BETTY CRUM, et al.,

Grievants,

v.

DOCKET NO. 96-29-498

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Betty Crum, Billie Sue Baisden, and Dovetta Miller, filed the following grievance on or about September 12, 1996:

> Board is in violation of WV Codes 18A-4-7a and 18A-2-3 in their use of long term substitutes. The Board has further violated these codes by using Chapter 1 teachers as substitutes.

Grievants seek as relief the "[r]eposting of all positions originally posted as long term substitutes and the immediate sessation(sic) of use of Chapter 1 personnel as substitutes." (See footnote 1)

A level two hearing was held on October 31, 1996. Grievants Baisden and Miller did not appear, and no evidence was presented on their behalf at level two. The Superintendent's designee, John Fullen, denied the grievance on November 22, 1996, and Grievants appealed to level four on November 26, 1996. A level four hearing wasconducted on February 11, 1997. Grievants Baisden and Miller did not appear. This case became mature for decision on March 14, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

The material facts in this case are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievants Crum, Baisden, and Miller, are employed by the Mingo County Board of Education

("Board') as classroom teachers.

2. Grievants were reduced-in-force at the end of the 1995-96 school year and placed on the preferred recall list.

3. On July 26, 1996, a notice of vacancy was posted, including a teaching position at Burch Middle School. Grievant Baisden was awarded that position. R. Ex. 1.

4. On July 31, 1996, a notice of vacancy was posted, including a teaching position at Gilbert Middle School. Grievant Crum was awarded that position. R. Ex. 1.

5. On September 9, 1996, a notice of vacancy was posted, including a teaching position at Kermit Grade School. Grievant Baisden was awarded that position, to be effective the second semester of the 1996-97 school year. R. Ex. 1.

6. On September 13, 1996, a notice of vacancy was posted, including two teaching positions at Lenore Grade School and Marrowbone Elementary. These positions were posted as long-term substitute positions for the 1996-97 school year only. LII, G. Ex. 1.

7. Grievants applied for the posted long-term substitute elementary teacher positions. 8. Grievants Crum and Baisden, who had more seniority, withdrew their applications for the Marrowbone Elementary position so that Grievant Miller, who was ill, could get it, as it was close to her home.

9. Grievant Miller was awarded the Marrowbone Elementary position for the 1996-97 school year.

10. No evidence was presented regarding the Lenore Grade School position. However, the notice of vacancy appears to indicate, in handwriting, that the Board voted not to fill the position. LII, G. Ex. 1.

11. In any event, Grievant Crum withdrew her application for the Lenore Grade School position because she would not have been able to transfer to that position until the second semester. She did not want to transfer mid-school year because she believed it was disruptive to the students to have more than one teacher during the school year.

12. The Board has posted other positions in the past as long-term substitute positions in the same manner as the Lenore Grade and Marrowbone Elementary positions.

13. These long-term substitute positions are newly created positions; they are not designed to fill in for regular employees off on leave of absence.

Discussion

Grievants contend the posting of long-term substitute positions for newly created positions violates W. Va. Code §§ 18A-4-7a and 18A-2-3. Code § 18A-4-7a provides, in pertinent part:

> 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.

Code § 18A-2-3 provides:

> The county superintendent, subject to approval of the county board, shall have authority to employ and assign substitute teachers to any of the following duties: (a) To fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal; (b) to fill a teaching position of a regular teacher on leave of absence, and (c) to perform the instructional services of any teacher who is authorized by law to be absent from class without loss of pay, providing such absence is approved by the board of education in accordance with the law. Such substitute shall be a duly certified teacher.

The Board does not dispute that these positions were newly created teaching positions, and were not intended to fill in for a regular employee off on leave of absence or any other excused absence. The Board argues that the grievance should be dismissed because the Grievants have not shown how they have been harmed. Alternatively, the Board argues it had the discretion to post the positions as it did, especially in light of its financial position, and its uncertainty regarding enrollment at the beginning of the school year.

