JAMES KEATLEY,

Grievant,

v.

DOCKET NO. 97-29-437

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

PAUL NELSON,

Intervenor.

D E C I S I O N

Grievant, James Keatley, filed this grievance on September 4, 1997, alleging that the:

> Board of Education violated past grievance board decisions (Crum v. Mingo Co. BOE) as well as 18-29-2, 18A-4-7a and State Education Department policies as the Board of Education acted in an arbitrary and inconsistent manner in the posting and filling of the Lenore school position.
>
> Relief Sought: Repost position in a manner consistent with Board of Education and State Education Department policies. (See footnote 1)

A level two hearing was held September 18, 1997, and the grievance was denied by decision dated September 29, 1997. Grievant appealed to level four on October 2,1997, and following several continuances for good cause, this matter was heard at level four on January 27, 1998. Following receipt of the parties proposed findings of fact and conclusions of law on February 23, 1998, this case became mature for decision.

SUMMARY OF EVIDENCE

Level Two Grievant's Exhibit

Ex. 1 -

August 28, 1997 Posting for Professional Personnel Vacancies.

Level Four Grievant's Exhibits

Ex. 1 -

Professional Teaching Certificate for James Keatley, effective July 1, 1995.

Ex. 2 -

Mingo County Board of Education Meeting Minutes for October 2, 1997.

Ex. 3 -

126 C.S.R. 136 § 7: Authorized Licenses, Specializations, and Programmatic Levels.

Ex. 4 -

126 C.S.R. 136 § 23: Authorizations.

Ex. 5 -

West Virginia Department of Education Request for Authorization for Paul Nelson, dated October 2, 1997.

Ex. 6 -

January 26, 1998 letter from Barbara Brazeau to Mr. Johnny Fullen.

Level Four Respondent's Exhibit

Ex. 1 -

September 11, 1997 memorandum from T. O. Harper to Johnny Fullen.

Testimony

Grievant testified in his own behalf and offered the testimony of Talmadge Harper, Barbara Brazeau and John Fullen. Intervenor testified in his own behalf.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. On August 28, 1997, the Mingo County Board of Education ("Board") posted two vacancies for a Math Teacher and a Multi-Subjects Teacher at Lenore Middle School.

2. Greg Miller previously held the Math position at Lenore Middle School, and is certified in Math and Social Studies. 3. Eddie Booten previously held the Multi-Subjects position at Lenore Middle School, and is certified Multi-Subjects 1-8. (See footnote 2) Mr. Booten taught 7th grade Science at Lenore Middle School.

4. Grievant, at the time of the posting, was a substitute teacher who had been reduced in force at the end of the 1996-97 school year, and was placed on the preferred recall list.

5. Grievant is certified in Biological Science 7-9 and Social Studies 4-8.

6. Lenore Middle School Principal Talmadge Harper requested that the Board post the Math and Multi-Subjects positions. After the posting went out, Principal Harper requested a Multi-Subjects 5-8 and a Math/Science 7-12 teacher. R. Ex. 1.

7. Assistant Superintendent John Fullen refused to either re-post the original posting, or to prepare a new posting as requested by Principal Harper.

8. Grievant did not apply for either position, as he did not hold certification in either Multi-Subjects or Math.

9. Debbie Bowen was selected to fill the Math teaching position.

10. Intervenor Paul Nelson was selected to fill the Multi-Subjects position. Mr. Nelson is certified Multi-Subjects 1-6.

11. Immediately after his hiring, Principal Harper assigned Mr. Nelson to teach 7th grade Science at Lenore Middle School. Mr. Nelson is not certified to teach 7th grade Science. 12. When Assistant Superintendent Fullen found out what Mr. Harper had done, he immediately requested an authorization from the State Board of Education which would permit Mr. Nelson to teach one grade level above his certification level.

13. The State Board of Education denied the request for authorization. In order to get an

authorization to teach one grade level above a certification level, the teacher must still be teaching in his or her area of certification. In this case, because Mr. Nelson was certified Multi-Subjects 1-6, he would not be teaching in his area of certification and could not be authorized to teach 7th grade Science.

14. At the time of the level four hearing, Mr. Nelson was improperly assigned to teach 7th grade Science at Lenore Middle School.

