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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
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JAMES K. GINN

v.

Docket No. 16-88-185

HARDY COUNTY BOARD OF EDUCATION

DECISION

Grievant, James K. Ginn, has been employed as a substitute teacher by Respondent Hardy County Board of Education each school year commencing 1979-80. Grievant made application for a regular teaching position at East Hardy High School (EHHS), and was not appointed to the job; accordingly, he filed this grievance at Level I on August 11, 1988. After a denial there and at Level II, the matter was waived to Level IV per W.Va. Code §18-29-4(c), where it was submitted for disposition on the record of proceedings below. Grievant filed proposed findings of fact and conclusions of law on October 24, 1988, and Respondent filed its reply thereto, and its proposals as to fact and law, on October 28, 1988.

On April 11, 1988, a notice of vacancy for "Teacher - Social Studies, Driver Education - East Hardy High School"

was posted by Respondent. Of those "six or seven" individuals who submitted an application for the job, only four, Grievant included, were selected for interview. Thereafter, two of the four withdrew their names from consideration, and Mr. David Walker was hired and was additionally granted assignment as EHHS' head football coach.¹

Grievant cites Code §18A-4-8b(a) and argues that he is entitled to the social studies/drivers' education post because he is more qualified therefor than is Mr. Walker. Grievant asserts, in the alternative, that he is at least equally qualified as Walker, and has greater seniority with Respondent than Walker, and he therefore should have been hired. He seeks placement into the position, with attendant back pay and benefits.

The number of days Grievant has worked for Respondent, by school year, is: 1979-80, 131 days; 1980-81, 86.5 days; 1981-82, 85.5 days; 1982-83, 105.5 days; 1983-84, 75 days; 1984-85, 97 days; 1985-86, 104 days; 1986-87, 91.5 days; 1987-88, 126 days. Grievant substituted on a number of

¹A vacancy in EHHS' head football coach position was simultaneously with the job in question, but separately posted. Grievant has at least implied that Respondent inappropriately "tied" the social studies/drivers' education instructorship with the coaching assignment to exclude him from consideration for the former. T. 34-36.

different occasions,² in one instance for ten weeks continuously, for Mrs. Frances Frye, then EHHS social studies/drivers' education instructor, who had protracted absences from work due to illness during the end of her tenure with Respondent.³

David Walker, a 1987 graduate of Glenville State College, had worked as a long-term substitute teacher in Nicholas County, West Virginia for one semester of school term 1987-88. At the time he was hired by Respondent, he was not certified to teach drivers' education, but had expressed his intention to become so certified prior to the commencement of the 1988-89 school term.⁴

Mr. John Marra, who served as Principal of EHHS during school years 1986-87 and 1987-88, testified at Level II that he and Dr. John V. Miller, Jr., Respondent's Superintendent of Schools, interviewed both Grievant and Walker. Marra stated that he found Walker to be the more impressive of the two in interview,⁵ and that he believed Walker would better

² Grievant was described by EHHS Principal John Marra as "our main substitute in that area" during 1986-87 and 1987-88.

³ Mrs. Frye's retirement from Respondent's employ was the reason for the vacancy.

⁴ Apparently, Walker was certified in drivers' education prior to the commencement of school year 1988-89.

⁵ Although it appears that the interviews were conducted somewhat differently, Grievant, via his representative, stated he does not "claim a violation there." T. 42.

"control" and "relate to the kids." T. 5. He went on to explain that he had phoned Walker's supervisors in Nicholas County and also in Calhoun County, where Walker student-taught, and obtained favorable references from those sources.

Marra further testified that he had never formally evaluated Grievant because "I honestly just really didn't know that I was supposed to write up observations and evaluations on substitutes." T. 10. However, he had ample opportunity to observe Grievant, since Mrs. Frye's classroom was adjacent to the EHHS main office. Marra opined that Grievant "tried hard" and is likeable, T. 5, but is "always going to have a problem controlling [sic] kids and I think deep down he would probably admit that." T. 12. He confessed that he had never discussed these feelings with Grievant, T. 20, and that he had not reviewed any of the written evaluations of Grievant's teaching performance on file with Respondent, T. 19, prior to advising Superintendent Miller that he believed Walker to be the most qualified applicant.⁶ Nor could Marra cite specific instances where Grievant had exhibited a failure to maintain classroom control or good relationships with students. He did, however, contact other principals under whom Grievant had substitute-taught, and he related that these other principals

⁶Miller's recommendation to Respondent that Walker be hired was based on Marra's like recommendation to him.

had verbally confirmed his conclusion that Grievant "did an adequate job...[but] did have some problems with discipline," T. 26, and that their impressions of Grievant as a professional, in general, were not positive. T. 25. None of these other principals were present to offer testimony at the Level II hearing.

Grievant has submitted eight separate written evaluations of his substitute teaching performance, designated Exhibits 1 through 8, respectively. These forms, which appear to cover the period 1984-1988 and which involved at least five different supervisor/evaluators⁷ reveal that Grievant was scored as at least "Satisfactory" in all categories of review. However, in a February, 1984 evaluation, the supervisor did note that "[s]ome teachers have told me lesson plans were not followed" and that Grievant was "weak" in the area of "Shows initiative." Exhibit 8. No other comment that could fairly be construed as negative is found in any of the other aforementioned exhibits, and Respondent has failed to present any documentation indicating sub-par performance on Grievant's part.⁸

⁷Interestingly, all the individuals Marra named as being his "contacts," who had "confirmed" that Grievant's performance as a professional left something to be desired, were among those who participated in Grievant's written performance evaluations.

