KIMBERLY SARGENT,

Grievant,

v. **DOCKET NO. 05-54-140**

WOOD COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Kimberly Sargent filed this grievance on September 29, 2004, claiming she should have been hired for an aide/paraprofessional position. She seeks instatement to the position, back wages and benefits, and "seniority priority over the successful applicant within the aide classification category."

A level four hearing was held in the Grievance Board's office on June 6, 2005. Ms. Sargent was represented by West Virginia School Service Personnel attorney John E. Roush, and Respondent was represented by counsel, Dean Furner of Spilman, Thomas and Battle, PLLC. The matter became mature for decision on July 1, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

At issue is whether Ms. Sargent should have been selected for an Aide position that required paraprofessional certification, where her certification had been granted but not received by Respondent prior to the selection being made. Respondent avers it has the discretion to wait for proof of certification, but not the obligation to do so, and properly awarded the position to a candidate whose certification was already established.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Ms. Sargent has been employed by Respondent as a Substitute Aide since September 13, 2001.

2. Ms. Sargent submitted her application for her paraprofessional certification on June 17, 2004, by handing it to Judy Perry, a secretary in the personnel office at the Board office. At that time, she expressed her concern about not having her certification back by the time she bid on a job, and Ms. Perry told her the Board could give the job to her and she would have 30 days to produce her certification.

3. Ms. Sargent applied for a regular job as a teacher's aide at Jefferson Elementary School. The job was posted from August 6, 2004 through August 13, 2004, and required paraprofessional certification.

4. At the time she applied, Ms. Sargent had not received her certification. However, she had learned of a State Board of Education website where she could check on the status of her application, and on August 10, 2004, the website indicated her application had been approved. Ms. Sargent did not print the webpage and supplement her application with the information, and did not call the fact to the attention of Respondent in any other way.

5. The paraprofessional certificate was dated August 12, 2004 and had an effective date of June 18, 2004. A copy was mailed to Respondent at the same time it wasmailed to Ms. Sargent. She received her certification in the mail on August 14, 2004, the day after the posting closed.

6. Heather McCormick, a substitute aide with less seniority than Ms. Sargent, but whose paraprofessional certification was in place at the time she was selected, was given the position in question.

7. Ed Alfred, Principal at Jefferson Elementary, made the initial decision to hire Ms. McCormick on August 18, 2004. On or about August 20, 2004, Ms. Sargent spoke with Mr. Alfred to see whether she had been given the position, and he told her he had already sent his recommendation to the Board, because he had nothing to indicate she was certified.

8. Robert Harris, Assistant Superintendent, is in charge of personnel matters. His past and consistent practice is to only consider credentials, such as licenses and certifications, that are in place as of the date the job posting closes. However, in the past, he has considered the Department of Education website information as a valid indicator that certification is in place, but only if the applicant brings it to his attention. His office does not check the website for applicants. The Board does not have a practice and has never in the past given an applicant thirty days to produce certification.

9. The Board's practice is in order to ensure that the right person gets hired, because occasionally the State Board of Education will not approve an application that an applicant believes will be approved, making the applicant ineligible for a given job.

10. Ms. McCormick's hiring was approved by Respondent, effective August 23, 2004, at a Board meeting held on September 14, 2004. The hiring was removed from the Board agenda for a prior meeting, on or about August 31, 2004, in order to verifyeverything was correct. At the time it was pulled from the agenda, Mr. Harris was aware Ms. Sargent was fully certified.

Discussion

This grievance does not challenge a disciplinary action, so Ms. Sargent bears the burden of proof. Ms. Sargent's allegations must be proven by a preponderance of the evidence. (See footnote 1) In this case, Ms. Sargent must prove she should have been selected for the position in question instead of the successful applicant. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. (See footnote 2) Respondent does not dispute that Ms. Sargent had satisfactory evaluations or that she had greater seniority than the successful applicant, but does dispute that Ms. Sargent was qualified for the position. The sole point of contention on the qualification issue is whether Ms. Sargent had the requisite Paraprofessional certification in time to be considered for the position.

