



**REPLY TO:**  
101 Harper Park Drive  
Suite D  
Beckley, WV 25801  
Telephone: 255-6155

**Members**  
James Paul Geary  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
Governor

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone: 348-3361

DORIS JOHNSON

v.

Docket No. 06-87-248-1

CABELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Doris Johnson, is employed by the Cabell County Board of Education as a special education teacher. She filed a grievance on June 26, 1987 alleging two summer school positions had been filled at the Cabell County Vocational-Technical Center with two less qualified applicants in violation of W.Va. Code, 18A-4-8b(a). A Level II hearing was held on July 23, 1987 and the decision at that level was adverse to grievant. The Board waived Level III proceedings and upon appeal to Level IV, the parties indicated a decision could be made on the record and supplemental briefs.

On April 27, 1987 the Board posted the two special education positions in question and the notice indicated the subject areas

to be covered would be behavioral disorders, specific learning disabilities or educably mentally impaired. It also contained the rather ambiguous phrase "with experience working with students in vocational programs" under the same heading.<sup>1</sup> The positions' terms were thirty-five (35) days and were characterized as an extended school contract but persons hired were required to sign a special contract. At least three (3) persons, including grievant, applied for the job and were interviewed by Mr. Albert Tenney, principal at the Vo-Tech Center. Mr. Tenney subsequently recommended Mr. Ben Steele and Mr. Mike Greathouse for the positions and the recommendation was accepted by the Cabell County Board of Education.

Grievant contends Mr. Tenney engaged in favoritism since the two persons hired had worked in the positions in previous summers and her credentials were not adequately reviewed. She further asserts she was the most qualified applicant for the position and the Board's failure to hire her was in direct violation of W.Va. Code, 18A-4-8b(a) and the decision in Dillon v. Board

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<sup>1</sup> It should be noted that the brief list of subject areas and the reference to "working with vocational programs" cannot be considered the job description required by W.Va. Code, 18A-4-8b(a) but this deficiency was not made a part of the grievance or raised at the Level II proceedings. The lack of such a description in the posting would generally entail a finding that the job should be reposted and another selection process conducted, Watson v. Logan County Board of Education, Docket No. 23-88-041, but the West Virginia Education and State Employees Grievance Board will not anticipate issues not fairly raised. Harrison v. Kanawha County Board of Education, Docket No. 20-87-134-1.

of Education of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986) which held the provisions contained therein required a county board of education to fill vacancies primarily on the basis of qualifications. The Board takes the position that the special education teacher's role at the Vo-Tech Center required hands-on experience in machine shop, auto mechanics and electronics and while grievant had worked in what it termed pre-vocational programs, she was lacking in these areas.

Ms. Johnson holds a Masters degree in special education and has completed thirty-six (36) additional hours, six (6) of which involved classes in vocational education of handicapped students. She has twenty-five (25) years of teaching experience and twenty-four (24) of those years have been spent teaching special education. For the past three (3) years she has been assigned to a Goodwill Industries program in which she assisted in the training of handicapped persons in various job skills. The record of the Level II proceedings is not clear on the complete qualifications of the successful applicants but it appears Mr. Greathouse is a regularly employed resource teacher at the Vo-Tech Center certified in special education and Mr. Steele is certified in special education and once worked in that area at the Vo-Tech Center but for the last several years has been teaching social studies due to a staff reduction at the Center. (T.12,39)

When a grievance contains allegations that a position has

been filled in violation of the provisions of W.Va. Code, 18A-4-8b(a), the grievant must necessarily prove by a preponderance of the evidence that the interview/selection process used to fill the position was flawed or that his or her qualifications exceed those of the successful applicant(s). See, Milam v. Kanawha County Board of Education, Docket No. 20-87-270-1; LeMaster v. Cabell County Board of Education, Docket No. 06-87-074-1. This burden also includes a requirement that the grievant produce sufficient evidence of not only his or her qualifications but also those of the applicant(s) who received the position(s) in question. Randolph v. Harrison County Board of Education, Docket No. 17-88-001-2.

In the present case the grievant's allegation that the interview process was flawed or manipulated in some fashion to favor Mr. Steele and Mr. Greathouse is unsupported by the evidence. Except for assertions by Ms. Johnson that her interview was rushed and Mr. Tenney did not contact her supervisors for input on her qualifications, there was no evidence produced to indicate any predetermination that Mr. Steele and Mr. Greathouse would receive the jobs. Mr. Tenney testified that he considered the credentials of all applicants and because of previous working relationships with Mr. Greathouse and Mr. Steele he was aware of certain mechanical skills that both possessed and were desirable in the type of work required by the position. A certain amount of reliance on subjective criteria in the selection process is both reasonable and necessary and not an arbitrary or capricious

use of the discretion normally afforded a county board of education in such matters unless the criteria is not reasonably associated with the requirements of the position. Higgins v. Board of Education of Randolph County, 286 S.E.2d 682 (W.Va. 1981); Strickland v. Kanawha County Board of Education, Docket No. 2-86-013; LeMaster v. Cabell County Board of Education, supra. There was ample evidence that Mr. Tenney's perceptions of the abilities of the two successful applicants were directly related to the duties and responsibilities of the positions.

As to the grievant's allegation that her qualifications exceeded those of Mr. Steele and Mr. Greathouse, she simply did not produce sufficient facts, either through testimony or collateral documentation, of the credentials of these two employees to facilitate a comparison with her own. A failure to present those facts renders any subsequent review of the Board's selection process impossible. Randolph v. Harrison County Board of Education, supra. It should also be noted the record contains no indication as to whether or not there were other candidates for the position whose qualifications must also be considered when a grievant alleges he or she was the most qualified of all who applied.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. Grievant, Doris Johnson, has been employed by the Cabell County Board of Education as a special education teacher.

2. On April 27, 1987 the Board posted two (2) positions for special education teachers at the Cabell County Vocational-Technical Center for a thirty-five (35) day summer school session.

3. At least three (3) persons made application including grievant, Mr. Ben Steele and Mr. Mike Greathouse. Mr. Tenney conducted an evaluation of the qualifications of each and his recommendation to the Superintendent of Schools that Mr. Steele and Mr. Greathouse be awarded the positions was accepted by the Cabell County Board of Education.

#### CONCLUSIONS OF LAW

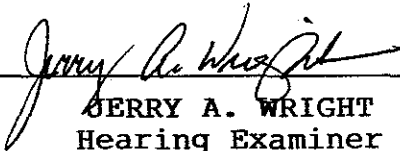
1. It is incumbent upon a grievant seeking relief pursuant to W.Va. Code, 18-29-1, et seq. to prove all of the allegations constituting the grievance by a preponderance of the evidence. Kirk v. McDowell County Board of Education, Docket No. 33-87-178; Andrews v. Putnam County Board of Education, Docket No. 40-87-330-1; Randolph v. Harrison County Board of Education, supra.

2. A grievant who makes allegations that a county board of education has failed to fill a position in accordance with the provisions of W.Va. Code, 18A-4-8b(a) must produce evidence of the successful applicant(s) qualifications sufficient to facilitate a comparison of credentials. Randolph v. Harrison County Board of Education, supra.

3. The grievant, Doris Johnson, has failed to prove by a preponderance of the evidence that she was more qualified for the special education teacher positions at the Cabell County Vo-Tech Center than the successful applicants or that the Cabell County Board of Education otherwise acted arbitrarily or capriciously in the filling of said positions.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Cabell County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
JERRY A. WRIGHT  
Hearing Examiner

Dated: July 20, 1988