JACK GOODWIN, .

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Grievant, .

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v. . Docket No. 93-20-161

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KANAWHA COUNTY BOARD OF EDUCATION, .

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Employer. .

D E C I S I O N

This Decision shall address one of two grievances filed by Jack Goodwin (hereinafter Grievant) against his employer, the Kanawha County Board of Education (hereinafter Board). This first complaint which was filed on May 10, 1993, contains the following statement of grievance: "Our department was reduced from 8 supervisors to 6. Several of us are supervising areas other than that of our undergraduate background. They did not reduce by seniority." The relief Grievant seeks is that he either be awarded the recently vacated vice-principal's position at Andrew Jackson Middle School, one of the six current curriculum supervisor positions or another administrative position comparable to thatwhich he held at the time of the reduction in force. (See footnote 1) Grievant contends that the vice-principal position is a lateral position to that of curriculum supervisor.

Both grievances proceeded through levels one and two of the grievance procedure and by-passed level three. For convenience, both complaints were heard on October 26, 1993, and the parties agreed that a joint Decision could be issued if appropriate. It has been determined that Grievant's two claims have no legal issues in common, therefore, separate Decisions shall be issued. The following facts relating to the claim in issue in this case are deduced from the record.

Findings of Fact

1. Grievant has been employed as a teacher by the Board for approximately twelve years and as an administrator for approximately ten years. Grievant has the following professional certifications and endorsements: Middle/Junior High/Senior High Principal 7-12; Supervisor of General Instruction 7-12; Elementary/Middle/Junior High K-8; Superintendent K-12; Vocational Administration 5-Adult.

2. Prior to the beginning of the 1993-1994 school year, Grievant served as a Curriculum Supervisor for Vocational Education.

3. At the beginning of the 1993-1994 school year, the Board reorganized the positions of curriculum supervisor. The eightexisting positions were eliminated and six new positions were created with accompanying job descriptions. These six new positions were posted as vacant and six of the eight former supervisors were hired to fill said positions. These six administrators were hired to act as supervisors over teachers who taught within the substantive areas of the supervisors' certification. (See footnote 2)

4. Grievant applied for but was not awarded any of the six newly created curriculum supervisor positions because the Board determined that he was not qualified for any of said positions.

5. Grievant was placed on administrative transfer and has been assigned to a teaching position within the county.

6. Grievant also applied for but was not chosen to fill the vice-principal's position at Andrew Jackson Middle School which was posted on July 9, 1993.

7. Grievant has more seniority within the county as a curriculum supervisor than at least one other curriculum supervisor who successfully bid upon and received one of the six posted positions.

Discussion

Grievant maintains that he should have received one of the six supervisory positions, based upon his seniority, even though he does not have a teaching or educational background within any ofthe six substantive areas being taught. He supports this contention by arguing that a supervisor's position is administrative in nature rather than instructive or hands-on; therefore, his administrative certification qualifies him to hold any of the six supervisory positions. In the alternative, he contends that he should have been awarded the vice-principal's position because it can be deemed lateral when

compared to the supervisor positions. The Board simply responds by asserting that Grievant has not proven any violation of law with regard to the filling of these six positions. It contends that it properly carried out a reduction in force of the number of curriculum supervisor positions. It further opines that the Board has taken a new approach with regard to the duties and responsibilities of curriculum supervisors. It explained that the six existing supervisors are now required to train teachers within those teachers' substantive area of teaching; therefore, it is reasonable to require the supervisors to be licensed in the respective teachers' subject matter area.

