ROY COOPER

v. Docket No. 95-45-522

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

The grievant, Roy Cooper, is a former special education teacher of the Summers County Board of Education (Board) on preferred recall since a Spring 1994 reduction-in-force. He filed this complaint at Level I October 23, 1995, following the failure of the Board to appoint him to a special education teaching position. The grievance was advanced to Level II where it was denied following a hearing held October 31, 1995. The Board, at Level III, declined to address the matter, and appeal to Level IV was made November 19, 1995. On or about April 18, 1996, the parties agreed to submit the case for decision on the record developed at Level II. (See footnote 1) The Board submitted proposed findings of fact and conclusions of law by May 1, 1996. Initially, it is noted that the record in the case is poorly developed, and the grievant's legal position, as articulated at Level II, is unclear. The little reliable evidence gleaned from the grievant's responses to Board counsel's brief questions at the Level II hearing reveals only that in September 1995, the grievant was on a preferred recall list per W.Va. Code §18A-4-7a, ¶6; that the Board posted a special education teaching vacancy and listed certification in Elementary Education, grades K through 8 and an endorsement to instruct gifted students as minimum requirements; and that the grievant did not have the endorsement but made application and was not selected.

The Level II evaluator, subsequent to hearing, and apparently through examination of Board records, determined that there were eight applicants for the position, seven of which were on the preferred recall list; no applicant had the required endorsement; a committee consisting of Hinton Area Elementary Principal Gary Irwin, Special Education Director William Ball and Summers Middle School Assistant Principal Vickie Hinerman, interviewed all candidates and recommended that Donnan Keaton, a preferred recall list applicant, be awarded the post; the Board ultimately accepted

the recommendation of Superintendent of Schools Richard Rodes that Ms. Keaton be appointed; the grievant was more senior than Ms Keaton; and that three other applicants on the preferred recall list were more senior than the grievant. Neither the evidence presented at the Level II hearing nor the evaluator's findingsreveal how the Board ultimately addressed the applicants' lack of “gifted” endorsements.

The grievant apparently bases his claim to the post on the following portion of W.Va. Code §18A-4-7a.

> 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 been employed 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.

It seems that the grievant interprets this language to mean that if no applicant for a vacancy in a professional post meets announced minimum requirements, the county board must appoint the most senior candidate then on its preferred recall list. The Board disputes the applicability of the cited provision and asserts that the selection process was controlled by Code §18A-4-7a, ¶1, which 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 classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to [§18A-2- 12]; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

The Board further asserts that all specified factors were considered and that Ms. Keaton was the most qualified applicant. A grievant must establish the truth of his or her allegations by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). The evidence presented at Level II is so scant that it does not permit analysis of any portion of the grievant's claims. Further, the findings of the Level II evaluator, if they could be considered an additional proper part of the evidentiary record in the case, also would not support that the Board

violated any provision of Code §18A-4-7a.

Moreover, to the extent that the record would factually support that the seniority-based recall provisions of the statute were triggered in the selection process, it would also support that an applicant with greater seniority than the grievant would have received the position. The grievant has, therefore, failed to even advance a theory of statutory interpretation and/or application whereby he would have obtained the post.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Summers 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 theintent 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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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: May 30, 1996

Footnote: 1 *The case was held in abeyance for several months upon the representations of the grievant that he was either seeking or considering seeking counsel. It was only after he was pressed to proceed in some manner that he advised that he had presented all evidence necessary at the Level II hearing.*