⁸Rather vague allegations that he is the victim of discrimination were made, but subsequently withdrawn, by Grievant at the Level II hearing. See, generally, T. 36-42.

It is not in dispute that Grievant was fully certified in both social studies and drivers' education at the time he made application for the EHHS vacancy.

In addition to the foregoing, it is appropriate to make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Grievant, James K. Ginn, has been employed as a substitute teacher by Respondent Hardy County Board of Education each year since school term 1979-80. In each year of his employment with Respondent, Grievant has worked less than 133 days.

2. Grievant made application for a regular teaching position in social studies and drivers' education at East Hardy High School (EHHS). Four applicants, including Grievant and Mr. David Walker, were interviewed by Mr. Frank Marra, EHHS Principal, and Dr. John V. Miller, Jr., BOE's Superintendent of Schools. Subsequent to the interview, the other two applicants withdrew their names from consideration.

3. Mr. Walker, a 1987 college graduate with no seniority with Respondent, was hired for the position, based upon his interview and verbal references from his student and substitute teaching supervisors in Calhoun and Nicholas Counties, West Virginia, respectively. He was not certified to teach drivers' education at the time, but expressed his

intention to obtain this certification prior to the 1988-89 school year.

4. Principal Marra did not review written evaluations of Grievant's teaching performance, on file with Respondent, prior to indicating to Superintendent Miller that he considered Walker the most qualified applicant.

5. Grievant's eight written evaluations, covering the period 1984-88, revealed a score of at least "satisfactory" in all areas of review.

6. Marra had never formally evaluated Grievant, although he had informally observed him in the role of teacher on a number of occasions.

7. Marra believed Grievant to be lacking in rapport with, and control of, students, although he never discussed this with Grievant. No reference to such deficiencies in Grievant's performance appeared on his written evaluations, and there is no evidence that Grievant was ever approached by anyone regarding these alleged problems.

8. While the evidence is inconclusive, there is the appearance that the applicants' interest and ability in coaching football, or lack thereof, was considered in filling the position in question.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence.

Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-020-4
(May 12, 1988).

2. A county board of education in West Virginia has substantial discretion in matters relating to the hiring of school personnel, but must exercise the same in an open and reasonable and not arbitrary and capricious manner. Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986); Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107 (November 7, 1988).

3. "The addition of requirements, not specified in the notice of a vacant position, after all the applications have been received is unfair to those who have applied in reliance upon the criteria described in the notice." Dillon at 63, n. 6.

4. A county board of education in West Virginia is obligated to hire the most qualified applicant for professional positions. W.Va. Code §18A-4-8b(a). If two or more candidates for a job are equal in qualification, the applicant with more seniority with the said board of education is entitled to the job. Id.

5. The totality of an individual's experience should be considered in determining his or her qualifications. Oser v. Marshall Co. Bd. of Educ., #18373 (W.Va.S.Ct.App. 10/26/88).

6. Evaluations of a teacher's past performance are relevant to the process of personnel decision-making. West Virginia Board of Education Policy 5300(6); also see Shaver.

7. Respondent did not evaluate Grievant's qualifications in an open or complete fashion.

8. A teacher need not be certified in a given subject to be found qualified to work in that area, so long as that certification is obtained prior to entry onto duty.

9. A teacher employed by a county board of education in West Virginia must work 133 days in a given school year in order to receive credit for a year of teaching experience and seniority. Harkins v. Ohio Co. Bd. of Educ., 369 S.E.2d 224 (W.Va. 1988); Davis v. Marshall Co. Bd. of Educ., Docket No. 25-88-096 (July 11, 1988).

10. A substitute teacher is "entitled to all of the benefits of regular employment including accrual of a semester's seniority to attain regular employment for each semester he worked on an ongoing regular basis at one continuing assignment and/or a year's seniority. . .to attain tenure for regular employment if he met the 133-day rule for each school year he taught." Talerico v. Harrison Co. Bd. of Educ., Docket No. 17-88-021-3 (June 23, 1988). Also see Toth v. McDowell Co. Bd. of Educ., Docket No. 33-87-309-4 (April 21, 1988) (substitute employees working in excess of 20 days do not become regular employees for purposes of seniority or preferential hiring per W.Va. Code §18A-4-15).

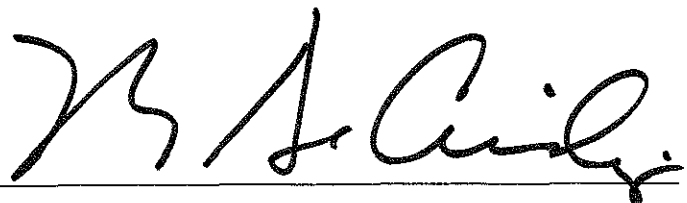
11. Grievant had no seniority as a regular employee with Respondent at the time he made application for the job in question. See Satterfield v. Marion Co. Bd. of Educ., Docket

No. 24-87-253-2 (February 26, 1988). Therefore, he and Walker were equal in this regard.

Accordingly, this grievance is **DENIED** in part, insofar as Grievant seeks reinstatement as regular teacher, social studies/drivers' education, EHHS; and **GRANTED**, insofar as it seeks fresh review of the qualifications of the applicants for that position as posted. Respondent is **ORDERED** to reevaluate each of the original "six or seven" applicants still interested in the job and, in as uniform a manner as practicable, to determine which of them is most qualified therefor.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hardy County and 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 Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: Dec. 9, 1988



M. DREW CRISLIP
HEARING EXAMINER