Assuming arguendo, that the Board had sought to assign Grievant to a "lateral position" in comparison to the former curriculum supervisor position he held, Grievant was properly determined not to be qualified for any of the six newly-created curriculum supervisor's positions. W. Va. Code §18A-3-2a (1990), states, in pertinent part,

> A professional administrative certificate, endorsed for serving in the public schools, with specific endorsement as a principal, vocational administrator, supervisor of instructions or superintendent, may beissued to a person who has completed requirements all to be approved by the state board as follows: For a master's degree from an institution of higher education accredited to offer master's degree, has successfully completed an approved program for administrative certification, developed by the state board of education in cooperation with the governing boards of the university of West Virginia system and the state college system, has successfully completed education and training in evaluation skills through the center for professional development, or equivalent education and training evaluation skills, and three years of management level experience: . . .. (Emphasis added).

Further, the State Board of Education has formulated administrative rules regarding the issuance of professional administrative certificates which are herein reproduced:

> The Professional Administrative Certificate shall be issued in all of the following specializations: 1) County Superintendent, 2) Elementary/Middle/Junior High School Principal, 3) Middle/Junior/Senior High School Principal, 4) General Supervisor of Instruction, and 5) Vocational Administrator. (Emphasis added).

Based upon an initial reading of these general statutory and regulatory provisions, an individual with a general supervisor of instruction certification is minimally qualified to supervise any group of teachers. However, the question in this case becomes whether the Board could legally create the new supervisory positions with minimum requirements that the individuals holding said positions must have an endorsement in the substantive area to be supervised.

In West Virginia, professional educators and administrators are to be hired by county boards of

education based upon qualifications. See, W. Va. Code §18A-4-7a. In actuality, the superintendents and their staff determine which candidates are the most qualified for the positions which are vacant andrecommendations are then made to the boards. In any event, because hiring decisions are to be based upon qualifications which include a wide variety of subjective criteria, it seems only natural that boards of education should be allowed to establish minimum and preferred requirements for positions that they create and fill; otherwise, hiring decisions would have to be based solely upon licensure and seniority and not upon a meaningful review of a candidate's qualifications. Such a limitation on the boards' authority to hire would not enable them to hire the "best-qualified" applicants for vacant positions but would often require them to hire only minimally qualified applicants. See generally, Gilkey v. Brooke Co. Bd. of Educ., Docket No. 91-05-489 (Jun. 25, 1992).
Code §18A-4-7a also contains the following language: "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." If a board can establish "special criteria or skills" within a job description, it must also be able to set forth such standards as minimum requirements for individuals to hold various positions. All of this correlates to the general proposition that county boards of education have substantial discretion to exercise their decision-making authority in the filling of vacant positions, guided only by their concern for the best interests of the schools. Dillon v. Bd. of Educ. of the County of Wyoming, 177 W.Va 145, 351 S.E.2d 58 (1986).

Grievant's argument that he should have been awarded one of the six newly-created supervisory positions based solely upon his certification is unpersuasive because the Board legally established minimum requirements for the six supervisory positions in question. Grievant would have been minimally qualified for any of the six positions if the Board had not created additional minimum requirements above and beyond the general certification requirement. Because the Board created the six supervisory positions with new minimum requirements and duties, Grievant was properly determined not to be minimally qualified.

Neither the Grievant nor the Board established exactly when the decision to reduce the number of curriculum supervisor positions was made. Grievant filed this claim on May 10, 1993, after he had received notice from the Board that he was to be placed on a transfer list. W.Va. Code §18A-2-2, among other things, requires that notice be given to those employees who are to have their continuing contracts of employment terminated prior to April 1. This missing fact is of importance

because Code §18A-4-7a was amended by the Legislature effective March 17, 1993. The Board's decision could have been rendered before April 1, 1993, but still have been governed by either version of 7a. Therefore, it is difficult to discern what rights Grievant possessed at the time of the reduction in force.

W.Va. Code §18A-4-7a (1990) ¶6 states, in pertinent part,

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuantto the provisions of section two, article two [§ 18A-2-2] of this chapter; . . .: Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure. (Emphasis added).

Code §18A-4-7a was amended in 1993 and the following language was added as an amendment to paragraph six:

> . . .Provided further, That if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.

