

**TAMMY MURPHY, .**

**Grievant, .**

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**v. . Docket Number: 95-29-382**

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**MINGO COUNTY BOARD OF EDUCATION, .**

**Employer. .**

### **DECISION**

Grievant, Tammy Murphy, filed this grievance against her employer, the Mingo County Board of Education (Mingo), pursuant to the provisions of West Virginia Code §§18-29-1, et seq., claiming as follows:

I was terminated from my aide's [sic] position beginning the '95-'96 school year. There was at least one aide with less seniority than me that was not terminated. I ask to be reinstated as to my aide's [sic] position and be given all back pay and benefits that I may lose because of this action. This is a violation of WV Code 18A-4-8g & 18A-4-8b.

Another Aide, Mary Blackburn, joined the grievance at level one but withdrew from participation prior to level four. A level two hearing was held by Mingo on May 4, 1995, but a timely decision was not issued. Pursuant to W. Va. Code §18-29-3(a), Grievant appealed to level four and an evidentiary hearing was held at this Board's Charleston, West Virginia office on October 12, 1995. The case became mature for decision at the conclusion of the hearing.

### **Findings of Fact**

1. For the 1994-1995 school year, Grievant was assigned to work as an Aide IV at Matewan Elementary School to help with students in Chapter One classes.
2. Grievant was the subject of a reduction in force (lay off) at the end of the 1994-1995 school year.
3. For the 1995-1996 school year, Matewan, Red Jacket and Thacker Elementary Schools were consolidated into one school called Matewan Elementary. [\(See footnote 1\)](#)
4. In October 1994, Mingo posted for competitive bid all Aide positions at Matewan because of the consolidation scheduled the following school year.
5. Grievant did not receive a Chapter One Aide position, via bid, because of her seniority.
6. During the level two hearing, Mingo discovered that Grievant should not have been laid off at the end of the 1994-1995 school year based upon her seniority. The grievance was not granted, instead, it was suspended pending a determination of the type and number of Aide positions that were to be open for the upcoming school year.
7. In August 1995, Grievant's former position of Chapter One Aide was posted for competitive bid because the employee in that position was removed.
8. For the 1995-1996 school year, Grievant was assigned as an Aide at Matewan Elementary School to help in a classroom with special education students.

### Discussion

Grievant contends that "but for" Mingo's error in calculating and comparing her seniority to the seniority of other Aides at the end of the 1994-1995 school year, she would not have been laid off. She argues that because she should not have been laid off, she should have been retained in a Chapter One classroom at Matewan Elementary for the 1995-1996 school year. She avers that this was made possible because one of these positions became vacant, after her level two grievance hearing, on or about the beginning of the 1995- 1996 school year.

Mingo admits that Grievant has more seniority than another Aide who was not laid off at the end of the 1994-1995 school year. However, it contends that Grievant would have been laid off in any event due to the consolidation of the three elementary schools into one, because the consolidation required that all of the Aide positions be posted. It further asserts that it was not bound to place Grievant in the assignment she once occupied, even if it improperly compared her seniority to that of

another Aide during Spring, 1995.

Grievant bears the burden of proving the facts supporting her claims by a preponderance of the evidence. W. Va. Code §18-29-6. Grievant has established a violation of W. Va. Code §18A-4-8b with regard to her lay off. However, the question is whether the remedy she seeks is appropriate for the established violation. Mingo is essentially arguing that the error was harmless because Grievant could not have remained in the position she had and now wants. Grievant does not allege that the Aide positions at the new Matewan Elementary should not have been posted for bid. The only error that she relies upon relates to her lay off. What she does assert is that Mingo should have reassigned her to her former position after it became vacant in August 1995, to remedy the grievance that was never ruled upon after hearing in May 1995. She claims that this could have been done pursuant to Assistant Superintendent John Fullen's authority to render relief as a grievance evaluator. Mingo's assertion that Grievant's lay off constituted harmless error is not specifically challenged.

Based upon the evidence, it is determined that Grievant's request for relief does not relate to the violation she has established. While it may be true that Grievant could have been placed in the vacated Chapter One Aide position in August 1995, Mingo was not required to take such action. Grievant has not established sufficient evidence upon which it can be concluded that "but for" her lay off, she would have remained in the position she occupied during the 1994-1995 school year for the 1995-1996 school year. Therefore, her requested remedy cannot be awarded.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

#### Conclusions of Law

1. Grievant has established that she was the subject of a reduction in force at the end of the 1994-1995 school year in violation of W. Va. Code §18A-4-8b.
2. Mingo's error in laying off Grievant was harmless. Therefore, Grievant has not established she has suffered damage that entitled her to the relief she requests.

Therefore, 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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**ALBERT C. DUNN, JR.**  
**Administrative Law Judge**

**January 25, 1996**

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[Footnote: 1](#)

*Whether this situation resulted in a consolidation or merger is not necessary to determine.*