GLORIA TOMBLIN,

Grievant,

v. **Docket No. 98-22-132**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., Gloria Tomblin (Grievant) filed this grievance against Respondent Lincoln County Board of Education (LCBE) on February 23, 1998. Grievant contends LCBE violated W. Va. Code § 18A-4-7a when it selected Melissa Vinson to fill a long-term substitute teaching assignment. After her grievance was denied at Level I, Grievant appealed to Level II, where an evidentiary hearing was conducted on March 6, 1998. Thereafter, the grievance was denied by the Superintendent's designee, Charles S. McCann, on April 21, 1998. Grievant waived consideration of her appeal by LCBE at Level III, as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on April 27, 1998. An evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on May 21, 1998. This matter became mature for decision on June 8, 1998, upon receipt of Grievant's proposed findings. (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 Respondent Lincoln County Board of Education (LCBE) as a substitute teacher. As of the 1997-98 school year, Grievant was serving in her fifth year as a

substitute.

2. On January 13, 1998, LCBE posted a vacancy for a classroom teacher at Ranger Elementary School. The posting indicated that the successful applicant would be teaching first grade until the return of the regular teacher, Michael Christian, but not to exceed the 1997-98 school year. G Ex 2 at L II. A standard job description for an elementary teacher was attached to the posting.

3. Neither the posting nor the attached job description indicated any particular specialized training was required for the teaching position at Ranger Elementary. See G Ex 2 at L III.

4. On January 5, 1998, Grievant was assigned to serve as a substitute for Mr. Christian, teaching first grade at Ranger Elementary. She remained in that capacity until a selection was made from the posting on January 27, 1998. 5. Grievant, Melissa Vinson, Matthew Miller, and Rebecca Carr made timely application for the teaching vacancy.

6. Grievant received substitute teacher evaluations on December 10,1997, and January 22, 1998. The first evaluation was conducted by Ferrelsburg Elementary Principal Bill Bryan in regard to Grievant's substitute teaching in a sixth grade class. G Ex A. The second evaluation was conducted by Ranger Elementary Principal Sheila Burns in regard to Grievant's substitute teaching in Mr. Christian's first grade class. G Ex B.

7. Grievant was rated satisfactory in all categories on the first evaluation. G Ex A. On the subsequent evaluation rendered by Ms. Burns, Grievant received “needs improvement” ratings in three categories; “manages class effectively,” “maintains an effective relationship with parents,” and ”takes appropriate action in regard to parents' requests, complaints, and concerns.” G Ex B.

8. Ms. Vinson received two completely satisfactory evaluations as a substitute teacher for LCBE prior to her selection for the position at issue.

9. Grievant is certified to teach elementary education, K-8. She has a bachelor's degree plus 15 hours.

10. Ms. Vinson is certified to teach multiple subjects, K-8. She was in her first year of substitute teaching for LCBE during the 1997-98 school year. Of 60 days teaching as a substitute, Ms. Vinson taught approximately 15 days at Ranger Elementary.

11. Grievant and Ms. Vinson were both on the Dean's List in college. The record does not contain their overall grade point averages.

12. Assistant Superintendent Charles S. McCann serves as Personnel Director for Lincoln

County Schools. Mr. McCann interviewed Grievant to update her personnelrecords as a substitute in October 1997. Mr. McCann interviewed Ms. Vinson at approximately the same time for the same purpose. He did not interview any of the applicants after the position was posted in January.

13. Mr. McCann prepared a matrix applying the first set of factors in W. Va. Code § 18A-4-7a to the four applicants. He awarded credit to Grievant in four of the seven criteria: (1) appropriate certification or licensure; (2) amount of coursework or degree level in relevant field and degree level generally; (3) academic achievement; and (4) other measures or indicators (interview). Mr. McCann awarded credit to the successful applicant, Ms. Vinson, in all seven criteria: (1) appropriate certification or licensure; (2) amount of experience relevant to the subject area; (3) amount of coursework or degree level in relevant field and degree level generally; (4) academic achievement; (5) relevant specialized training; (6) past performance evaluations; and (7) other measures or indicators (interview). See G Ex 3 at L II.

14. Ms. Vinson and Grievant received training in “Success for All,” a Title I reading program. Mr. McCann considered this program to be specialized training relevant to the position at issue. Mr. McCann was not aware that Grievant completed this program in January 1998, while substituting for Mr. Christian at Ranger Elementary.

15. Principal Burns recommended that Melissa Vinson be hired for the teaching vacancy at Ranger Elementary. Mr. McCann considered Ms. Burns' recommendation in recommending Ms. Vinson's selection to LCBE Superintendent Rick Powell.