Whatever these newly created positions might be, they are not substitute positions as defined by W. Va. Code § 18A-2-3. There simply is no authority for the Board to fill newly created teaching positions, even if specified to be for only one year, with long-term substitutes as opposed to regular, full-time professionals. To do so denies a regular, full- time professional the opportunity to work for full pay, benefits and seniority. (See footnote 2) While there is no evidence the Board acted maliciously or with intent to violate the cited statutes, and the Board's action is understandable in light of its precarious financial position, there is noprovision in the statutes for the type of teaching position the Board has attempted to create; in essence, an auxiliary teaching position. See generally State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E.2d 176 (1996); see also Watts v. Hancock County Bd. of Educ., Docket No. 90-15-392 (Dec. 28, 1990); Talerico v. Harrison County

Bd. of Educ., Docket No. 17-88-021-3 (June 23, 1988).

If the Board is concerned about shifting enrollment during the first days of the school year, W. Va. Code § 18A-4-7a allows the Board twenty working days to post any position openings. Perhaps the better way to handle the needs of the schools would be to employ day-to-day substitutes during those twenty days, which should be ample time for the enrollment to stabilize. If, after twenty days, it is apparent the position will be needed for the entire year, then the Board would post the position as a regular, full-time teaching position.

Applying the above holding to this grievance, Grievant Crum had already accepted a regular, full-time teaching position with the Board at the time the September 13, 1996, vacancies were posted. She withdrew her application for the Marrowbone position so that Grievant Miller, who had less seniority, could get it. She withdrew her application for the Lenore Grade position because she did not want to transfer in the second semester. Even if the Lenore position had been posted as a regular, full-time teaching position, Grievant would not have been able to transfer until the second semester, pursuant to W. Va. Code § 18A-4-7a. Grievant's testimony that she would have done so had it been a regular, full- time position directly conflicts with her testimony that she did not believe it was in the student's best interests to have more than one teacher during the school year, and is,therefore, speculative. Grievant Crum has shown no harm from these postings, and her grievance is denied.

Grievant Baisden also already had a teaching position with the Board when the September 13, 1996, vacancies were posted. She was teaching the first semester at Burch and had accepted a second-semester position at Kermit Grade. She had also withdrawn her application for the Marrowbone position in order to allow Ms. Miller to get the position. No other evidence was presented regarding Ms. Baisden, and she has likewise shown no harm by these postings. Therefore, her grievance is denied.

Grievant Miller accepted the position at Marrowbone Elementary as a long-term substitute for the 1996-97 school year. Assistant Superintendent John Fullen testified that after 133 days, substitutes are credited with a year's seniority for all purposes in Mingo County. He also testified that, “after so many days”, substitutes receive all the benefits of a regular, full-time employee. However, in accordance with W. Va. Code § 18A-4-7, substitutes are paid 80% of their regular salaries. Thus, Ms. Miller has been harmed by the postings in terms of salary and benefits.

Conclusions of Law

1. Grievants have the burden of proving their case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. Grievant Miller has proven by a preponderance of the evidence that the Board violated W. Va. Code §§ 18A-4-7a and 18A-3-2, by posting newly created positions at the beginning of the school year as long-term substitute positions. See generally State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E.2d 176 (1996); see also Watts v. Hancock County Bd. of Educ., Docket No. 90-15-392 (Dec. 28, 1990); Talerico v. Harrison County Bd. of Educ., Docket No. 17-88-021-3 (June 23, 1988). 3. Grievant Miller has proven by a preponderance of the evidence that by accepting a long-term substitute position, she was denied the salary and benefits accorded a regular, full-time teaching position.

4. Grievants Crum and Baisden have failed to show how they have been harmed by the Board's postings.

Accordingly, this grievance is **DENIED** with respect to Grievants Crum and Baisden. The grievance is **GRANTED** with respect to Grievant Miller. The Board is hereby **ORDERED** to compensate Grievant Miller the difference between her regular, full-time teacher's salary and the substitute salary she received during the 1996-97 school year, as well as any additional benefits she is entitled to under the statute as a regular, full-time teacher. The Board is further **ORDERED** to cease and desist its practice of posting vacancies for newly created positions as long-term substitute positions.

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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MARY JO SWARTZ

Administrative Law Judge

Dated: May 13, 1997

Footnote: 1

No evidence was presented regarding the Chapter 1 teacher claim and this issue is considered to be abandoned.

Footnote: 2

Grievants in this case were not denied the opportunity to apply for these positions. Even though they were posted as substitute positions, the Board clearly attempted to fill the positions with teachers on the preferred recall list, including Grievants, as opposed to a substitute list.