



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 233-4484

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

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

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

SANDRA MILLIKIN

v.

Docket No. 43-87-278-3

RITCHIE COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Sandra Millikin, is professionally employed by the Ritchie County Board of Education. On November 17, 1987 she filed a level four grievance appeal when she was not hired for a guidance counselor position vacancy. A level four hearing was conducted in Harrisville, Ritchie County on December 16, 1987; matters were kept open for the deposition of a key witness on January 22, 1988. Proceedings came to a halt when legal steps were taken by grievant's WVEA representative to obtain documents relating to the successful candidate's application materials and credentials, deemed critical to the adjudication. These matters have not been resolved to date but grievant's representative requested nonetheless that a decision be rendered due to the inordinate amount of time already transpired since the grievance was filed and the speculation that final resolution of the evidentiary matters would delay disposition of the grievance

even more. Grievant's representative requested that the parties be given a date for the submission of briefs, and he complied with the proposed August 5, 1988 date. Conversely, counsel for the board submitted only a short letter stating the board's position in the matter.¹

Grievant has obtained a Master's degree plus 30 hours graduate work and has held a West Virginia teaching certificate since 1979. She completed her Master's degree in counseling and guidance at the College of Graduate Studies (COGS). In order to receive State certification in counseling, a teacher/candidate must also complete a one-year Supervised Entry Level Counselor (SELC) program sponsored by a graduate school while concurrently employed as a school counselor. It appears that grievant had some counseling assignments in Ritchie County in the 1985-86 school year, but was not eligible for the SELC program as the position was not full-time, as required. (T4.25). For the 1986-87 school year, the respondent board assigned grievant to a full-time counseling position at two middle schools. At that time grievant enrolled in the SELC program for grades 5-12 at West Virginia University (WVU) and signed up for the requisite six hours coursework in the fall semester -- her supervisor was Dr. Michael Yura. The coursework may be split into three hours per semester or six hours in either the fall or spring semester. When the six

¹ References to the various hearings and deposition shall be cited as follows: October 13, 1987 level two hearing (T2.__), December 16, 1987 level four hearing (T4.__) and January 22, 1988 Deposition of Russell Crawford (TD.__).

hours occur in the fall, the candidate is automatically given an Incomplete ("I") until the end of the SELC program the following spring. Grievant was granted a temporary certificate during the 1986-87 school year and could apply for the Provisional Professional Certificate upon completion of the SELC. The provisional certificate is good for three years and the counselor must be employed and take six additional credit hours to qualify for a five-year renewal at the end of the first three-year period.

In the spring of 1987 the respondent board determined some reduction in force (RIF) action was necessary. A French teacher, Gary Hamrick, was terminated by board action and grievant was informed that her counseling position at the two middle schools was eliminated. As she had sufficient seniority to be retained, she was reassigned to the French teaching position for school year 1987-88. Grievant did not apply for her Provisional Certificate that spring as her counseling position had been eliminated and the certification would have been for naught.

However, in June 1987 she requested that Dr. Yura submit a grade modification for her "I," issued at the end of the fall semester. Dr. Yura routed it for processing on June 15, 1987. (Grievant Exhibit No. 5, 12/16/87.) Dr. Yura testified that in late June, before he had completed his 9-month contractual obligations for the University, he called the Assistant Superintendent of Ritchie County, Michael Been, in response to Mr. Been's earlier query to the Department about grievant's status and SELC

program. Dr. Yura said he had assured Mr. Been that he had heard no complaints of grievant's work during in-site visitation and that grievant had successfully completed her SELC program. (T4.45, 46).

In early July 1987, Mr. Dixon Law, Superintendent of Schools, received a letter of interest from Dianne Byrer; Ms. Byrer sought a guidance counseling position in Ritchie County. In response to her inquiry, Mr. Law sent Ms. Byrer an application. The completed application was dated and signed by Ms. Byrer on July 29, 1987 and stamped as received by the county on that date. Ms. Byrer holds an AA degree in Social work, a BA in Sociology and had completed the requirements for a master's degree in counseling and guidance at WVU on August 17, 1984. Her later graduate coursework in counseling was tailored to meet West Virginia school certification standards for a non-teacher and she completed a required one-semester practicum at Doddridge County High School in June 1985. Subsequently, Ms. Byrer was employed as an "Assistant 4H" in Harrison County from October 1985 until February 1987. Her application further states that she was employed from February 1986 (sic) until June 1987 as a "counselor" at Lincoln High School in Harrison County, but the nature of the semester's employment, full-time, part-time or substitute, is not known. According to State certification records, she was not certified for the counseling position that semester. (Grievant Exhibit No. 7, 12/16/87).

