EVA STROUD,

Grievant,

v. **Docket No. 94-29-621**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Eva Stroud, alleges she should have been placed in a teaching position at Dingess Elementary School ("DES") when the grievance of another Mingo County teacher was denied. She requests back pay and seniority for the 1993-94 school year from September 13, 1993. This case was waived at Levels I and III and denied at Level II. A Level IV hearing was held on March 14, 1995, and this case became mature for decision on April 27, 1995, after the submission of proposed findings of fact and conclusions of law.

The following facts are not in dispute.

Findings of Fact

1. The Mingo County Board of Education ("MCBOE") posted a kindergarten teaching position at DES at the beginning of the 1993-94 school year.

2. Grievant, Abigail Runyon, and Susan Runyon applied for the position. All three were on the preferred recall list.

3. MCBOE believed Grievant and Susan Runyon were tied in seniority, and on September 13, 1993, a coin toss was conducted. Susan Runyon won.

4. Susan Runyon was placed in the position at DES.

5. Abigail Runyon initiated a grievance, and a further review of the records indicated Susan Runyon to be the least senior of the three applicants, and Grievant and Abigail Runyon to be equal in seniority.

6. Grievant did not intervene into Abigail Runyon's grievance.

7. Shortly thereafter in October, 1993, Susan Runyon applied for and received a position at Matewan Grade School. Neither Abigail Runyon nor Grievant applied for this position.

8. The principal at DES, as is within his authority, called Abigail Runyon to fill the position as a substitute. Level IV, Fullen.

9. The position was reposted in November and January, and both Abigail Runyon and Grievant applied.

10. On November 12, 1993, MCBOE denied Abigail Runyon's grievance at Level II, and because MCBOE had determined Grievant and Abigail Runyon had equal seniority, called the teachers in on November 19, 1993, for a coin toss.

11. At the November 19, 1993 meeting, Abigail Runyon was represented by West Virginia Education Association ("WVEA") Representative Richard Stonestreet. Assistant Superintendent John Fullen believed both teachers were represented by Mr. Stonestreet. Both teachers refused to participate in the coin toss, with each stating they were the most senior.

12. In November, 1993, Grievant rejoined WVEA.

13. Abigail Runyon's grievance was appealed to Level IV and was styled Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 14, 1994). The parties submitted a Joint Stipulation of Facts (See footnote 1) in that grievance, which stated a further review of the records had been conducted, and Grievant now had one more day of seniority than Abigail Runyon. One issue remained, and that was Grievant's employment status from August 30, 1989 to September 14, 1989. This determination was left to the Administrative Law Judge ("ALJ") at Level IV, leaving the final seniority status of the two teachers undetermined by MCBOE.

14. On April 4, 1994, ALJ Lewis Brewer denied Abigail Runyon's grievance at Level IV, and found Grievant to have one more day of seniority than Abigail Runyon.

15. Copies of this decision were sent to Abigail Runyon, MCBOE, and Mr. Stonestreet. Grievant was not a party to the grievance, thus she was not sent a copy.

16. After receiving this decision, MCBOE did not repost the position because it was the end of the school year, and the DES position was to be reduced for the following school year. Trans. Level II at 7, Level IV, Fullen.

17. However, just prior to the 1994-95 school year, MCBOE decided the kindergarten position would be needed at DES and it was posted again. Grievant applied, and Ms. Mary Young was

selected. Grievant filed a separate grievance over this issue.

18. Grievant did not find out about the April 4, 1994, grievance decision in the Runyon case until the middle of September, 1994. She filed this grievance three days later.

One major fact is in dispute. Grievant testified that all parties agreed on November 19, 1993, to await the outcome of the Level IV decision in Runyon. Grievant also testified that Assistant Superintendent Fullen told her at this time not to file a grievance, but to await this outcome, and "justice will be done." Grievant testified she has known at all times about her right to file grievances.

Assistant Superintendent Fullen agrees the parties decided to take no further action until the Level IV decision in the Runyon case was issued. He stated he did not remember telling Grievant not to file a grievance. Given Grievant's unrebutted testimony, the undersigned finds Assistant Superintendent Fullen did tell Grievant not to file a grievance and "justice would be done."