> For the purposes of this article, all positions which meet the definition of classroom teacher as defined in section one, article one of this chapter, shall be lateral positions. For all other professional positions the county board of education shall adopt a policy by the thirty-first day of October, one thousand nine hundred ninety-three, and may modify said policy thereafter as necessary, which defines which positions shall be lateral positions.

Both of these provisions instruct county boards of education on the manner in which reductions in force or RIFs, as they are commonly known, are to be performed. Grievant contends that the board reduced in force the number of curriculum supervisors but that it did not do so based upon seniority; therefore, he avers that he is entitled to one of the six positions in question based upon the language of Code §18A-4-7a (1990) reproduced above. Grievant's argument must also be interpreted to stand for the proposition that the Board was required to assign him to any lateral administrative position for which he was qualified for as opposed to a teachingposition in an area where he is certified and was

previously employed.

In the instant case, the Board conducted a reduction in force among its curriculum supervisor's positions by reducing all eight positions. As a result of this reduction of the entire staff and recreation of positions, no "bumping" rights existed (which are based upon seniority) because there were no existing positions for which the employees could receive via transfer. Further, nothing within Code §18A-4-7a prohibits a board of education from eliminating old positions and establishing newly-created positions during a RIF. Displaced teachers and administrators affected by a reduction in force have a right to be transferred, based upon their seniority, under both Code §§18A-4-7a (1990) and 18A-4-7a (1993); however, said rights may be different under each version of the RIF provisions in question.

In Ghion v. Berkeley Co. Bd. of Educ., Docket No. 92-02-116 (Nov. 6, 1992), this Grievance Board interpreted the RIF provisions of Code §18A-4-7a (1990) with relationship to bumping rights of administrators. In Ghion, the grievant, an instructional supervisor, was subjected to a reduction in force. Ms. Ghion maintained a complete professional administrative certification commonly referred to as a "Taco Bell" certificate. Based upon this fact, plus a reference to the following provision of Code §18A-4-7a (1990): [f]or purposes of accruing seniority under this paragraph, employment as a principal, supervisor or central office administrator, as defined in section one of this chapter, shall beconsidered one area of employment;" the administrative law judge ruled that all professional administrative positions are considered "lateral". (See footnote 3) From that holding, it was ruled that Ms. Ghion was entitled to bump the least senior professional administrator assigned to any administrative position. She was ultimately awarded a principal's position. The Ghion decision was appealed to the Berkeley County Circuit Court by the board of education.

By Order dated May 24, 1993, the Berkeley County Circuit Court remanded the case to the administrative law judge to have developed a more complete record which could then be evaluated in relation to the then recent State Supreme Court's opinion in State ex rel. Melchiori v. Bd. of Educ., 188 W.Va. 575, 425 S.E.2d 251 (1992). Melchiori was issued on December 18, 1992. The Berkeley County Circuit Court concurred with the administrative law judge's conclusion of law in Ghion that a supervisor of instruction position was lateral to an assistant principal position. After the case was remanded it was settled and compromised by the parties without further ruling by this Grievance Board.

In Melchiori, the Court attempted to interpret the "bumping" provisions of Code §18A-4-7a (1990), as it applied to a teacher who was the subject of a reduction in force and who was certified in two different teaching fields. In that case, the Court held that "[W]hen educational personnel lose their positions due to areduction in force, both of the alternatives for reassignment provided in West Virginia Code § 18A-4-7a should be considered in conjunction with the reassignment decision." Id. at W.Va. 578. The Court in Melchiori ruled that boards of education have discretion in assigning professional personnel either to positions where they were previously employed or to lateral positions. The Court referred again to Dillon v. Board of Education, 177 W.Va 145, 351 S.E.2d 58 (1986), for the proposition that boards of education have substantial discretion in matters relating to the assignment of personnel. It compared the reduction in force provisions of 7a to that section's hiring provisions and based its ruling on the theory that boards should be allowed to consider qualifications when making "bumping assignments" just as they do when making hiring decisions, so long as the best interests of the schools are considered.

