VADA R. OOTEN,

Grievant,

v.

DOCKET NO. 98-29-417

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Vada R. Ooten, filed the following grievance against her employer, the Mingo County Board of Education ("Board") on August 31, 1998:

> Grievant is employed by the Respondent as a substitute teacher's aide. Grievant applied for a vacant position as a sign language specialist at Kermit K-8 School. The position was awarded to a candidate who had not previously been employed as a school service employee by the Respondent. The Grievant alleges a violation of West Virginia Code § 18A-4-8b and 18A- 4-8g and requests instatement into this position, all wages, benefits and regular employment seniority retroactive to the date of the filling of the vacancy, and interest on all monetary sums.

The grievance was denied at level one, and a level two hearing was conducted on October 1, 1998. The grievance was denied by the Superintendent's designee, William C. Totten, by decision dated October 15, 1998. The grievance was by-passed at level three in accordance with W. Va. Code § 18-29-4(c), and appealed to level four on October 23, 1998. A level four hearing was held on December 4, 1998, and this grievance became mature for decision on January 7, 1999, the deadline for the parties' submission ofproposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by David Temple, Administrative Assistant for the Board.

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

None

LII Board Exhibits

Ex. 1 -

Service Personnel Vacancies 1998-99 School Year Posting No. 1, July 7, 1998.

Ex. 2 -

Job Description: Sign Language Specialist

Ex. 3 -

July 30, 1998 letter from Karen Browning, Director, to David Temple, Administrative Assistant.

LIV Grievant's Exhibits

Ex. 1 -

Undated memorandum from Connie Pitman, Sign Language Interpreter and Instructor, to Whom It May Concern.

Ex. 2 -

West Virginia Rehabilitation Center Sign Language Instruction Class Descriptions.

Testimony

Grievant testified in her own behalf, and presented the testimony of Karen Browning. The Board presented no witnesses.

FINDINGS OF FACT

1. Grievant has been employed as a substitute Special Education Aide with the Board since January 1991.

2. On July 1, 1998, the Board posted a vacancy for a Sign Language Specialist at Kermit K-8

School, with an attached job description. LII Board Exs. 1, 2. 3. The qualifications listed on the job description for the Sign Language Specialist are:

1. Must have a high school diploma or equivalent;
2. Must have completed an interpreter training program and have appropriate certification as an interpreter;
3. Must have experience working as an interpreter with students in a classroom setting;
4. Must be able to translate the spoken word at a normal conversation rate using a sign system;
5. Must be able to reverse interpret (voice interpret) from sign language to the spoken word;
6. Must have knowledge of deafness and hearing impairments and their effect on language development.

LII Board Ex. 2. It is not known who developed the job description for Sign Language Specialist for the Board. The Board had never hired a Sign Language Specialist before this position.

4. The position was needed for child who would be attending first grade at Kermit K-8 School.

5. Grievant and Marilyn Gilman applied for the position.

6. Grievant's qualifications are as follows: Grievant has her GED equivalent to a high school diploma. Grievant had not, at the time of the selection, completed an interpreter training program, and was not certified as an interpreter. Grievant had worked in a classroom setting as a special education aide, and specifically with the child who needed signing services in Kindergarten, using sign language to communicate with the child. Grievant has successfully completed beginner through advanced sign language training, and at the time of the selection, was enrolled in interpreter training. LIV G. Ex.1. Grievant can translate the spoken word using a sign system. Grievant can reverse interpret sign language to the spoken word. LIV G. Ex. 1.

7. Ms. Gilman's qualifications are as follows: Ms. Gilman had, at the time of the selection, completed sign language instruction through interpreter training, but was not certified as an interpreter. (See footnote 1) Ms. Gilman was an independent contractor who worked with the Board

from time to time, and had worked in Kindergarten with the child in question, although no evidence was produced to demonstrate exactly what services she provided to the child.

8. Grievant was notified by telephone to come to the central office for an interview for the position. When Grievant arrived for the interview she discovered that a committee of three, including special education director Karen Browning, would administer a skills test to her.

9. Grievant was required to interpret the signing of one of the interviewers and she was required to sign the pledge of allegiance to the interview team. Grievant was given no opportunity for inservice training prior to the interview. The evaluation of the applicants' performance on the test was subjectively based. There was no scoring system and no pass/fail points. 10. Grievant was nervous because she had not expected a skills test to be administered at that time. She was further handicapped by her unfamiliarity with signing of the member of the interview team. Everyone signs slightly differently and familiarity with the signer improves one's ability to interpret. The interview team felt Grievant did not use all of the correct signs in signing the pledge of allegiance. Grievant signed the pledge as she was taught by her instructor.

11. The Board awarded the position to Ms. Gilman, based upon Ms. Browning's recommendation. LII Board Ex. 3.

12. The Board has employed Grievant and another aide, Penny Estep(sic), to provide sign language assistance in the past as part of their aide duties.

