THOMAS HOFFMAN,

Grievant,

v. **Docket No. 99-29-162**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

JEFFREY REYNOLDS,

Intervenor.

D E C I S I O N

On September 30, 1996, Thomas Hoffman (Grievant), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., against Respondent Mingo County Board of Education (MCBE), challenging his non-selection for a Dean of Students position at Williamson High School (WHS). As permitted by W. Va. Code § 18-29-3(c), this grievance was filed at Level II, where MCBE agreed to hold the matter in abeyance pending resolution of a grievance filed against MCBE by Frank Jones. Following receipt of the decision of the West Virginia Supreme Court of Appeals in Mingo County Board of Education v. Jones, 512 S.E.2d 597 (1998), a Level II evidentiary hearing was conducted on February 17, 1999. As authorized by W. Va. Code § 18-29-3(u), Jeffrey Reynolds(Intervenor), the current Assistant Principal at WHS, became a party to this matter at the Level II hearing. On April 12, 1999, MCBE Superintendent John T. Mattern issued a decision denying the grievance at Level II. (See footnote 1) As permitted by W. Va. Code § 18-29-4(c), Grievant waived consideration of his grievance at Level III, appealing to Level IV on April 16, 1999. Without objection from the other parties, Grievant further elected to waive a Level IV hearing, relying upon the record developed

through Level II. After receiving input from the parties, the undersigned Administrative Law Judge established a briefing schedule. Timely written arguments were received from Grievant and Respondent, and this matter became mature on June 11, 1999, the deadline for filing reply briefs. (See footnote 2)

Based upon a preponderance of the credible evidence contained in the record established at Level II, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Mingo County Board of Education (MCBE) as a classroom teacher. HT at 7.

2. Grievant was first employed by MCBE in 1986. Since 1987, he has been certified to serve in administrative positions in the public schools. In 1992, the WestVirginia Department of Education issued his permanent certification as a school administrator. G Ex 2. Grievant is also certified to teach General Science, 7-12, and Social Studies, 7-9. HT at 8.

3. As of July 1, 1994, Grievant had attained a Master's Degree plus 45 additional graduate hours. G Ex 2; HT at 10.

4. On January 20, 1994, the West Virginia Education and State Employees Grievance Board issued a decision in the matter of Talbert v. Mingo County Board of Education, Docket No. 93-29-166 (Talbert I), holding that the Dean of Students position at MCBE's Lenore Junior High School was, in essence, an Assistant Principal's position, which requires administrative certification.

5. Since the Talbert I decision, MCBE has attempted to fill Dean of Students vacancies with personnel holding administrative certification. HT at 33.

6. On July 26, 1996, MCBE posted a vacancy for a Dean of Students position at Williamson High School (WHS), for the 1996-97 school term only. G Ex 3.

7. On August 2, 1996, the WHS Dean of Students position was posted again, this time as a permanent position. G Ex 4.

8. MCBE's official position description for Dean of Students, effective September 15, 1992, provides the following qualifications for the position:

Valid Professional Teaching Certification

AB, 5 years teaching experience

Administrative Certificate preferred/not required for consideration

G Ex 8. 9. The duties assigned to the Dean of Students under the position description described in Finding of Fact Number 8, above, are substantially the same as were listed in the position description described in the Talbert I decision. HT at 34-35; cf. G Exs 8 & 9.

10. Pursuant to the posting on July 26, 1996, Grievant and 21 other applicants applied for the WHS Dean of Students position. Grievant was among those interviewed for the vacancy by a committee consisting of WHS' Principal and two teachers. The position was reposted as a permanent position before anyone was recommended to fill the position. HT at 20.

11. Pursuant to the posting on August 2, 1996, Grievant and 19 other applicants were considered. Grievant was again interviewed by WHS' Principal and two different WHS teachers. HT at 20.

12. Of the applicants considered pursuant to the second posting, only Grievant and Frank Jones were certified in administration.

13. At the time he applied for the WHS Dean of Students position, Grievant was assigned to WHS as a classroom teacher. During the course of his employment by MCBE, Grievant previously served as Principal of a Junior High School and Principal of Matewan High School.

14. Grievant received satisfactory evaluations during his first two years as Principal of Matewan High School. After his third year at Matewan, Grievant received an unsatisfactory evaluation and was demoted to a teaching position. Since his demotion, Grievant has received satisfactory evaluations as a classroom teacher. 15. Because of his unsatisfactory evaluation for the 1994-95 school year, and his subsequent demotion from Principal of Matewan High School to a classroom teaching position, MCBE Superintendent Everett Conn determined that Grievant was not qualified to fill the Dean of Students position at WHS. HT at 46-47.

16. Following the second set of interviews, Superintendent Conn recommended Intervenor Jeffrey Reynolds for the WHS Dean of Students position. MCBE did not accept this recommendation. Mr. Reynolds did not then hold administrative certification.

17. On September 30, 1996, Grievant initiated this grievance contesting his non- selection for the WHS Dean of Students position.