16. LCBE hired Melissa Vinson to fill the temporary vacancy at Ranger Elementary, effective January 28, 1998. G Ex C. 17. Ms. Vinson held the temporary position for 28 days before Mr. Christian returned. Grievant worked for LCBE as a substitute in another position for 14 of those 28 days.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. More particularly, in order to prevail on her claim of improper selection, Grievant must establish that she was more qualified than the successful

applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process was used. Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990). See Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

When, as here, no “permanently employed instructional personnel” applied for the teaching vacancy, the county board is authorized to apply the more flexible standards in the "first set of factors" set forth in W. Va. Code § 18A-4-7a. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Cutlip v. Braxton County Bd. of Educ., Docket No. 92-04-406 (Nov. 30, 1992). The following statutory language governs this selection:

> 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 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 foregoing Code provision does not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson, supra; Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55- 022 (Sept. 1, 1994); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993). See 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).

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). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Christian v. Logan County Bd. of

Educ., Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the grievance procedure is not intended as a "super interview" but merely an analysis of the legal sufficiency of the selectionprocess at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89- 20-75 (June 26, 1989). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997).

Grievant complains that LCBE Assistant Superintendent McCann erred in applying the first set of factors under W. Va. Code § 18A-4-7a, by crediting the successful applicant with "relevant specialized training," although no particular training requirement was included in the posting. Grievant relies upon Hall v. Mercer County Board of Education, Docket No. 96-27-175 (Apr. 30, 1997). Hall applied Richmond v. Raleigh County Board of Education, Docket No. 92-41-363 (May 27, 1993), noting when a county board "wants to rely on specific criteria and considerations in selecting an applicant, it must give notice thereof in its postings."

More recently, in Younger v. Marshall County Board of Education, Docket No. 97- 25-432 (May 13, 1998), this Grievance Board noted that the Hall ruling involved the second set of factors in W. Va. Code § 18A-4-7a. Younger pointed out that the language in the second set of factors addresses "specialized training directly related to the performance of the job as stated in the job description." However, the first set of factors only states that "consideration shall be given to," among other things, "relevant specialized training." Clearly, the Legislature must have intended to give county boards of education more flexibility under the first set of factors by employing more general language regarding specialized training. See Younger, supra. Because Grievant failed to demonstrate that the specialized training which Mr. McCann noted, "Success for All," was not relevant to the position at issue, Grievant has not established that Ms. Vinson should not have prevailed on this category. It was incumbent upon Grievant to advise Mr. McCann in her applicationif she had completed any relevant specialized training that would not yet be reflected in her personnel records. Accordingly, consistent with Younger, the prior rulings of this Grievance Board in Hall and Richmond are distinguished.

Grievant also complains that LCBE erred in applying the past performance evaluations criterion because three "needs improvement" areas on a performance evaluation covering twenty-three categories should not prevent her overall evaluation from being considered as satisfactory. Although the performance evaluation, on its face, indicates that Grievant needed improvement in only two or three areas, it was not improper, or an abuse of the board's substantial discretion, to consider that the

successful applicant had no such comments on her evaluation. See Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991). Ms. Vinson was correctly awarded credit on this criterion. (See footnote 2)

Grievant further contends that Mr. McCann improperly awarded credit to Ms. Vinson for "amount of teaching experience in the subject area." Mr. McCann acknowledged during the Level IV hearing that he primarily considered the number of days Ms. Vinson taught at Ranger Elementary during the 1997-98 school year. Obviously, the "subject area" which could properly be applied under this criterion is primary or elementary education, not the number of days a teacher has taught at a particular level in a particular school orclassroom. (See footnote 3) Moreover, even if this could be considered, the records indicate Ms. Vinson had only worked fifteen days at Ranger as of the time she was selected to fill the vacancy at issue. With over four years of substitute teaching, primarily at the elementary level, credit for this criterion should have been awarded to Grievant. See Cutlip, supra.

Grievant does not contest Mr. McCann's award of credit for appropriate certification and academic achievement to both herself and Ms. Vinson. In regard to "degree level in the relevant field," Grievant notes that she had more hours beyond her bachelor's degree than Ms. Vinson. However, as both applicants held the same degree level, LCBE did not err in giving credit to each of them on this criterion.

Mr. McCann gave credit to each applicant under the "other measures or indicators" criterion, primarily based upon the positive interviews he had conducted with Grievant and Ms. Vinson several months earlier. (See footnote 4) However, he credibly testified that the Principal at Ranger Elementary preferred Ms. Vinson, a preference which is completely consistent with the evaluation she rendered on Grievant's performance as a substitute. Notwithstanding this input from the Principal at Ranger, Mr. McCann awarded credit to both Grievant and Ms. Vinson under the "other measures" criterion, and the record does not indicate that this determination was arbitrary and capricious. Had Mr. McCann properly applied the first set of factors in W. Va. Code § 18A-4-7a to assess the relative qualifications of the applicants, his matrix would have indicated that Grievant should have received credit in the criterion of amount of experience relevant to the subject area instead of Ms. Vinson. Thus, Ms. Vinson properly prevailed on the basis of a mathematical application of the factors. However, even if Grievant and Ms. Vinson should have been "tied" by Grievant prevailing on an

additional factor in dispute, this would not result necessarily in awarding the position to Grievant.

