in *Rollyson & Ward*, the Board's determination that the GMS is a newly created position, exactly the opposite of their determination in the prior case, is not reasonable or supported by the facts. The Board treated the positions of every other professional employee in GMS as if this action was a merger and did not post their positions as newly created. Only Grievant's position was abolished and newly created. The Board simply cannot have it both ways. The position of Principal in the merged Gilbert PreK-8 was not newly created. Grievant held the position in the existing school and it should not have been posted.

The Board's personnel problems in this matter do not end there. Respondent sent Grievant a notice pursuant to W. VA. CODE §§ 18A-2-7 and 18A-4-7a that her position was going to be abolished and the Superintendent was going to recommend to the Board that Grievant be reassigned. W. VA. CODE § 18A-2-7 sets out the procedures for transferring an employee and W. VA. CODE § 18A-4-7a provides the procedure for dismissing an employee due to a reduction in force. Both statutes require that an employee be given

notice and an opportunity for a hearing before the board of education prior to an action being taken on the superintendent's recommendation.<sup>13</sup>

The West Virginia Supreme Court squarely addressed the notice and hearing requirement prior to school personnel actions in the case of *Lavender v. McDowell County Bd. of Educ.*, 174 W. Va. 513, 514, 327 S.E.2d 691, 692, (1984). In *Lavender* a school counselor was notified that the board of education had tentatively approved his transfer from a counselor position to a teacher position. Before he was given a hearing, the board of education officially approved his job status change. The Court noted:

We spoke of the procedural requirements of *W. Va. Code, 18A-2-7*, for altering the positions of tenured teachers, in *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979), and stated in Syllabus Point 2: "*W. Va. Code, 18A-2-7* provides for notice and hearing before an employee's placement on a transfer or reassignment list is approved by a board of education. It must be complied with strictly."

*Id.*

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<sup>13</sup> W. Va. Code § 18A-2-7 states:

Any teacher or employee who desires to protest the proposed transfer may request in writing a statement of the reasons for the proposed transfer. The statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, *the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board. The hearing on the proposed transfer shall be held on or before May 1. At the hearing, the reasons for the proposed transfer must be shown.* (Emphasis added).

W. Va. Code § 18A-4-7a requires that the employee is entitled to the procedure set out in 18A-2-a which states:

1) A [professional employees] continuing contract may not be terminated except:

(A) By a majority vote of the full membership of the county board on or before May 1 of the then current year, *after written notice, served upon the teacher, return receipt requested, stating cause or causes and an opportunity to be heard at a meeting of the board prior to the board's action on the termination issue.* (Emphasis added).

In discussing what strict compliance with the statute requires the Court wrote:

It appears from the statute that the legislature intended for the county board of education to conduct a detached and independent hearing on the reasons for a proposed transfer. We also believe that due process requires that such a hearing be conducted only after due notice to the employee and in such a manner as to guarantee that the employee has an opportunity to present his position to the board. As we stated in *Morgan v. Pizzino*, 163 W. Va. at 458, 256 S.E.2d at 595, "if a decision has already been made, and the employees have been prejudged the process is meaningless."

*Id.* The Court found that the Board had violated the petitioner's rights to a "detached and independent hearing on the reasons for a proposed transfer when it tentatively approved the transfer before the employee was notified and given a hearing. Therefore, the transfer was void.

The facts are similar if not more troublesome in this matter. On January 9, 2018, the position of Gilbert Middle School held by Grievant was ostensibly abolished and the position of Principal Gilbert PreK-8 was posted. On January 29, 2018, the Board voted to employ a different person in that position, apparently leaving Grievant without a job. On January 30, the position of Assistant Principal Gilbert PreK-8 was posted and Grievant applied for it so that she might at least be employed while she contested the loss of her principal position. The Board voted to place Grievant in that position on February 20, 2018. After the Board took these definitive actions a month before, the superintendent notified Grievant that pursuant to W. VA. CODE §§ 18A-2-7 AND 18A-4-7a he was going to recommend to the Board that her position as Principal of Gilbert Middle School be abolished, and she be reassigned to the position of Assistant Principal of Gilbert PreK-8 and apprised her of her right to a hearing. Grievant was finally given her hearing on April

16, 2018, and thereafter, to no one's surprise, the Board voted to "reassign or transfer" Grievant from Principal Gilbert Middle School to Assistant Principal Gilbert PreK-8.