18. On November 7, 1996, MCBE approved placement of Doug Jackson in the WHS Dean of Students position as a “long-term substitute,” retroactive to September 4, 1996. Mr. Jackson was to remain in that position until June 8, 1996, or a circuit court decision was rendered in the matter of Jones v. Mingo County Board of Education. G Ex 7.

19. In January of 1997, Mr. Jackson was reassigned to MCBE's central office as Director of the Mingo County Alternative Program. In April 1997, MCBE placed Glenn Justice in the WHS Dean of Students position as a substitute. G Ex 6.

20. For the 1997-98 school year, Don Roberson was transferred from Delbarton Grade School to serve as the WHS Dean of Students. HT at 51.

21. The WHS Dean of Students position has not been filled since the 1997-98 school year. 22. The WHS Dean of Students position is a 210-day position. MCBE's regular classroom teaching positions are 200-day positions. G Exs 3 & 4; HT at 8.

23. MCBE posted a vacancy for an Assistant Principal/Teacher's position at WHS, commencing with the 1998-99 school year. Intervenor applied for and was selected for that position. HT at 42.

24. The Assistant Principal's position held by Intervenor involves significantly different duties from the Dean of Students position Grievant is seeking through this grievance. Cf. I Ex 1 & G Ex 8.

25. In or about September 1996, Frank Jones initiated a grievance contesting his non-selection for the WHS Dean of Students position. HT at 51-52.

26. On January 27, 1999, Frank Jones indicated he was no longer an applicant for the Dean of Students position at issue, effectively withdrawing his grievance. See G Ex 1.

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. By agreement of the parties, this grievance was held in abeyance awaiting the outcome of a grievance filed by Frank Jones against MCBE. On

December 15, 1998, the West Virginia Supreme Court of Appeals issued its decision in Mingo County Board ofEducation v. Jones, 512 S.E.2d 597 (1998), resolving that dispute. Grievant contends that the outcome of this grievance is controlled by the language in W. Va. Code § 18A-4-7a, and the Jones decision.

The following provisions in W. Va. Code § 18A-4-7A are pertinent to resolution of this dispute:

> 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 certification 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 coursework 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 are indicators upon which the relative qualifications of the applicant may fairly be judged.
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> Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period. If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within 30 working days of the end of the posting period.

In Syllabus Point 2 of Jones, supra, the West Virginia Supreme Court of Appeals declared the following rule of law to be applied in interpreting the above-quoted statute:

> When a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7(a), and one or more qualified applicants apply for the positionwithin the posting period, the school board must select a qualified applicant from those who applied during the posting period.

Ordinarily, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is 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). However, in Jones, the Supreme Court of Appeals firmly declared that county boards of education must strictly adhere to the terms of the job postings they issue pursuant to W. Va. Code § 18A-4-7a. Syl. Pt. 3, Jones, supra. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Therefore, in accordance with Jones and W. Va. Code § 18A-4-7a, MCBE was required to select a qualified applicant from the pool of applicants who timely applied for the vacancy, and met the minimum qualifications for the position.

MCBE and Grievant directed a substantial portion of their written arguments to the issue of whether the Dean of Students position at issue required administrative certification. Grievant apparently made this argument in an effort to narrow the field of minimally qualified applicants to himself and Mr. Jones. Certainly, the issue of whether a Dean of Students position is administrative has generated considerable litigation before this Grievance Board. See, e.g., Ward v. Mingo County Bd. of Educ., Docket No. 94-29- 1134 (April 26, 1995); Talbert I, supra. However, for purposes of resolving this grievance this issue need not be addressed, as Grievant would not prevail under either interpretation. None of the other applicants, excepting Mr. Jones, preserved their right to pursue this position by filing a timely grievance over MCBE's failure to fill the vacancy in accordance with the posting. Intervenor, while timely intervening to protect his interests in the Assistant Principal position at WHS which he attained in 1998, did not file a timely grievance challenging MCBE's failure to select him for the Dean of Students position in 1996. Because Mr. Jones has effectively withdrawn his grievance after receiving another administrative position, Grievant is the only applicant arguably entitled to be placed in the position (See footnote 3) in accordance with Jones. (See footnote 4) Thus, the pivotal issue to be decided is whether Grievant was a “qualified applicant” for the position under the terms of the job posting. See Talbert v. Wetzel County Bd. of Educ., Docket No. 98-52-499 (Feb. 26, 1999) (Talbert II).

