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DAVID RAY MILLER

v.

Docket No. 33-87-133-1

MCDOWELL COUNTY BOARD OF EDUCATION

DECISION

David Miller, grievant, is presently employed as an elementary school teacher at Anawalt Elementary School. On April 15, 1987, he filed a grievance alleging that he had been deprived of a teaching position at Switchback Elementary School due to the erroneous calculation of his seniority. A level two hearing was conducted on April 24, 1987, and grievant was awarded the seniority he sought; however, he was informed that qualifications, not seniority, was the reason for his nonselection and he appealed to the Education Employees Grievance Board. A level four evidentiary hearing was conducted in Beckley on August 10, 1987.

Grievant received a bachelor of arts degree in dramatic arts from Concord College and has since obtained eighteen credit hours through the College of Graduate Studies. He commenced teaching

elementary school in McDowell County twelve years ago on a permit and was certified in 1984 in elementary teaching after he completed the necessary undergraduate courses in elementary education and passed the National Teachers Examination. His state certification is as an elementary school teacher, self contained classroom, grades 1-6. During his teaching career grievant has received excellent evaluations.

During the 1986-87 school year grievant was assigned to Crumpler Elementary School as a self contained fourth grade teacher. In March 1987 he was notified by the superintendent that he was being recommended for a transfer due to the closing of Crumpler Elementary School; the recommendation was thereafter approved by the school board. Sometime in April 1987 there was a posting of eighteen job positions and five of the positions were at Switchback Elementary School, grades 1-6. The sole qualification specified in the posting was for West Virginia certification in the area of work for which the application was made. (Grievant's Exhibit 1). Grievant and approximately twenty other teachers applied for the five positions and four of these positions were filled with candidates holding higher credentials and with greater seniority; grievant does not contest the selection of those four applicants.

However, the remaining position was filled by a less senior applicant, Sandra Hickman, who had nine years of teaching experience in McDowell County and held a bachelor's degree, plus 15 hours. She is certified in elementary education and has an endorsement to teach mentally retarded students. Grievant filed a grievance

on April 15, 1987, after being told by Jerry Roncella, assistant director of personnel, that he was not selected because his years of service were not continuous.

On April 24, 1987, a level two hearing was conducted and the grievance evaluator found that grievant's seniority should be calculated on the summated periods of employment (T. 9) but held that grievant had not proved that "seniority was the only factor considered in filling the Switchback elementary school position in accordance with W.Va. Code, 18A-4-8b." (Level two decision, page two). By letter dated May 7, 1987, grievant was advised by superintendent Bennett Church that Ms. Hickman had been selected on the basis of her qualifications and that

(W)hile she is less senior than you, she has an additional endorsement on her teaching certificate which will enable her to effectively deal with the learning problems of the students in her classroom. (Grievant's Exhibit 4).<sup>1</sup>

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<sup>1</sup> As required by W.Va. Code, 18A-4-8b, grievant was also advised that he should consider adding an additional endorsement to his teaching certificate in order to enhance his understanding of the learning problems his students might encounter.

At level four grievant testified that Ms. Roncella had advised him that evaluations could not be considered but she did not give him a basis for this statement.

Michael Cortelessi, personnel director of McDowell County Schools, testified that he took the applications and made the recommendations for the Switchback Elementary School positions and that while Ms. Hickman had less seniority she was more qualified for the position. More specifically, he stated that she attended an accredited college, completed an accredited teacher training program and obtained a teaching degree in elementary education. She has completed fifteen hours post B.A. degree, is certified in elementary education with a mental retardation endorsement.<sup>2</sup> On the other hand, he observed that grievant had a non-teaching degree and was initially issued a permit under Option 4; that he obtained the credit hours to renew his permit and took the National Teachers Examination to become certified by the State, not an accredited college. Accordingly, he concluded that grievant was more senior but less qualified.<sup>3</sup>

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<sup>2</sup> Mr. Cortelessi was not familiar with Ms. Hickman's evaluations and he did not know how they compared with grievant's evaluations; Ms. Hickman did not testify at level two or level four.

<sup>3</sup> He stated that school officials look at additional endorsements and encourage teachers to obtain additional endorsements; that the first option is to find fully certified graduates from an accredited institution for a position and then look to other candidates.

Grievant contends that both he and Ms. Hickman hold valid certificates to teach in the position in question and the only difference is that Ms. Hickman has an endorsement to teach mentally retarded students, a criterion not relevant to the qualifications of an elementary classroom teacher; that the only qualification listed in the posting was a valid West Virginia teaching certificate in the area of elementary education and the school board should have specified an endorsement in special education if such a qualification was either necessary or desired. Finally, grievant contends that the board ignored its own policy relating to the transfer of instructional employees and that it was bound by the procedure set forth therein.<sup>4</sup>

Counsel for the board contends that Ms. Hickman was awarded the teaching position by virtue of being better qualified than grievant because she received her professional teaching certificate by taking the required courses in an accredited educational institution and has an endorsement on her professional teaching certificate

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<sup>4</sup> Policy 8-043 states that the board of education will appoint the most senior qualified regular employee who wishes to fill a vacant position. (Grievant's Exhibit 6).

