THOMAS HOFFMAN,

Grievant,

v. **Docket No. 97-29-266**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

THOMAS R. NEWSOME,

Intervenor.

D E C I S I O N

Thomas Hoffman (Grievant) filed this grievance against Respondent Mingo County Board of Education (MCBE) in accordance with W. Va. Code §§ 18-29-1, et seq., contending that MCBE violated W. Va. Code § 18A-4-7a when it selected Thomas Newsome (Intervenor) to fill a vacancy as Principal at Tug Valley High School. Grievant's immediate supervisor did not have authority to resolve the grievance at Level I, and Grievant proceeded to Level II where an evidentiary hearing was conducted on September 18, 1997. Thereafter, MCBE failed to issue a Level II decision, and Grievant appealed to Level IV, by-passing Level III in accordance with W. Va. Code § 18-29-4(c), on October 8, 1997. After MCBE did not respond to an order from the Grievance Board providing anopportunity to show cause why this grievance should not be advanced to Level IV, this matter was set for hearing.

On February 2, 1998, Thomas R. Newsome was granted intervenor status in accordance with W. Va. Code § 18-29-39(u). Following a series of continuances, each of which was granted for good

cause shown, an evidentiary hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on March 26, 1998. On April 2, 1998, MCBE attempted to supplement the record by submitting additional documents from its records. On April 15, 1998, Grievant moved to reopen the record in order to rebut certain of those documents. During a telephonic conference on April 30, 1998, MCBE agreed to withdraw the documents, and Grievant withdrew his request to reopen the record. This matter became mature for decision on May 5, 1998, upon receipt of post- hearing written arguments from the parties. (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, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at both levels.

FINDINGS OF FACT

1. Grievant is employed by the Mingo County Board of Education (MCBE) as a teacher at Tug Valley High School (TVHS). 2. In May 1997, MCBE posted a position vacancy for Principal at TVHS. MCBE Superintendent Everett Conn recommended Don Roberson, a Principal on transfer notice from an elementary school that was closing, to serve as TVHS Principal. The county board did not accept Superintendent Conn's recommendation.

3. On July 7, 1997, MCBE again posted the vacancy for Principal at TVHS. The posting specified that applicants must have administrative certification. G Ex 2 at L IV.

4. Grievant, Intervenor, Mr. Roberson, Frank Jones, and Jeff Reynolds applied for the TVHS Principal's position in accordance with the second posting. See G Ex 3 at L IV. Superintendent Conn recommended Intervenor to fill the TVHS Principal's position following the July posting.

5. At the time Superintendent Conn recommended Mr. Roberson and, subsequently, Intervenor, to serve as Principal at TVHS, he considered TVHS to be a “problem” school based upon low test scores, high dropout and absentee rates, and low employee morale. Therefore, Superintendent Conn determined that a strong leader was needed to manage that school.

6. Grievant has been employed by MCBE for over 12 years, and is certified by the West Virginia Department of Education to hold administrative positions, including Principal at the high school level. See G Ex 1 at L IV.

7. Grievant has a master's degree and 45 additional hours of course work beyond a master's.

See G Ex 1 at L IV. 8. As of August 1997, Intervenor had worked for MCBE for 26 years. At the time he applied for the Principal's position at TVHS, Intervenor was serving as Assistant Principal at TVHS.

9. Intervenor was previously certified to hold a Principal's position. However, that certification expired on June 30, 1997.

10. At the time Intervenor applied for the TVHS Principal's position, he had completed all of the coursework required to obtain a new certification to serve as a Principal. However, he had not yet taken the required content examination. Intervenor took and passed the content examination in November 1997, thereby completing all requirements for the required administrative certification.

11. On August 22, 1997, MCBE approved Intervenor's placement as Principal at TVHS. G Ex 4 at L IV. As of that date, Intervenor was certified to teach Biological Science 7-12, and General Science, 7-12. G Ex 8 at L IV. Intervenor did not hold administrative certification.

12. MCBE obtained a permit for Intervenor to serve as TVHS Principal from the West Virginia Department of Education, based upon Superintendent Conn's representation that Intervenor was the “best qualified” applicant for the position. See G Exs 12, 13, 14 & 15.

