

**JENNIFER LESTER ELLIS,**

**Grievant,**

**v.**

**DOCKET NO. 96-29-164**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **D E C I S I O N**

Grievant, Jennifer Lester Ellis, filed this grievance on February 8, 1996, as follows:

Jennifer Lester is on the preferred teacher recall list in Mingo County. The Mingo County Board of Education advertised for an Adult Basic Education teacher at Kermit. Ms. Lester was not sent the posting as required by law and the job was filled without her knowledge. She asks that the job be reposted so that she can apply.

The grievance was denied at the lower levels and Grievant appealed to level four on April 26, 1996. Hearing was held on June 5, 1996, at which time this case became mature for decision.

The material facts are not in dispute and are set forth in the following findings of fact.

### Findings of Fact

1. Grievant is employed as a teacher, certification Elementary 1-6, by Respondent Mingo County Board of Education.
2. Grievant, at all times pertinent herein, had been reduced in force and was on the preferred recall list.
3. Respondent posted a position of Adult Basic Education Teacher at Kermit, a five-hour position, from January 22 to January 26, 1996.
4. The Adult Basic Education Teacher position did not require any special certification, other than a West Virginia teacher's certificate.

5. Grievant did not receive a certified mail notice of the posting for the Adult Basic Education Teacher position.

6. Grievant learned from the newspaper that another individual, Craig Michael Clay, also on the preferred recall list, but with less seniority, had received the Adult Basic Education Teacher position. Grievant then filed this grievance.

7. Subsequently, about a week later, Mr. Clay and Grievant applied for a half-time position at Varney, which Mr. Clay received because he had preference as a regular employee with Respondent.

8. The Mingo County Economic Commission, in concert with the Department of Health and Human Resources, has since taken over the adult education program in Mingo County and Respondent does not have any control over that program, nor any employee within that program.

### Discussion

There are two key issues involved in this grievance. One, whether Respondent was required to send Grievant a certified mail notice for the Adult Basic Education Teacher position; and two, whether Grievant's position on the preferred recall list entitled her to the Adult Basic Education teacher position.

West Virginia Code § 18A-4-7a, provides, in pertinent part:

All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional personnel position opening within the area where they had been previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position. Before position openings that are known or expected to extend for twenty consecutive employment days or longer for professional personnel may be filled by the board, the board shall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause such employee to forfeit any right to recall. The notice shall be sent by certified mail to the last known address of the employee, and it shall be the duty of each professional personnel to notify the board of continued availability annually of any change in address or of any change in certification and/or licensure. (Emphasis added).

This Grievance Board has previously held that a board of education is not required, by the language of the above statute, to provide professionals on the preferred recall list notice of vacancies in areas in which they do not hold the required certification and/or licensure, because those individuals are not "qualified" for the position. McGuire v. Monroe County Bd. of Educ., Docket No.

94-31-588 (Apr. 6, 1995). Respondent argues that this holding should be extended to the instant situation, and boards of education should not be required to send certified mail notices of vacancies to professionals on the preferred recall list in instances where the position in question requires no certification or licensure. Respondent avers that it is only required to send certified mail notices of vacancies to professionals who hold the requisite certification and/or licensure for positions which require the same.

The undersigned does not agree with Respondent's interpretation of the above statute. While it clearly is reasonable not to require a board of education to send notices of vacancies to professionals on the preferred recall list for positions for which they are not qualified, it is, conversely, more than reasonable to require the boards to send notices to individuals if they are qualified. In this instance, because there was no certification and/or licensure requirement for the position at issue, presumably all professionals on the preferred recall list were "qualified" to hold the position, and should have been given the opportunity to apply. Thus, Respondent was required by law to send Grievant, as well as other qualified individuals on the preferred recall list, a certified mail notice of the Adult Basic Education Teacher position at Kermit.

The remaining matter to be resolved is whether Grievant's position on the preferred recall list entitled her to the Adult Basic Education Teacher position. Grievant contends that she is entitled to the Adult Basic Education Teacher position as a matter of law under the recall provisions of W. Va. Code § 18A-4-7a, because both she and Mr. Clay were on the preferred recall list and she had greater seniority.

The preferred recall provision of Code § 18A-4-7a was designed to guarantee or to entitle employees to regain employment, by order of seniority, in the certification area in which they had been previously employed or in another area in which they have been certified or licensed. This is the limited purpose and scope of the recall provision. Grievant's recall rights were thus confined to the area in which she had been certified, namely, Elementary 1- 6. See Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993). The Adult Basic Education Teacher position did not require any specific or distinct certification requirement; it was a generic teaching position. Grievant was not entitled to recall to that position because that position was not "within the [certification] area where [she] had previously been employed." Under the same reasoning, the Adult Basic Education Teacher position was not a "lateral area" for which she had been certified or

licensed. The preferred recall provision simply has no application to this specific factual situation and hence was not violated. Bailey v. Wyoming County Bd. of Educ., Docket No. 92-55- 478 (July 19, 1993); Woodson, *supra*.

The board of education in Woodson, *supra*, filled the subject position utilizing the seven selection criteria set forth in W. Va. Code § 18A-4-7a. The Grievant argued that the position should have been filled based upon the preferred recall provisions of that Section. While it is unclear from the record in the instant grievance, it does not appear that the Board utilized the seven selection criteria in filling the subject position, but rather filled the position directly from the preferred recall list based on seniority alone. ([See footnote 1](#))

In summary, Grievant has proven that she was entitled to receive notice of the Adult Basic Education Teacher position so that she be afforded an opportunity to apply, but has failed to prove that she is entitled to the position on the basis of W. Va. Code § 18A-4-7a's recall provisions.

In addition to the foregoing, the following formal conclusions of law are made.

#### Conclusions of Law

1. In grievances that are not disciplinary in nature, the grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. W. Va. Code § 18A-4-7a requires that certified mail notice of all vacancies be sent to individuals on the preferred recall list who are qualified to fill the positions in question, when no specific certification and/or licensure is required for the positions in question. 3. Grievant has proven by a preponderance of the evidence that she was entitled to receive certified mail notice of the vacant Adult Basic Education Teacher position at Kermit, which required no certification and/or licensure.

4. The preferred recall provision of W. Va. Code § 18A-4-7a, was intended to afford laid-off employees a right to be recalled to employment, by order of seniority, in the certification area in which they had been previously employed or in another area in which they had been certified or licensed. Bailey v. Wyoming County Bd. of Educ., Docket No. 92-55-478 (July 19, 1993); Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993).

5. Under Code § 18A-4-7a's recall provision, Grievant's recall right was confined to that area in

which she had been certified, namely, Elementary 1-6.

6. Grievant was not entitled to be recalled from the preferred recall list to fill the vacant Adult Basic Education Teacher position.

Accordingly, this grievance is **GRANTED** only insofar as Respondent is hereby **ORDERED** to provide all individuals on the preferred recall list with certified mail notice of all positions which they are qualified to hold, which necessarily includes "generic" teaching positions requiring nothing more than a West Virginia teaching certificate.

Further, Grievant's claim of entitlement to the position based on her preferred recall status is **DENIED**. However, Respondent is hereby further **ORDERED** to consider whether Grievant was better qualified than the successful applicant under the second set of factors in W. Va. Code § 18A-4-7a, and if she is found to be the better qualified candidate, Grievant shall be compensated in back pay, benefits and seniority for the Adult Basic Education Teacher position for the time period the position was held by the successful applicant.

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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Date: June 28, 1996**

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[Footnote: 1](#)

*The record does not reveal whether any regularly employed instructional personnel applied for the position.*