

BEVERLY BAILEY,

Grievant,

v.

DOCKET NO. 97-29-392R

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION ON REMAND

On or about June 6, 1997, Grievant filed a grievance against her employer, the Mingo County Board of Education ("Board"), alleging it violated W. Va. Code § 18A-4-7a when it reduced her in force at the end of the 1996-97 school year, placed her on the preferred recall list, and subsequently transferred a less senior teacher, Mildred Ooten, to a math teacher position at Burch Middle School in May 1997. Although Grievant admitted at the level four hearing that she was not certified to teach math at the time Ms. Ooten was transferred into the math position, Grievant argued the Board abused its discretion when it did not rescind her termination in the prior RIF action once she attained her certification in math. The grievance proceeded through level four of the grievance process, and a decision was rendered on January 6, 1998. That decision concluded that Grievant was not entitled to be recalled from the preferred recall list to fill the math position because she was not certified in math at the time the decision was made to transfer Ms. Ooten, nor was she certified by the end of the school year, as her math certification did not become effective until July 1, 1997.

Subsequently, Grievant filed a motion in the Circuit Court of Kanawha County to remand the matter back to the Grievance Board for the limited purpose of taking additional testimony from the West Virginia Department of Education ("WVDOE"), and for reconsideration of the level four decision based on such evidence. The Circuit Court granted the Motion by Order dated February 2, 2000, and this matter was remanded to the Grievance Board.

A level four hearing was held on August 10, 2000, for the limited purpose of taking additional testimony from Joyce O'Dell, a WVDOE certification coordinator. This matter became mature for reconsideration on September 11, 2000, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Steve Angel and Sidney Fragale, West Virginia Federation of Teachers, and the Board was represented by Hannah B. Curry, Esq., Kay Casto & Chaney.

SUMMARY OF EVIDENCE

Grievant's Exhibits (Original Level Four Decision)

Ex. 1 -

Mingo County Board of Education meeting minutes for May 1, 1997.

Ex. 2 -

June 14, 1997 letter from West Virginia Department of Education to Beverly Bailey.

Board's Exhibits (Original Level Four Decision)

Ex. 1 -

Professional Teaching Certificate for Beverly Bailey

Ex. 2 -

Professional Teaching Certificate for Beverly Bailey

Ex. 3 -

Professional Teaching Certificate for Mildred Ooten

Ex. 4 -
December 20, 1996 letter from Michael Underwood to John Fullen

Ex. 5 -

Application for a Change in Professional Status for Mildred Ooten, dated April 23, 1996

Ex. 6 -

Application for a Change in Professional Status for Beverly Bailey, dated May 12, 1997

Ex. 7 -

October 29, 1996 letter from Everett Conn to Beverly Bailey

Ex. 8 -

December 6, 1996 letter from Everett Conn to Beverly Bailey

Ex. 9 -

December 5, 1996 Board minutes listing professional personnel to be terminated and placed on preferred recall list for the 1997-98 school term.

Grievant's Exhibits (Remand Hearing)

Ex. 1 -

March 31, 1998 letter from Mike Kelly to Robert M. Steptoe, III, with attachments.

Ex. 2A -

June 14, 1997 letter from West Virginia Department of Education to Beverly Bailey, approving certification for Math through Algebra 1, 5-12.

Ex. 2B -

Affidavit of Joyce O'Dell, dated March 31, 1998.

FINDINGS OF FACT

The following findings are set forth in the level four decision in Bailey v. Mingo County Bd. of Educ., Docket No. 97-29-392 (Jan. 6, 1998), and remain the same, with the exception of Finding of Fact No. 10, which has been omitted as inaccurate, based upon additional testimony presented on remand.

1. Grievant was employed by the Board for the 1996-97 school term as a Title I teacher at Gilbert High School, certified in Multi-Subjects K-8. R. Ex. 1.

2. Grievant's position was advertised as a one-year only position to cease at the end of the 1996-97 school term.

3. On October 29, 1996, Grievant received a letter from Superintendent Everett Conn advising her that she would be "listed as not hired and placed on the preferred recall list effective July 1, 1997." That letter also advises Grievant that she could request a hearing before the Board if she chose to protest the matter. R. Ex. 7.

