ELIZABETH D. DAVIS,

Grievant,

v. **Docket No. 98-35-500**

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Elizabeth D. Davis, employed by the Ohio County Board of Education (OCBE) as a teacher, filed a level one grievance on August 6, 1998, in which she alleged, "I was unjustifiably denied a full-time position at Wheeling Park High School in the Language Arts Department. I am fully qualified for the position and was discriminated against in not being awarded the job. When I sought an informal conference pursuant to law I was refused the opportunity to meet with Mr. Krelis, my immediate supervisor and thus denied due process." For relief, Grievant requested placement as a full-time Language Arts teacher at WPHS, with lost income, costs, and attorney fees.

The grievance was denied at levels one and two. Grievant waived consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on December 14, 1999. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on February 18, 1999, at which time Grievant was represented by Owens Brown, WVEA Consultant, and OCBE was represented by Howard E. Seufer, Jr., Esq. The grievance became mature for decision with the receipt of proposed findings of fact and conclusions of law on or before March 17, 1999.

The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. From 1974 to 1988, and 1995 through 1998, Grievant was employed by OCBE as a substitute teacher. She holds a PhD in English, and is certified to teach English, grades 7-12, and Social Studies, grades 7-9.

2. From April 21, 1998, through April 27, 1998, OCBE posted notice of a vacancy in the position of Language Arts Teacher at Wheeling Park High School (WPHS). The notice required interested applicants to apply in writing, submit a resume, and complete an Applicant Qualification

Matrix.

3. The Applicant Qualification Matrix is a form prepared by the school system on which applicants provided information relating to their credentials. The questions are designed to cover the seven qualification criteria under which classroom teaching positions must be filled when one or more permanently employed instructional personnel apply.

4. The applicants for the position included Grievant, and the successful applicant, Pam Brock.

5. OCBE administrators reviewed the applicants' resumes, Applicant Qualification Matrices, and their personnel files. None of the applicants were interviewed.

6. Based upon a review of the applicants' credentials, OCBE's Director of Human Resources determined that both Grievant and Ms. Brock had the “appropriate certification and/or licensure”, and had “teaching experience in the required certification area”. Grievant was deemed to have acquired a greater ”total amount of teaching experience”, and a “higher degree level in the required certification area”. Ms. Brock was credited for receiving an “overall rating of satisfactory in evaluations over the previous two years”, and she had more seniority than Grievant. Neither candidate received credit for “specialized training directly related to the performance of the job as stated in the jobdescription”, because none was specified.

7. Because Ms. Brock and Grievant had each received three points in the evaluation, the tie was broken by the seniority factor, and Ms. Brock was awarded the position.

8. From July 6, 1998, to July 10, 1998, OCBE posted vacancy notices for two Language Arts teaching positions, one at WPHS and the other at Triadelphia Middle School (half-time).

9. Grievant was out of town during the posting period, and did not apply for the second position available at WPHS.

10. A third Language Arts teaching position at WPHS was posted from December 11, through December 17, 1998. Grievant applied for, and was awarded the assignment, effective January 25, 1999.

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.

Grievant argues that she should have been hired in August because Ms. Brock had erroneously been given credit for the factor of "receiving an overall rating of satisfactory in evaluations over the previous two years". Grievant claims that Ms. Brock had not yet received two evaluations at the time the position was filled. Without the credit forsatisfactory evaluations, Grievant would have prevailed over Ms. Brock, and been employed in August 1998.

Respondent asserts that Ms. Brock was evaluated twice during the 1997-98 school year, and was rated as satisfactory on both occasions. Additionally, she was evaluated as satisfactory for the 1996-97 school year by her employer, a parochial school. Finally, Ms. Brock was employed by Marshall County Schools during the summers of 1995 and 1996, and her performance was satisfactory, as evidenced by a letter from the principal.

W. Va. Code §18A-4-7a provides in pertinent part:

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. . . .

