THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

LOSSIE MAHONE,

Grievant,

v. Docket No. 07-29-126

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

DECISION

Grievant, Lossie Mahone, a retired teacher and administrator employed by the Mingo County Board of Education ("MCBOE"), filed this grievance on December 4, 2006. His unedited Statement of Grievance reads as follows:

> The Assistant Principal's job for Lenore K-8 has been posted on three separate occasions. The first was Posting No. 8, posted on August 11, 2006. The second was posting was Posting No. 12 on September 7, 2006 and the third time was Posting No. 14 posting on October 5, 2006. On the first two postings, at the beginning of each posting, the following WV Code was listed in boldface print. "Subject to the provisions of WV Code 18A-4- 7a, no person may transfer to another professional position until the beginning of the 2007-2008 instructional term."
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> Mrs. Julia Collins, a Special Education teacher at Tug Valley High School, bid on the job in the third position and was awarded the position. Although she is certified, she has had no previous experience in this capacity. She was allowed to move to Lenore K-8 on November 20, 2006 although I was placed in this position at the beginning of the 2006-2007 instructional term. I am a qualified, experience, capable professional who is already in that position.
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> Furthermore, in several incidents in the county, teachers wanted to leave their job for another one and were told they would not be allowed to leave unless a certified person bid on their present job. Two professionals who where in this situation is Crystal Ferguson, a Science teacher at Kermit K-8 and Angela Willis, a first grade teacher at Lenore K-8. Mrs. Ferguson did not get to change jobs, because no one certified applied for her position. The person who took over Mrs. Collins' position at Tug Valley High School is not certified.

Grievant's Relief Sought:

> I would like to remain in my present position as Assistant Principal at Lenore K-8 for the remainder of the 2006-2007 instructional term. I also am asking to be compensated for any wages lost and any damages that may occur.

The grievance was denied at levels one and two, and level three was bypassed. Julia Collins, the successful applicant for the position at issue, intervened at level two. (See footnote 1) By mutual agreement, the parties submitted the case on the record. Grievant was represented by Jane Moran, Esq. Respondent was represented by Jennifer S. Caradine, Esq. The matter became mature for decision on March 14, 2008, the cutoff date for the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was employed at the beginning of the 2006-2007 school year as a substitute assistant principal at Lenore. The assistant principal position at Lenore was posted on August 11, 2006, and again on September 7, 2006. Grievant held the necessary qualifications to apply for the assistant principal position. Despite the position being posted, Grievant did not apply for the position. Julia Collins, former intervenor, applied for and was awarded the assistant principal position. Respondent asserts hiring a full-time assistant principal instead of having a day-to-day substitute is in the best interest of the students at Lenore. Grievant relies on the past custom and practice of Respondent to retain substitute administrative personnel for the remainder of a school term once they have served for a substantial portion of the term. Grievant also points out in support of his grievance the legislative intent to limit transfers after the fifth day prior to the beginning ofthe instructional term. The MCBOE has the authority to transfer a professional employee during the instructional term when it is deemed to be in the best interest of the students. MCBOE was obligated to fill the posted position with a qualified applicant that applied for the position during the posting period. In addition, the State Superintendent has the authority to fill the positions of administrators and principals in school systems under State intervention.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is a retired teacher, and administrator employed by the Mingo County Schools. Grievant agreed to serve in a substitute teaching capacity for Mingo County, and was called out for that employment by Respondent.

2. Grievant was asked to serve as a substitute Assistant Principal for Lenore K-8 at the

beginning of the 2006-2007 school year. Grievant was not provided with an Employment Contract. It had been his experience that the practice of the MCBOE, when an employee was called in to substitute in an administrative position at the beginning of the school year, and after serving in that position for a certain period of time, they would not be transferred or terminated for the remainder of the school year.

3. MCBOE posted the job for Assistant Principal at Lenore K-8 on August 11, 2006. One qualified candidate applied for the job of Assistant Principal at Lenore K-8 from the posting. This candidate was Julia Collins, former intervenor in this grievance. Ms. Collins decided to pull her bid for the job, which left no qualified candidates for the position. 4. The position of Assistant Principal at Lenore K-8 was re-posted by MCBOE on September 7, 2006. Grievant did not bid on the position of Assistant Principal at Lenore K-8 on August 11, 2006, nor did he bid on the job when it was re-posted on September 7, 2006.