Grievant's representative cites several West Virginia decisions for the proposition that boards are bound by the procedures they establish, e.g., Powell v. Brown, 238 S.E.2d 220 (1977); State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908 (1980), etc.

for Mental Retardation K-12, rendering her better qualified to deal with any learning disabilities any of her students might have.<sup>5</sup> Counsel concludes that boards of education have discretionary power to determine qualifications of applicants and this discretion should be upheld unless there has been a showing of an abuse of this discretion.

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

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<sup>5</sup> Grievant contends that except for mainstreamed students there is no expectation that EMI students will be found in a regular self contained classroom. He testified that during his twelve years he's had no problems dealing with these mainstreamed children who generally attended his classes for physical education, art or music.

Mr. Cortelessi testified that EMI students are not the only special ed students found in a regular classroom but also LD, gifted, etc., students.

### FINDINGS OF FACT

1. Grievant is employed as an elementary school classroom teacher at Anawalt Elementary School; he has taught elementary school for twelve years in McDowell County.

2. During the 1986-87 school year grievant was assigned to Crumpler Elementary School as a self-contained fourth grade teacher but in March 1987 was notified that due to the closing of Crumpler Elementary he was being recommended for a transfer.

3. Sometime in April 1987 the school board posted a list of eighteen teaching positions, five of which were at Switchback Elementary School, grades 1-6. The qualification specified in the posting was for West Virginia certification in the area for which application was being made, i.e., elementary school classroom teacher, grades 1-6. Four of the five positions were filled by applicants of admitted higher qualifications and greater seniority and no issue is made thereof by grievant.

4. However, the fifth position was filled by a less senior applicant, Sandra Hickman, and grievant contends that his qualifications were equal to those of Ms. Hickman and he should have been selected on the basis of seniority. The respective qualifications of grievant and Ms. Hickman are set out elsewhere in this decision

and will not be reiterated in these findings of fact. Grievant was initially advised that the reason for his non-selection was the seniority of Ms. Hickman; however, this was repudiated at the level two hearing.

5. By letter dated May 7, 1987, grievant was advised by superintendent Church that although Ms. Hickman was less senior than grievant she was selected on the basis of an additional endorsement on her teaching certificate which would enable her to effectively deal with the learning problems of the students in her classroom. However, there was no requirement in the posting that an endorsement in special education was required and grievant testified that during his tenure he seldom has special education students in his classroom and had encountered no problems dealing with special education students. Grievant has been active in several special projects and holds certification in track and field for special olympics.

6. There is a preponderance if not a totality of evidence that the appropriate school officials failed to investigate and evaluate the qualifications, credentials, education and experience of Ms. Hickman and grievant prior to rendering the decision and were unaware of the seniority, evaluations and other criteria of these applicants. It is equally as clear that premising the decision solely upon the special education endorsement on Ms. Hickman's certificate was an afterthought, was arbitrary and an abuse of discretion.



## CONCLUSIONS OF LAW

1. W.Va. Code, 18A-4-8b provides that a county board of education shall make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications. If the applicant with the most seniority is not selected for the position a written statement of the reasons shall be given to the applicant with the most seniority with suggestions for improving the applicant's qualifications.

2. Under this Code provision if the applicant with the most seniority is also the most qualified person for the job, seniority does not come into play. However, where several applicants have the same or similar qualifications the statute establishes a presumption that the applicant with the most seniority is more qualified. Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986); Julie Kilmer v. Wayne County Board of Education, Docket No. 50-86-324-1.

3. County boards of education have substantial discretion in matters relating to the hiring, assignments, transfer and promotion of school personnel but this discretion must be exercised reasonably, in the best interest of the school system and in a manner which is not arbitrary or capricious. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908 (W.Va. 1980);

Jack Yearego v. Jackson County Board of Education, Docket No. 18-87-031-1. The failure to interview finalists, the addition of requirements not specified in the posting of the position and the general unfamiliarity of the credentials of the finalists is unfair to applicants who have relied upon the criteria described in the posting and are indicia of an arbitrary selection. Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986); Jack Yearego v. Jackson County Board of Education, Docket No. 18-87-031-1.

4. The selection of Sandra Hickman over grievant was arbitrary and contrary to W.Va. Code, 18A-4-8b. Dorsey Scott v. Jackson County Board of Education, Docket No. 18-86-009-1; Jack Yearego v. Jackson County Board of Education, Docket No. 18-87-031-1.

Accordingly, the grievance is Granted and the board of education is Ordered to award the position in question to grievant.

Either party may appeal this decision to the Circuit Court of Kanawha County or McDowell 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: September 15, 1987