The Court has not yet been asked to interpret the "bumping" provisions of Code §18A-4-7a (1993) which are somewhat different from the provisions of Code §18A-4-7a (1990) reviewed in Melchiori and Ghion. The 1993 amendments to Code §18A-4-7a (1990) can be interpreted to nullify the rulings in Melchiori by requiring that administrative personnel who hold various administrative certifications and who are subjected to a reduction in force be assigned to the "professional position held by the employee with the least seniority in any of those areas of certification and/or licensure." There are also logical interpretations which wouldenable the rulings in Melchiori to be included within consideration of the new proviso.

Regardless of which interpretation is adopted, there is one clear distinction which can be drawn between the 1990 version of 7a as written and interpreted and the 1993 version as written: under the 1990 language and Ghion, all professional positions as deemed to be lateral. However, under the 1993 amendments, the boards of educations are permitted to define lateral and such definition may obviously be more narrow than that which has been carved out by this Grievance Board. If a county board considers certain administrative positions as lateral but not all, then both provisos in the RIF statute could be given meaning. However, the Board in this case cannot take advantage of this new right to define lateral because it has yet to have its policy approved by the State Superintendent of Schools, in writing, which of the time of this actions in this case it was not required to have done.

In the instant case, the Board defined lateral very narrowly and determined that no lateral position existed for Grievant to be transferred to. If the RIF decision was made by the Board prior to March 17, 1993, then it can be said that the Board impermissibly ruled out other professional positions as being lateral to that of a curriculum supervisor, inconsistent with the holding of Ghion; therefore, the Board erred in not at least considering Grievant for another administrative position based upon his seniority. The same conclusion can be drawn if the RIF decision was made after March 17, 1993, because the Board at that time still did not have awritten policy defining lateral which had been reviewed by the State Superintendent of Schools; therefore, it was bound to still consider what positions were lateral to that of curriculum supervisor under Ghion. In any event, the case must be remanded to the Board for further consideration of Grievant's transfer in relation to the actual date of the RIF decision and the applicable statute herein discussed and cited. After determining which positions are to be considered lateral, the Board must interpret the applicable version of 7a to ascertain the appropriate position for Grievant to receive by transfer.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusions of law.

Conclusions of Law

1. The Kanawha County Board of Education conducted a reduction in force of curriculum supervisor positions at the beginning of the 1993-1994 school year. It also reorganized its administrative staff by eliminating eight previously existing curriculum supervisor positions and creating six new positions with new job descriptions and minimum requirements.

2. The Board was required to post and fill these six new position vacancies according to the mandates of W.Va. Code §18A-4-7a (1992).

3. Grievant has established that the Board improperly defined the term "lateral" in relation to that of the position ofcurriculum supervisor before it assigned him to a teaching position as a result of a reduction in force.

Therefore, this case is **REMANDED** to the Kanawha County Board of Education for further consideration of Grievant's legal entitlement to a lateral administrative assignment consistent with the applicable statutory provisions at issue of the time of the transfer which occurred at the beginning of the 1993-1994 school year.

Any party may appeal this decision to the Circuit Court of Kanawha 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. Any appealing 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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ALBERT C. DUNN, JR.

Administrative Law Judge

March 14, 1994

Footnote: 1The Assistant Principal position was posted as vacant on July 9, 1993, and filled prior to the level four hearing in this case. Therefore, Grievant's request for relief was allowed to be amended.

Footnote: 2These positions were created to supervise the following teaching areas: Language Arts and Reading; Math; Science; Elementary Education; Fine Arts; Foreign Language and Social Studies.

Footnote: 3The ALJ determined that two State Superintendent of Schools opinions, dated December 18, 1991 and January 31, 1992, were clearly wrong insofar as they defined lateral administrative positions more narrowly than saying that all administrative positions are determined to lateral.