FORREST CUMMINGS,

Grievant,

v. DOCKET NO. 97-22-324

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievant Forrest Cummings against the Respondent Lincoln County Board of Education, alleging a violation of W. Va. Code § 18A-4-7a occurred when Respondent filled the position of Title I Summer Camp Instructor, asserting he was the most qualified applicant for the posted position. (See footnote 1) Grievant initially requested instatement into the position and compensation for lost wages. However, as the position was no longer available as of the date of the Level IV hearing, he simply sought compensation.

The Code Section cited by Grievant, W. Va. Code § 18A-4-7a, sets forth, among other things, the criteria to be used by county boards of education in evaluating the candidates for classroom teaching positions. It likewise applies to the hiring of teachers for a summer school program, when,as in this case, none of the applicants have been previously employed in the summer program. W. Va. Code § 18-5-39. (See footnote 2) Baisden v. Logan County Bd. of Educ., Docket No. 94-23-549 (Jan. 13, 1995). The "second set of criteria" found in 7a is applicable to this case, and reads as follows:

> 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 previous two years; and seniority. Consideration shall be given to each criterion with each criterion being given equal weight.

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Lincoln County Board of Education ("LBOE") as a principal at West Hamlin Elementary School. He has been employed by LBOE for 32 years, and 23 of those years have been in administration.

2. On June 3, 1997, LBOE posted the position of Title I Summer Camp Instructor, West Hamlin Elementary School. It was a 20 day summer position, beginning June 30, 1997 (with two planning days prior to that), and ending on or about July 28, 1997. The posting required certification in Elementary Education, and preferred Title I personnel and a Reading Certification/Authorization. No specialized training was required in the posting, and was not considered in the selection process.

3. The Title I Summer Camp is an extended year program of Title I, which extends the Title I skills practice into the summer for students who need extra help. Title I is a reading and math program at the elementary level. None of the applicants had previously been employed in this summer school program.

4. Grievant, Betsy Grzyb, and six other persons applied for the position. (See footnote 3) The position was awarded to Ms. Grzyb.

5. Neither Grievant nor Ms. Grzyb has Reading Authorization. Grievant is certified in Elementary Education 1-8, Language Arts 1-9, Social Studies 1-9, English 7-12, and Administration. Ms. Grzyb is certified in Elementary Education. Both Grievant and Ms. Grzyb were credited by LBOE in the selection process with possession of the required certification.

6. Grievant has 11 years of teaching experience, including two years when he was a teaching principal. He has taught Adult Basic Education eight years during the summer. He taught nine years at the elementary level, and was a teaching principal one of those years. Ms. Grzyb has 22 years of teaching experience, with eight years at the elementary level, and 14 years at the secondary level, with 13 of those years being in math instruction. Ms. Grzyb has more teaching experience than Grievant, and was so credited by LBOE in the selection process.

7. Ms. Grzyb was given credit by LBOE for existence of teaching experience in the required certification area, while Grievant was not, because Ms. Grzyb has more years of experience than Grievant. 8. Both Grievant and Ms. Grzyb hold a Masters Degree, and have completed 45 hours of course work beyond that degree. They were credited by LBOE in the selection process with the same degree level.

9. Grievant and Ms. Grzyb both have satisfactory evaluations for the last two years, and were so credited by LBOE in the selection process.

10. Grievant has more seniority than Ms. Grzyb, and was so credited by LBOE in the selection process.

11. LBOE has no policy in place to break ties which exist after the W. Va. Code § 18A-4- 7a criteria are applied.

Discussion

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). With regard to hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the "qualifying factors" set forth in W. Va. Code § 18A-4-7a (1992). That Code Section requires that, in applying the second set of criteria, each factor be weighted equally.

The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stoverv. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The burden of proof is on the Grievant to demonstrate a flaw in the selection process, or that LBOE's action was arbitrary and capricious.

Grievant challenged LBOE's action in giving Ms. Grzyb credit for existence of teaching experience in the required certification area, but not giving him the same credit. This placed Ms. Grzyb ahead of

Grievant in the selection criteria. This criterion "does not refer to the amount of teaching experience an individual has in his/her area of certification, because the word `existence' is not a quantitative word." Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993). West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 18, 1997); Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). LBOE should have credited both Grievant and Ms. Grzyb in this criterion. This tied Grievant and Ms. Grzyb.

