WILLIAM ADAMS, .

.

Grievant, .

.

v. . Docket No. 94-06-520

.

CABELL COUNTY BOARD OF EDUCATION, .

.

Respondent, .

.

and .

.

KATHY HOSAFLOOK, .

.

Intervenor. .

D E C I S I O N

William Adams (Grievant) seeks to reverse an August 18, 1994, Level III decision by Respondent Cabell County Board of Education (CCBE) on a grievance filed by Kathy Hosaflook (Intervenor), (See footnote 1) which instated Ms. Hosaflook to one of four assistant principal positions at CCBE's Cabell Midland High School (CMHS). As a result of this decision, Grievant was displaced from the assistant principal position to which he had been selected on January 10, 1994. Ms. Hosaflook initiated her grievance at Level I on January27, 1994, alleging CCBE violated W. Va. Code § 18A-4-7a in failing to select her for one of four assistant principal positions posted for CMHS. Ms. Hosaflook's grievance was denied at Levels I and II but granted by CCBE at Level III by a four-to-one vote.

On August 29, 1994, Grievant appealed CCBE's Level III decision to this Grievance Board, seeking to intervene at Level IV under W. Va. Code § 18-29-3(u). Following a conference call with

the parties and an opportunity for written argument, the undersigned administrative law judge issued an Order dated November 28, 1994, granting Grievant leave to intervene at Level IV. A copy of that Order is attached as Appendix A to this decision.

Once this matter was set for hearing at Level IV, Grievant, with the concurrence of the other parties, opted to submit the matter for decision on the record below. A briefing schedule was established, allowing the parties an opportunity to submit written arguments. Intervenor Hosaflook and Grievant filed timely briefs. CCBE elected to waive argument. This matter became mature for decision on March 28, 1995.

DISCUSSION

Intervenor Hosaflook maintains that Grievant should not be permitted to elevate this grievance to Level IV, contending that CCBE's Level III decision should be recognized as a "final disposition" of this grievance in accordance with this Grievance Board's prior decision in Epling v. Boone County Board of Education, Docket No. 89-03-562 (Feb 28, 1990), aff'd Case No. 90-AA-67(Kanawha County Cir. Ct. Apr. 3, 1992). In Epling, this Board concluded:

> An employee who is selected for a position but whose appointment is rescinded due to a county board of education's ruling in a grievance to which he is not a party or intervenor, and to which he has not sought to become either despite awareness of that grievance and its substance, has no remedy at a higher level of the education employees' grievance procedure ....

Epling, supra, at 10. Epling has since been followed by this Board. Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991). See Kennedy v. Univ. of W. Va. Bd. of Trustees, Docket No. 90-BOT-302 (Dec. 27, 1990).

In seeking review of CCBE's Level III decision at Level IV, Grievant filed an affidavit which included the following:

> That I had heard, but was not formally informed, that grievances had been filed by two applicants not recommended by the county superintendent for the positions of Assistant Principal of Cabell Midland High School.

> That on Monday, August 15, 1994, I had a chance meeting with the Cabell County Superintendent at the Cabell County Board of Education Offices at which time, and for

> the first time, I was advised that the grievances had been denied at Levels One and Two and that there was to be a hearing by the Cabell County Board of Education that Thursday night; upon inquiry concerning the status of such hearing, I was informed by Superintendent Brewster that the customary practice in such situations was for the Cabell County Board to waive its Level Three Hearing directly to Level Four pursuant to the provisions of the Grievance Procedure and he believed that it would be moved to Level Four.
>
> That based upon the information from the Superintendent, I did not even attend the meeting of the Board on the night of August 18, 1994.

Affidavit of William A. Adams, Oct. 14, 1994 (paragraph numbers omitted).

