ELIZABETH BAILEY and

SHEILAH BROWN,

Grievants,

v. DOCKET NO. 02-41-042

RALEIGH COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievants Elizabeth Bailey and Sheilah Brown filed separate grievances relating to the posting and filling of an extracurricular position in the after-school and Saturday detention program at Woodrow Wilson High School (WWHS). Both seek instatement into the position and back pay. Both grievances were denied at Level I. Ms. Bailey's grievance was granted, in part, at Level II, while Ms. Brown's was denied. Level III was waived for both. Both intervened in each other's grievances at Level II, and the grievances were consolidated at Level IV.

At the Level IV hearing, held on August 13, 2002, at the Grievance Board's Beckley office, Respondent Raleigh County Board of Education (RCBOE) was represented by its attorney, Erwin Conrad, Esq., Ms. Bailey was represented by WVSSPA attorney John E. Roush, Esq., and Ms. Brown was represented by Gary Archer of the WVEA. The partiesagreed to submit their proposed findings of fact and conclusions of law by September 10, 2002 (See footnote 1) , whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant Bailey is employed by Respondent as a supervisory aide at WWHS. She does not have a teaching certificate.

2. Grievant Brown is a certified teacher, and is employed by Respondent as a classroom teacher at WWHS, teaching social studies and physical education.

3. Respondent posted a position supervising its after-school detention program at the beginning of the 2000-2001 school year. The posting required a teaching certificate, but no certified teachers applied. Having no certified applicants, WWHS's Vice Principal offered the job to anyone interested at a faculty senate meeting. Ms. Bailey and Ms. Brown both volunteered, and were assigned to the program.

4. The position was re-posted, again requiring a teaching certificate, at the beginning of the 2001-2002 school year. Grievant Brown did not apply, but this time Grievant Bailey did apply, as did Venida McDaniel, a certified teacher.

5. Ms. McDaniel was selected for the position, and Grievant Bailey was offered the opportunity to be the first-call substitute. However, Ms. McDaniel and Grievant Bailey worked out a regular schedule, with Ms. McDaniel covering the program on Monday, Tuesday, Wednesday, Thursday and every other Saturday and Grievant Bailey working Monday, Friday and every other Saturday. (See footnote 2) 6. Grievant Brown objected to Respondent's use of Ms. Bailey in the position, as she is not a certified teacher as called for in the posting. Ms. Brown was offered the opportunity to substitute for either Ms. Bailey or Ms. McDaniel, but refused. She has on several other occasions since then been offered the opportunity to substitute, and has always refused.

7. When Ms. Brown complained, Grievant Bailey was instructed to discontinue the regular schedule she had worked out with Ms. McDaniel, and told she would be second substitute after Ms. Brown. Ms. Brown, however, declined to serve as substitute. Ms. Bailey filed her grievance, and the partial relief granted at Level II was to compensate Ms. Bailey for the days of her unofficial regular schedule she missed.

8. The posting for the 2001-2002 school year, dated August 13, 2001, was for “After-school-Saturday Detention Instructors - Itinerant.” The posting was for five openings “assigned to the five high schools,” which would indicate there was one opening at each school. It further specified, “Secondary teacher certification required - grades 7-12 minimum.” The job was for two hours per day after school Monday through Thursday and four hours per day on Saturday. Brown Grievance Level II Joint Exhibit No. 6.

9. After the Level II decisions, the Saturday portion of the position was reposted. Again, Ms. Brown did not apply. Ms. Bailey did apply, but the job was awarded to another, qualified applicant.

DISCUSSION

The issues raised here are not disciplinary, so each grievant bears the burden of proving her allegations by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. To summarize the positions of the parties, Grievant Bailey claims she should be placed in a position she is not qualified (See footnote 3) for, and Grievant Brown claims she should be have been hired for a position she did not apply for.

Respondent is obliged by W. Va. Code § 18A-4-7a(b) to "make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications," and by subsection (c) of that section, in judging the qualifications of the applicants to give consideration to "Appropriate certification and/or licensure." This, Respondent did when it awarded the job to Ms. McDaniel, the only qualified applicant. Under the plain meaning of the statute, neither Grievant was harmed by the hiring of Ms. McDaniel, so neither is entitled to the relief she seeks. Ms. Bailey is not entitled to be placed in a position for which she is unqualified, and Ms. Brown is not entitled to be placed in a position for which she did not apply.

While it sounds simple enough, the issue is complicated by Respondent's attempts to accommodate all of the parties involved, and by the apparent fact that even the successful applicant does not want the job for which she applied. However, Respondent's actions did not create a grievable entitlement for either party to the position in question.

