

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**DONNA JOY,**

**Grievant,**

**v.**

**Docket No. 2019-0374-JefED**

**JEFFERSON COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Donna Joy, is employed by Respondent, Jefferson County Board of Education. On September 18, 2018, Grievant filed this grievance against Respondent stating, "Grievant applied for three math teaching vacancies. Two positions are at Jefferson High School & one position is at Washington High School. These positions were filled by the Respondent with long-term substitutes. The Respondent is regularly employed & is qualified for these vacancies. Grievant also alleges that the Respondent cannot fill these positions with a long-term substitute when there is a qualified regularly employee (sic) teacher who has applied for these positions. Grievant alleges a violation of West Virginia Code 18A-4-7a and SBE Policy 5000." For relief, "Grievant seeks reinstatement into one of the three vacancies, retroactive and prospective wages less appropriate set-off, benefits, seniority, and any other relief that the administrative law judge deems appropriate."

A level one conference was held and a decision issued shortly thereafter on October 11, 2018, denying the grievance. Grievant appealed to level two on October 15, 2018, and a mediation session was held on December 18, 2018. Grievant appealed to level three of the grievance process on December 19, 2018. A level three hearing was

held before the undersigned administrative law judge at the Grievance Board's Westover, West Virginia office on May 6, 2019. Grievant appeared in person and was represented by John Roush, Esquire. Respondent was represented by Tracey Eberling, Esquire. Each party submitted Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on June 25, 2019.

### **Synopsis**

Grievant is regularly employed by Respondent, Jefferson County Board of Education, as a half-time high school math teacher. Respondent posted three full-time math teacher positions for the 2018-19 school year, one for Washington High School and two for Jefferson High School. Grievant was the only certified applicant for the Washington High School position and was one of two certified applicants for each of the Jefferson High School positions. The schools reposted the positions because fewer than three qualified persons applied for each position. When the number of qualified candidates did not change after the repostings, Respondent selected long-term substitutes to fill the positions.

Grievant contends that there were the requisite three applicants for each of the initial postings, triggering the requirement that each be filled with an existing qualified applicant. Grievant also contends that the schools erred in not filling the positions within 30 days of the initial postings and in doing so with substitutes when there were qualified regularly employed applicants. Respondent counters that, as it had not filled the positions at least 20 days prior to the staff starting date, Grievant would have been precluded from transferring to any of the posted positions for the 2018-19 school year had she been selected. Respondent argues that its protocol allows schools to repost when there are

fewer than three qualified applicants. Grievant did not prove she was the more qualified of the two regularly employed applicants for the two Jefferson High School positions. Grievant proved that Respondent should have hired her over a substitute and that she was the only qualified applicant for the Washington High School position after its reposting. Grievant proved that, as she was the only qualified regularly employed applicant for the Washington High School position, she should have received the position within 30 days of reposting, making it probable that she would have received the position 20 days prior to the start of school. Accordingly, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

#### **Findings of Fact**

1. Grievant is regularly employed by Respondent as a half-time<sup>1</sup> high school math teacher.
2. Respondent posted three full-time high school math teacher positions for the 2018-19 school year: one at Washington High School (Posting 10632) and two at Jefferson High School (Postings 10765 & 10766).
3. Posting 10632 was first posted on March 27, 2018. Thirteen applications were received. Grievant was the only certified applicant.<sup>2</sup> Respondent extended the posting on June 26 and again July 10. There were no additional certified applicants.
4. Posting 10765 was first posted on June 12, 2018. Seven applications were received. After one withdrew, only two of the applicants met the certification requirement.

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<sup>1</sup>Regular teacher who teaches half of the time.

<sup>2</sup>Respondent's Exhibit 1.

Grievant was one of the two. Respondent extended the posting time to July 10 and again to July 24. There were no additional certified applicants.

5. Posting 10766 was first posted on June 12, 2018. Eight applications were received. Only two of the applicants met the certification requirement. Grievant was one of the two. Respondent extended the posting time to July 10 and again to July 18. No additional certified applicants applied.

