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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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JULIE J. KILMER

v.

Docket No. 50-86-324-1

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievant, Julie Kilmer, is employed by the Wayne County Board of Education as a special education teacher assigned to East Lynn Elementary School. On September 11, 1986, she filed a grievance alleging that on August 28, 1986, she had bid upon a special education LD position at Wayne Elementary School but that the board selected Lynn Leach Ferguson, a less qualified teacher for the position. A level two hearing was held on October 9, 1986, and the decision appealed to level four; an evidentiary hearing was conducted on March 12, 1987.¹

¹ The grievance was, in effect, submitted to the hearing examiner on the transcript of evidence adduced at level two (T. __) because the only evidence taken at level four related to events occurring subsequent to the decision making process and was admitted over objection as to relevancy.

In August, 1985, after a year as a special education teacher in Lincoln County grievant was employed in Wayne County as a special education teacher. At East Lynn Elementary School she has EMI students and LD students and holds certification in LD and other areas of special education; she is pursuing a Masters degree in that field. (T. 3,10).² The evaluations she has received at East Lynn have been very good and especially in the area of certification, in which she received a score of ten (10), the highest score on the evaluation form. (T. 5).³

Eliza Adkins is director of special education with Wayne County Schools and has twenty one years experience in the LD field. Grievant is under her supervision and she testified that grievant was well organized, had excellent classroom control, excellent teaching techniques, good rapport with parents and students, very dependable and contemporary and "among the very best teachers we have in the

² She is also certified in Mental Retardation K-12 (T.3) and testified that she applied for the position at Wayne Elementary because she would only be teaching LD students at Wayne Elementary, her area of specialization, it is closer to her home and to the special education office and it was a promotion. (T. 7). Cf. Slade v. McDowell County Board of Education, Docket No. 33-86-050.

³ By letter dated October 3, 1986, Principal Samuel Thompson noted that grievant did an excellent job with the elementary special education program at East Lynn and that "... (I) mprove- ment, both academically and socially, is readily observable in Miss Kilmer's students." (Level II, Exhibit D).

Learning Disabilities Program." (T. 8)⁴ She had not been consulted by Superintendent Ferguson in the selection of Lynn Leach Ferguson for the position and did not know Mrs. Ferguson personally but would have recommended grievant for the position had she been consulted. (T. 10).⁵

The successful applicant, Lynn Leach Ferguson, had been employed by Wayne County Schools from 1979-84 (T. 14) and her previous experience did not include special education. (T. 16). She had been hired as a special education teacher at Crockett Elementary School effective August 20, 1986, and at a special board of education meeting on August 28 was transferred from Crockett Elementary to Wayne Elementary, effective August 29. Mrs. Ferguson had applied for a permit to teach special education LD but had not received it at the time of the level two hearing (T. 12) or the level four hearing.

⁴ Ms. Adkins is certified in public schools (K-12) and in EMI and TMI; has a Masters degree in Learning Disabilities with fourteen years teaching experience, seven of which is in supervision. (T. 7).

⁵ She is concerned about improving the teaching staff and in obtaining some certified people for Wayne County and had "begged" grievant not to leave Wayne County the previous year because she was doing an excellent job. (T. 9).

As to Lynn Leach Ferguson, she stated that she understood she was an excellent regular teacher but had no experience with her (T.10). At level four she testified that Mrs. Ferguson was doing a good job at Wayne Elementary.

Grievant contends that she is the most qualified applicant for the position by virtue of her certification and training and that State Board of Education Policy 5113 and W.Va. Code, 18A-4-8b(a) and several opinions of the State Superintendent require the selection of the certified applicant in preference to the noncertified applicant.⁶

Superintendent Ferguson does not question grievant's qualifications and abilities but contends that W.Va. Code, 18A-3-3 provides for the issuance of certificates and/or permits to persons who do not qualify for a professional certificate and that a permit holder is as qualified to teach a class as a teacher with a certificate; that after determining that both applicants were qualified for the position he selected Mrs. Ferguson, who is not related, on the basis of seniority.⁷

⁶ Grievant also argues that W.Va. Code, 18A-3-1 requires that a teacher must be certified in the specialization and grade level as indicated on the certificate and that this is the highest degree of qualification; that W.Va. Code, 18A-3-2 permits the State Superintendent to issue permits to persons who do not qualify for the professional certificate and that this authority was designed to meet the problems created by a teacher shortage.