Grievant argued he should have scored ahead of Ms. Grzyb in total amount of teaching experience, which would have given him more total points in the 7a criteria than Ms. Grzyb. He first argued his experience as a teacher and as a teaching principal was greater than Ms. Grzyb's teaching experience. The evidence does not support Grievant's argument. He testified he had taught for nine years, and was a teaching principal for two years. Ms. Grzyb has taught 22 years. Second, he argued he had more elementary teaching experience than Ms. Grzyb. While this is true, LBOE was not required to limit its consideration to elementary education teaching experience. The applicable criterion reads, "total amount of teaching experience," not "total amount of teaching experience in the required certification area." One of the other criteria speaks to teaching experience in the required certification area, and as discussed above, that criterion does not measure the amount of experience, but only the existence of the experience. The undersigned cannot read the qualifying language suggested by Grievant into the statute.

Finally, Grievant argued that if he and Ms. Grzyb were tied, as has been found to be the case, a random selection should have occurred. Respondent's Level II Decision found it was not arbitrary and capricious to choose a "vastly more experienced classroom teacher." Donna Martin, Assistant Superintendent of Lincoln County Schools, stated simply that Ms. Grzyb had taught more, and had taught more of what she needed, referring to her 13 years' experience teaching math.

W. Va. Code § 18A-4-7a does not address how ties are to be broken, but it does provide "the criteria the board of education must take into consideration when determining which candidate is the most qualified. The candidate who is most qualified must be chosen to fill the vacancy." Syl. Pt. 4, State of W. Va. ex rel. Monk v. Knight, No. 24366, slip op. (W. Va. Nov. 24, 1997). A random selection may not be ordered by the Undersigned. Id.

In this case, it is clear from the evidence that Ms. Martin would have recommended Ms. Grzyb for the position as the most qualified candidate, breaking the tie by looking to her total amount of

teaching experience and her math teaching experience. This seems a reasonable method of choosing which candidate was best qualified. Grievant has failed to prove he was the best qualifiedcandidate, and that the placement of Ms. Grzyb in the subject teaching position was arbitrary and capricious.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. County boards of education have substantial discretion in matters relating to the assignment of school personnel, so long as they act reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

2. With regard to the hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the seven "qualifying factors" set forth in W. Va. Code §18A-4-7a (1992). That Code Section requires that, in applying the second set of criteria, each factor be weighted equally. Sisk v. Mercer County Bd. of Educ., Docket No. 95-27-113 (Sept. 25, 1995).

3. The 7a criterion "existence of teaching experience in the required certification area," "does not refer to the amount of teaching experience an individual has in his/her area of certification, because the word `existence' is not a quantitative word." Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993). West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 18, 1997); Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). LBOE incorrectly failed to credit Grievant with teaching experience.

4. After proper application of the 7a criteria, Grievant and Ms. Grzyb were tied.

5. W. Va. Code § 18A-4-7a does not address how ties are to be broken, but it does provide "the criteria the board of education must take into consideration when determining whichcandidate is the most qualified. The candidate who is most qualified must be chosen to fill the vacancy." Syl. Pt. 4, State of W. Va. ex rel. Monk v. Knight, No. 24366, slip op. (W. Va. Nov. 24, 1997). A random selection may not be ordered by the Undersigned. Id.

6. Grievant failed to prove by a preponderance of the evidence that he was more qualified than Ms. Grzyb to fill the posted position, or that it was arbitrary and capricious for LBOE to place Ms.

Grzyb in the position as the most qualified candidate.

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: December 3, 1997

Footnote: 1

This grievance was filed on June 24, 1997. Grievant requested that Level I be waived, and the grievance was waived to Level II. The grievance was denied at Level II on July 7, 1997, following a hearing held on June 30, 1997. Level III was waived, and Grievant appealed the Level II Decision to Level IV on July 9, 1997. After a Level IV hearing on August 19, 1997, this case became mature for decision on September 9, 1997, with receipt of Grievant's written argument. Respondent declined to submit written argument.

Footnote: 2

In 1990, the selection requirements were moved from W. Va. Code § 18A-4-8b(a) to § 18A-4- 7a, but the statutory reference was not changed in § 18-5-39.

Footnote: 3

None of the six other applicants received credit in any criterion where Grievant or Ms. Grzyb did not, nor were any of them second in any criterion. Accordingly, their qualifications are not a consideration in this grievance.