6. The West Virginia Board of Education and county boards of education issue policies to assist in implementing State code.

7. West Virginia Board of Education Policy No. 5000 (126CSR126) provides, in pertinent part:

11.1. Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. **At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three qualified individuals apply during the first posting.**

11.2. **If no applicant meets the qualifications** set forth in the job posting, **a board may continue to post or repost as set forth in section 11.1 without limitation.**

11.3. The county superintendent of schools shall have the authority to determine whether a professional position will be reposted.

11.4. These provisions shall apply to both professional positions and extra-curricular positions.

(Emphasis Added)

8. Standard Operating Procedure is formulated by Respondent's leadership team to facilitate compliance with policies and must comply with State code.

9. Respondent's Standard Operating Procedure is not approved by the West Virginia Board of Education and as such does not constitute written policy of the West Virginia Board of Education. (Testimony of Joseph Pettiford, Judy Marcus, and Sherry Fitzgerald Ross)

10. Respondent's Standard Operating Procedure states: "If fewer than three qualified individuals apply, the hiring manager may opt to repost to attract more qualified applicants. There is no minimum or maximum length of posting time. Recommended no longer than ten (10) working days." (Grievant's Exhibit 9)

11. Respondent's Standard Operating Procedure further states: "If there are less than three qualified applicants in the second pool, the hiring manager can opt to not hire any of the candidates and utilize a long term substitute." (Grievant's Exhibit 9)

12. Jefferson High School Principal Sherry FitzGerald has filled prior vacancies with long-term substitutes when there were fewer than three qualified applicants.

13. Washington High School Principal Judy Marcus has filled prior vacancies with long-term substitutes when there were fewer than three qualified applicants.

14. Respondent's Standard Operating Procedure is not automatically available in writing to all employees.

15. A regularly employed teacher must be certified to be qualified to teach math. However, a long-term substitute does not require certification to be qualified.

16. As there were fewer than three qualified applicants for each of the initial postings, the initial postings did not result in any interviews.

17. The postings were extended a couple of times before being reposted with a new posting number on January 3, 2019, which reposting was well after the grievance was appealed to level three.

18. Prior to being reposted on January 3, 2019, the positions were filled with long-term substitutes for the 2018-2019 school year because no posting had a minimum of three qualified applicants.

19. The 2018-19 school year started for staff on August 13, 2018.

20. Each of the three vacancy notices provided a posting deadline of a “minimum of 5 working days from date of posting, or if a qualified person does not apply, the posting will remain open until filled”.

21. After the first extension/reposting, if there are still fewer than three qualified applicants, Respondent allows a school to choose from any qualified applicant or long-term substitute.

22. Following the January 3, 2019, reposting, Jefferson High School Principal FitzGerald elected to interview the only two qualified candidates for a math position for the 2019-20 school year. Grievant was one of two applicants but was not selected for the position. The other applicant, a long-term substitute, was selected. The interview panel determined that Grievant did not interview well, had inconsistencies in her resume, had negative evaluations in the past, and was concerned about her content experience. This was after Grievant filed her level three grievance on December 19, 2018.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-

1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant contends that the schools erred in reposting the positions because every position had well over three applicants after the initial postings. Grievant argues that Respondent’s own protocol, which requires reposting if there are less than three qualified applicants, is not actionable because it conflicts with West Virginia Code. Grievant asserts that Respondent may not limit employee protections found in the code by adding “qualified” to “applicants” to enable it to repost vacancies, as the code must be strictly construed to protect employees it is designed to protect. Grievant contends that regardless of the legality of reposting, Respondent was required by code to fill the positions within thirty days of the initial posting because there was at least one qualified applicant, and Respondent could not do so with substitutes because there were qualified regularly employed applicants.