5. Julia Collins did reapply for the position of Assistant Principal at Lenore K-8 when it was re-posted on September 7, 2006. Ms. Collins was subsequently recommended for the position by Principal Runyon. The State Department of Education ("DOE") followed the recommendation and hired Ms. Collins. (See footnote 2) She began her duties as the Assistant Principal on November 20, 2006.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 3) "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Grievant asserts that the placement of Julia Collins in the position is contrary to the provisions of W. Va. Code § 18A-4-7a(l)(3), and runs contrary to MCBOE practice and policy. In short, the transfer was contrary to the stated intent of the Legislature to provide the students with stability by prohibiting untimely transfers during the instructional year. Respondent's position is that it has the authority to transfer professional personnel during the instructional term when it is deemed to be in the best interest of the students. In addition, the Legislature specifically granted the power to fill the positions of administrators and principals in school systems under State intervention to the State Superintendent. At the time in question, the

State Board of Education had intervened in the operations of MCBOE pursuant to W. Va. Code § 18-2E-5, suspending the operation of W. Va. Code § 18A-4-7a. However, because the Respondent appears to have intended to follow § 18A-4-7a, in its posting and its selection decision, its adherence to those procedures will be analyzed, in order to assess the reasonableness of the recommendation to the State Superintendent.

The State Superintendent has the authority to transfer Ms. Collins. The DOE voted unanimously to intervene in the Mingo County School system in February 2005. The West Virginia Code grants the DOE, and State Superintendent broad powers once it has taken control of a County, including the ability to make hiring decisions with regard to vacant principal and 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:
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> (v) Taking any direct action necessary to correct the emergency including, but not limited to, the following:
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> (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
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> (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 grants the State Superintendent the authority to fill the position to which Grievant asserts he is entitled to be reassigned. Furthermore, the statute indicates this authority is not subject to W. Va. Code § 18A-4-1, et seq. Therefore, 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.

The authority of the MCBOE to transfer professional personnel during the instructional term is found in the provisions of W. Va. Code § 18A-4-7a(l). That section provides:

> (l) After the fifth day prior to the beginning of the instruction term, no person employed and assigned to a professional position may transfer to another professional position in the county during that instructional term unless the person holding that position does not have valid certification. The provisions of this subsection are subject to the following:
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> (1) The person may apply for any posted, vacant positions with the successful applicant assuming the position at the beginning of the next instructional term;
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> (2) Professional personnel who have been on an approved leave of absence may fill these vacancies upon their return from the approved leave of absence; and
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> (3) The county board, upon recommendation of the superintendent may fill a position before the next instructional term when it is determined to be in the best interest of the students: Provided, That the county superintendent shall notify the state board [of education] of each transfer of a person employed in a professional position to another professional position after the fifth day prior to the beginning of the instructional term. The Legislature finds that it is not in the best interest of the students particularly in the elementary grades to have multiple teachers for any one grade level or course during the instructional term. It is the intent of the Legislature that the filling of positions through transfers of personnel from one professional position to another after the fifth day prior to the beginning of the instructional term should be kept to a minimum.

It is well-recognized that county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3*, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 352 S.E.2d 58 (1986).

In the instant case, Ms. Collins' transfer to the position as assistant principal was permissible pursuant to W. Va. Code § 18A-4-7a(l)(3). This provision does state, as was written on the job postings, that “[S]ubject to the provisions of W. Va. Code § 18A-4-7a, no person employed and assigned to a professional position may transfer to another professional position until the beginning of the 2006-2007.” However, the same statute further states that “[T]he county board, upon recommendation of the superintendent may fill a position before the next instructional term when it is determined to be in the best interest of the student.” The transfer of Ms. Collins was in the best interest of the students because she is up-to-date on changes in the curriculum that greatly benefit the students, and the school as a whole. In addition, it is also in the best interest of the students to

have a permanent assistant principal. Grievant seeks to have Ms. Collins removed from aposition she has held since November 20, 2006. The purpose of the above statute is to foster stability in the leaning environment; therefore, it would not be in the best interest of the students to disrupt the school by removing Ms. Collins.

The transfer of Ms. Collins was not done in an arbitrary and capricious manner. Although Grievant is certified for the position of assistant principal, he is a retired employee who was only placed there in a substitute capacity. W. Va. Code § 18A-2-3(5) provides "[W]hen a retired teacher is employed as a substitute to fill a vacant position, the county board shall continue to post the vacant position until it is filled with a regularly employed teacher." Accordingly, MCBOE was under a mandatory requirement to post the assistant principal position until it was filled with a regularly employed teacher. That is exactly what took place in this grievance.

