DAVID GILLISPIE

v. **Docket No. 94-20-615**

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, David Gillispie, is a long-term employee of the Kanawha County Board of Education ("KCBOE"). He grieves his non-selection for the position of Summer School Supervisor at East Bank High School ("EBHS") for the second term. This grievance was waived at Levels I and III and denied at Level II. The Grievant appealed to Level IV, and the parties agreed to submit the case on the record developed below. This case became mature for decision on January 24, 1995.

Findings of Fact

1. Grievant is a long-term employee of KCBOE and has served as a principal for many years. He is currently employed as the Principal at McKinley Junior High School.

2. Either on June 28 or 29, 1994, Mr. Cy Faris, Associate Superintendent of Business and Personnel, learned that Mr. Danny Webb, Coordinator of Community Education, had not posted the Summer School Supervisor position at EBHS. Mr. Faris also learned thatMr. Webb had not planned to post the position and had planned to hire a teacher, not an administrator, to fill this position.

3. Mr. Faris directed Mr. Webb to post the position and told him a teacher could not fill this administrative position.

4. The position was posted on June 30, 1994. All interested employees were to apply in writing by the deadline of July 8, 1994.

5. Because the first session of summer school started before the deadline date, Mr. Faris selected Mr. Clifford Cunningham, a long time administrator and current Vice Principal of South Charleston High School, to fill the Summer School Supervisor position until the position was permanently filled.

6. Grievant applied for the position on July 8, 1994. When he turned in his application, he

verbally told Mr. William Milam, Director of Personnel, he had taught summer school for seven years. He did not inform Mr. Milam that he had supervised a Title I summer school program from 1972-76.

7. On July 8, 1994, Mr. Faris selected Mr. Cunningham to complete the first summer school session. Grievant was selected to supervise the second summer school session. Testimony was unclear as to whether Mr. Cunningham had submitted a written application for the position.

8. Mr. Faris thought Mr. Cunningham should be selected for the position because he had more seniority and more years of experience as an administrator. Additionally, Mr. Cunningham had recent summer school experience as he had supervised summer schoolthe past two years. No testimony was elicited about whether Mr. Cunningham had past summer school teaching experience.

9. Grievant had taught summer school for seven years from 1965 to 1971. From 1972 to 1976 he supervised a special summer school for secondary students and fifth and sixth grades. This was a Title I program for students needing help in math and language arts.

10. The personnel files of Mr. Cunningham and Grievant do not reflect any summer school teaching or summer school administrative experience.

11. KCBOE administration was unaware of Grievant's past summer school supervisory experience.

Issues

Grievant argues KCBOE violated W. Va. Code §§18-5-39 and 18A-4-7a. He argues he was entitled to the position pursuant to W. Va. Code §18-5-39 because he had more summer school experience than the successful applicant. Further, Grievant argues he was the most qualified person for the position. Respondent argues W. Va. Code §18-5-39 does not apply to the selection of administrators. The Respondent also argues the successful applicant was the most qualified person for the position.

Discussion

The first issue to address is whether the criteria stated in W. Va. Code §18-5-39 applies to the selection of summer school administrators. This code section states in pertinent part:

The county boards may employ as teachers for this summer school program any certified teacher. Certifiedteachers employed by the county board to teach in the summer school program shall be paid

an amount to be determined by the county board and shall enter into a contract of employment in such form as is prescribed by the county board: Provided, That teachers who teach summer courses of instruction which are offered for credit and which are taught during the regular school year shall be paid at the same daily rate such teacher would receive if paid in accordance with the then current minimum monthly salary in effect for teachers in that county.

. . .

Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. In the event that no employee who has been previously employed in the summer school program holds a valid certification or licensure, a board shall fill the position as a classroom teaching position in accordance with section eight-b [§ 18A-4-8b], article four, chapter eighteen-a of this code.

(Emphasis Added)

A careful reading of the statute indicates this code section specifies the method of hiring classroom teachers for summer school. Clearly, when hiring summer school teachers, the Legislature chose to make past experience in summer school a preference for these teaching positions. This code section does not discuss the hiring of administrative personnel, thus W. Va. Code §18-5-39 does not apply to administrators.

Since no violation of W. Va. Code §18-5-39 is found, the next issue is whether KCBOE violated W. Va. Code §18A-4-7a when they did not hire the Grievant for the Summer School Supervisor position. The pertinent part of this code section states:

A county board of education shall make decisions affecting the hiring of professional personnel other thanclassroom teachers on the basis of the applicant with the highest qualifications.

According to the above-stated statute, KCBOE is required to fill the Summer School Supervisor position with the applicant with "the highest qualifications." Additionally, it must be noted that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transferring and promotion of school personnel" as long as they exercise this discretion "reasonably,

in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

Although both Grievant and Mr. Cunningham were qualified for the position, it was not a violation of W. Va. Code §18A-4-7a or an arbitrary and capricious act to select Mr. Cunningham for the position of Summer School Supervisor for the first session. Mr. Cunningham was the administrator with the most administrative experience in Kanawha County and had supervised summer school for the past two years. Thus, KCBOE's decision to hire Mr. Cunningham will not be reversed.

The above-stated discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. The Grievant, in a nondisciplinary case, has the burden of proving his grievance by a preponderance of the evidence.

2. An applicant has a "duty to inform [the employer] of any experience or credentials believed to be pertinent to theposition." Vonkallist v. Mercer County Bd. of Educ., Docket No. 94-27-073 (Aug. 8, 1994).

3. W. Va. Code §18-5-39 does not apply to the hiring of summer school administrators.

4. Grievant has failed to establish that KCBOE violated W. Va. Code §18A-4-7a when they hired Mr. Cunningham to serve as Summer School Supervisor at EBHS for the first summer school session.

5. KCBOE's hiring Mr. Cunningham for the Summer School Supervisor position at EBHS was not arbitrary and capricious since Mr. Cunningham possessed the most administrative experience of all administrators in Kanawha County and served as a Summer School Supervisor for the past two years.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 28, 1995