Respondent counters that, regardless of the merits of her arguments, Grievant would have been precluded from transferring to any of the posted positions for the 2018-19 school year had she been selected, as Respondent had not filled any position prior to the twenty day period before the staff starting date. Respondent further argues that it has substantial discretion in hiring and can create protocol that facilitates compliance with its hiring policies in conjunction with state code, even if this entails limiting “applicants” to

mean “qualified applicants” in allowing schools to repost positions when there are fewer than three qualified applicants.

West Virginia Code § 18A-4-7a(o) provides, in pertinent part, the following:

Openings in established, existing or newly created position shall be processed as follows:

(1) Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than one in order to attract more qualified applicants. **At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three individuals apply during the first posting subject to the following:**

(A) Each notice shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

(B) At least one notice shall be posted within twenty working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;

(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;

(2) No vacancy may be filled until after the five-day minimum posting period of the most recent posted notice of the vacancy;

(3) **If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the first posting period;**

(4) A position held by a teacher who is certified, licensed or both, who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years; and



(5) Nothing provided herein may prevent the county board of education from eliminating a position due to lack of need.

(Emphasis Added)

West Virginia Board of Education Policy No. 5000 (126CSR126) provides, in pertinent part:

11.1. Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, **boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three qualified individuals apply during the first posting.**

11.2. **If no applicant meets the qualifications set forth in the job posting,** a board may continue to post or repost as set forth in section 11.1 without limitation.

(Emphasis Added)

The relevant portion of Respondent's Standard Operating Procedure states as follows:

"If fewer than three qualified individuals apply, the hiring manager may opt to repost to attract more qualified applicants. There is no minimum or maximum length of posting time. Recommended no longer than ten (10) working days." "If there are less than three qualified applicants in the second pool, the hiring manager can opt to not hire any of the candidates and utilize a long term substitute."

While West Virginia Code permits a board of education to repost a classroom teacher position only if the initial posting attracts less than three applicants, the West Virginia Board of Education policy and Respondent's own Standard Operating Procedure limits "applicants" to mean "qualified applicants". Grievant contends that in thereby limiting employee rights in contravention of the code, Respondent is acting beyond its

statutory authority, as well as West Virginia Supreme Court's mandate that school personnel laws be strictly construed in favor of employees they are designed to protect. School personnel laws and regulations must be strictly construed and in favor of the employees that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W.Va. 1979). Further, a board of education is a corporation created by statute with functions of a public nature expressly given, and no other; as such, it "can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by the statute." *Dooley v. Board of Education*, 80 W.Va. 648, 93 S.E. 766 (1917); *Honaker v. Board of Education*, 42 W.Va. 170, 24 S.E. 544 (1896); *Shinn v. Board of Education*, 39 W.Va. 765, 65 S.E. 102 (1909); *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W.Va. 360 (1882). Through its use of the term "qualified applicants" in other parts of the code, the legislature implicitly acknowledged its intent to exclude "qualified" when it did not couple it with "applicants".

The issue of whether Respondent is permitted to enact policies that impart a different meaning to State code in order to allow its schools to repost positions to the detriment of employees is in this case obfuscated by the uncertainty of whether Respondent truly reposted the positions prior to Grievant filing her grievances. While Grievant appealed to level three on December 19, 2018, Respondent did not technically repost the positions until January 3, 2019, when it first posted the positions under new posting numbers. Respondent did, however, extend the initial postings multiple times during the Summer of 2018. Neither party presented any argument concerning whether these extensions counted as repostings. While the burden of proof is on Grievant, Respondent implied in its Level One Grievance Conference Response issued on

September 18, 2018 (well before the repostings under new numbers), that the extensions were repostings in stating: “The positions were reposted in an attempt to increase the applicant pool as follows for total of 3 separate posting periods with no additional certified applicants received: (a) Posting 10765 (JHS math—extended on July 10<sup>th</sup> and July 24<sup>th</sup> (b) Posting 10766 (JHS math)—extended on July 10<sup>th</sup> and July 18<sup>th</sup> (c) Posting 2300148463 (WHS math) extended on June 26<sup>th</sup> and July 10<sup>th</sup>”.