13. Certified interpreters are a rare commodity in West Virginia. There are only two (2) known certified interpreters in the Charleston area, including Connie Pitman, Grievant's and Ms. Gilman's sign language instructor.

14. Ms. Pitman is of the opinion that Grievant is qualified to perform the duties of Sign Language Specialist for the Board. LIV G. Ex. 1.

DISCUSSION

Grievant contends that the Board's selection process was fatally flawed. She alleges that the failure of the Board to devise a test or matrix with objective measurable standards rendered the process suspect. Further, the failure to advise Grievant that she was to be tested so that she could prepare herself mentally and otherwise put her at a serious disadvantage. It is not known whether Ms. Gilman was forewarned of the elements of the interview. Finally, Grievant alleges the Board

violated W. Va. Code § 18A-4-8b inawarding the position to Ms. Gilman, because Grievant was superior in status, superior in seniority, had satisfactory evaluations, and was qualified for the Sign Language Specialist position.

The Board contends Grievant failed to demonstrate that she was qualified for the position through the interview and testing process, and that the selection of Ms. Gilman was not arbitrary or capricious, and was in the best interests of the school.

A county board of education must fill all school service personnel vacancies on the basis of seniority, evaluations of past service, and qualifications. Further, preference in filling vacancies is given in descending order to regular employees, employees on the preferred recall list, substitute employees, and lastly to applicants with no employment status with the board of education. W. Va. Code § 18A-4-8b.

County boards of education also 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. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Such discretion extends to the establishment of qualifications for school service personnel positions so long as such qualifications are consistent with the definitions for the positions found in the Code. Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-002 (Mar. 30, 1992). Such discretion also extends to the comparison of the qualifications of applicants and making determinations about which applicant is more qualified. Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600,457 S.E.2d 537 (1995); Cox v. Hampshire County Bd. of Educ., 177 W. Va. 567, 355 S.E.2d 365 (1987).

These cases have all held, in other words, that having established such qualifications, a board of education may employ them to determine which candidate is most qualified, and may hire that person even though the other candidates who meet the minimum qualifications are more seniored. All of the above cases have dealt with vacancies for supervisory positions, and the courts have uniformly granted the county boards of education discretion in determining the most qualified candidate for a supervisory position. Further, a review of the qualifications of the applicants in those cases demonstrated that the successful applicants had vastly greater qualifications and experience than the unsuccessful applicant.

The instant case does not deal with a supervisory position. It is a service personnel position within the aide classification category of employment, which of necessity requires additional training to meet the minimum qualifications of a Sign Language Specialist.

It is undisputed that Grievant, as a substitute employee, had superior status over Ms. Gilman, who was not an employee of the Board, and that Grievant had satisfactory evaluations. In addition, although neither applicant had in-classification seniority, "total county seniority [is] determinative among applicants who 'qualify' for a service position." See Sargent v. Cabell County Bd. of Educ., Docket No. 96-06-090 (May 2, 1996), rev'd Circuit Court of Kanawha County, Civil Action No. 96-AA-78 (Apr. 23, 1998), Gandee v. Mason County Bd. of Educ., Docket No. 93-296-476 (Sept. 30, 1994); Brewer, supra. The issues to be decided, then, are whether the qualifications established in the Sign Language Specialist job description are consistent with the statutory definition in the Code, and whether Grievant was qualified for the Sign Language Specialist position.

W. Va. Code § 18A-4-8 defines "[b]raille or sign language specialist" as "personnel employed to provide braille and/or sign language assistance to students: Provided, That if any employee has held or holds an aide title and becomes employed as a braille or sign language specialist, the employee shall hold a multiclassification status that includes aide and braille or sign language specialist title, in accordance with section eight-b of this article."

W. Va. Code § 18A-4-8b provides, in pertinent part, that "[p]araprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides."

One way an employee may "meet" the definition of the job title, and thus become qualified, is by passing a competency test. (See footnote 2) However, in the instant case, there is no state competency test for a braille or sign language specialist. In the absence of a state competency test, an applicant may qualify for a position in a classification category of employment by (a) holding or having held a contract in the classification category in question, or (b) by meeting the definition of the class title in the Code. W. Va. Code § 18A-4-8b. Grievant contends that, because she holds a contract in the aide classification category of employment, and since sign language specialist is a part of the aide classification category, Grievant is qualified for the position under the cited statute. This simple logic, of course, cannot prevail. Just because one is employed as an aide with a county board of education does not automatically make one qualified to be a sign language specialist. An applicant

must be able to demonstrate that he or she has completed the necessary training required, and meets the job description requirements set forth by the Board, in order to qualify for such a specialized position.