13. Intervenor applied to the West Virginia Department of Education through Marshall University for administrative certification in late December 1997 or early January 1998. As of March 26, 1998, the Department of Education had not yet received Intervenor's application. In these circumstances, the Department will issue certificationretroactive to the date in November 1997 when Intervenor passed the required content examination.

14. Superintendent Conn indicated that he would not have recommended Grievant for a Principal's position, as he had previously transferred Grievant out of two administrative positions, and later terminated Grievant's assignment as an Assistant Principal, transferring him to a teaching position. From Superintendent Conn's observations, Grievant is lacking in the skills necessary to provide effective leadership in a school.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

County boards of education are authorized to fill vacancies in administrative positions under the more flexible standards contained in the so-called "first set of factors" in W. Va. Code § 18A-4-7a:

> 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. . . . In judging qualifications, consideration shall be given to each of the following: Appropriate certifi cation and/or licensure; amount of experience relevant to the position, or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with Dillon, a county board is free to determine the weight to be applied to each of the above-listed factors in W. Va. Code § 18A-4-7a when assessing an applicant's qualifications for an administrative position, so long as this substantial discretion is not abused. Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). See Pockl v. Ohio County Bd. of Educ., 185. W. Va. 256, 406 S.E.2d 687 (1991).

In order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Grievant argues that the successful applicant did not meet the minimum qualifications for the position because he did not possess the required certification. This Grievance Board has previously allowed a county board to interview and select an applicant for a professional position where the applicant had previously completed all of the requirements for certification, but did not receive certification until the beginning of the school year. Keatley v. Mercer County Bd.of Educ., 94-27-641 (Apr. 26, 1995), aff'd 200 W. Va. 487, 490 S.E.2d 306 (1997). This interpretation of the “qualifications” requirement in W. Va. Code § 18A-4-7a has

been extended to an employee who completes all requirements for certification, but does not receive a credential until after the school year has commenced. Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994). See also Egan v. Bd. of Educ., 185 W. Va. 302, 406 S.E.2d 733 (1991).

However, in the instant matter, Intervenor had not completed all requirements for administrative certification at the time he applied for, was selected, or entered into his duties as TVHS Principal. Although Intervenor later passed the required content examination, it was mere speculation by MCBE that he would be successful in his first attempt at that test. This Grievance Board has previously determined that under State Board of education Policy 5202, a county board of education may only apply for a permit to fill the post when no certified applicant applies for a position. Peters v. Putnam County Bd. of Educ., Docket No. 90-40-027 (Aug. 16, 1991). See Ashworth v. Putnam County Bd. of Educ., Docket No. 89-40-560 (Oct. 31, 1989). In these circumstances, it was an abuse of discretion for MCBE to select an applicant who did not meet the minimum qualifications for the position, when there were other applicants available who held the appropriate credential required by the posting. See W. Va. Code § 18A-3-2; Johnson v. Cassell, 182 W. Va. 317, 387 S.E.2d 553 (1989); Peters, supra.

Grievant contends that because he proved that he held the appropriate certification for the position at issue and Intervenor did not, he is entitled to instatement as TVHS Principal retroactive to August 1997. Grievant notes that this Grievance Board hasawarded instatement to grievants in similar circumstances where the successful applicant did not hold the certification required for the position. Boyce v. Hancock County Bd. of Educ., Docket No. 97-15-219 (Dec 18, 1997); Belcher v. Hancock County Bd. of Educ., Docket No. 97-17-389 (Dec. 9, 1997).

Although it is clear that MCBE improperly selected Intervenor to serve as TVHS Principal, it is not so apparent that Grievant was the best qualified applicant for the position under the first set of factors in W. Va. Code § 18A-4-7a. Unlike the positions at issue in Boyce, supra, and Belcher, supra, Grievant is seeking instatement to an administrative position where the school board has greater discretion in determining which applicant is best qualified for the position. See Baker v. Lincoln County Bd. of Educ., Docket No. 97- 22-482 (Mar. 5, 1998); Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-398 (Jan. 30, 1991). Further, Superintendent Conn specifically testified that he would not have recommended Grievant for the position based upon his prior experience with

