ROSETTA SPAULDING

v. Docket No. 92-29-469

MINGO COUNTY BOARD OF EDUCATION

DECISION

The grievant, Rosetta Spaulding, was employed by the Mingo County Board of Education (Board) as a Chapter I Aide. She filed a grievance September 20, 1992, alleging, "Grievant should have been hired instead of Wanda Ooten for the position of special education aide. Therefore, grievant requests reversal of the October 16, 1992, Level II decision with employment and backpay." The grievant's supervisor was without authority to address the matter at Level I and a hearing was held at Level II on October 9, 1992. The grievance was denied at that level in a October 16, 1992 decision and the Board, at Level III, waived participation in the case. Appeal to Level IV was made November 27, 1992, and the parties subsequently agreed to submit the case for decision on the record developed below. (See footnote 1) The parties declined to submit proposed findings of fact and conclusions of law.

It appears the grievance arose from a series of events beginning in 1988. (See footnote 2) In November 1988, the Board posted the an aide position at Chafin Grade School (CGS) and the grievant and Wanda Ooten made applications. The Board ultimately awarded the position to the grievant and Ms. Ooten filed a grievance protesting that decision. At Level IV, Ms. Ooten prevailed on the merits of her claim and the Board was ordered to instate her to the position and award her backpay and seniority to December 8, 1988, the date on which the grievant started working in the position. See, Ooten v. Mingo County Bd. of Educ., Docket No. 89-29-230 (Aug. 23, 1989). During the pendency of Ms. Ooten's claim, the Board permitted the grievant to remain in the position. She ultimately served in the position until the end of the 1988-89 school year.

At the beginning of the 1989-90 school year, the grievant was placed in an aide position at Kermit Junior High School (KJHS) and Ms. Ooten was awarded the CGS slot. In the spring of 1991 both the grievant and Ms. Ooten lost their jobs in a reduction-in-force.

In August 1991 the Board posted an Early Childhood Aide position at Marrowbone Grade School

(MGS) and the grievant and Ms. Ooten made applications. Assistant Superintendent John Fullen determined that the grievant was the most qualified for the position but also concluded that because the Board had been orderedto place Ms. Ooten in the CGS position, it might be a "violation of the law" to award the position to the grievant. (See footnote 3) Mr. Fullen also determined that the grievant should not be awarded regular employee seniority for the time she spent in the CGS position while Ms. Ooten's grievance was pending. Mr. Fullen eventually recommended Ms. Ooten for the MGS position and the Board accepted.

Ms. Spaulding filed a grievance protesting her rejection for the MGS post and at Level IV asserted, among other things, that the selection decision should have been controlled by the recall provisions of W.Va. Code §18A-4-8b. She further contended that had the Board properly credited her for time served in the CGS position, she and Ms. Ooten would have been tied in seniority and the provisions of Code §18A-4-8b providing for a random selection process would have been triggered. The grievant sought as relief that the Board be directed to conduct such a "tie-breaking" procedure.

Administrative Law Judge Albert C. Dunn, Jr. agreed with the grievant's contentions and ordered the Board to conduct "a random selection method. . .to determine whether Grievant or Ms. Ooten should have been assigned the [MGS] position" and to place thegrievant in the position if she were the winner. See, Spaulding v. Mingo County Bd. of Educ., Docket No. 91-29-492 (Aug. 31, 1992). Either the Board or the grievant filed an appeal of that decision to the Circuit Court of Mingo County. (See footnote 4)

Sometime in September 1992, the Board posted an aide position at Lenore Grade School (LGS) and the grievant and Ms. Ooten made application. For reasons not discernible from the record, it was decided that the grievant and Ms. Ooten should participate in a random selection to see who should be awarded the position. On September 21, 1992, the grievant and Ms. Ooten signed an agreement whereby they assented to a coin toss for that purpose. The toss was conducted the same day and Ms. Ooten was the winner. Ms. Spaulding then filed the instant grievance.

At the Level II hearing the grievant made the following response to the hearing evaluator's request for a statement of her legal position,

> Well, uh, I don't think I was treated fairly, uh, at any of the hearings, I would just like to have my backpay, well I don't. . .I think I should have been working all of the time instead of waiting to get a job. Because I feel like I was more qualified than the other lady and I just don't think I was treated fairly in any of them.

The grievant's husband, who was acting as her representative at the hearing, then remarked,

> What she is seeking is instatement in the position that Miss Ooten has now at the Lenore Aide position. Backpay to the beginning of the time that Miss Ooten first worked the first day, same period, and, uh, if the Board decidesthat both employees has equal seniority and she feels that both should be in that position if there's no other recourse for the Board to go, and uh, as there is a precedent in the Board's position in placing two aides in the same position.

These were the only statements concerning the grievant's legal position made at the hearing. (See footnote 5)

It is concluded from these statements that the grievant is protesting her nonselection for the LGS position. The only evidence of record, however, on the process by which the post was filled is the referenced September 21, 1992 agreement between the grievant and Ms. Ooten to conduct a random selection. This evidence is clearly insufficient for a finding that the Board committed legal error in awarding Ms. Ooten the position. Since the grievant bears the burden of proof in the matter, see, Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (March 23, 1990), the failure to provide further evidence compels a finding adverse to her claims.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mingo 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 Administrative Law Judges is a party to such appeal and should not be so named. Anyappealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: November 30, 1994

Footnote: 1The case was originally assigned to Administrative Law Judge Andrew Tarr and was transferred to the

undersigned's docket on December 23, 1993. Judge Tarr, by letter dated October 7, 1993, requested that the parties submit the lower level record and briefs by October 15, 1993. Despite several further requests, the record was not forwarded until November 21, 1994.

Footnote: 2The record is very sparse. At the Level II hearing the grievant presented no evidence save her testimony about matters which appear wholly irrelevant to the case. As hereinafter discussed, she also did not clearly define her legal position at the hearing. Much of the background recited herein was derived from the Grievance Board decisions cited and the Level II decision issued October 16, 1992.

Footnote: 3Mr. Fullen reached this conclusion after discussing the matter with John Roush, Attorney for the West Virginia School Service Personnel Association. The rationale for the conclusion is somewhat difficult to discern but it appears that Mr. Fullen considered Ooten to be a declaration that Ms. Ooten was more qualified than Ms. Spaulding for any position for which both were candidates. A careful review of the decision, however, indicates that no such holding was made and that the ultimate finding that Ms. Ooten should have received the position in issue therein was essentially based on the Board's failure to comply with W.Va. Code §18A-5-8(2).

Footnote: 4It is likely that the Board made the appeal. Since, however, the grievant made alternative arguments and requests for relief in the case, she may also have appealed.

Footnote: 5As previously noted, the parties declined to submit proposed findings of fact and conclusions of law.