4. On December 6, 1996, Grievant received by certified mail a letter from Superintendent Everett Conn notifying her that the Board voted to accept his recommendation to terminate her and place her on the preferred recall list by a majority vote at its December 5, 1996 meeting. R. Exs. 8, 9.

5. On December 20, 1996, Grievant requested that West Virginia Graduate College issue a letter to Assistant Superintendent John Fullen, advising him that she had completed fifteen hours of the Math through Algebra I program and was eligible for a permit in that field at that time. The letter further advised Mr. Fullen that Grievant was enrolled for the Spring semester to complete the remaining six hours required for that certification. R. Ex. 4.

6. Mr. Fullen had advertised a mathematics teaching position the first semester to be filled in January 1997, and had spoken with Grievant regarding her certification status at that time, wondering whether she was certified to fill that position. After Mr. Fullen received the letter from West Virginia Graduate College indicating Grievant was only eligible for a permit at that time, he filled the position with someone who was fully certified in math.

7. In the Spring of 1997, Grievant possessed a multi-subjects K-8 teaching certificate. She was, however, pursuing a certificate to teach mathematics and to this end was enrolled in classes, the successful completion of which would make her eligible for such certification.

8. County boards must make decisions regarding reductions-in-force of professional personnel before April 1. In this instance, Grievant did not have her math certification as of April 1, 1997, even though she was working towards that certificate.

9. At an official Board meeting on May 1, 1997, the Board voted to approve the transfer of Mildred Ooten into a math teacher position at Burch Middle School, effective July 1, 1997. The Board minutes of that meeting reflect that Ms. Ooten was "[s]aved by Math Certification". G. Ex. 1.

10. Ms. Ooten is less senior than Grievant.

11. Grievant received a copy of the May 1, 1997 Board minutes on May 22, 1997, and filed this

grievance on June 6, 1997.

ADDITIONAL FINDING OF FACT

The following finding is based upon the testimony of Ms. O'Dell at the level four remand hearing on August 10, 2000, and replaces Finding of Fact No. 10 from the original level four decision.

12. On June 14, 1997, Grievant received notice from the WVDOE of approval for additional certification in Math through Algebra I, 5-12, effective June 5, 1997. Level Four Decision R. Ex. 2, Remand Hearing G. Ex. A.

DISCUSSION

The Grievance Board has been ordered by the Circuit Court of Kanawha County to reconsider its level four decision in Bailey v. Mingo County Bd. of Educ., Docket No. 97-29- 392 (Aug. 10, 1998), based upon the additional evidence presented at the level four remand hearing by Ms. O'Dell, regarding the effective date of Grievant's additional certification in Math and Algebra I, 5-12.

The issue to be decided is whether the Board abused its discretion by not rescinding the termination of Grievant's employment once she attained certification in Math and Algebra I, 5-12. The Grievance Board has held that, in the event the reason for an employee's termination in a RIF action ceases to exist prior to the end of the school year in which the action was initiated, a board of education must rescind the termination. Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993). In the original level four decision in this matter, I found, in Finding of Fact No. 10, that Grievant's mathematics certification was not effective until July 1, 1997, which was after the end of the school year in which the RIF action was taken. Therefore, I found the Board had no duty to rescind Grievant's termination.

I must now reconsider the issue in light of the evidence that Grievant's certification in mathematics was effective on June 5, 1997, before the close of the school year in which Grievant's RIF took place. I find that the additional evidence does not change the outcome of this grievance.

The Board's underlying reason for terminating Grievant's teaching position was due to the lack of need for a Title I teacher at Gilbert High School certified in Multi-Subjects K-8 for the 1997-98 school year. No evidence has been presented that the reason for her termination changed or disappeared before or after the final RIF action. Unlike the situation in Hollins, this is not a case where a

professional employee was RIF'd or transferred shortly before she received certification which would have enabled her to remain in her position. See Sammons v. Mingo County Bd. of Educ., Docket No. 96-29- 336 (Jan. 17, 1997); see also Warner v. Uphsur County Bd. of Educ., Docket No. 95-49- 210 (July 17, 1995).

The Grievance Board has also held that a RIF'd employee is only entitled to reinstatement to her former position if a board knows, before taking the final RIF action, that the RIF of that employee is no longer needed. If, after the final RIF action, the RIF is no longer required as the need to decrease the number of teachers in a certification area has changed, the position is to be filled following the proper statutory provisions of W. Va. Code § 18A-4-7a. See Canterbury v. Monroe County Bd. of Educ., Docket No. 99-31-499 (Jan. 27, 2000); Daughtery/Harshbarger v. Lincoln County Bd. of Educ., Docket No. 96-22- 528 (Dec. 31, 1997).

