JANE CHIPPS,

Grievant,

v.

RALEIGH COUNTY BOARD

OF EDUCATION, **DOCKET NO. 04-41-422**

Respondent,

and

TAMARA GRANT,

Intervenor.

DECISION

Grievant Chipps filed this grievance against the Raleigh County Board of Education (RCBOE), Respondent, on August 4, 2004. The Statement of Grievance reads simply, “WV §18A-4-7a.” Ms. Chipps stated the relief sought as: “Placement in position of PE/Health - Independence Middle School.”

Having been denied at level two, level three was bypassed and the matter was submitted for consideration at level four based on the record developed at level two. Ms. Chipps was represented at level one by WVEA UniServ Consultant Ben Barkey, and at level two by counsel, John F. Parkulo. RCBOE was represented by Dr. Emily Meadows, its Director of Personnel. Ms. Grant was joined as a party at level two, and was represented by counsel, Carl W. Roop. This matter became mature for decision on February 4, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. On May 27, 2004, RCBOE posted a job opening for a female Health and Physical Education

Teacher at Independence Middle School (IMS).

2. Ms. Chipps and Ms. Grant, both substitute classroom teachers employed by RCBOE, applied for the position, along with two regularly-employed classroom teachers.

3. Dr. Meadows prepared a grid to compare the candidate's qualifications using the equally-weighted “second set of factors” contained in W. Va. Code § 18A-4-7a. After determining which candidate, one of the regular teachers, was most qualified, she then re- evaluated the candidates using the same set of factors, as a back-up in case the most qualified declined the job. The back-up applicant was the other regularly-employed teacher.

3. Dr. Meadows provided the results of her evaluation to Terry Poe, Principal at IMS, who contacted the most qualified candidate and offered her the position. That candidate did decline the job, so Mr. Poe offered the position to the back-up candidate identified by Dr. Meadows. That person also declined the job.

4. Mr. Poe asked Dr. Meadows to reevaluate the remaining two candidates, Ms. Chipps and Ms. Grant. Dr. Meadows did so using the “first set of factors” in W. Va. Code § 18A-4-7a. In addition, Mr. Poe interviewed each and had them complete a written exercise. As a result of the re-evaluation and interviews, Mr. Poe felt Ms. Grant was most qualified.

5. Ms. Chipps and Ms. Grant are both certified to teach health and physical education, the former for grades 1-9, the latter for grades K-12. 6. Ms. Chipps had 6 ½ years of experience teaching in junior high school, Ms. Grant had 4 ½ years teaching in middle school.

7. Both Ms. Chipps and Ms. Grant had attained bachelor's degrees in the required certification area, but Ms. Grant had more coursework related to the certification than Ms. Chipps, thirty-three classes compared to fourteen. In addition, Ms. Grant's grade point average was significantly higher than Ms. Chipps', both overall and in the required certification area classes.

8. Ms. Chipps and Ms. Grant had essentially equivalent past evaluations.

9. Mr. Poe determined that Ms. Grant had more specialized training than Ms. Chipps.

10. The position was offered to Ms. Grant, she accepted the offer, and she was hired into the position.

DISCUSSION

This is a non-disciplinary grievance in which Ms. Chipps bears the burden of proof. She must prove her allegations by a preponderance of the evidence. *(See footnote 1)* Ms. Chipps contends that the first set of West Virginia Code § 18A-4-7a factors should not have been used and that under the second set of factors, she would have been more qualified than Ms. Grant. Both RCBOE and Ms. Grant aver the selection was made properly.

"With regard to the hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the seven 'qualifying factors' set forth in W. Va. Code §18A-4-7a (1992). That Code Section requires that, in applying thesecond set of criteria, each factor be weighted equally." *(See footnote 2)* Because the first set of factors is not prioritized like the second set, and the statute does not mandate that any one area be afforded particular significance, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. (See footnote 3)

Choosing between the two sets of factors is also spelled out in W. Va. Code § 18A- 4-7a. Subsection (d) provides the so-called "second set of factors," which are to be used "[i]f one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting." On the other hand, subsection (c) specifies the "first set of factors" to be used when hiring pursuant to subsection (b), which states, "The county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications."

The first set of factors is:

> (1) Appropriate certification, licensure or both;
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> (2) 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;
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> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
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> (4) Academic achievement;
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> (5) Relevant specialized training;
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> (6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and
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> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

The second set of factors is:

(1) Appropriate certification, licensure or both;
(2) Total amount of teaching experience;

(3) The existence of teaching experience in the required certification area;

(4) Degree level in the required certification area;

(5) Specialized training directly related to the performance of the job as stated in the job description;

(6) Receiving an overall rating of satisfactory in the previous two evaluations conducted pursuant to section twelve, article two of this chapter; and

(7) Seniority.