It is apparent that the highlighted sections of West Virginia Code § 18A-4-7a(o) are meant to protect regularly employed employees during the hiring process. As such, the code must be strictly construed in favor of the employees it was designed to protect. Therefore, even though Respondent has great leeway in hiring employees, Respondent’s policies may not limit employee protections specifically granted by the legislature.

Grievant argues that regardless of how many times Respondent reposted the position, Respondent was required by code to refill the positions within thirty days of the initial posting because there was at least one qualified applicant for each of the positions after the initial posting. However, the code says “[i]f one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the first posting period.” As such, 30 days is calculated from the end of the posting deadline, not from the posting date.

Each posting provides a deadline of a “minimum of 5 working days from date of posting, or if a qualified person does not apply, the posting will remain open until filled”. The West Virginia Supreme Court has stated that a county board of education has the prerogative to make the application period longer to obtain a larger pool of candidates.

However, “once the [b]oard established the ... deadline, it was bound to adhere to the deadline, and to hire the single qualified applicant who had filed during that application period. When a school board posts a notice of vacancy pursuant to W.Va. Code, 18A-4-7a [1993], and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period.” *Mingo Co. Bd. of Educ. v. Jones*, 204 W. Va. 340, 343, 512 S.E.2d 597 (W. Va. 1998), *aff’d*, *Jones v. Mingo Co. Bd. of Educ.*, Docket No 96-29-042 (May 30, 1996). The statutory language of West Virginia Code § 18A-4-7a [1993] provided: “If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the posting period.” This language is identical to the current statute.

The distinction between the current action and the facts before this Board in *Jones v. Mingo Co. Bd. of Education* is that in this case Respondent did not list a precise end date on the posting whereas the board of education in *Jones* did set an end date on its posting. However, in stating that “if a qualified person does not apply, the posting will remain open until filled”, Respondent’s postings implicitly limit the posting period to between 5 days of posting and the receipt of an application from a qualified candidate. Further, while Respondent’s Standard Operating Procedure does not establish a hard deadline, it recommends that the posting deadline be no longer than 10 working days.

“We agree that W.Va. Code 18-4-7a [1993] requires only a minimum posting period of 5 days, and that school boards are permitted to post vacancies for longer periods of time. However, ‘county boards of education are bound by procedures they properly establish to conduct their affairs.’ Syllabus Point 3, *Dillon v. Wyoming County Board of*

*Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” *Mingo County Bd. of Educ. v. Jones*, 204 W. Va. 340, 343, 512 S.E.2d 597 (1998), *aff’d*, *Jones v. Mingo Co. Bd. of Educ.*, Docket No 96-29-042 (May 30, 1996).

In applying for each of the positions, Grievant met the one qualified applicant requirement necessary to trigger the posting deadline 30 days hence. Further, each of the Jefferson High School positions had the same two qualified applicants, which included Grievant. The Washington High School position had one qualified applicant in Grievant. However, neither party presented any evidence as to when the first qualified applicant (or any qualified applicant) applied for each position. The evidence shows that all certified applicants applied before any extensions or repostings.

The initial posting extension for the Washington High School position was made on June 26, 2018. Because at least one qualified applicant applied by June 26, Respondent was at least required to fill the Washington High School position within 30 days of June 26, 2018, which would have been on or about July 26, 2018. The initial posting extension for the Jefferson High School positions was made on July 10, 2018. Because at least one qualified applicant applied before July 10, Respondent was at least required to fill the Jefferson High School position within 30 days of July 10, 2018, which would have been on or about August 9, 2018. While neither party provided the dates any position was filled, the evidence showed that Respondent filled the positions with long term substitutes by the beginning of the 2018-19 school year. The 2018-19 school year officially started for staff on August 13, 2018. Each of the three postings were extended a second time: on July 10 for the Washington High School position and July 18 and July 24 for each of the Jefferson High School positions. Therefore, the undersigned can

conclude that the Washington High School position was filled between July 10 – August 13, and the Jefferson High School positions were each filled between July 18 – August 13, and July 24 – August 13.

