

MARY KINSER,

Grievant,

v.

DOCKET NO. 96-29-075

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

AILEEN BLANKENSHIP,

Intervenor.

D E C I S I O N

Grievant, Mary Kinser, filed this grievance on or about November 27, 1995, alleging:

Mary Kinzer [sic] applied for an assistant girl's basketball coaching position at Matewan High School. It was given to a less qualified applicant in violation of W. Va. Code 18A-2-2-a [\(See footnote 1\)](#) and 18A-4-16.

Following adverse decisions at the lower levels, Grievant appealed to level four on February 13, 1996. Aileen Blankenship was granted Intervenor status prior to the level two hearing pursuant to W. Va. Code § 18-29-3(u). A level four hearing was held on June 5, 1996, and this case became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on June 17, 1996. [\(See footnote 2\)](#)

The following findings of fact are properly derived from the record developed in this case.

Findings of Fact

1. Grievant is, and was at all times relevant herein, employed by Respondent Mingo County

Board of Education as a Math and Science teacher at Matewan Middle School.

2. Intervenor was not employed by Respondent at all times relevant herein, and did not have the necessary certification to teach at the time of the selection. [\(See footnote 3\)](#)

3. Respondent posted a vacancy for an assistant girl's basketball coach at Matewan High School in or about October 1995 for the 1995-96 school year.

4. Grievant and Intervenor applied for and were interviewed for the position.

5. Respondent selected Intervenor for the position because she was the best qualified applicant.

Discussion

Grievant alleges Respondent's selection of Intervenor for the subject position was in violation of W. Va. Code §§ 18A-3-2a and 18A-4-16, because Intervenor was not an employee of Respondent at the time of the selection.

The coaching position at issue is an extracurricular activity as defined by W. Va. Code § 18A-4-16 (1994), which provides in pertinent part:

Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

W. Va. Code § 18A-4-16 does not designate how, or under what standard, extracurricular assignments to professional personnel for coaching positions are to be made. [\(See footnote 4\)](#)

Respondent adopted a Mingo County Athletic Policy on July 27, 1995, which provides, in pertinent part:

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All hiring for extra-curricular positions must be filled with the most qualified persons and determined by personal interviews and resumes. Teaching experience shall have no importance in determining the extra-curricular positions. A committee of two or more members form(sic) the county Athletic committee and the principal of the school involved will interview and recommend(sic) to the Superintendent the nominee for such position.

In accordance with W. Va. Code § 18A-4-16 and the above policy, Respondent selected Intervenor for the assistant girls' basketball coach position because she was the best qualified

applicant for the position.

However, because Respondent was faced with a currently employed certified professional educator and a non-certified, non-employee for the position, the provisions of W. Va. Code § 18A-3-2a come into play, which provides, in pertinent part:

(4) Other certificates; permits. - Other certificates and permits may be issued, subject to the approval of the state board, to persons who do not qualify for the professional or paraprofessional certificate. Such certificates or permits shall not be given permanent status and persons holding such shall meet renewal requirements provided by law and by regulation, unless the state board declares certain of these certificates to be the equivalent of the professional certificate.

Within the category of other certificates and permits, the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches or other extracurricular activities coaches whose duties may include the supervision of students, subject to the following limitations: (A) Such person shall be employed under a contract with the county board of education which specifies the duties to be performed, which specifies a rate of pay equivalent to the rate of pay for professional educators in the district who accept similar duties as extra duty assignments and which provides for liability insurance associated with the activity; Provided, That such persons shall not be considered employees of the board for salary and benefit purposes other than as specified in the contract; (B) a currently employed certified professional educator has not applied for the position; and © such person completes an orientation program designed and approved in accordance with the state board rules which shall be adopted no later than the first day of January, one thousand nine hundred ninety-one . (Emphasis added).

This provision controls the situation where a board wishes to hire an individual who does not hold a West Virginia teaching certificate to serve as an athletic coach or other extracurricular activities coach, for which the superintendent may issue an authorization to coach to enable that individual to serve in the public schools. The issue of whether a county board of education is required to select a currently employed certified professional educator over a non-employee for a coaching position was recently decided by this Board in Ramey v. Mingo County Bd. of Educ., Docket No. 95-29-483 (Apr. 30, 1996). An individual not currently employed by the board of education was selected to fill an athletic coaching position over an individual who was a currently employed certified professional educator. The Administrative Law Judge found that the board did not err in its selection of the non-employee, because evidence was presented that the successful applicant, while not currently employed, did possess a West Virginia teaching certificate. [\(See footnote 5\)](#) It is apparent that the provisions of W. Va. Code § 18A-3-2a only come into play when the board is faced with an applicant who is a currently employed certified professional educator and one who is not a currently certified professional educator. When the board is presented with two applicants who possess valid West

Virginia certification, even if one is not currently employed by the board, then the board is given discretion to hire the applicant they deem most qualified for the position.