Generally, this Grievance Board attempts to follow the doctrine of stare decisis (See footnote 2) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This position is premised on a belief that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

In that regard, the undersigned is not aware of any decisions by our Supreme Court of Appeals which address the question of a grievance being elevated to Level IV by an employee who was not a party to the grievance at Level III. However, this Board's ruling in Epling, supra, effectively determined that such intervention is not permitted under the applicable grievance statute, W. Va. Code, §§ 18-29-1, et seq. In particular, Epling recognized a distinctionbetween a board of education as an employer under W. Va. Code §§ 18-5-1, et seq., and its separate and distinct role as a grievance evaluator under W. Va. Code §§ 18-29-1, et seq., concluding: "A 'grievance,' as defined in Code §18-29-2(a), must be understood, at least generally, to mean an employee's complaint against the action of his employer only when that action is in the context of the employment relationship and not in that of the grievance procedure." Epling, supra, at 7 (footnote omitted).

The intervention clause of the grievance procedure for education employees, W. Va. Code § 18-29-3(u), provides:

> Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties.

This provision must be read in pari materia with W. Va. Code § 18-29-4(d)(1), governing appeals to Level IV:

> If the grievant is not satisfied with the action taken by the chief administrator, or, if appealed to level three, the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 18-29-5] of this article ....

Epling holds, and the undersigned administrative law judge is constrained to agree, that once a determination is made at Level III on the merits of a grievance, appeal to Level IV is available only to those who were parties to the grievance below. Where, as here, Grievant was on notice, albeit informal and casual notice, of a grievance which might "substantially and adversely affect" hisrights or interest in the Assistant Principal position to which he had been appointed at CMHS, Grievant forfeited any right to proceed to Level IV by failing to timely intervene in the grievance at Level III. This result is consistent with the Legislature's intent that this grievance procedure "provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." W. Va. Code § 18-29-1. In addition to encouraging interested parties to resolve their differences at the lowest possible level, this approach promotes finality in the administrative process. See Liller v. W. Va. Human Rights Comm'n, 376 S.E.2d 639, 646 (W. Va. 1988).

Accordingly, consistent with this Board's prior decisions in Epling, supra, Gillman, supra, and Kennedy, supra, the undersigned administrative law judge concludes that the Order dated November 28, 1994, allowing Grievant to move this grievance forward to Level IV on its merits was improvidently granted, and this grievance must be denied.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant applied for and was chosen by CCBE for one of four Assistant Principal positions at CMHS.

2. Kathy Hosaflook, an unsuccessful applicant, filed a grievance seeking instatement to one of the CMHS Assistant Principal positions.

3. On August 15, 1994, Grievant learned that the grievance which Ms. Hosaflook had filed had been denied at Levels I and II and the matter had been appealed to Level III where a hearing was scheduled before CCBE on August 18, 1994.

4. On August 18, 1994, CCBE elected to hear Ms. Hosaflook's grievance at Level III, and at the conclusion of the hearing, granted her grievance by a four-to-one vote.

5. Grievant did not attend the CCBE hearing on August 18, 1994, and made no effort to intervene in this matter until filing this appeal at Level IV on August 29, 1994, seeking to challenge CCBE's Level III decision.

CONCLUSIONS OF LAW

1. "The actions of a board of education as employer on the one hand and as grievance evaluator on the other are separate and distinct." Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb 28, 1990), aff'd Case No. 90-AA-67 (Kanawha County Cir. Ct. Apr. 3, 1992). Cf. W. Va. Code §§ 18-5-1, et seq., & 18-29-1, et seq. See Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991).

2. "An employee who is selected for a position but whose appointment is rescinded due to a county board of education's ruling in a grievance to which he is not a party or intervenor, and to which he has not sought to become either despite awareness of that grievance and its substance, has no remedy at a higher level of the education employees' grievance procedure." Epling, supra. See W. Va. Code §§ 18-29-1 et seq.; Gillman, supra.

Accordingly, Mr. Adams' grievance is **DENIED** , and the Level III decision by CCBE will not be reviewed by this Board.

Any party may appeal this decision to the Circuit Court of Cabell County or 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 15, 1995

Footnote: 1For purposes of properly identifying the true interests of the parties in this matter, Mr. Adams has been designated as the "Grievant" at Level IV while Ms. Hosaflook, the prevailing party at Level III, has been recognized as an "Intervenor."

Footnote: 2Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 451 S.E.2d 768, 771 (W. Va. 1994).