Respondent argues that even if Grievant’s interpretation of the law is correct, she is still precluded from receiving any of the posted positions because the “stay put” provisions in the code would have prevented her from transferring to a new position within 20 days of the August 13, 2018, first day of school. The 20-day cut-off date for Grievant would have been July 24, 2018. West Virginia Code § 18A-2-7b provides that “[a]fter the twentieth day prior to the beginning of the instructional term, no person employed and assigned to a professional position may transfer to another professional position in the county during that instructional term unless the person holding that position does not have valid certification.” Because Grievant fits the criteria in the code, she would have been precluded from transferring to any of the posted positions after July 24, 2018.

Assuming that Respondent was permitted to limit the code’s language to allow reposting if there were less than three qualified applicants, it was still limited to one reposting since it had at least one qualified candidate for each position. Regardless of who is correct regarding Respondent’s limitation of applicants to “qualified”, because there was no evidence as to the date(s) qualified candidates applied after the initial posting, and because there was at least one qualified candidate at the time of the first extension, Respondent should have at least filled each position within 30 days of this reposting date. As previously shown, 30 days from the July 10<sup>th</sup> date of the first extension for the Jefferson High School positions would have been August 10, 2018. Respondent filled these positions sometime between July 18 – August 13 (for one Jefferson High

School position) and July 24 – August 13 (for the other). Therefore, it is likely that Respondent filled the Jefferson High School positions with long term substitute personnel within the requisite 30-day period. If Respondent had selected Grievant for the Jefferson High School positions, it is probable this would have occurred after July 24<sup>th</sup> and therefore would have triggered the “stay put” provision for Grievant until January 2019.

On the other hand, as previously shown, Respondent filled the Washington High School position with a long-term substitute between July 10<sup>th</sup> – August 13<sup>th</sup>, and had to do so by July 26, 2018, to comply with the 30-day statutory requirement. If Respondent filled this position between July 10<sup>th</sup> and July 26<sup>th</sup>, as statutorily required, there is a strong likelihood that it did so before the July 24<sup>th</sup> cut-off date, which would have allowed Grievant to start on August 13<sup>th</sup> and avoid the “stay put” provision. While Grievant did not prove that Respondent failed to timely fill the positions, she did prove that it was more likely than not that Respondent filled the Washington High School position by July 24<sup>th</sup> if it did so in compliance with the 30-day requirement.

This leads us to the determinative factor for the Washington High School position, Grievant’s argument that Respondent could not fill the positions with substitutes when it could do so with a qualified regularly employed teacher. West Virginia Code § 18A-2-3(a) provides, in pertinent part, the following:

The county superintendent, subject to approval of the county board, may employ and assign substitute teachers to any of the following duties:

- (1) Fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal;
- (2) Fill a teaching position of a regular teacher on leave of absence; and
- (3) Perform the instructional services of any teacher who is authorized by law to be absent from class without

loss of pay, providing the absence is approved by the board of education in accordance with the law.

The vacancies were posted prior to the 2018-19 school year and were therefore apparently not for an unexpired school term. There was no evidence that the vacancies were intended to cover for another teacher's leave of absence or that they were meant for the performance of instructional services on another teacher's behalf. Grievant has proven that Respondent should have filled the Washington High School position with Grievant rather than a substitute.

Accordingly, the grievance is GRANTED.

The following Conclusions of Law support the decision reached.

#### **Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. West Virginia Code § 18A-4-7a(o) provides, in pertinent part, the following:

Openings in established, existing or newly created position shall be processed as follows:

(1) Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than one in order to attract more qualified applicants. **At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants**



**only if fewer than three individuals apply during the first posting subject to the following:**

- (A) Each notice shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;
  - (B) At least one notice shall be posted within twenty working days of the position openings and shall include the job description;
  - (C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;
  - (D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest pool of qualified applicants may apply; and
  - (E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;
- (2) No vacancy may be filled until after the five-day minimum posting period of the most recent posted notice of the vacancy;
  - (3) **If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the first posting period;**
  - (4) A position held by a teacher who is certified, licensed or both, who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years; and
  - (5) Nothing provided herein may prevent the county board of education from eliminating a position due to lack of need.

