

**DEBORAH BOWEN, .**

.

**Grievant, .**

.

**v. . Docket No. 95-29-488**

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**MINGO COUNTY BOARD OF EDUCATION, .**

.

**Respondent. .**

## **DECISION**

Deborah Bowen (Grievant) alleges that the Mingo County Board of Education (MCBE or Respondent) violated W. Va. Code §§ 18A-4-7a and 18-29-2(m) by refusing to select her for a teaching position at Delbarton Elementary School (DES). Following a hearing at Level II on October 26, 1995, this grievance was denied by John W. Fullen, the Superintendent's designee, on November 2, 1995. Grievant elected to waive Level III in accordance with W. Va. Code § 18-29- 4(c), and appealed to Level IV on November 7, 1995. A Level IV evidentiary hearing was conducted at this Board's office in Charleston, West Virginia, on January 31, 1996. This matter became mature for decision on February 16, 1996, upon expiration of the agreed time period for submission of written post-hearing arguments.

## **DISCUSSION**

Grievant has been employed by MCBE for 16 years. She is presently assigned as an itinerant physically handicapped teacher working out of Williamson Middle School. Grievant is certified to teach physically handicapped students in grades K-12, and multiple subjects, 1-6. Early in the 1995-96 school year, MCBE issued three separate postings listing teaching vacancies at DES. See G Exs

E, C & D. Grievant met the minimum qualifications for each vacancy and submitted a timely application for each position. MCBE selected applicants with greater seniority for the first two positions, and Grievant does not contest those hiring decisions.

The third posting involved a fourth grade teaching position at DES. See G Ex D. After posting this vacancy, MCBE elected to shift students between two current fourth grade teachers, and to assign fourth and fifth grade students to a "split" class, thereby eliminating the need to hire another teacher. (See footnote 1) MCBE Assistant Superintendent Fullen explained that this decision was made due to financial constraints, after further review of the actual number of students attending DES in the affected grades. Therefore, MCBE rescinded the posting without filling the vacancy.

Hiring decisions relating to classroom teachers in West Virginia are governed by the provisions of W. Va. Code § 18A-4-7a (1993). Portions of that statute pertinent here provide:

A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications.

\* \* \*

Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period. If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty days of the end of the posting period: Provided, That a position held by a certified and/or licensed teacher who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years. Nothing provided herein shall prevent the county board of education from eliminating a position due to lack of need. (Emphasis added).

Grievant contends that the first underlined provision in § 18A-4-7a compels MCBE to employ her at DES. However, the rule of law applicable in these circumstances was recently described in this Grievance Board's decision in Catron v. Mingo County Board of Education, Docket No. 95-29-060 (July 11, 1995) at 4, as follows:

W. Va. Code § 18A-4-7a states that "nothing herein shall prevent the county board of education from eliminating a position due to lack of need." School law requires that a

board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). (Footnote omitted).

Thus, it is clear that the latter underlined provision in § 18A-4-7a supersedes the provision relied on by Grievant. In the circumstances present here, MCBE did not violate § 18A-4-7a when it elected to rearrange class assignments at DES rather than fill a vacant teaching position. See Catron, supra. See also Audia v. Harrison County Bd. of Educ., Docket No. 17-87-127-2 (July 8, 1987).

Grievant further complained that MCBE had engaged in discrimination. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant is required to demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Inasmuch as no applicant was hired to fill the vacancy at DES which is the subject of this grievance, Grievant has failed to demonstrate that she has been treated differently than another similarly situated employee. Accordingly, Grievant did not establish a prima facie case of § 18-29-2(m) discrimination. See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543 &

93- 01-544 (Jan. 31, 1995); Steele, supra.

In addition to the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate in this matter.

### **FINDINGS OF FACT**

1. Grievant is a regular employee of the Mingo County Board of Education (MCBE) currently assigned to Williamson Middle School as an itinerant physically handicapped teacher.

2. Grievant is certified by the West Virginia Department of Education to teach physically handicapped, K-12, and multiple subjects, 1-6.

3. On September 22, 1995, Mingo County Board of Education (MCBE) posted a position for an elementary teacher at Delbarton Elementary School (DES). (G Ex D.)

4. Grievant submitted a timely application for the position at DES. In addition, Grievant met the minimum qualifications for the position.

5. After the DES position was posted, MCBE elected to reassign students in the fourth and fifth grades among the teachers then employed at DES. This change extended to the creation of a "split" fourth/fifth grade class.

6. As a result of the decision described in Finding of Fact Number 5, MCBE determined that no need existed to fill the position for which Grievant applied and the posting was rescinded.

### **CONCLUSIONS OF LAW**

1. Grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). 2.

School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a vacancy does not occur. *Payne v. Fayette County Bd. of Educ.*, Docket No. 94-10-144 (Sept. 18, 1994); *Terek v. Wetzel County Bd. of Educ.*, Docket No. 52-86-122-2 (Aug. 25, 1987).

3. MCBE did not violate W. Va. Code § 18A-4-7a when it determined not to fill a posted teaching vacancy at DES based upon its determination that a need for the position no longer existed. See *Catron v. Mingo County Bd. of Educ.*, Docket No. 95-29-060 (July 11, 1995). See also *Audia v. Harrison County Bd. of Educ.*, Docket No. 17-87-127-2 (July 8, 1987).

4. Grievant failed to establish a prima facie case of discrimination in regard to MCBE's actions in

failing to fill a posted teaching position in that no similarly situated employee was treated differently than Grievant. See Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543 & 93-01-544 (Jan. 31, 1995); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

\_\_\_\_ Accordingly, this Grievance is hereby **DENIED**.

\_\_\_\_ 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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\_\_\_\_ **LEWIS G. BREWER**

\_\_\_\_ **Administrative Law Judge**

**Dated: March 29, 1996**

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[Footnote: 1](#)

MCBE's assigning a split fourth and fifth grade to the incumbent fifth grade teacher was the subject of a separate grievance. See Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996).