Arguments

Grievant argues the Runyon decision awarded her the teaching position at DES. She also argues she would have been awarded the DES position in the first place, but for MCBOE's failure to properly calculate her seniority, thus she should receive back pay and seniority from September 13, 1993, the date the position wasinitially filled. Further, Grievant states she did not file a grievance or intervene because Assistant Superintendent Fullen told her not to do so.

MCBOE argues four main points. One, the grievance is untimely filed from either the date of the Runyon decision, April 4, 1994, or the date the position was posted in September, 1993. MCBOE's second argument is, Grievant could have intervened in the Runyon grievance and did not do so. MCBOE notes Grievant was a member of WVEA at the time the Runyon grievance was filed at Level IV, but never sought advice of any kind. Third, MCBOE states Judge Brewer's decision did not award the position to Grievant, only clarified Grievant's seniority as it related to Abigail Runyon. Fourth, MCBOE states it was too late in the school term to post and fill the position, and as of April, 1994, MCBOE thought the position at DES would be eliminated because of decreased student enrollment.

Discussion

While it is clear Grievant knew she had a right to file a grievance over the filling of the DES position, it is also clear she relied, to her detriment, on Assistant Superintendent Fullen's request not

to do so and his promise "justice would be done." The evidence demonstrates Assistant Superintendent Fullen's statement is the kind that would "mislead or lull the grievant into believing that filing a grievance would not be necessary." Gaskins v. Dept. of Health and Human Resources and Div. of Personnel, Docket No. 90-8-032 (April 12, 1990); See Naylor v. W. Va. Human Rights Comm'n,378 S.E.2d 843, 846 (W. Va. 1989). Thus, Grievant's failure to grieve or intervene cannot be held against her. Because Grievant was promised justice would be done after the Runyon grievance was resolved, MCBOE, in this instance, had a duty to take some action after ALJ Brewer determined Grievant was more senior than the other applicant for the position. Although it is understandable that MCBOE did not wish to place Grievant in the position that late in the school year, as it would be disruptive to the learning of kindergarten children, this fact did not free them from the duty to act and negotiate some resolution with Grievant after receiving notification of the Runyon decision.

Based on the above-conclusion, the undersigned finds MCBOE should grant Grievant back pay (See footnote 2) and seniority from November 19, 1993, until the end of the 1993-94 school year. This was the date Grievant was told not to intervene and the date she was promised justice would be done. While it is unknown what relief ALJ Brewer would have granted Grievant if she had intervened, it is distinctly possible Grievant would have received the position. ALJs may "provide such relief as is deemed fair and equitable." W. Va. Code §18-29-6(b). Accordingly, the undersigned finds the Grievant should receive the equitable relief of seniority and back pay from November 19, 1993, the date Grievant was told not to intervene.

The rest of this decision will be stated as conclusions of law.

Conclusions of Law

1. W. Va. Code §18-29-3(u) allows any party whose rights may be substantially affected by the outcome of a grievance the right to intervene, upon a timely request.

2. Grievant relied, to her detriment, on Assistant Superintendent Fullen's request not to intervene in the Runyon grievance, and his promise that justice would be done after the resolution of that grievance. Gaskins v. Dept. of Health and Human Resources and Div. of Personnel, Docket No. 90-8-632 (Apr. 12, 1990).

3. MCBOE is equitably estopped from alleging untimeliness or failure to intervene by its prior request and promise. Naylor v. W. Va. Human Rights Comm'n, 378 S.E.2d 843, 846 (W. Va. 1989).

4. If Grievant's seniority had been properly calculated, she would have received the position. Since Grievant did not grieve her initial non-selection, but would have grieved on November 19, 1993, after the second posting, the equitable relief based on this set of facts only, is to place Grievant as close as possible to the posture she would have been in if she had intervened.

Accordingly, this grievance is **GRANTED** in part and **DENIED** in part. MCBOE is directed to grant the Grievant back pay and seniority from November 19, 1994, until the end of the 1993-94 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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. 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 30, 1995

Footnote: 1The stipulation of facts submitted in the prior grievance was utilized in this grievance at the request of Grievant and over the objection of MCBOE.

Footnote: 2It is noted, as testified to at the Level IV hearing, that this ruling will necessitate Grievant repaying the unemployment she received during this period.