(Emphasis Added)

3. School personnel laws and regulations must be strictly construed and in favor of the employees that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W.Va. 1979).

4. "When a school board posts a notice of vacancy pursuant to W.Va. Code, 18A-4-7a [1993], and one or more qualified applicants apply for the position within the

posting period, the school board must select a qualified applicant from those who applied during the posting period.” *Mingo County Bd. of Educ. v. Jones*, 204 W. Va. 340, 343, 512 S.E.2d 597 (1998).

5. “We agree that W.Va. Code 18-4-7a [1993] requires only a minimum posting period of 5 days, and that school boards are permitted to post vacancies for longer periods of time. However, ‘county boards of education are bound by procedures they properly establish to conduct their affairs.’ Syllabus Point 3, Dillon v. Wyoming County Board of Education, 177 W. Va. 145, 351 S.E.2d 58 (1986).” *Mingo County Bd. of Educ. v. Jones*, 204 W. Va. 340, 343, 512 S.E.2d 597 (1998), *aff’d*, *Jones v. Mingo Co. Bd. of Educ.*, Docket No 96-29-042 (May 30, 1996).

6. West Virginia Code § 18A-2-3(a) provides, in pertinent part, the following:

The county superintendent, subject to approval of the county board, **may employ and assign substitute teachers to** any of the following duties:

- (1) Fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal;
- (2) Fill a teaching position of a regular teacher on leave of absence; and
- (3) Perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing the absence is approved by the board of education in accordance with the law.

(Emphasis Added)

7. West Virginia Code § 18A-2-12a(b)(7) provides, in pertinent part, that “[a]ll official and enforceable personnel policies of a county board must be written and made available to its employees.”

8. West Virginia Code § 18A-2-7b is titled “Limitations on voluntary transfer of school employees to posted vacant position after twentieth day prior to beginning of instructional term” and provides, in pertinent part, as follows:

(a) The Legislature finds that it is not in the best interest of the students particularly in the elementary grades to have multiple teachers for any one grade level or course during the instructional term. Therefore, it is the intent of the Legislature that the filling of positions through transfers of personnel from one professional position to another after the twentieth day prior to the beginning of the instructional term should be kept to a minimum in accordance with the following:

(1) After the twentieth day prior to the beginning of the instructional term, no person employed and assigned to a professional position may transfer to another professional position in the county during that instructional term unless the person holding that position does not have valid certification;

(2) The person may apply for any posted, vacant positions with the successful applicant assuming the position at the beginning of the next instructional term.<sup>3</sup>

9. A board of education is a corporation created by statute and given functions of a public nature such that it “can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by the statute.” *Dooley v. Board of Education*, 80 W.Va. 648, 93 S.E. 766 (1917); *Honaker v. Board of Education*, 42 W.Va. 170, 24 S.E. 544 (1896); *Shinn v. Board of Education*, 39 W.Va. 765, 65 S.E. 102 (1909); *Pennsylvania Lightning Rod Co. v. Board of Education*, 20 W.Va. 360 (1882).

10. Grievant proved that Respondent should have hired her over a substitute.

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<sup>3</sup> Per West Virginia Department of Education Policy 4232, an instructional term is defined as a school year.

11. Grievant proved that she was the only qualified regularly employed applicant for the Washington High School position and should have received the position within 30 days of reposting.

Accordingly, the grievance is GRANTED. Respondent is ORDERED to immediately instate Grievant to the Washington High School math teacher position along with back pay, benefits, and seniority going back to the start of the 2018-19 school year.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: August 1, 2019**

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**Joshua S. Fraenkel**  
**Administrative Law Judge**