Grievants' employment situation in the previous year has no bearing on their entitlement to employment in the same position this year. While that might be true of summer school programs, for which a teacher is entitled to continuation after having servedthe previous year, the after-school detention program was not summer school. *See*, W. Va. Code § 18-5-39. The previous year was in this case a special circumstance, given that there were no qualified applicants after the job was properly posted, but this year the position was both properly posted and properly filled by a qualified applicant. It is evident that there are times when a board of education has no choice but to violate the letter of the law, such as when no qualified applicants apply for a posted position that must be filled by a capable employee. However, when that need evaporates, its prior violation is not a justification for a future violation.

While Ms. Bailey did apply for the job this year, the fact that she lacks the minimum qualifications for the job means it would be error to employ her in the position, regardless of the fact that she is

perfectly capable of performing the job and that she did so the prior year. Ms. Bailey correctly argues it was not error to employ her when no qualified applicants were interested, but she cannot make that claim with respect to this year, when that situation had changed. Although her attorney implies that there is a question as to whether the position actually requires a certified teacher, he presents no authority on that point and that question is not part of Ms. Bailey's statement of grievance. Respondent was also entirely proper in directing Ms. Bailey to discontinue regularly filling that position for which she did not meet the minimum certification requirement, given she was only offered the job as a substitute and given there was an applicant hired for the position who does meet the certification requirement. Ms. Bailey also claims she was removed from the job only when Ms. Brown complained, but it would have been improper for her to hold the job whether anyone complained or not, so that issue is irrelevant even if it were the catalyst for Respondent's action. Ms. Brown argues that Ms. Bailey was not, in actuality, used as a substitute in the position, but was actually performing the duties on a regular basis, demonstrating that there are actually two positions instead of the one posted. When she first made this argument, Ms. Bailey was told to stop and Ms. Brown was offered the substitute position originally given to Ms. Bailey. Ms. Brown declined this opportunity, so has no reason to complain that she hasn't been used in that capacity.

Although Ms. McDaniel applied for a five-day-per-week job, she evidently did not actually want to work all five days. While Ms. Bailey was initially offered only the opportunity to substitute for Ms. McDaniel, in practice she and Ms. McDaniel divided the days, with Ms. Bailey regularly working on the days Ms. McDaniel did not want to. Ms. Brown is correct, that Ms. Bailey was not in fact serving as just a substitute on an as- needed basis, but she fails to articulate a reason why the practice should affect her employment rights. Ms. Brown did not apply for the original, and so does not have a right to expect she should be employed at all. When the job was actually divided into two separate positions by the posting of the Saturday portion, Ms. Brown again failed to apply. Ms. Bailey's employment situation is unrelated to, and has no bearing on, her employment situation.

Neither grievant demonstrated any entitlement to the position, so they have both failed to show they were harmed by Respondent's decision not to allow them to fill the position. “A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. [Citations omitted.]” Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41-531 (Apr. 3, 2002). Grievant Bailey, as an unqualified

applicant, is not harmed by the hiring of a qualified applicant. She is not harmed by Respondent's directive that shenot perform duties for which she was not hired. (See footnote 4) Grievant Brown is not harmed by Ms. Bailey's employment, legal or not, in a position for which she herself did not apply, or for her use as a substitute when she herself refused the opportunity. Neither Grievant, therefore, has demonstrated any entitlement to the relief she seeks.

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CONCLUSIONS OF LAW

1. The issues raised here are not disciplinary, so each grievant bears the burden of proving her allegations by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

2. Respondent is obliged by W. Va. Code § 18A-4-7a(b) to “make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications,” and by subsection (c) of that section, in judging the qualifications of the applicants to give consideration to “Appropriate certification and/or licensure.”

3. Grievant Brown did not sustain her burden of proof that she is entitled to be placed in a properly posted position for which she did not apply.

4. Grievant Bailey did not sustain her burden of proof that she should be reinstated to a position for which she is unqualified.

5. “A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50- 272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994).” Wiley v. Raleigh County Bd. of Educ., Docket No. 01-41-531 (Apr. 3, 2002). 6. Neither grievant has standing to challenge Respondent's actions, as neither grievant has shown they were harmed by the actions.

For the foregoing reasons, these grievances are hereby **DENIED**. Respondent is ordered to comply with the requirements of W. Va. Code § 18A-2-3 in assigning substitutes for the position.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 16, 2002

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Briefs were received only from Mr. Conrad and Mr. Roush.

Footnote: 2

Grievant Bailey's testimony is somewhat confusing on her exact work schedule, in that the job posted was for Monday through Thursday and Saturday, but she claims to have worked on Friday. However, the exact schedule is not the issue, only the fact that the days were divided witheach regularly working only certain days.

Footnote: 3

Grievant's capability to perform the duties in question is not at issue, only her ability to meet the teacher certification requirement.

Footnote: 4

The relief she was granted at Level II is inexplicable, and does not justify her continuation in a position for which she is not qualified.