

**KAY LEE**

**v. DOCKET NO. 95-14-424**

**HAMPSHIRE COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Kay Lee, is employed by the Hampshire County Board of Education (Board or Respondent) as a teacher for students with Mildly Mentally Impairments\Specific Learning Disabilities (MMI\SLD). Grievant filed her grievance on August 25, 1995, claiming that:

On July 24, 1995 I was hired by the Board of Education as Teacher for Specific Learning Disabilities and Mildly Mentally Impaired at the John J. Cornwell Elementary School and was notified of this action by letter dated July 26, 1995 from Superintendent of Schools Gerald A. Mathias. I was later informed that my position was given to a more senior teacher and that I would now be a permanent substitute on a temporary basis filling her vacant position until it could be posted and filled.

As relief, Grievant seeks to be instated into the Specific Learning Disabilities and Mildly Mentally Impaired teaching position at John J. Cornwell Elementary School (Cornwell).

Grievant's immediate supervisor denied relief at Level I, because he did not have the authority to grant the relief sought. At Level II the grievance was denied by the Superintendent, after hearing on September 6, 1995. Pursuant to W.Va. Code §18-29-4(c), Grievant bypassed Level III and appealed the Level II decision directly to Level IV. At Level IV, an evidentiary hearing was scheduled at the Grievance Board's Elkins Office on December 11, 1995. After arriving, the parties decided to submit the case on the record developed below; however, the parties desired to supplement and clarify the record with certain statements by the representatives. The case became mature on December 26, 1995, with the receipt of Grievant's brief.

**BACKGROUND FACTS**

Grievant's assignment for the 1994-95 school year was at Cornwell. This position had become vacant and had been posted because Mr. Lyndon Willis, the MMI\SLD teacher at Cornwell, did not

have the proper certification and was transferred to a position for which he was certified pending his certification. The Cornwell position was posted for the 1994- 1995 school year as a one year vacancy. Grievant was the only applicant for the Cornwell position and was hired on a probationary contract for the entire school year. Grievant signed her one year probationary contract with Respondent on August 30, 1994.

In a letter from the Superintendent, dated April 27, 1995, Grievant was informed of the following:

Please be advised that the School Laws of West Virginia will not allow the Board to re-hire any individual who holds an Out-of-Field Authorization or a Teaching Permit until after July 1, of each school year.

We must be assured that you have taken the required classes in order to obtain a Permit in MMI and SLD for next school term, prior to your re- employment. We have placed your name on a Contract Hold list for the present time.

Please feel free to keep in touch with me or Mrs. Starkey regarding your certification status. You will need to inform us when you have attained the required six hours of credit and make application for certification to the State Board of Education following the July 1, date.

Should you have any questions regarding this matter, please feel free to contact me or any member of my office staff.

At the end of the summer, Grievant received a letter from the Superintendent, dated July 26, 1995, and was informed of the following:

I am pleased to inform you that the Hampshire County Board of Education, meeting in regular session on July 24, 1995, approved your re-employment as Teacher for Specific Learning Disabilities and Mildly Mentally Impaired at the John J. Cornwell Elementary School, effective August 22, 1995, for the 1995-96 school term.

Further action by the Board awarded you a Second Year Contract of Employment. This Contract of Employment is enclosed for your signatures. Please review, sign and return both copies of the Contract to my office. I will return one copy to you for your files.

On August 7, 1995, Grievant was telephoned at her home and requested to come to the Board office for a meeting with the Superintendent and Coordinator of Personnel. At that meeting, she was

informed that Ms. Felisa Allen ([See footnote 1](#)), a MMI\SLD teacher at Slanesville Elementary School (Slanesville), wanted the Cornwell position, and that Ms. Allen had also brought it to Respondent's attention that the Cornwell position had not been advertised pursuant to the posting requirements of W.Va. Code §18A-4-7a. The Superintendent also explained to Grievant that, based on his research, the position should have been advertised. This meeting occurred ten days after Grievant had received notification that she had been assigned the position at Cornwell.

On August 8, 1995, Ms. Paula O'Brian, Coordinator of Special Education programs, telephoned Grievant and told her to submit a letter of application for teacher of Specific Learning Disabilities\Mildly Mentally Impaired at Cornwell. Subsequently, the MMI\SLD position posting at Cornwell was published in the Hampshire Review newspaper on August 9 and 21, 1995.