DISCUSSION

As noted above, Grievant amended his grievance at level four, with no objection, to protest the filling of the posted Multi-Subjects position with Mr. Nelson, as well as the posting of the position as Multi-Subjects. The record establishes that, even though the position was posted as Multi-Subjects, Mr. Nelson was immediately assigned by Mr. Harper to teach 7th grade Science.

With regard to Grievant's first assertion, that it was improper for the Board to post a Multi-Subjects teaching position in the middle school setting, Grievant's claims must fail. While it is true that there is an emphasis in Mingo County to hire content-certified teachers for middle school positions, there is no statute or policy which mandates that practice. In this instance, Principal Harper requested a Multi-Subjects teacher and that is what the Board posted. Grievant has pointed to no authority which prohibits a Board from posting a Multi-Subjects position in the middle school, especially upon request from the Principal. It is the Principal who is responsible for the supervision, management and operation of the school to which he or she is assigned. W. Va. Code § 18A-2-9. Thus, the board did not violate the posting provisions of W. Va. Code § 18A-4-7a.

Grievant's second complaint, that the Board improperly filled the position with Intervenor Nelson, is more persuasive. It is more accurate to state that Principal Harper improperly assigned Intervenor Nelson to the 7th grade Science position after he was hired as a Multi-Subjects 1-6 teacher. A Principal is without authority to assign teachers to vacancies without the approval of the Board. See State ex. rel. Rose v. Raleigh County Bd. of Educ., 179 W. .Va. 275, 367 S.E.2d 223 (1988). It is clear the Board originally posted and filled the position based upon what Principal Harper requested for his school. It is also clear the Board took immediate action to correct the situation when it became aware Principal Harper had assigned Intervenor Nelson into a 7th grade Science position, for which he was not certified, by requesting an authorization from the State Board of Education. Unfortunately,

the State Board of Education is operating under a serious backlog and did not respond to the Board until approximately three months later, denying the request for authorization.

While I cannot find the Board deliberately acted to violate the posting and filling requirements of W. Va. Code § 18A-4-7a, it nonetheless is currently employing an uncertified teacher in the 7th grade Science teaching position at Lenore Middle School, while it has a certified teacher on the preferred recall list. The remedy is for the Board to accurately assess the needs of the school. If it determines that a 7th grade Science teacher is needed, then it should post the position in accordance with its needs. If, however, the Board determines there is no need for a 7th grade Science teacher or a Multi-Subjects teacher at Lenore Middle School, it will not be required to post and fill that position, but shall vacate Intervenor Nelson from his present position immediately. Further, as Grievant has not proven by a preponderance of the evidence that he would have been the successful applicant for the position had it been correctly posted as a 7th grade Science position, nor could he have been awarded the position of a Multi-Subjects teacher due to his lack of certification in that field, he is not entitled to any compensation for that position.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, the burden lies with the Grievant to prove his case by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

2. The Principal is delegated the responsibility for the “management and the operation of the school” to which he is assigned. W. Va. Code § 18A-2-9.

3. There is no law, policy, statute or regulation that mandates that only content- specific teachers may be hired to teach in the middle school setting.

4. Grievant has failed to prove by a preponderance of the evidence that the Board violated the posting provisions of W. Va. Code § 18A-4-7a when it posted a Multi- Subjects 1-6 teaching position for Lenore Middle School at the request of the Principal.

5. Grievant has failed to prove that Intervenor Nelson's selection for the Multi- Subjects 1-6 teaching position was improper.

6. Grievant has proven that Principal Harper exceeded the authority granted him as Principal when he reassigned Intervenor Nelson to a 7th grade Science teaching position for which he was not

certified. 7. Grievant has not proven that he is entitled to instatement into the Multi- Subjects teaching position, which Principal Harper turned into a science position, at Lenore Middle School.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. The Board is hereby **ORDERED** to assess the needs at Lenore Middle School and determine whether a 7th grade Science teacher position is needed, and to post such position if necessary. As Grievant has failed to prove he would be entitled to instatement into the position, he is not entitled to any compensation in the form of back pay and benefits for the Board's error.

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: April 16, 1998

Footnote: 1

Grievant amended his grievance without objection at level four to include the filling of the position as well as the posting of it, and requests as relief reinstatement into the position or reposting of the position.

Footnote: 2

Grievant testified at level two that he believed Mr. Booten was certified in Science, but that information was clarified and corrected at level four.