Grievant presented no evidence that the Board knew, before taking the final RIF action herein, that Grievant's RIF was no longer needed. Furthermore, even if she prevailed, Grievant would be entitled only to instatement into the former position which she would have held but for the RIF. Grievant would not be entitled to instatement into the mathematics teaching position at Burch Middle School.

Finally, Grievant has failed to prove the Board had a duty to recall her where there was a fully-certified professional available to teach math at Burch Middle School. The law is clear that if there is a regularly employed fully-certified professional to teach a specific subject, that person must be hired before an individual who possesses a permit. At the time the Board voted on May 1, 1997, to transfer Ms. Ooten into the Burch Middle School position, Grievant did not possess a mathematics certificate, nor was she eligible to receive it. Grievant did possess a permit to teach math which she received in the Fall of 1996. W. Va. Code § 18A-3-2 permits school boards to employ teachers in good faith who are anticipated to, but have not yet, received their certification. However, there is nothing in that statute that mandates a board do so, especially when there is a fully-certified educator available to fill the specific teaching position. Moreover, WVDOE Policy 5202 does not allow a board to hire an uncertified teacher for a specific position unless it "is unable to employ" an educator certified for the position. Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-402 (Feb. 23, 1993). See also Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994).

Likewise, Grievant has failed to prove she was eligible as an employee subject to release to be

employed in the math teaching position at Burch Middle School. W. Va. Code § 18A-4-7a governing transfers of professional personnel during a RIF provides that, “an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licenses, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure[.]” Grievant did not possess a mathematics certification at the time the Board voted on May 1, 1997, to transfer Ms. Ooten to the math position at Burch Middle School. Grievant was not entitled to be recalled from the preferred recall list to fill that position, nor could the board ignore the rights of Ms. Ooten to be employed in a position where she was certified and held greater seniority than any other employee certified in math. Dunford v. MercerCounty Bd. of Educ., Docket No. 94-27-618 (Dec. 21, 1994); see also Adams v. Mercer County Bd. of Educ., Docket No. 92-27-455 (Mar. 31, 1993).

CONCLUSIONS OF LAW

1. Grievant is required to prove the allegations of her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).
2. When a service or professional employee's transfer or reduction-in-force, otherwise valid, loses its stated justification, absent some extraordinary circumstance, the employee is entitled to reinstatement into the position she would have held but for the transfer or reduction-in-force. Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22- 298 (Oct. 30, 1996); Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993).
3. The stated justification for Grievant's RIF was the need to reduce a Multi- subjects, K-12, teacher at Gilbert High School, and Grievant has failed to prove that reason ceased to exist prior to the end of the 1997-98 school year.
4. In order for an applicant to be basically qualified for a classroom teaching position vacancy in West Virginia, that person must hold the appropriate certification. Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991). See Via v. Nicholas County Bd. of Educ., Docket No. 89-34-710 (Apr. 11, 1990); Ashworth v. Putnam County Bd. of Educ., Docket No. 89-40-560 (Oct. 31, 1989).

5. Only if no certified applicant applies for a position may a county board of education petition the West Virginia Department of Education for a person to be granted a special permit to fill the post. Peters v. Putnam County Bd. of Educ., Docket No. 90-40- 247 (Aug. 16, 1991). See West Virginia Board of Education Policy 5202.

6. W. Va. Code § 18A-3-2 permits school boards to employ teachers in good faith who are anticipated to, but have not yet, received their certification. However, there is nothing in that statute that mandates a board of education do so, especially when there is a fully-certified educator available to fill the specific teaching position, in which case they must select the fully-certified educator.

7. Grievant was not entitled to be recalled from the preferred recall list to fill the mathematics teaching position at Burch Middle School because she was not certified in mathematics at the time the hiring decision was made. Dunford v. Mercer County Bd. of Educ., Docket No. 94-27-618 (Dec. 21, 1994); see Adams v. Mercer County Bd. of Educ., Docket No. 92-27-455 (Mar. 31, 1993).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Mingo County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: September 26, 2000