In Talbert II, this Grievance Board distinguished Jones in a case where neither applicant for an Assistant Principal's position was determined to be qualified under a subjective interview process required for all applicants. However, unlike the posting in Talbert II, MCBE's posting (G Exs 4 & 8) did not specify that the applicants had to successfully complete an interview process. Indeed, neither the posting nor the job description for the Dean of Students position contain any subjective criteria for the position. In any event, there was no evidence that either of the two WHS interview committees who interviewed Grievant in 1996 found him unqualified for the position. Moreover, the fact that

Grievant received an interview suggests he was considered minimally qualified under the terms of the posting. See Talbert II, supra. Nonetheless, Superintendent Conn testified that he did not consider Grievant qualified to hold any administrative position with MCBE, based upon his performance as Principal of Matewan High School from 1993 through 1995, which resulted in an unsatisfactory performance evaluation for 1994-95, and his subsequent demotion to a teaching position. See Hoffman v. Mingo County Bd. of Educ., Docket No. 95-29-527 (May 31, 1996).

In addition to meeting the minimum requirements which the school board reasonably decides to include in the posting, the applicant's qualifications for an administrative position may be judged upon the criteria contained in the "first set of factors" in W. Va. Code § 18A- 4-7a. School boards have considerable discretion in applying these factors, so long as this discretion is not abused through an arbitrary and capricious decision. See 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 generally Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). In applying an arbitrary and capricious standard of review to MCBE's actions, a searching and careful inquiry into the facts is required. However, the undersigned may not substitute his judgment for that of the board of education. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998); Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). Seegenerally, 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).

Among the criteria in W. Va. Code § 18A-4-7a which a county board may consider in determining whether an applicant is qualified to hold an administrative position are "past performance evaluations" and "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged." Because MCBE had recently demoted Grievant from an administrative position as Principal of Matewan High School to a teaching position, and Grievant's most recent performance evaluation as an administrator contained a rating of "unsatisfactory," Superintendent Conn had no confidence in Grievant's ability to perform the duties of Dean of Students at WHS. Based upon these circumstances, the undersigned is unable to find Superintendent Conn's determination that Grievant was not qualified to hold the administrative position at issue was arbitrary and capricious, or an abuse of his discretion in making such personnel decisions.

Grievant asserts that, as the only remaining applicant with administrative certification, he is entitled to instatement into the position in accordance with Jones, supra. However, as this Grievance Board concluded in Talbert II, instatement per Jones is not mandated where the county board reasonably determines that the applicant is not qualified for the position in question. Moreover, since Jones, the West Virginia Supreme Court of Appeals has noted in Hancock County Board of Education v. Hawken, No. 25818 (July 12, 1999), that the school board, in exercising its discretion to fill school personnel positions, may properly consider the educational needs of the students, in addition to any statutorilymandated criteria. Accord, Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). Furthermore, there was no evidence in Jones that the grieving employee was not minimally qualified for the vacancy at issue because he had recently been demoted from an administrative position in the same school system, or had received an unsatisfactory evaluation while serving as a school principal in the same system, or for any other reason. Therefore, it was not contrary to W. Va. Code § 18A-4-7a, or the terms of the posting, for MCBE to determine that Grievant was not qualified for the position of Dean of Students at WHS, and to fill the position through some alternative means. See Talbert II, supra.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. 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.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a mannerwhich is not arbitrary and capricious.

Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. In making its selection, a 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. W. Va. Code § 18A- 4-7a.

4. County boards of education have wide discretion in choosing applicants to serve as 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).

5. "When a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7(a), and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period." Syl. Pt. 2, Mingo County Bd. of Educ. v. Jones, 512 S.E.2d 597 (W. Va. 1998). 6. Although Grievant established, by a preponderance of the evidence, that he held the basic qualifications for the position of Dean of Students as contained in the posting for the position at issue, Respondent Mingo County Board of Education did not violate W. Va. Code § 18A-4-7a, or abuse its substantial discretion in filling an administrative position, when it determined, through its Superintendent, Everett Conn, that Grievant was not qualified to serve as the Dean of Students at Williamson High School because he had recently been demoted from his position as Principal of Matewan High School, after receiving an unsatisfactory performance evaluation for the previous school year. See Jones, supra; Talbert v. Wetzel County Bd. of Educ., Docket No. 98-52-499 (Feb. 26, 1999).

7. W. Va. Code § 18A-4-7a does not require a county board of education to fill an administrative position when none of the applicants are found to be qualified under the terms of the posting or the criteria set forth in that statute. See Talbert, supra.

Accordingly, this grievance is **DENIED**.

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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 6, 1999

Footnote: 1

MCBE denied the grievance at Level II, at least in part, on the grounds that it was not timely filed. This argument was not renewed in MCBE's written argument at Level IV and is deemed abandoned.

Footnote: 2

Grievant was represented by Kathleen W. Smith, with the West Virginia Education Association (WVEA). Respondent was represented by counsel, Harry M. Rubenstein, with Kay Casto and Chaney. Intervenor was represented by Anita Mitter, with WVEA.

Footnote: 3

Based upon this determination, it is not necessary to decide if the Dean of Students position at issue required administrative certification in order to meet the minimum qualifications of the position.

Footnote: 4

Cf. Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998), wherein MCBE had placed an unqualified applicant into an administrative position. However, because Grievant was not the only qualified applicant who had timely grieved MCBE's action, he was entitled to reconsideration of the selection decision, but not instatement into the position.