According to Mr. McCann's testimony at Levels II and IV, while he used the matrix in considering the first set of factors as required by W. Va. Code § 18A-4-7a, he ultimately recommended Ms. Vinson's selection to the Superintendent based on the input he received from Ms. Burns, Ranger Elementary's Principal, who had recently supervised both applicants who were serving as substitute teachers in that school. As previously noted, county boards have substantial discretion in selecting a new classroom teacher, once the statutory factors have been considered. See Fittro, supra. Grievant did not demonstrate that such consideration was improper in any regard, or an arbitrary and capricious basis for selecting between two applicants who were otherwise well qualified for the position at issue.

Although Grievant demonstrated that mistakes were made in applying the statutory factors, it was not shown that Ms. Vinson was unqualified for the position. Cf. Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998) (successful applicant was not properly certified). Accordingly, Grievant failed to establish that the flaws identified in the selection process were so significant that a different outcome would have occurred if the proper process had been used. See Townsend v. Mercer County Bd. of Educ.,Docket No. 97-27-093 (Nov. 4, 1997); Cutlip, supra. While another individual might have selected Grievant for the position at issue based upon her greater amount of teaching experience in the county, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial 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 did not establish that LCBE's ultimate decision to select Ms. Vinson was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such professional determinations.

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 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. When no permanently employed instructional personnel of a county board of education make application for a classroom teaching position, the county board of education must assess and consider the applicants' credentials in the following areas: appropriate certification and/or licensure, the amount of teaching experience in the subjectarea, the amount of 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. W. Va. Code § 18A-4-7a; Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996).

3. In reviewing a county board's exercise of discretion in a hiring decision, the inquiry into the process by which the decision was made must be thorough and searching, but considerable deference must be afforded those conducting it. Fittro, supra; Jenkinson, supra; Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

4. LCBE did not misapply the “relevant specialized training” criterion under the first set of factors in W. Va. Code § 18A-4-7a by awarding credit to the successful applicant for completing the “Success for All” Title I reading program. See Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998).

5. LCBE misapplied the “amount of teaching experience in the subject area” criterion under the first set of factors in W. Va. Code § 18A-4-7a by awarding credit to the successful applicant based upon the number of days teaching as a substitute at a particular grade level or in a particular school. See Cutlip v. Braxton County Bd. of Educ., Docket No. 92-04-406 (Nov. 30, 1992).

6. LCBE did not apply the “past performance evaluations” criterion incorrectly under the first set of factors in W. Va. Code § 18A-4-7a, by awarding credit to the successful applicant based upon two substitute teacher evaluations wherein she was rated satisfactory in all categories, but denying such credit to Grievant who received “needsimprovement” comments in three categories of her most recent substitute teacher evaluation, all other categories in that and a prior evaluation having been rated as satisfactory. See Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991).

7. In order to obtain instatement to a position or a reevaluation of the applicants, a grievant must not only demonstrate flaws in the process, but must also show that had the process been more accurate and/or fair, the ultimate selection might reasonably have been different. Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998); Hopkins, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

8. Grievant failed to establish that she was more qualified for the position at issue than the successful applicant.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Lincoln County or the Circuit Court of Kanawha 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: June 29, 1998

Footnote: 1

Grievant was represented by Anita Mitter of the West Virginia Education Association. Respondent was represented through the Level IV hearing by its General Counsel, Charles Damron. LCBE subsequently retained Erwin Conrad as counsel in this matter. Mr. Conrad submitted a post-hearing brief in behalf of LCBE, dated June 11, 1998. As this brief was not timely filed, it has not been considered in deciding this grievance.

Footnote: 2

As previously discussed in addressing Grievant's argument concerning specialized training, the first and second sets of factors under W. Va. Code § 18A-4-7a contain different language regarding evaluations. While the second set refers specifically to "an overall rating of satisfactory in evaluations over the previous two years," the first set only requires consideration of "past performance evaluations. . . ."

Footnote: 3

Grievant attempted to argue the reverse of this proposition, that she should have been retained as the long-term substitute at Ranger because she had already been teaching the students in Mr. Christian's class for over two weeks. Grievant's interpretation of the applicable criteria is no more persuasive than LCBE's.

Footnote: 4

As all applicants were treated equally, it was not improper for LCBE to rely upon interviews that were conducted at an earlier point during the same school year. See Covert v. Boone County Bd. of Educ., Docket No. 89-03-688 (June 27, 1990).