KATHY GROSSL, .

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Grievant, .

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v. .

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MINGO COUNTY BOARD OF EDUCATION, . DOCKET NO. 93-29-496

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Respondent, .

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and .

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ELLA MAYNARD, .

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Intervenor. .

D E C I S I O N

This is a grievance by Kathy Grossl (Grievant) alleging a violation of W. Va. Code § 18A-4-7a, in regard to her not being selected by Respondent Mingo County Board of Education (MCBE) for a special education teacher's position at MCBE's Dingess Elementary School (DES) for the 1993-94 school term. Following a hearing at Level II on November 1, 1993, this grievance was denied in a written decision by William C. Totten, the Superintendent's designee, on November 8, 1993. After receiving MCBE's declination to hear her grievance at Level III on November 23, 1993, Grievant timely appealed to Level IV under W. Va. Code § 18-29-4(c).

On February 4, 1994, pursuant to W. Va. Code § 18-29-3(u), the undersigned granted Intervenor status to Ella Maynard, theindividual selected by MCBE to the contested teaching position at DES. Thereafter, an evidentiary hearing in this matter was conducted in this Board's offices in Charleston, West Virginia on February 8, 1994. (Ms. Maynard did not participate in that hearing.) Upon receipt of

post-hearing submissions from Grievant and MCBE, this matter became mature for decision on March 17, 1994.

DISCUSSION

Hiring decisions relating to classroom teachers in West Virginia are governed by the provisions of W. Va. Code § 18A-4-7a (1993). The portion of that statute pertinent to this grievance provides:

> A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. Further, the county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications. In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged. If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, the county board of education shall make decisions affecting the filling of such positions on the basis of the following criteria: Appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated in the job description; receiving an overall rating of satisfactory in evaluations over the past twoyears; and seniority. Consideration shall be given to each criterion with each criterion being given equal weight.
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> Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period. If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty days of the end of the posting period: Provided, That a position held by a certified and/or licensed teacher who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years. Nothing provided herein shall prevent the county board of education from eliminating a position due to lack of need.

The evidence adduced through the hearings conducted at Levels II and IV revealed that MCBE received 24 to 25 applications for a special education classroom teaching position at DES posted as

requiring certification in both Mild-Moderate Mentally Impaired (MMI) and Specific Learning Disabilities (SLD). The successful applicant, Ella Maynard, was certified only in SLD K-12. R Ex 3. Ms. Maynard had been employed by MCBE as a "General Substitute" Teacher for 9.5 days during the 1991-92 school year and for another 71.5 days during the 1992-93 school year. R Ex 1. Ms. Maynard's status was changed to Regular Substitute Teacher at MCBE's Nolan Elementary School where she taught for another 48 days during the 1992-93 school year. R Ex 1. Consistent with Department ofEducation Policy 5202, Ms. Maynard worked for MCBE under a permit for the 1992-93 school year. That permit expired on June 30, 1993.

John Fullen, MCBE's Assistant Superintendent and Personnel Director, testified at Level II that the hiring decision in question was made on September 24, 1993, applying the first set of criteria in W. Va. Code § 18A-4-7a. T at 11. Along those lines, he indicated that the fact that Ms. Maynard had performed successfully during her 119.5 days of service as a general substitute and regular substitute was significant in reaching the decision to recommend her for the position rather than Grievant who had worked only 38.5 days for MCBE. On September 24, 1993, MCBE initiated a permit application to allow Ms. Maynard to teach SLD and MMI.

As of August 9, 1993, Grievant had completed the necessary coursework at West Virginia Graduate College to be certified in both MMI and SLD. Department of Education Policy 5202, Section 5-F-1a, provides: "The effective date of the license or endorsement for an individual who applies within three months following completion of an approved program shall be the program completion date." Pamela J. Browning, MCBE's Certification Officer, testified at Level IV that she is responsible for assisting with the necessary paperwork to obtain appropriate certification from the Department of Education. According to Ms. Browning, MCBE's records indicate that Grievant filed her certification application for MMI and SLD on August 9, 1993. See G Ex 5. Ms. Browning testified that she mailed the application that same day to Mike Underwood at West Virginia Graduate College for verification. Mr. Underwoodexecuted his verification and sent an official transcript to MCBE by August 26, 1993. On that date, Ms. Browning mailed the application to the State Department of Education for approval.

