MICHAEL K. DUNFORD

v. Docket No. 94-27-618

MERCER COUNTY BOARD OF EDUCATION

D E C I S I O N

This grievance concerns the recall provisions of W.Va. Code 18A-4-7a.1 Essentially, Grievant, on the preferred recall list at the time a vacancy was posted for a (special education) Behavioral Disorders (BD) teaching position for Fall 1994, applied for, but was not selected for the position. He claims he was entitled to recall and seeks instatement to the position plus back wages and benefits, including seniority. Respondent Mercer County Board of Education (MCBE) denies wrongdoing and maintains Grievant was not eligible for recall to this position because he did not possess certification in BD.

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1The case was advanced to level four for a record decision upon adverse outcomes at the lower grievance levels. The record consists of the September 29, 1994 waiver at level one, a copy of the transcript/exhibits of the October 11 level two hearing and October 14, 1994 decision, and Grievant's level four fact/law proposals, transmitted by facsimile on December 12, 1994, the agreed-upon cut-off date for submission.

For reasons more specifically set forth below via formal findings of fact and conclusions of law, MCBE, and not Grievant, must prevail in this dispute. The salient facts in this case, as gleaned from the record as a whole, are not in dispute:

Findings of Fact

1. At all times relevant to the grievance, Grievant's

only teaching certification was for mathematics, 5-8. T.7. According to Grievant, he was also "in the process of getting certified in two of the exceptionalities" in special education. T.8.

2. Although Grievant's eight-year teaching experience with MCBE was primarily in the area of mathematics, he had taught "TMI" special education classes for MCBE in the past. T.6, 8.

3. Seven persons applied for a BD position (posted July 29, 1994) at Bluefield Middle School (BMS), and none of them, including Grievant, then on the preferred recall list, was certified in BD.

4. While not then certified in BD, four of the applicants for the BD position at BMS, including Grievant and Ernest Gilliard, had completed course work in special education and were eligible to obtain a permit to teach in the field (Grievant had attained twelve hours in special education, T.16).

5. Because none of the applicants was certified in BD, MCBE utilized the hiring criteria set forth in Code 18A-4-7a in order to select the successful candidate.

6. MCBE conducted interviews of the applicants and determined that Mr. Gilliard, not on the recall list, was the most qualified candidate for the BD position at BMS.

7. Although MCBE concluded that the question of qualifi cations was close, the ultimate decision to hire Mr. Gilliard and not Grievant was based primarily on the fact that Mr. Gilliard held the greatest number of credit hours toward BD certification (fifteen hours) and because he had prior BD teaching experience.2

8. Although Grievant held the most seniority of all of

the applicants, and although he was permit eligible in the BD teaching area, he had no prior BD teaching experience.

9. Grievant contends he was entitled to the Bluefield Middle School BD position based solely upon the recall provi sions of Code 18A-4-7a.3

2Subsequent to filing this grievance but prior to the October 11, 1994, level two hearing, Grievant was hired to teach BD at Bluefield High School and commenced that employment on October 5, 1994. T.7.

3The recall portion of Code 18A-4-7a upon which Grievant relies reads as follows:

All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously taught or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

In addition to the foregoing, the following conclusions of law are made:

Conclusions of Law

1. "The preferred recall provision of W.Va. Code, 18A-4-7a, was intended to afford laid-off employees a right to be recalled to employment, by order of seniority, in the certi fication area in which they had been previously employed or in another area in which they had been certified or licensed." Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993).
2. Under Code 18A-4-7a's recall provision, Grievant's recall right was confined to that area in which he had been certified, namely, Mathematics 5-8. See Id.
3. Grievant was not entitled to be recalled from the preferred recall list to fill the vacant BD position at BMS at issue because he was not certified in BD at the time the hiring decision was made. See Adams v. Mercer County Bd. of Educ., Docket No. 92-27-455 (Mar. 31, 1993).

Accordingly, the grievance is DENIED in its entirety.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: December 21, 1994