In the present matter, OCBE correctly applied this set of factors to the position in question because at least one applicant was a permanent employee. However, the criterion of satisfactory evaluations over the previous two years is somewhat troublesome, as applied herein, because Ms. Brock had only been employed by OCBE for four months at the time she applied for the full-time WPHS position. The record includes only the evaluations from WPHS, dated May 11, 1998, and from Triadelphia Middle School, datedJune 5, 1998. (See footnote 1) At the level four hearing, Kathy Finsley, OCBE Director of Human Resources, testified that she considered Ms. Brock's two evaluations as a regular employee, and a letter indicating that she had been evaluated as satisfactory for the 1996- 97 school year in her position at St. John The Evangelist School. (See footnote 2)

OCBE argues that Code §18A-4-7a does not require that the evaluations be performed under

West Virginia Board of Education Policy 5310, and that had the legislature intended such a limitation, it could have included language to effectuate that intent, as it had in an earlier version of Code §18A-4-7a, which referred to “past performance evaluations conducted pursuant to §18A-2-12". Applying this argument, OCBE asserts that it was not error to consider Ms. Brock's evaluation from the parochial school, or the letter from Marshall County, regarding her summer employment.

Accepting OCBE's argument that evaluations which specify whether an employee's performance is satisfactory or not, may be considered when filling positions under Code §18A-4-7a, two serious flaws nevertheless invalidate OCBE's evaluation of the criterion. First, Ms. Brock was only employed for four months, not an entire year, at the time of her application, and only for one semester at the time the position was filled. The second flaw is that Ms. Finsley did not see the evaluation from the parochial school, but only a letter which referred to it. Even if evaluations from outside the school system are accepted, it would be reasonable to actually see the evaluation. The document, admitted asRespondent's Exhibit 4 at level four, is revealed to be minimal, providing a narrative recitation of the employee's strengths, concerns, and suggestions for improvement. It does not include any type of rating system of satisfactory, needs improvement, exceeds expectations, etc. In conclusion, Ms. Brock was erroneously given credit for two years of satisfactory evaluations.

The issue of relief must next be considered. Grievant requests instatement to the assignment assumed by Ms. Brock, effective August 24, 1998, with all backpay and benefits to which she would be entitled. After WPHS Principal George Krelis testified that his staff do not have specified teaching assignments, but rather are given their class assignments on an as-needed basis each semester, Grievant explained that her request for Ms. Brock's assignment was made to secure a permanent classroom for herself. As Grievant is the teacher with the least seniority, she is required to travel from room to room throughout the day, and testified that the movement, with her books and supplies, aggravated a knee injury.

OCBE argues that Grievant is not entitled to relief because an unsuccessful applicant for a position has a duty to mitigate his or her damages by accepting similar employment to that sought in the grievance. If Grievant had applied for the second posted vacancy, OCBE asserts that she would have been the most qualified applicant, and would have entered into employment on August 24, 1998, the same date as Ms. Brock. Addressing the issue of a room assignment, OCBE asserts that this matter was initially raised at level four, and is a new request which should be made outside this

grievance.

Grievant testified that she was out of state during the posting period July 4 through 11. She concedes that she did not call the hotline to check position vacancies, or haveanyone else monitor the hotline for her in her absence. It is accurate, as OCBE argues, that an individual has a duty to mitigate her damages by accepting similar employment. This does not mean, however, that the individual must sit by the telephone to apply for each and every job opening. Grievant did apply for the third position, which she received. Under these circumstances, Grievant is entitled to backpay and benefits from August 24, 1998, to January 25, 1999, including a permanent room, if she has sufficient seniority. (See footnote 3)

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. W. Va. Code §18A-4-7a provides in pertinent part:

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 teachingexperience; 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. . . .

3. Grievant has proven by a preponderance of the evidence that the successful applicant was improperly awarded the position in question based upon an erroneous credit for receiving two years of satisfactory evaluations.

4. Grievant's failure to apply for the next available position when she was out of state during the posting period, and OCBE was in possession of a prior application, does not result in her failure to mitigate damages barring an award of relief.

Accordingly, the grievance is **GRANTED**, and OCBE Ordered to adjust Grievant's seniority date to August 24, 1998, and provide her with all backpay and benefits which she would have received until the date she was hired, January 25, 1999.

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

Date: March 26, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Ms. Brock was employed at both schools the second semester of the 1997-98 school year.

Footnote: 2

This position was not filled by OCBE until June 22, 1998, by which time both of Ms. Brock's 1997-98 evaluations had been completed.

Footnote: 3

Due to the outcome of the grievance it is unnecessary to address the alleged due process violation, or the claim of discrimination.

Consistent with previous decisions issued by the Grievance Board, no award of costs or attorney fees will be made.