⁷ He testified that seniority was mandated by a decision of the Circuit Court of Wayne County in Gilkerson v. Nolan, Civil Action No. 85-P-116, which required credit for time behind a resignation. See also, Hark v. Kanawha County Board of Education, Docket No. 20-86-225-1, reversed by Circuit Court of Kanawha County, March 5, 1987.

It is also to be noted that in applying for the permit for Mrs. Ferguson it was necessary that Superintendent Ferguson certify that she was the most qualified person and that no fully certified applicants were available for the position. Cf. Scott v. Jackson County Board of Education, Docket No. 18-86-009. The posting was not made part of the record so the qualification requirement is not known.

In addition to the foregoing recitation, the following specific findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant is employed as a special education teacher and holds certification in learning disabilities and other areas of special education; she is pursuing a graduate degree in that field. She has been employed at East Lynn Elementary School as an LD teacher since August, 1985. Her evaluations at East Lynn have been very good and top rated in the area of certification.

2. On August 28, 1986, she bid upon a special education LD position at Wayne Elementary School because she would be teaching only LD students, it was nearer to her home and amounted to a promotion. The actual posting is not in evidence and the specifications thereof are unknown.

3. The only other applicant, Lynn Leach Ferguson, had been employed by Wayne County Schools from 1979-84 and taught at Wayne Elementary School. The area of specialization and/or certification is unknown but it was established that Mrs. Ferguson's previous employment did not include special education. Mrs. Ferguson was hired as a special education teacher at Crockett Elementary School

effective August 20, 1986, and at a special board meeting on August 28 was transferred from Crockett Elementary to Wayne Elementary, effective August 29. Mrs. Ferguson was recommended to the board of education by Superintendent of Schools Ferguson.

4. Mrs. Ferguson was not certified in special education LD but had applied for a permit from the State Department of Education; however, Mrs. Ferguson had not yet received the permit as of the date of the level four hearing, i.e., March 12, 1987.

5. Superintendent Ferguson had not requested a recommendation or otherwise discussed the selection of the LD teacher at Wayne Elementary School with the director of special education of Wayne County Schools and allegedly made the recommendation based upon the seniority of Mrs. Ferguson, having concluded grievant and Mrs. Ferguson were equally qualified.

CONCLUSIONS OF LAW

1. Under W.Va. Code, 18A-4-8b(a) decisions of a county board of education affecting teacher promotions and the filling of vacant teaching positions must be based primarily upon the applicant's qualifications for the job, with seniority having a bearing on the selection process when the applicants have otherwise equivalent qualifications or where the differences in qualification criteria

are insufficient to form the basis for an informed and rational decision. Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986).

2. Under W.Va. Code, 18A-4-8b(a) where one candidate for a teaching position is clearly more qualified, the seniority of another applicant will not be sufficient to justify denying the position to the more qualified applicant. Dillon v. Wyoming County Board of Education, supra.

3. The qualifications of grievant were superior to Mrs. Ferguson as a matter of law and the board of education abused its discretion and acted arbitrarily in refusing to appoint grievant to the position. Dorsey Scott v. Jackson County Board of Education, Docket 18-86-009.

The grievance is GRANTED and the board of education is Ordered to award the special education LD teaching position at Wayne Elementary School to grievant.

Either party may appeal this decision to the Circuit Court of Kanawha County or Wayne County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



LEO CATSONIS

Chief Hearing Examiner

Dated: April 14, 1987