Respondent telephoned Grievant on August 15, 1995, and informed her that the superintendent was requesting that her letter of application be submitted no later than Friday, August 18, 1995. On August 16, 1995, Respondent again telephoned Grievant and directed her to have a letter of application for the Cornwell position in the superintendent's office by 5:00 p.m. that day.

On August 16, 1995, Grievant submitted a letter stating that she had already been hired for the position and inquiring as to why it was necessary to submit a letter of application. However, in her letter, Grievant did not apply or ask to be considered for the Cornwell position.

The first day of employment for teachers for the 1995-96 school year was August 23, 1995. Grievant reported for work at Cornwell. Ms. Allen also reported for work at the same school on that date. The Principal, Marie Breinig, called the Superintendent for instructions and was informed to direct Grievant to report to Slanesville and for Grievant to submit a letter of application for the position at Slanesville. Grievant was also verbally informed of the contents of the following letter from the Superintendent, dated August 22, 1995, but which Grievant did not receive until August 24, 1995, the second day of school:

As a follow-up to our recent conference regarding the MMI\SLD position at the John J. Cornwell Elementary School, please be advised that the Hampshire County Board of Education, meeting in regular session on August 21, 1995, voted to transfer Mrs. Allen to this position, as per her request, after it was duly advertised.

In further action by the Board, you were placed as a long-term substitute to teach MMI\SLD at the Slanesville Elementary School, effective August 22, 1995, until this position can be advertised in accordance with West Virginia Code.

Please be assured that I, or any member of my office staff, will be more than willing to assist you in making the transition to the Slanesville Elementary School.

Also, should you wish to confer with me regarding this action, please feel free to contact me.

Grievant complied and wrote a letter, dated August 23, 1995, to the superintendent protesting her reassignment to Slanesville.

### **DISCUSSION**

This grievance resulted because Respondent failed initially to post the MM\SLD position at its Cornwell school. Grievant was rehired and sent a letter telling her she was assigned to Cornwell. However, Ms. Allen had been waiting for Respondent's posting or advertisement of that position. Eventually, Ms. Allen either heard that the position had been given to Grievant or inquired as to the posting of the Cornwell position. Respondent promptly posted the position after learning of its oversight.

W.Va. Code §18A-2-8a, the code section at issue, provides:

The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one [§ 18A-2-1] of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five [§§ 18A-2-4, repealed and 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who received notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the non-rehiring must be shown. (1977, c. 94.)

Respondent complied with W.Va. Code §18A-2-8a, in that Respondent notified Grievant, by letter dated April 27, 1995 and before the first Monday in May, that she was being placed on the "contract

hold" ([See footnote 2](#)) list. Grievant was also informed in this letter that in order to be considered for re-employment she again needed to obtain a permit, and that the Code does "not allow the Board to re-hire any individual who holds an Out-of-Field Authorization or a Teaching Permit until after July 1, of each school year." Subsequently, Respondent did hire Grievant for a second probationary year using a one year contract.

Grievant's counsel also advanced a theory that since Respondent illegally placed Grievant on a "contract hold" list that this somehow guaranteed Grievant the Cornwell position for the 1995-96 school year, if she satisfied the certification requirements. However, Grievant clearly knew that her contract was for the 1994-95 school year only. Grievant was also notified by a letter dated April 27, 1995, and within the dictates of W.Va. Code §18A-2-8a, that she was not being rehired. Furthermore, Board action on the termination of Grievant's contract occurred when it was approved for one year only, and the contract ended according to its own terms at the expiration of the contract period. This Grievance Board has previously held that when a contract "entered into pursuant [to statute] ceases to exist and that cessation is expressly provided for in the terms of the contract, the contract comes to an end by its own terms and is not subject to the procedural requirements of [W.Va. Code §18A-2-8a]." Ramsey v. Lincoln Co. Bd. of Educ., Docket No. 94-02-002 (June 3, 1994). Therefore, even though Respondent placed Grievant on the "contract hold", and a better practice would be not to create and use such a designation, Respondent did not violate W.Va. Code §18A-2-8a, since proper notice was given to Grievant. ([See footnote 3](#))

It should also be noted that as far as Grievant's alleged right to the Cornwell position is concerned, section C of her contract states that:

[t]he services to be performed hereunder by the Teacher are to be performed in such school or schools, and at such place or places as may be designated by the County Superintendent of Schools, with the approval of the Board.

Furthermore, State ex rel. Hawkins v. Tyler County Bd. of Educ. and Roy Truby, State Superintendent, 375 S.E.2d 911 (W.Va. 1981), makes it clear that teachers do not have a vested right to be assigned to any position or particular school in the county.

