WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JAMES SPENCE, SR.,

Grievant,

v.

Docket No. 2008-0957-McDED

MCDOWELL COUNTY BOARD OF EDUCATION, and

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondents.

DISMISSAL ORDER

Grievant James Spence, Sr. filed this grievance on July 10, 2007, challenging his non-selection as assistant superintendent. Grievant's relief sought is placement in the position of assistant superintendent with back pay plus interest and all benefits that go with the position. The grievance was denied at level one. Level two mediation was waived by Grievant. Administrative Law Judge Landon R. Brown entered an Order on April 10, 2008, wherein the West Virginia Department of Education was joined as a party respondent pursuant to 156 C.S.R. 1 § 6.13. The West Virginia Department of Education filed a Motion to Dismiss this grievance on April 25, 2008. Administrative Law Judge Brown conducted a phone conference on the motion on April 30, 2008, and May 6, 2008. Following the phone conferences, Grievant filed a response to the Motion to Dismiss on May 27, 2008. For administrative reasons, the matter was reassigned to the undersigned Administrative Law Judge on September 16, 2008. (See footnote 1) The level three hearing scheduled on the grievance for September 22, 2008, was canceled by the undersigned due to theoutstanding nature of the ruling on the motion. The Motion to Dismiss became mature for decision on May 27, 2008, the date Grievant submitted a brief in response. Grievant appeared by Katherine Dooley, Esquire. The

McDowell County Board of Education appeared by Kathryn R. Bayless, Esquire. The Department of Education appeared by Heather L. Deskins, its Counsel.

Synopsis

Grievant argues that he is the most qualified applicant for the position of assistant superintendent. Grievant seeks placement into that position pursuant to the criteria set out in W. Va. Code § 18A-4-7a. Respondent West Virginia Department of Education argues that this section is not controlling in this matter because McDowell County Board of Education is under state intervention. As such, the State Superintendent has the sole discretion to hire administrators in counties under intervention without regard to the provisions of W. Va. Code § 18A-4-7a. Because Grievant has asserted no basis for this grievance other than the alleged failure to comply with § 18A-4-7, which is not controlling, this grievance fails to state a claim upon which relief can be granted. The following facts are undisputed:

Finding of Facts

1. Grievant has been employed by the McDowell County Board of Education as a Principal for seventeen years.

2. In 2001, the West Virginia Department of Education intervened in the operations of the McDowell County Board of Education, limiting its authority as to theemployment of school personnel, by delegating this authority to the State Superintendent of Schools.

3. State Superintendent of Schools Steven L. Paine approved the appointment of Carolyn Falin to the position of Assistant Superintendent of Elementary Education and Planning by correspondence dated July 13, 2007.

4. At some point prior to July 5, 2007, Grievant applied for the Assistant Superintendent position through Suzette Cook, Superintendent of McDowell County Schools. Grievant was not placed on the Memo dated July 6, 2007, representing the list of the McDowell County personnel who were to be considered for approval by the State Superintendent for various school personnel positions in McDowell County.

Discussion

Pursuant to the Procedural Rules of the West Virginia Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.11(2008), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly

unavailable to the grievant is requested."

Respondent West Virginia Department of Education asserts that this matter should be dismissed because Grievant has failed to make a claim upon which relief can be granted in pursuing the Assistant Superintendent position. Respondent points to W. Va. Code § 18-2E-5(p)(4)(C) giving the State Superintendent of Schools sole discretion to hire administrators in counties under state intervention without regard to the provisions of W. Va. Code § 18A-4-7a. While Grievant does cite W. Va. Code § 18A-4-7a as defining the criteria by which a county board of education must evaluate a prospective professional employee, the West Virginia Code grants the Department of Education and State Superintendent, broad powers once it intervened into the operations of McDowell County Schools, including the ability to make hiring decisions with regard to administrator positions. Specifically, W. Va. Code § 18-2E-5(p)(4)(C) provides the following:

> [t]he state board shall intervene in the operation of the school system to cause improvements to be made that will provide assurances that a thorough and efficient system of schools will be provided. This intervention may include, but is not limited to, the following:
>
> (v) Taking any direct action necessary to correct the emergency including, but not limited to, the following:
>
> (I) Delegating to the state superintendent the authority to replace administrators and principals in low performing schools and to transfer them into alternate professional positions within the county at his or her discretion; and
>
> (II) Delegating to the state superintendent the authority to fill positions of administrators and principals with individuals determined by the state superintendent to be the most qualified for the position. Any authority related to intervention in the operation of a county board granted under this paragraph is not subject to the provisions of article four [§§ 18A-4-1 et seq.], chapter eighteen-a of this code;

The Legislature clearly granted the State Superintendent the authority to fill the position to which Grievant asserts he is entitled. Furthermore, the statute indicates this authority is not subject to W. Va. Code §§ 18A-4-1, *et seq*. In the instant grievance, W. Va. Code § 18A-4-7a was pre-empted by W. Va. Code § 18-2E-5 when the West Virginia Board of Education intervened into the operations of

McDowell County Schools. This resulted in the State Superintendent being under no obligation to comply with W. Va. Code § 18A-4-7a in making the final decision in the selection challenged by Grievant. Throughout this grievance, the sole basis for the claim is reliance on W. Va. Code § 18A-4-7a and the assertion that it contains the relevant criteria for the hiring decision at issue, particularly as it relates to seniority. At the level one conference, Grievant's only argument was that the appropriate selection for the position was not made pursuant to W. Va. Code § 18A-4-7a. Once again, in Grievant's response to the Motion to Dismiss, Grievant seeks to the have the Grievance Board review the qualifications of the applicants for the assistant superintendent position based on the factors set forth in W. Va. Code § 18A-4-7a. Grievant cannot assert a claim based on this statute, as the above provisions of W. Va. Code § 18-2E-5(p) specifically supersede the provisions of § 18A-4-7a. *See Mahone v. McDowell County Bd. of Educ.*, Docket No. 07-29-126 (April 25, 2008); *Hicks v. Mingo County Bd. of Educ.*, Docket No. 07-29-054 (April 23, 2008).

Because Grievant has asserted no basis for this grievance other than the alleged failure to comply with § 18A-4-7, which is not controlling, this grievance fails to state a claim upon which relief can be granted.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Pursuant to the Procedural Rules of the West Virginia Public Employees Grievance Broad 156 C.S.R. 1 § 156-1-6 6.11(2008), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.”

2. West Virginia Code § 18-2E-5(p) specifically grants the power to fill the positions of administrators and principals in school systems under state intervention to theState Superintendent of Schools without an examination of whether the State Superintendent complied with West Virginia Code § 18A-4-7a. *Mahone v. McDowell County Bd. of Educ.*, Docket No. 07-29-126 (April 25, 2008).

Based upon the foregoing, the Respondent's Motion to Dismiss is **GRANTED** and the above-styled action is **DISMISSED** due to Grievant's failure to state a claim upon which relief may be granted.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West

Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: September 26, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Grievant's objection to this reassignment has been received, noted, and made a part of the file in this matter.