Use of the second set of factors is regulated by subsection (e), which requires that: “consideration shall be given to each criterion with each criterion being given equal weight.” That weighting is not required when using the first set of factors, and this Grievance Board has found that “Because the . . . factors are not prioritized, and the statute does not mandate that any one area be afforded particular significance, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials.” *(See footnote 4)* Thus, a county board of education may determine that "other measures or indicators" is the most important factor. *(See footnote 5)*

In this case, RCBOE used the second set of factors in making its first two choices for the position, because it had two permanently-employed teachers as applicants. After those two applicants declined the position, RCBOE was left with Ms. Chipps and Ms. Grant as the only applicants, and since they were both substitutes, RCBOE re-evaluated them based on the first set of factors. The initial pool of applicants for this position was a “mixed” pool containing permanent employees who met the standards in the posting as well as persons who were not permanent employees. That type of applicant pool requiresa board of education to employ the second set of criteria in W. Va. Code § 18A-4-7a in making a selection for a teaching position when the applicant pool includes permanent employees. *(See footnote 6)* When the applicants do not include permanent employees, the first set of factors must be used. (See footnote 7)

Respondent's use of one set of criteria for the original applicant pool and the other set of criteria for the remaining applicant pool gives effect to the legislature's intent in setting out two different sets of factors for different situations.

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith. [Citations omitted.] (See footnote 8)

Ms. Chipps also contends that she was more qualified than Ms. Grant when the first set of criteria were used to evaluate the remaining applicants. Ms. Chipps has not met her burden of proof on the qualification issue. A review of the qualifications of Ms. Chipps and Ms. Grant under the first set of criteria was performed, and, using RCBOE's weighting of the factors, Ms. Grant was the more qualified applicant. The last criterion, “other measures and indicators,” does permit a board of education to exercise some discretion in assessing applicants. In reviewing the written exercise, RCBOE's subjective judgment was that Ms.Grant performed better than Ms. Chipps. Ms. Grant provided far more specific ideas and tasks for students that incorporated the objective for the lesson plans than did Ms. Chipps. Nothing in that evaluation is unreasonable.

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. “With regard to the hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the seven 'qualifying factors' set forth in W. Va. Code §18A-4-7a (1992). That Code Section requires that, in applying the second set of criteria, each factor be weighted equally. *Sisk v. Mercer County Bd. of Educ.*, Docket No. 95-27-113 (Sept. 25, 1995).” *Cummings v. Lincoln County Bd. of Educ*. Docket No. 92-22-324 (Dec. 3, 1997).

3. Because the first set of factors is not prioritized like the second set, and the statute does not mandate that any one area be afforded particular significance, a county board may objectively or

subjectively assign different weights to the various aspects of the applicants' credentials. *Jenkinson v. Greenbrier County Bd. of Educ.*, Docket No.95-13-503 (Mar. 31, 1996); *Fisher v. Marion County Bd. of Educ.*, Docket No. 93-24-042 (Mar. 11, 1993); *Marsh v. Wyoming County Bd. of Educ.*, Docket No. 94-55-022 (Sept. 1, 1994). *See Saunders v. Cabell County Bd. of Educ.*, Docket No. 97-06-149 (Dec. 29, 1997); *Bell v. Lincoln County Bd. of Educ.*, Docket No. 97-22-013 (July 28, 1997).

4. When applicants include permanent employees, the second set of factors must be used. *Ewing v. Bd. of Educ. of the County of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998); *Maynard v. Mercer County Bd. of Educ.*, Docket No.94-27-047 (Nov. 16, 1996). When the applicants do not include permanent employees, the first set of factors must be used. *Houck v. Wyoming County Bd. of Educ.*, Docket No. 99-55-290 (Mar. 9, 2001).

4.

> “'"A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908).” Syl. Pt. 1, State ex rel. Simpkins v. Harvey, [172] W. Va. [312], 305 S.E.2d 268 (1983).' Syl. Pt. 3, Shell v. Bechtold, 175 W. Va. 792, 338 S.E.2d 393 (1985) [(per curiam)].” Syllabus point 1, State v. White, 188 W. Va. 534, 425 S.E.2d 210 (1992).

Ewing, supra.

5. Respondent's use of one set of criteria for the original applicant poll and the other set of criteria for the remaining applicant pool gives effect to the legislature's intent in setting out two different sets of factors for different situations. 6. Grievant did not meet her burden of proving she was the most qualified applicant.

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

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

March 15, 2005

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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

Cummings v. Lincoln County Bd. of Educ. Docket No. 92-22-324 (Dec. 3, 1997).

Footnote: 3

Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996).

Footnote: 4

Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996).

Footnote: 5

Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

Footnote: 6

Ewing v. Bd. of Educ. of the County of Summers, 202 W. Va. 228, 503 S.E.2d 541 (1998); Maynard v. Mercer County Bd. of Educ., Docket No.94-27-047 (Nov. 16, 1996).

Footnote: 7

Houck v. Wyoming County Bd. of Educ., Docket No. 99-55-290 (Mar. 9, 2001).

Footnote: 8

Ewing, supra.