Grievant also alleges that Respondent's action violates W.Va. Code §18A-2-7. However, W.Va. Code §18A-2-7 is not applicable in this particular case, because Grievant attained her position as a result of the unlawful filling of the Cornwell position by Respondent. Because Grievant did not lawfully hold the position, there was not a transfer as contemplated by the Code. Furthermore, Grievant did

not acquire any legal rights or protection under W.Va. Code §18A-2-7 by virtue of Respondent's unlawful act. The Supreme Court of Appeals of West Virginia, in Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (1985), at 748, stated that "unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." The Court also went on to point out that such unlawful or ultra vires representations usually do not give rise to a due process property interest.

Respondent, in trying to correct its unlawful error, did not act in an arbitrary and capricious manner. The Superintendent stated that he personally has the highest regard for Grievant as a teacher, and that there is no reason why she should think that she is being downgraded in any way. The undersigned did not find the Superintendent's reasoning to be pretextual. However, an unlawful error was brought to the Superintendent's attention and he acted in accordance with W.Va. Code §18A-4-7a in filling the Cornwell position. Therefore, in the present case, after Respondent lawfully corrected its error, by the posting and filling of the Cornwell position according to the requirements of W.Va. Code §18A-4- 7a, Grievant no longer held a valid probationary teaching contract. ([See footnote 4\)](#)

In addition to the foregoing narration, it is appropriate to make the following formal findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Grievant was hired by Respondent for the 1994-95 school year on a one year "teacher's probationary contract of employment". 2. The posting under which Grievant was employed stated that the position was for one year.

3. On July 27, 1995, Respondent rehired Grievant, under the same type of contract, for a second year. 4. On August 9, 1995, Respondent published a posting in the local newspaper for a teacher from MMI/SLD at Cornwell and the only applicant was Ms. Allen.

5. On August 21, 1995, at a regular meeting, Respondent approved the recommendations by the superintendent that Ms. Allen be transferred from MMI/SLD teacher at Slanesville to Cornwell, and that Grievant be placed as a long term substitute at Slanesville until that position could be advertised.

### **CONCLUSIONS OF LAW**

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Napier v. Logan Co. Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. County boards of education have substantial discretion in matters relating to personnel actions. Board of Educ. v. Enoch, 186 W.Va.712, 414 S.E.2d 630 (1992).

3. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. State ex rel. Hawkins v. Tyler County Bd. of Educ. and Roy Truby, State Superintendent, 375 S.E.2d 911 (W.Va. 1981).

4. Teachers have no vested right to be assigned to any particular school in the county. Id.

5. Unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity and usually do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (1985), at 748.

6. Grievant failed to prove her grievance by a preponderance of the evidence or that she was entitled to the position in question as a matter of law.

Accordingly, the grievance must be DENIED.

DATED: 1/22/96 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE

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[Footnote: 1](#)

*According to Ms. Starkey, it was subsequently determined by Respondent, pursuant to W.Va. Code § 18A-4-7a, that Ms. Allen was more qualified for the position than Grievant. Therefore, even though, Ms. Allen was the only person who applied for the Cornwell position after it was advertised, Grievant was also considered for the Cornwell position, although she did not apply once it was posted.*

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[Footnote: 2](#)

*This term does not appear in the Code, nor did Respondent explain what it meant when using this term.*

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[Footnote: 3](#)

*For a good discussion of W.Va. Code §18A-2-8a, see Underwood v. Marion Co. Bd. of Educ., Docket No. 94-24-535 (Jan. 10, 1995); and Miller v. Bd. of Educ. of County of Boone, 190 W.Va. 153 (1993), 437 S.E.2d 591.*

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[Footnote: 4](#)

*Grievant, on page three her brief, seems to add to the relief sought when she states "[t]his action was compounded because the recommendation approved by the board also reduced Grievant from a regular employee to the status of long*

*term substitute. This denies Grievant the opportunity to accumulate seniority to which she is entitled as a regular full time employee. That is further compounded by the approval in the same recommendation that grievant's long term substitute position is only until that*

*(Footnote #4 continued to next page.)*

*(Footnote #4 continued:)*

*position can be advertised."*

*The undersigned, finding that the above statements constitute a change in the relief sought and were properly brought before the undersigned at Level IV pursuant to W.Va. Code §18-29-3(k), allowed the relief sought to be expanded to include the above statements.*

*After due consideration of the facts, and based on the analysis applied and the resulting holding in this case, the additional relief sought is hereby DENIED.*