Grievant established through her own testimony and a letter from her sign language instructor, Connie Pitman (LIV G. Ex. 1), that she met all but one of the requirements in the job description. Grievant had not completed the certified interpreter training, and was not certified as an interpreter. Ms. Gilman had completed the certified interpreter training, but was not certified as an interpreter. The fact that the Board was willing to disregard this deficiency in Ms. Gilman clearly demonstrates certification as an interpreter was not a mandatory requirement for the position, and cannot be held against the Grievant. Further, the testimony established that certified interpreters are rare in West Virginia and, in fact, there are only two (2) known certified interpreters in the Charleston area, including Ms. Pitman. If true, this would appear to create an undue hardship for a Board to require a certified interpreter for a Sign Language Specialist position. No evidence was produced to show that such an advanced level of training would be necessary to provide “sign language assistance” to a first-grade child. Indeed, Grievant, as well as another aide, Penny Estep(sic) had provided sign language assistance for the Board in the past. Therefore, considering how difficult it would be for one county board, let alone several, to require certified interpreters for their Sign Language Specialist positions, I find that such a stringent requirement is not consistent with the statutory definition of Sign Language Specialist, i.e., to provide “sign language assistance” to students.

Deleting that requirement from the job description, as well as the related training requirements for certified interpreter, the remaining issue is whether Grievant was qualified for the Sign Language Specialist position. As a substitute employee with the Board, and therefore, preference on the hiring tier in Code § 18A-4-8b, if Grievant was qualified for the position, then no comparison needed to be made with a non-employee at all, and it would be irrelevant whether Ms. Gilman was the better signer. Grievant would be entitled to the position. See Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997).

In the instant case, Grievant has demonstrated that she minimally met the qualifications set forth by the Board for the Sign Language Specialist position, absent the criteria regarding certified interpreter training and licensing. Scant evidence was produced as to the successful applicant's qualifications, other than a subjective determination by the interview team that she was more

proficient than Grievant at signing. As Grievant has established minimum qualifications for the position, the Board should have awarded her that position according to the instructions of Code § 18A-4-8b.

CONCLUSIONS OF LAW

1. A county board of education must fill all school service personnel vacancies on the basis of seniority, evaluations of past service, and qualifications. Further,preference in filling vacancies is given in descending order to regular employees, employees on the preferred recall list, substitute employees, and lastly to applicants with no employment status with the board of education. W. Va. Code § 18A-4-8b.

2. County boards of education also 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. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. Such discretion extends to the establishment of qualifications for school service personnel positions so long as such qualifications are consistent with the definitions for the positions found in the Code. Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Brewer v. Mercer County Bd. of Educ., Docket No. 91- 27-002 (Mar. 30, 1992). Such discretion also extends to the comparison of the qualifications of applicants and making determinations about which applicant is more qualified. Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Cox v. Hampshire County Bd. of Educ., 177 W. Va. 567, 355 S.E.2d 365 (1987).

4. It is undisputed that Grievant, as a substitute employee, had superior status over Ms. Gilman, who was not an employee of the Board, and that Grievant had satisfactory evaluations. In addition, although neither applicant had in-classification seniority, “total county seniority [is] determinative among applicants who 'qualify' for a service position.” See Sargent v. Cabell County Bd. of Educ., Docket No. 96-06-090 (May 2, 1996), rev'd Circuit Court of Kanawha County, Civil Action No. 96-AA-78 (Apr. 23,1998), Gandee v. Mason County Bd. of Educ., Docket No. 93-296-476 (Sept. 30, 1994); Brewer, supra.

6. The requirement in the job posting that a Sign Language Specialist be trained and certified

as an interpreter is too stringent and is not consistent with the statutory definition of Sign Language Specialist, as someone who provides “sign language assistance” to students.

7. Grievant has proven by a preponderance of the evidence that she met the minimum qualifications for the Sign Language Specialist position, absent the criteria requiring training and certification as an interpreter.

8. Grievant established that she had more seniority, satisfactory evaluations, and met the minimum qualifications for the subject position according to the clear language in W. Va. Code § 18A-4-8b. As such, she was entitled to the Sign Language Specialist position, without comparison to a non-employee. See Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997).

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to instate Grievant into the Sign Language Specialist position, with all back pay, benefits and interest to which she is entitled.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 25, 1999

Footnote: 1

The level two decision includes information about Ms. Gilman's qualifications that was not presented as evidence at the level two hearing. The level two hearing examiner inappropriately included his own personal knowledge of Ms. Gilman into his decision, clearly to the detriment of Grievant. No further information was provided about Ms. Gilman's qualifications at level four, and the undersigned cannot accept as evidence the level two hearing examiner's statements regarding Ms. Gilman.

Footnote: 2

State Board of Education guidelines provide that applicants for positions in certain classifications, such as electrician, which require a license or certification from an accepted institution or agency, will be considered qualified and will not be required to take a competency test.