It is undisputed that Grievant failed to apply for the position of assistant principal. When a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7, and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period. *Sly. Pt. 2*, *Mingo County Bd. of Educ. v. Jones*, 512 S.E.2d 597, 204 W. Va. 340 (1998). Grievant failed to apply for the position on the two occasions it was posted. As noted above, he is a retired employee who was only placed in the position in a substitute capacity. Once again, MCBOE was under an obligation to fill the position with Ms. Collins because she was the qualified applicant that applied during the posting period.

Grievant does not claim the status of a contracted or tenured teacher for his substitute assistant principal position. Grievant argues he somehow relied on the pastcustom and practice of the MCBOE to retain substitute administrative personnel for the remainder of a school term once they served for a substantial portion of the term. In addition, Grievant asserts he relied on the MCBOE to comply with the law regarding transfer as it was cited on the two job postings for the position of assistant principal. This argument is without merit due to the exception that a transfer can take place before the next instructional term when it is determined to be in the best interest of the students. Neither is Grievant entitled to be reassigned to his former position based on past practice. The Grievance Board has previously ruled that "in the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year." *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05- 43-450 (Apr. 26, 2006); *Conner v. Barbour County Bd. of Educ.*,

Docket No. 93-01-246 (Apr. 28, 1994). *See e.g., Taylor v. Monongalia County Bd. of Educ.*, Docket No. 92-30-314 (Nov. 30, 1992); *Biller v. Upshur County Bd. of Educ.*, Docket No. 90-49-533 (Sept. 27, 1991); *Napier v. Lincoln County Bd. of Educ.*, Docket No. 89-23-635 (May 25, 1990); *Isaacs v. Lincoln County Bd. of Educ.*, Docket No. 89-22-555 (Jan. 12, 1990); *Terek v. Ohio County Bd. of Educ.*, Docket No. 35- 87-294-3 (July 20, 1988).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6. 2. W. Va. Code § 18-2E-5(p) specifically grants the power to fill the positions of administrators and principals in school systems under State intervention to the State Superintendent.

3. It is well-recognized that county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3*, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 352 S.E.2d 58 (1986).

4. The authority of the MCBOE to transfer professional personnel during the instructional term is found in the provisions of W. Va. Code § 18A-4-7a(l).

5. When a retired teacher is employed as a substitute to fill a vacant position, the county board shall continue to post the vacant position until it is filled with a regularly employed teacher. W. Va. Code § 18A-2-3(5).

6. When a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7, and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period. *Sly. Pt. 2*, *Mingo County Bd. of Educ. v. Jones*, 512 S.E.2d 597, 204 W. Va. 340 (1998).

7. The Grievance Board has previously ruled that “in the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year.” *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05- 43-450 (Apr. 26, 2006); *Conner v. Barbour County Bd. of Educ.*, Docket No. 93-01-246(Apr. 28, 1994). *See e.g., Taylor v. Monongalia County Bd. of Educ.*, Docket No. 92-30-314 (Nov. 30, 1992); *Biller v. Upshur County Bd. of Educ.*,

Docket No. 90-49-533 (Sept. 27, 1991); *Napier v. Lincoln County Bd.of Educ.*, Docket No. 89-23-635 (May 25, 1990); *Isaacs v. Lincoln County Bd. of Educ.*, Docket No. 89-22-555 (Jan. 12, 1990); *Terek v. Ohio County Bd. of Educ.*, Docket No. 35- 87-294-3 (July 20, 1988).

8. Grievant has failed to prove that he is entitled to be reassigned to his former position. The State Superintendent had the authority to transfer Ms. Collins to the assistant principal position. MCBOE properly posted this position because it was occupied by a retired teacher employed as a substitute. Ms. Collins was properly selected as the qualified applicant from those who applied during the posting period to fill the position. The process by which MCBOE posted and filled the position was a reasonable exercise of discretion; in the best interest of the students; and done in a way which was not arbitrary and capricious.

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 county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (repealed, *See Footnote 3, supra)*. Neither the West 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 appealing party must alsoprovide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: April 25, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Intervenor communicated to the Board on December 4, 2007, that she desired to withdraw her position as Intervenor in this grievance.

Footnote: 2

On February 15, 2005, DOE intervened in the operations of the Mingo County Board of Education, limiting its authority as to the employment of school personnel, by delegating this authority to the State Superintendent of Schools.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.