Grievant's formal certification to teach MMI and SLD was subsequently received by Ms. Browning on October 13, 1993. Ms. Browning testified that she had no reason to doubt that Grievant's certification would be approved, once it was sent to the Department of Education. Consistent with Policy 5202, that certification was effective August 9, 1993. Mr. Fullen testified that MCBE had

previously hired teachers pending receipt of certification. See G Exs 2 & 3.

This Grievance presents the issue of what course of action a school board should follow when no applicant holds the certifications required by the posting under W. Va. Code §18A-4-7a. (See footnote 1) In determining whether an applicant holds the necessary qualifications, a board of education is entitled to substantial discretion, but such discretion must not be exercised in an arbitrary andcapricious manner. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Grievant correctly argues that under the rationale set forth in this Board's ruling in Davidson v. Wyoming County Board of Education, Docket No. 92-55-402 (Feb. 23, 1993), MCBE's hiring decision improperly failed to consider that Grievant was closer to obtaining both of the required certifications than the selectee. As noted in Davidson, W. Va. Code § 18-5-4 (1993) specifically contemplates that boards of education may make selection decisions based upon the best information as to the certification an individual will hold at the time that person enters into their assigned teaching duties. In particular, that statute authorizes school boards to "employ such qualified teachers, or those who will qualify by the time of entering upon their duties, necessary to fill existing or anticipated vacancies for the current or next ensuing school year." W. Va. Code § 18-5-4 (1993) (emphasis added).

West Virginia Board of Education Policy 5202, Section 7-A-1, Minimum Requirements for the Licensure of Educational Personnel, states: "A permit is a one-year license issued at the request of the employing superintendent to staff a specific position. The county superintendent verifies that the applicant is the most qualified candidate." That policy was interpreted in Peters v. Putnam County Board of Education, Docket No. 90-40-247 (Aug. 16, 1991). There, this Board explicitly held that "[o]nly if no certified applicant applies for a position may a county board of education petition the West Virginia Department of Education for aperson to be granted a permit to fill the post." The Peters holding is consistent with the West Virginia Supreme Court of Appeals' ruling in Johnson v. Cassell, 387 S.E.2d 553 (W. Va. 1989), where it was determined that a board of education improperly obtained a special education teaching permit for an individual when a fully certified candidate had applied for the position. Citing "State Board Policy 5113," a predecessor to Policy 5202, the Court stated: "County superintendents are obligated, pursuant to such policy, to utilize fully qualified teachers when they are available." Johnson, supra, at 555.

As of the time MCBE made its hiring decision under 18A-4-7a, Ms. Maynard was certified only in SLD and was not eligible for certification in MMI. (See footnote 2) Accordingly, she was not qualified to

fill the teaching position as posted. 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. 19, 1989). As of that same point in time, MCBE was aware that Grievant had completed all of the requirements for certification and her application was then pending before the State Board of Education where its approval was a foregone conclusion.

Thus, Grievant stands in a better position than the appellant who prevailed in Egan v. Board of Education, 406 S.E.2d 733 (W. Va.1991). There, the court relied, at least in part, on the fact that the appellant there was closer to obtaining full certification than the selectee. Egan, supra, at 736. Moreover, under this Board's ruling in Davidson, MCBE failed to give due credit to Grievant's "certification pending" status, despite the fact that it routinely makes favorable hiring decisions while formal certification is still pending before the State Department of Education. By obtaining a permit for Ms. Maynard, knowing that full certification was then pending before the Department for another applicant, MCBE abused its discretion by ignoring the status of Grievant's credentials, as well as by acting contrary to Policy 5202. Grievant has met her burden of proving by a preponderance of the evidence that she was entitled to the teaching position at issue. In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. On August 30, 1993, Mingo County Board of Education (MCBE) posted a position for a special education teacher certified in Mild-Moderate Mentally Impaired (MMI) and Specific Learning Disabilities (SLD) at its Dingess Elementary School (DES) for the 1993-94 school term only.