Respondent, in its Proposed Findings of Fact and Conclusions of Law, argues that Ms. Sargent had not received her certification prior to the hiring decision being made. It correctly contends that it is permitted, but not required, to employ teachers whose certifications are anticipated and pending. However, this contention is inapposite to the issue, as Respondent's basic factual premise is in error.

The evidence conclusively establishes that the hiring decision was made on September 14, 2004, and that both Ms. Sargent and Respondent were notified of Ms.Sargent's complete certification a full month earlier, on August 14. Respondent bases its argument on the fact that Principal Alfred chose a recommended applicant for the position on August 18, shortly after the posting closed. However, Mr. Alfred did not make the hiring decision and did not hire the applicant on that date. The Board made the actual decision to fill the position on September 14. Even using the Board's “effective date” for the hiring, one cannot escape the fact that the Board had actual knowledge of Ms. Sargent's certification by then.

Respondent cites *Keatley v Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997), as providing county boards of education discretion in matters such as these, particularly in setting a cut-off date for when an applicant must possess the necessary certification for a given position. (The absence of [a deadline] clearly indicates legislative intent for county boards of education to exercise discretion on the issue.) *Id. at 310.* However, *Keatley* also tempers that discretion by stating "the statute's certification requirement should not be read so narrowly so as to exclude from the hiring process, individuals who have completed all necessary requirements for a certificate, but do not have the actual physical possession of the such [sic] certificate at the time of the interview or during the hiring stage." *Id. at 311.* Although discussing the statutory certification requirement for classroom teachers, the same analysis applies here. Had this been a case where grievant had completed all the requirements for her certification, but no evidence of that the certification had been issued prior to the hiring decision being made, then Respondent would have a valid argument. (See footnote 3) This reading comports with the West Virginia Supreme Court's general mandate that "School personnel regulations and laws are to be strictly construed in favor of the employee." (See footnote 4) The statute and the Court's interpretation of it, in context with the statute's first requirement in Code section 18A-4-8b(a) that the hiring decision be made by the Board (and not by one of its employees, such as a principal or the Superintendent) gives merit to Ms. Sargent's position. Combined with the facts in evidence that the Board actually delayed acting on the recommendation to hire Ms. McCormick in order to complete vetting her application materials, without acting on the knowledge it had at the time that Ms. Sargent's certification was complete, Ms. Sargent's position becomes insurmountable. That same fact makes Respondent's unwritten policy of requiring qualifications to be proven as of the closing of the posting period too nebulous to be enforceable.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Ms. Sargent bears the burden of proof. Ms. Sargent'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 Res.*, 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. "Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. Va. Code § 18A-4-8b." *Leishman v. Monongalia County Bd. of Educ.*, Docket No. 04-30-127 (Aug. 31, 2004).

3. "'School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1, *Cruciotti v. McNeel,* 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.,* 197 W. Va. 176; 475 S.E.2d 176, (1996).

4. Certification requirements in job postings for service personnel should not be read so narrowly as to exclude from the hiring process individuals who have completed all necessary requirements for a certificate, but do not have the actual physical possession of the certificate at the time of the interview or during the hiring stage. See *Keatley v Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997)

5. Ms. Sargent was the most senior qualified applicant for the posted position, and should have been selected.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is ordered to instate Ms. Sargent into the teacher's aide position at Jefferson Elementary School, and to pay for her the difference in salary she would have earned had she been hired effective August 23, 2004, plus interest. Ms. Sargent is also to be credited for any seniority and benefits she would have accrued had she been hired in the position on that date. (See footnote 5) Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

July 15, 2005

M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

W. Va. Code §18A-4-8b.

Footnote: 3

See Hurd v. Fayette County Bd. of Educ., Docket No. 04-10-283 (Sep. 14, 2004).

Footnote: 4

Syl. pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Footnote: 5

Ms. Sargent's level four appeal also requested "seniority priority" over Ms. McCormick, but as that issue was not discussed at any level and no authority was cited for such an entitlement, it is not awarded.