ANNA M. WELLMAN,

Grievant,

v. Docket No. 97-29-381

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

BESSIE STURGILL,

Intervenor.

D E C I S I O N

Anna M. Wellman (Grievant) filed this grievance pursuant to W. Va. Code §§ 18-29- 1, et seq., contesting a decision by Respondent Mingo County Board of Education (MCBE) to select another employee for an Aide IV position at Kermit School. This grievance was initiated at Level I on May 22, 1997, and waived to Level II due to a lack of authority to grant the relief sought. The successful applicant, Bessie Sturgill (Intervenor) intervened at Level II, as authorized under W. Va. Code § 18-29-3(u), and a Level II hearing was conducted on August 8, 1997. Thereafter, on August 13, 1997, the grievance was denied by Johnny W. Fullen, the Superintendent's designee. Grievant waived Level III as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on March 27, 1997. After the matter was scheduled for hearing at Level IV, Grievant wrote to advise that the mattercould be decided on the record below, without a Level IV hearing. MCBE supplemented the record by providing experience documentation from the personnel records of Grievant and Intervenor, and, following an opportunity to supplement the record with written arguments, this matter became mature for

decision on November 3, 1997. **(See footnote 1)**

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, and documentary evidence submitted by the parties.

FINDINGS OF FACT

1. Grievant was continuously employed by the Mingo County Board of Education (MCBE) in the school service personnel classification of Aide from the beginning of the 1979-80 school year through the 1996-97 school year. See R Ex 1 at L IV. Grievant is presently classified as an Aide IV. L II HT at 2.

2. As of the end of the 1996-97 school year, Grievant had 18 years of regular seniority in the Aide classification. See R Ex 1 at L IV.

3. Intervenor was first employed by MCBE on February 15, 1971, during the 1970-71 school year, in the school service personnel classification of Aide. See R Ex 2 at L IV.

4. Intervenor's employment with MCBE was interrupted during the 1971-72, 1973-74 school years, and she was not employed by MCBE during the 1976-77 school year. Intervenor has been continuously employed by MCBE as an Aide since the beginning of the 1977-78 school year. MCBE credited Intervenor with 23.317 years ofregular seniority as an Aide at the end of the 1996-97 school year. See R Ex 2 at L IV. 5. Grievant and Intervenor applied for an Aide position at the new Kermit School for the 1997-98 school year. The position was awarded to Intervenor.

6. Grievant's entire 18 years' experience as a classroom aide has been at the Kindergarten level. The vacancy at issue is a Kindergarten-level classroom aide.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-8b provides that "[a] county board of education shall make decisions affecting promotion and filling of any service personnel positions . . . on the basis of

seniority, qualifications, and evaluations of past service." Moreover, the statute further provides:

> **Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:**
>
> **(1) Regularly employed service personnel;**
>
> **(2) Service personnel whose employment has been discontinued in accordance with this section;**
>
> **(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth of June, one thousand nine hundred eight- two, and who apply only for such temporary jobs or positions;**
>
> **(4) Substitute service personnel; and**
>
> **(5) New service personnel.**

W. Va. Code § 18A-4-8 provides the following pertinent definitions of class titles for school service personnel:

> **"Aide I" means those personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aide.**
>
> **"Aide IV" means personnel referred to in the "Aide I" classification who hold a high school diploma or a general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in-service training program determined by the state board to be the equivalent of three hours of college credit.**

Both Grievant and Intervenor are regularly employed by MCBE in the classification of Aide.

W. Va. Code § 18A-4-8g provides: "Service personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill such vacancy." Thus, Grievant and Intervenor, as regular employees holding the Aide classification, are "qualified" for the position in accordance with W. Va. Code § 18A-4-8b.

Grievant contends that she was better qualified for the position in question because all of her service with MCBE has been as a "Kindergarten aide," while Intervenor, although likewise employed as a classroom aide, spent time as a Title I and special education aide. Because "[c]ounty boards of education have substantial discretion in matters relating to thehiring, assignment, transfer, and promotion of school personnel," (See footnote 2) **MCBE has authority to determine the minimum qualifications for the position. See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Snell v. Mingo County Bd. of Educ., Docket No. 97-29-154 (Aug. 13, 1997); Saunders v. Cabell County Bd. of Educ., Docket No. 92-06-113 Aug. 21, 1992). However, MCBE did not elect to go beyond the minimum requirements in W. Va. Code §§ 18A-4-8 and 18A-4-8b in posting the position in question. Although Grievant is undoubtedly qualified to perform the duties of the position at issue, Grievant's evidence falls well short of establishing that MCBE abused its discretion, or acted in an arbitrary and capricious manner, by failing to require that the Aide position at issue be filled by the service employee applicant with the most experience as a "Kindergarten aide." See Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993); Kirk v. Mingo County Bd. of Educ., Docket No. 97-29-069 (July 17, 1997); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-128 (Oct. 25, 1994). See also Bell v. Lincoln County Bd. of Educ., Docket No.97-22-013 (July 28, 1997). See generally Bedford County Mem. Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th. Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).**

Grievant also contends that she has more seniority than Intervenor, alleging that MCBE violated W. Va. Code § 18A-4-8g by permitting Intervenor to "bridge" her seniority over gaps in her employment. However, the undisputed facts indicate that Intervenor has been employed continuously as an Aide since the 1977-78 school year, while Grievant's employment with MCBE commenced two years later, at the beginning of the 1979-80school year. Thus, even

without bridging, Intervenor had greater regular seniority as an Aide, and was properly selected for the Aide position at Kermit School in accordance with W. Va. Code §§ 18A-4-8b and 18A-4-8g. See Sargent v. Cabell County Bd. of Educ., Docket No. 96-06-090 (May 2, 1996).

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. MCBE did not abuse its discretion, or act in an arbitrary and capricious fashion, by failing to require the successful applicant for a school service personnel Aide position at Kermit School to have the most experience working as an Aide at the Kindergarten level.

4. Grievant failed to establish by a preponderance of the evidence that MCBE violated W. Va. Code §§ 18A-4-8b, 18A-4-8g, or any other law, rule or regulation, in selecting Intervenor for the Aide IV position at Kermit School.

Accordingly, this Grievance is DENIED.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: November 25, 1997

Footnote: 1

None of the parties filed additional submissions.

Footnote: 2

Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).