MICHAEL TYE,

Grievant,

v. **DOCKET NO. 03-33-413**

McDOWELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On September 8, 2003, Grievant Michael Tye filed a grievance against his employer, McDowell County Board of Education (Respondent), stating: “Non placement in position posted PE certification required - Bradshaw Elem. - WV § 18A-4-7a.” As relief, Grievant seeks, “Placement into Bradshaw Elementary PE Position.”

Having been denied at levels one and two, Grievant waived level three, and a level four hearing was held in the Grievance Board's Beckley office on March 10, 2004. Grievant was represented by West Virginia Education Association Region VII UniServ Consultant Ben Barkey, and Respondent was represented by counsel, Kathryn Bayless. The matter became mature for decision on April 9, 2004, the due date for the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is currently employed by Respondent as a classroom teacher at Gary Elementary School. He is certified in Physical Education (PE), K-12, and has been employed by Respondent for five years.

2. On June 18, 2003, Respondent posted a job opening for the 2003-2004 school year as follows:

Posting Number	Location	Position	Standards of Posting		Employment Term
			Certification	Specific Skills or Training	
P-07-04	Bradshaw Elementary	Classroom Teacher	PE/ K-6 or K-8	PE Certification Required	200 days

Level two Joint Exhibit No. 5.

3. The same position had been previously posted on May 14, 2003, with a Health certification requirement, as follows:

Posting Number	Location	Position	Standards of Posting		Employment Term
			Certification	Specific Skills or Training	
P-07-04	Bradshaw Elementary	Classroom Teacher	PE/Health K-6 or K-8	Both PE/Health Certification Required	200 days

Level two Joint Exhibit No. 5.

4. Grievant applied for the position both times it was posted. He was not selected the first time because he is only certified in PE, not Health, and that posting required both certifications. Another applicant who had multi-subject classification was selected, but that applicant took another job and the position was re-posted.

5. When Grievant applied again on June 18, after the Health certification requirement was dropped, there were three other applicants, all of whom were certified toteach PE at that grade level. Grievant was the only applicant with a PE-specific endorsement on his license.

6. Gertie Beavers was the successful applicant. Her certification is in Elementary Education, grades K-6.

7. It was the intent of the Board to require certification in PE either by a subject- specific certification or a multi-subject certification.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant contends the subject job posting required a content-specific PE certification for the position, and he was the only applicant with the PE endorsement on his license. Respondent's position is that it has the discretion whether to post a position with content-specific certification requirements or not, and that in this case a content-specific license was not required. The successful applicant's general license permitted her to teach in the PE subject area at that grade level.

Professional licenses are regulated by W. Va. State Board of Education Policy 5202, which is codified in 126 C.S.R. 136. Under this rule, the license issued to most classroom teachers is categorized as a "Professional Certificate in teaching" 126 C.S.R. 136 § 7.2.1. Each license carries certain endorsements, which are "[t]he specialization(s) and grade levels appearing on any license which designate the program areas to which the holder can be legally assigned within the public schools of West Virginia." 126 C.S.R. 136 § 4.20. (See footnote 1) Generally, a teacher must hold both a grade-level endorsement and subject-specific endorsement that matches the class he or she teaches. However, an exception to that rule is made for elementary education teachers, who need not have a subject-specific endorsement, and are considered to be multi-subject classified. 126 C.S.R. 136 § 9.8. Under this exception, Ms. Beavers is certified to teach PE, and any other subject, to grades K-6. Grievant's PE K-12 certification, however, only permits him to teach PE to grade levels Pre-K through Adult. 126 C.S.R. 136 § 9.18.

At issue is whether the job required a PE-specific certification or not. If it did, since Grievant was the only applicant with that specialization, he should have been awarded the position. Although Respondent's sole witness, Assistant Superintendent Peggy Freeman, testified that the intent of the posting was to describe a PE position for which either PE or multi-subject-certificated applicants were eligible, the format of the posting fails to reflect this intent. Under the "Certification" heading, it says "PE/K-6 or K-8." Under "Specific Skills or Training," it says "PE Certification Required." To any ordinary reader of this posting, an PE endorsement is required.

However, Grievant's argument assumes the posting sets the certification requirements for the position. If that were so, then Grievant should have been the successful applicant. This assumption is incorrect -- only the position itself can determine what certification is required. While the Board does

have the discretion to determine the certification requirements of a position, it does that by determining the duties of the position. It is then incumbent upon the County Board of Education to ensure that its jobpostings accurately state those requirements. *See* Conners v. Hardy County Bd. of Educ., Docket No. 99-16-459 (Jan. 14, 2000); Feltz v. Marion County Bd. of Educ., Docket No. 90-24-078 (Oct. 19, 1990). However, "The purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position." Conners, *supra*; Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263 (June 7, 1988). In other words, it would be an abuse of its discretion for a Board to include certification requirements in the posting that are not actually needed for the position. In this case, the posting simply failed to reflect the intent of the Board, and it is the intent of the Board that controls, not the posting. Had the posting mistakenly stated an administrative certificate was required for an elementary teaching position, the posting would not compel the Board to hire an administrator for that position.

This requirement prevents a Board from unfairly narrowing the field of applicants, but Grievant's complaint is that the Board improperly made the field too wide. At any rate, since PE-specific certification is not necessary to teach a PE class at the elementary grade level, it was improper for the posting to contain the requirement. Respondent properly cured this defect in the posting, however, by accepting all applicants who were qualified to teach PE at that grade level and by filling the position with the most qualified of these applicants. (See footnote 2)

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. A subject-specific endorsement is not necessary to teach PE at the elementary grade level. A multi-subject license covering the required grade level is sufficient certification. 126 C.S.R. 136 § 9.8.

3. While the Board does have the discretion to determine the certification requirements of a position, it is incumbent upon the County Board of Education to ensure that its job postings accurately state those requirements. *See* Conners v. Hardy County Bd. of Educ., Docket No. 99-16-459 (Jan. 14, 2000); Feltz v. Marion County Bd. of Educ., Docket No. 90-24-078 (Oct. 19, 1990).

4. "The purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position." Conners, *supra*; Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263 (June 7, 1988).

5. While a Board does have the discretion to require subject-specific certification requirements, it does so by assigning duties to the position itself that determine thecertification requirements. Absent such, it would be an abuse of discretion for the Board to include in a job posting certification areas that are not necessary for the position.

6. Although Respondent improperly posted the position, it cured the defect by hiring the best-qualified and appropriately certified applicant.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: April 22, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Interestingly, although the posting in question calls for K-6 or K-8 certifications, the K-8 multisubject certification has been unavailable since the 2000-2001 school year. See 126 C.S.R.136 § 9.8.

Footnote: 2

Grievant made no argument that he was better qualified than the successful applicant, only that he was better certified.