These actions go well beyond the prior tentative approval of the transfer the Court addressed in *Lavender*. Here the Board had decided to eliminate Grievant's position, hire someone else for the position which allegedly replaced the one abolished and employed Grievant in a position she had only taken to stay employed, all before she was given any written notice that she was being considered for transfer or reduction in force. The hearing Grievant was given by the Board was in no way a detached and independent hearing the Supreme Court found was required by the statute to be held prior to board action. *Lavender supra*.<sup>14</sup> Grievant proved by a preponderance of the evidence that the Board violated W. VA. CODE § 18A-2-7 rendering the actions taken by the Board to abolish her position and reassign her void. Accordingly, the consolidated grievance is GRANTED.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*.

2. The closing of Gilbert Elementary School and transferring of those students to Gilbert Middle School constituted a merger for purposes of personnel actions,

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<sup>14</sup> For cases where the Grievance Board has applied *Lavender* to void transfer where 18A-2-7 was violated. See, *Beverage, et al. v. Pocahontas County Bd. of Educ.*, Docket No 00-38-250 (Apr. 23, 2001); *Wagoner, v. Mineral County Bd. of Educ.*, Docket No. 92-28-046 (Jun. 28, 1992); *Dotson, et al. v. Berkeley County Bd. of Educ.* Docket No. 90-02-404 (Mar. 26, 1991).

notwithstanding the school name change. W. VA. CODE § 18A-4-8f, *Rollyson & Ward v. Mingo County Bd. of Educ.*, Docket No. 04-29-140 (Aug. 30, 2004).

3. When two schools are merged the only positions which need to be posted pursuant to W. VA. CODE § 18A-4-7a(o) are the positions created by the influx of new students from the closed school. *Board of Educ. v. DeFazio*, 180 W. Va. 614, 616, 378 S.E.2d 656, 658 (1989),

4. The position of Principal Gilbert Middle School was not affected by the influx of students from Gilbert Elementary School and Grievant was fully certified to be a principal for all grade levels in the new school. Grievant's position should not have been posted as vacant or newly created. *Board of Educ. v. DeFazio*, 180 W. Va. 614, 616, 378 S.E.2d 656, 658 (1989),

5. Through W. VA. CODE § 18A-2-7, "the legislature intended for the county board of education to conduct a detached and independent hearing on the reasons for a proposed transfer. We also believe that due process requires that such a hearing be conducted only after due notice to the employee and in such a manner as to guarantee that the employee has an opportunity to present his position to the board. As we stated in *Morgan v. Pizzino*, 163 W. Va. at 458, 256 S.E.2d at 595, "if a decision has already been made, and the employees have been prejudged the process is meaningless." *Lavender v. McDowell County Bd. of Educ.*, 174 W. Va. 513, 514, 327 S.E.2d 691, 692, (1984).

6. By abolishing Grievant's job and reassigning her to another position prior to giving her an opportunity for a detached and independent hearing the Board violated the notice and hearing provisions of W. VA. CODE §§ 18A-2-7 and 18A-4-7a, rendering those

actions void. *Lavender v. McDowell County Bd. of Educ.*, 174 W. Va. 513, 514, 327 S.E.2d 691, 692, (1984).

Accordingly, the consolidated grievance is **GRANTED**. Respondent is **ORDERED** to immediately restore Grievant to the position of Principal Gilbert Middle School with back pay, statutory interest and all other benefits she lost.<sup>15</sup>

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: April 18, 2019**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**

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<sup>15</sup> See *State ex rel. Board of Educ. v. Casey*, 176 W. Va. 733, 738, 349 S.E.2d 436, 441-442, (1986), concerning reinstating a school employee to a position now held by a different employee.