2. Approximately 24 persons, including Grievant and Ella Maynard, applied for the job.

3. Ms. Maynard had been employed by MCBE for 48 days as an MMI/SLD teacher at its Nolan Elementary School during the 1992-93school year under a permit from the West Virginia Department of Education which expired on June 30, 1993.

4. Ms. Maynard was certified in SLD but was not then eligible for certification in MMI.

5. As of August 9, 1993, Grievant had completed all of the requirements for certification in MMI and SLD through West Virginia Graduate College. On August 26, 1993, MCBE's Certification Officer, Pamela Browning, forwarded Grievant's application for certification, previously verified by an official at West Virginia Graduate College, to the Department of Education.

6. On September 21, 1993, MCBE selected Ms. Maynard for the teaching position at DES. MCBE then applied to the Department of Education for an MMI/SLD teaching permit for Ms. Maynard.

7. Grievant was issued a teaching certificate by the Department of Education on October 13, 1993, certifying her to teach special education students in both MMI and SLD, effective as of August 9, 1993.

CONCLUSIONS OF LAW

1. Grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). 2. MCBE abused its discretion by failing to recognize that Grievant had met all qualifications for certification in MMI and SLD as of the time it made its hiring decision for the special education teaching position at DES requiring MMI/SLD certification. Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-402 (Feb 23, 1993). See Egan v. Bd. of Educ., 406 S.E.2d 733 (W. Va. 1991).

3. 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).

4. 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, Section 7-A-1 (1991); W. Va. Code §§ 18A-3-1 et seq.

5. MCBE abused its discretion by applying for a permit from the West Virginia Department of Education under Policy 5202 to allow Ella Maynard to teach MMI/SLD special education classes at DES, knowing that a fully qualified applicant had completed all requirements for MMI/SLD certification and was then simply awaiting formal certification from the Department of Education. See Johnson v. Cassell, 387 S.E.2d 553 (W. Va. 1989); Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-402 (Feb. 23, 1993).

6. Grievant established, by a preponderance of the evidence, that she was the only candidate fully

qualified for the posted vacancy at DES.

Accordingly, this Grievance is hereby **GRANTED** and the Respondent is **ORDERED** to provide Grievant backpay and any benefits she may have lost due to its failure to instate her into the position at the beginning of the 1993-94 school year. As the position, by its terms, was due to expire at the end of the 1993-94 school year, the Respondent is not required to instate Grievant into the position, except constructively for purposes of calculating backpay and benefits, as well as correcting her personnel records to reflect appropriate seniority for full-time service.

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

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LEWIS G. BREWER

Administrative Law Judge

Dated: July 21, 1994

Footnote: 1There was some dispute regarding whether MCBE should have applied the first or second set of factors in W. Va. Code § 18A-4-7a when evaluating applicants for this position. The holding in this case makes it unnecessary to reach the legal issue of which set of criteria should have been applied. Likewise, it is not necessary to address Grievant's contentions that MCBE should have employed an application form allowing applicants to provide specific information for the school board to consider in applying the 18A-4-7a criteria or that MCBE should have interviewed the applicants in order to obtain a more complete picture of their respective qualifications. Nonetheless, it is noted that the evidence presented in this grievance created the appearance of a hiring process that was haphazard, at best. The Respondent is encouraged to review its hiring procedures to determine whether a more structured and better documented approach would facilitate compliance with the somewhat complex body of statutes and decisions applicable to this process.

Footnote: 2Although MCBE's Superintendent testified at Level IV that there were no MMI students at DES, making such certification unnecessary, the Respondent is bound by the terms of its 18A-4-7a posting. The witness further acknowledged that some MMI students might transfer to DES whereupon their teacher would have to have either MMI certification or a valid permit to teach MMI.