Thus, while Respondent is not prohibited under Code § 18A-3-2a from adopting a policy that establishes a hiring standard for extracurricular positions, that standard, as it applies to professional personnel, can only be applied in a situation where all applicants are certified professional educators. In a situation such as this, however, where one applicant is a non-employee and not certified, and the other is a currently employed certified professional educator, Code § 18A-3-2a clearly states that the currently employed certified professional educator must be selected over the non- certified applicant.

Respondent erred in selecting Intervenor over Grievant for the assistant girl's basketball coach position, because Intervenor did not possess a valid West Virginia certificate at the time of the selection. Any discussion of the relative qualifications of the two candidates is unnecessary in this context, and the subject position should have been awarded to the Grievant. ([See footnote 6](#))

Respondent also contends that Grievant, even if she was entitled to the position, is not entitled to compensation because neither the Superintendent nor Respondent ever entered into a written, extracurricular contract with the Intervenor as required by W. Va. Code § 18A-4-16. Respondent argues that since Intervenor finished out the basketball season, under the contract theory of quantum meruit, she, not the Grievant, has earned the salary as coach and not the Grievant.

The undersigned does not disagree that Intervenor should receive compensation for the time she actually performed the services of the basketball coach. However, Respondent violated the above-cited Code provisions in selecting Intervenor, and Grievant should have rightfully been assigned the basketball coach position. Thus, Respondent is also required to compensate Grievant for the amount she would have been paid had she been selected to fill the subject position.

Conclusions of Law

1. Grievant has the burden of proving each element of a grievance by a preponderance of the evidence. York v. Mingo County Bd. of Educ., Docket No. 95-29- 519 (Apr. 23, 1996).

2. W. Va. Code § 18A-3-21 states, in pertinent part that:

"the state superintendent may issue certificates for persons to serve in the public schools as athletic coaches subject to the following limitations:

(B) A currently employed certified professional educator has not applied for the position.

3. Grievant has proven that she was a currently employed certified professional educator at the time of the selection for the assistant girls' basketball coach position.

4. Grievant has proven that Intervenor did not hold a valid West Virginia certificate at the time of the selection for the subject position.

5. Grievant has proven by a preponderance of the evidence that Respondent violated W. Va. Code § 18A-3-2a in selecting Intervenor over Grievant for the position of assistant girls' basketball coach.

6. Respondent's athletic policy is contrary to W. Va. Code § 18A-3-2a to the extent that it permits selection of applicants not currently certified for athletic coaching positions over currently employed certified professional educators. Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to compensate Grievant the amount to which she would be entitled had she been selected and performed the duties of the assistant girls' basketball coach for the 1995-96 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: July 29, 1996

[Footnote: 1](#)

A review of the record and Grievant's argument reveals that Grievant meant to cite W. Va. Code § 18A-3-2a.

[Footnote: 2](#)

Intervenor did not appear at the level four hearing or submit post-hearing submissions.

[Footnote: 3](#)

Grievant testified that Intervenor had been hired by Respondent but subsequently fired because she did not hold the required West Virginia teaching certificate. Respondent did not rebut this testimony. At the end of the level four hearing, the undersigned offered Respondent the opportunity to supplement the record with proof of Intervenor's certificate. Respondent did not provide any evidence of Intervenor's status. Thus, the undersigned finds that Grievant's un rebutted testimony serves to prove that Intervenor did not hold a West Virginia teaching certificate at the time of the selection.

[Footnote: 4](#)

W. Va. Code § 18A-4-16 does provide that service personnel extracurricular assignments are to be made pursuant to Code § 18A-4-8b or in accordance with county policy.

[Footnote: 5](#)

The decision in Ramey contained a significant typographical error in the replication of W. Va. Code § 18A-3-2a. The typed version of that Code Section omitted the word "employed" in subpart (B): "a currently employed certified professional educator has not applied for the position." However, since the ALJ's decision rested on the fact that the non-employee held a valid West Virginia teaching certificate, this typographical error and the analysis of the ALJ under that erroneous citing of the statute, does not alter the outcome of the Ramey decision.

[Footnote: 6](#)

There was no evidence presented to indicate there were any applicants other than Grievant and Intervenor for the subject position.