DOROTHY BAISDEN,

Grievant,

v. DOCKET NO. 94-23-549

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dorothy Baisden, filed this grievance protesting her non-selection as a lead teacher for the 1994 Logan County summer school program. Specifically, Grievant "alleges violation of W. Va. Code 18-5-39 in regard to the summer school employment at Logan Grade. Grievant had more summer seniority than the successful applicant." Grievant requests all lost wages, benefits and seniority. A Level II hearing was conducted on July 11, 1994 and a decision rendered denying the grievance on September 2, 1994. Upon appeal to Level IV, a hearing was held before the undersigned on January 5, 1995 at which time the matter became mature for decision.

The facts are not in dispute.

1. Grievant is employed as a Chapter I Reading teacher at Logan Elementary School by Respondent, Logan County Board of Education.

2. Respondent has a summer school program established pursuant to W. Va. Code § 18-5-39.

3. Mrs. McCloud, the Principal at Logan Elementary, had bid on and held the position of Principal/Lead Teacher in the summer school program at Logan Elementary for several years preceding the summer of 1994.

4. It is Respondent's practice to fill summer school positions with the same individuals who held the positions in the preceding year, if possible.

5. Mrs. McCloud informed Respondent that she did not wish to participate in the 1994 summer school program. Therefore, on May 25, 1994, Respondent posted the position of "Principal or Lead Teacher" at Logan Elementary School for its 1994 Extended Chapter 1 Summer Program. R Ex. 2.

6. Grievant and three other individuals applied for the "Principal or Lead Teacher" position at

Logan Elementary school.

7. Respondent utilized the second set of criteria listed in W. Va. Code § 18A-4-7a for selecting classroom teacher positions in filling the "Principal or Lead Teacher" position at Logan Elementary School (R Ex. 1), and filled the position with the successful applicant.

8. Grievant and the successful applicant both possessed the required certification for the position.

9. At the time of selection, Grievant had six years' experience in Respondent's summer school program.

10. At the time of selection, the successful applicant had three years' experience in Respondent's summer school program.

11. Grievant was awarded a regular summer school teaching position for the 1994 summer school program.

12. Grievant's salary as a regular summer school teacher for the 1994 summer school program was $10.75/hour. The Principal or Lead Teacher salary was $13.75/hour.

Discussion

Grievant alleges that Respondent violated W. Va. Code § 18-5-39 in filling the Principal/Lead Teacher summer school position at Logan Elementary. That Code section provides, in pertinent part:

> The county boards may employ as teachers for this summer school program any certified teacher. . . .
>
> 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. (See footnote 1)
>
> Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer. If such employee is unavailable or if the position is newly created, the position shall befilled

pursuant to section eight-b, article four, chapter eighteen-a of this code.

Grievant argues that, since she possessed the required certification and had more years' summer school experience than the successful applicant, she should have been awarded the Principal or Lead Teacher position for the 1994 summer school program.

Respondent argues that its practice, in conformance with W. Va. Code § 18-5-39, is to fill summer school positions with individuals who possessed those positions in previous years. Once Mrs. McCloud declined to take the Principal or Lead Teacher position for the 1994 summer school program, Respondent treated the position as "newly-created" and believed it was required by W. Va. Code § 18-5-39 to fill the position in accordance with W. Va. Code § 18A-4-7a. Respondent evaluated the four applicants utilizing the criteria set forth for classroom teachers in Code § 18A-4-7a and awarded the job to the successful applicant.

Respondent's interpretation of W. Va. Code § 18-5-39 is wrong. That Code section does not require Respondent to fill professional summer school positions automatically with individuals who held the same positions in the previous year. That requirement only applies to school service personnel: "An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer". W. Va. Code § 18-5-39, ¶6 (emphasis added). There is no corresponding language in the statute applicable to professional employees.

W. Va. Code § 18-5-39 also only requires county boards of education to apply Code § 18A-4-7a in hiring professional employees when "no employee who has been previously employed in the summer school program holds a valid certification or licensure" [for the position]. Thus, for a given summer school job, only if there are no applicants with proper relevant certification and in-county summer school employment experience, must a county board of education utilize the "most qualified" selection standard set forth in Code § 18A-4-7a. Molnar v. Berkeley County Bd. of Educ., Docket No. 91-02-355 (Oct. 17, 1991). (See footnote 2)

On the other hand, for a given summer school job, if there is at least one applicant with proper relevant certification and in-county summer school employment experience, a county board of education must base its selection on "certification and length of time the professional has been employed in the county's summer school program". W. Va. Code § 18-5-39; Molnar, supra.

Therefore, as Grievant possessed the proper relevant certification for the posted position and had been employed for more years in the county's summer school program than the successful applicant, Grievant should have been awarded the "Principal or Lead Teacher" position at Logan Elementary.

Based upon the foregoing facts and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. For a given summer school job, if there are no applicants with proper relevant certification and in-county summer school employment experience, a county board of education must utilize the "most qualified" selection standard set forth in W. Va. Code § 18A-4-7a. Molnar v. Berkeley County Bd. of Educ., Docket No. 91-02-355 (Oct. 17, 1991).

2. For a given summer school job, if there is at least one applicant with proper relevant certification and in-county summer school employment experience, a county board of education must base its selection on "certification and length of time the professional has been employed in the county's summer school program". W. Va. Code § 18-5-39; Molnar, supra.

3. The requirement that a county board of education fill a particular summer school position with an individual who possessed the same position in the preceding year only applies to school service personnel. See W. Va. Code § 18-5-39, ¶6.

Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to compensate Grievant for the difference between a regular summer school teacher's salary ($10.75/hour) and the Principal or Lead Teacher's salary ($13.75/hour) for the period of the 1994 summer school program, plus any benefits and seniority she is entitled to for the period of the 1994 summer school program.

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

MARY JO SWARTZ

Administrative Law Judge

Dated: January 13, 1995

Footnote: 1 *W. Va. Code § 18A-4-8b was repealed and replaced in 1990 by W. Va. Code § 18A-4-7a; however, Code § 18-5-39 has not been amended to reflect that change.*

Footnote: 2 *But see, Bd. of Educ. of County of Wood v. Enoch, 414 S.E.2d 631 (W. Va. 1992), wherein the Supreme Court held that the hiring requirements for a special education summer school program established pursuant to the Assistance for Education of All Handicapped Children Act, 20 U.S.C. § 1400, et seq., are governed by W. Va. Code §18A-4-7a.*