Grievant as an administrator, which led to Grievant's termination and transfer to a teaching position. (See footnote 2) In addition, there was testimony from Superintendent Conn, Mr. Fullen and Intervenor that Mr. Roberson filed a separate grievance over his nonselection under the initial posting. Any one of these three factors is sufficient to distinguish this matter from the situations addressed in Boyce, supra, and Belcher, supra. See Baker, supra. Moreover, givenGrievant's prior experience as a Principal, where the county board is seeking a leader with certain skills to serve as TVHS Principal in accordance with the "other measures or indicators" factor in W. Va. Code § 18A-4-7a, Grievant did not establish by a preponderance of the evidence that he was the best qualified applicant for the position at issue. See Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992); Bell, supra.

Nonetheless, Grievant is entitled to another opportunity to compete for the position of TVHS Principal. Superintendent Conn is no longer serving as MCBE Superintendent, giving Grievant a chance to persuade MCBE's new Superintendent that he is best qualified for the position. Therefore, this matter must be returned to MCBE to repeat the selection process for TVHS Principal from among those applicants under the July 1997 posting who held the minimum qualifications at the time of the posting, or who had completed all requirements for certification by the start of the 1997-98 school year. (See footnote 3) If Grievant is the successful applicant, he will be entitled to back pay and benefits, retroactive to August 22, 1997.

Consistent with the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving his 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. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the highest qualifications. In making its selection, the board must give consideration to appropriate certification, experience relevant to the position, course work and/or degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the

relative qualifications of the applicants may be fairly judged. County boards have wide discretion in choosing administrators once they have reviewed the criteria in W. Va. Code § 18A-4- 7a. Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

3. In order for an applicant to be minimally qualified for an administrative position vacancy in West Virginia, that person must hold the appropriate certification. See Johnson v. Cassell, 182 W. Va. 317, 387 S.E.2d 553 (1989); Bailey v. Mingo County Bd. of Educ., Docket No. 97-29-392 (Jan. 6, 1998) ; Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991). 4. Only when no certified applicant applies for a professional position may a county board of education petition the West Virginia Department of Education for a person to be granted a special permit to fill the post. Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994); Peters, supra. See W. Va. Code §§ 18A-3-1 et seq.

5. MCBE abused its discretion by applying for a permit from the West Virginia Department of Education to allow Intervenor to serve as a Principal when there were other fully certified applicants available to fill the position. See W. Va. Code § 18A-3-2; Johnson, supra; Grossl, supra; Peters, supra.

6. Although Grievant established that he was more qualified than the successful applicant for the position at issue, Grievant failed to establish that he was entitled to instatement into the position as the best-qualified applicant in accordance with W. Va. Code § 18A-4-7a. See Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992); Bell, supra; Suan v. Lewis County Bd. of Educ., Docket No. 91-21-074 (Aug. 28, 1991).

Accordingly, this Grievance is **GRANTED, IN PART**. Respondent Mingo County Board of Education is hereby **ORDERED** to repeat the selection process for the position of Principal of Tug Valley High School in accordance with this decision.

Any party may appeal this decision to the Circuit Court of Kanawha County or 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 andState 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: June 15, 1998

Footnote: 1

Grievant was represented by Kathleen Smith of the West Virginia Education Association. MCBE was represented by Assistant Superintendent W.C. Totten. Intervenor was represented by Anita Mitter of the West Virginia Education Association.

Footnote: 2

The merits of this disciplinary transfer were previously adjudicated in a prior decision by this Grievance Board. Hoffman v. Mingo County Bd. of Educ., Docket No. 95-29-527 (May 31, 1996). Accordingly, the validity of that action is res judicata, and the undersigned is without authority to reconsider the propriety of that decision. Meeks v. Kanawha County Bd. of Educ., Docket No. 96-20-095 (Feb. 28, 1997); Woodall v. W. Va. Dept. of Transp., Docket No. 93-DOH-393 (Feb. 2, 1994); Ramsey v. W. Va. Dept. of Health & Human Serv., Docket No. 90-H-478 (July 31, 1991).

Footnote: 3

Intervenor may not be considered in this process, as he was not minimally qualified for the position at issue.