In early August 1987 a county guidance counselor, Diane Godwin, who had been reassigned to Ritchie County High School (RCHS) and Cairo Middle School that spring resigned her position. At its August 10, 1987 meeting, the school board announced a vacancy for a Guidance Counselor for RCHS and Cairo Middle School (Board Exhibit No. 5, 10/13/87); the printed posting erroneously omitted the Cairo school assignment. Grievant bid on the position as posted. On August 14, 1987 grievant sent an application for her provisional counseling certificate to officials at WVU for processing. The normal procedure is for the degree granting school officials to check their records for verification of requirements and route the application on to State Certification officials in the Department of Education. The respondent board's personnel office received a memo dated August 20, 1987 from a WVU official which stated that grievant's application for certification in counseling must be processed through COGS, not WVU, and also noted that, on the WVU transcript, grievant had received an "I" in the SELC course and the "I" had to be removed. Ritchie County school officials did not inform grievant of this problem. (Board Exhibit No. 9, 10/13/87).

With respect to the August 10 posting, Mr. Law testified that Ms. Byrer was considered for the position on the basis of her completed application. In mid-August Ms. Byrer was interviewed by Mr. Law as well as by the RCHS principal, Russell Crawford. Principal Crawford admitted that he spoke with Ms. Byrer at the high school on more than one occasion, but he

refuted the testimony of two teachers who had been in the high school building on two separate occasions in mid-August and who claimed that Ms. Byrer was introduced to them as the new guidance counselor. Principal Crawford interviewed grievant on August 20, 1987. He did not discuss grievant's qualifications with her, but, instead, voiced a concern about what would happen to the language program as he had assigned her (grievant) to teach French in the ensuing school year. (T2.11).

On August 20, 1987 Superintendent Law polled board members by phone to terminate the counselor position posted on August 10. On August 24, 1987 the board formally terminated the erroneous posting of Guidance Counselor for RCHS and voted to repost the position as "Guidance Counselor/Social Worker - All primary schools, both middle schools and RCHS." The posting, with a September 1, 1987 deadline for applications, stated that the position required Certification in Guidance at all school levels. Superintendent Law nominated Ms. Byrer for the position by telephone "poll" to the board members on September 1, 1987 and the decision to employ Ms. Byrer was formalized at a September 14, 1987 board meeting.

Principal Crawford stated that he had tendered a written recommendation to Superintendent Law, as is required, that Ms. Byrer be hired. His determinations were based upon "the University said that she was certifiable," she had the required working experience and her principal where she last worked gave her a "glowing recommendation." (TD.9). He said grievant was not qualified and he had a letter from the State Department of

Education, Certification Department, saying that grievant's certification and her coursework were incomplete. (TD.11). When asked to produce the documentation of the matters to which he testified, Mr. Crawford replied that the data was at the school board office. Mr. Crawford said Ms. Byrer's certifiability was an important consideration, but the primary factors for his recommendation were her experiences in mental health, her qualities such as enthusiasm and energy and her recommendation from a principal for whom she had worked previously. (TD.13). Subsequent to Ms. Byrer's employment, by letter dated September 3, 1987, Superintendent Law personally forwarded Ms. Byrer's application for temporary certification in K-8 counseling to WVU officials and noted that she would be employed by the county in counseling and would enroll in the SELC program at WVU. The application had been filled out and signed by Ms. Byrer on August 11, 1987 and noted that the license was to be mailed to Ritchie County. Ms. Byrer would have had no purpose to complete the application had she not been ensured a position in counseling with the designated county. The application was forwarded from WVU to State Certification officials with a recommendation that Ms. Byrer be issued a temporary permit for K-8 counselor. (Grievant Exhibit No. 6, 12/16/87).

Grievant charges that the selection process for the position in dispute was tainted in that the successful candidate was given preferential treatment, including multiple interviews; that school officials did not notify grievant of questions about her certifiability which could have been readily resolved had she known

of them; and that a decision to hire Ms. Byrer was informally made in mid-August and board actions to alter the scope of the position duties were executed in late August to accommodate Ms. Byrer and exclude her (grievant). Grievant contends that she was the most qualified and senior candidate for the guidance counselor vacancy, is certifiable at all grade levels, using in part the same standards by which Ms. Byrer was hired, and is therefore entitled to instatement to the position.

Counsel for the board contends and argues that grievant was not qualified for the posted position on September 1, 1987, the date of hiring, as the board had no other information available to it but that grievant had an incomplete grade on her SELC and was thus not certifiable.

The West Virginia Education and State Employees Grievance Board has held that when a grievant alleges impropriety in the selection of a candidate for a vacant position and the school board's determinations were otherwise violative 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 and that his or her qualifications exceed those of the successful applicant(s). Johnson v. Cabell County Board of Education, Docket No. 06-87-248-1; 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 respondent board stonewalled grievant's attempts to prove her case by its refusal to produce essential documentation and at no time offered a legal argument for said refusal. Nonetheless, grievant's allegation that the hiring process was flawed or manipulated in some fashion and that Ms. Byrer's employment was predetermined is supported by the evidence. The principal testified that his recommendation was based in part on subjective criteria which could be reasonably associated with the requirements of the position, however, the respondent relies entirely on its stated position that grievant was not qualified for the position at the time of hiring because it had no evidence that she was certifiable. Undisputed testimony established that school officials in Ritchie County knew in June 1987 that grievant had satisfactorily completed her SELC. Apparently the proper WVU personnel were slow to act on the grade modification request. At WVU the appropriate Dean finally signed the form September 14, 1987 upon Dr. Yura's earlier recommendation that the "I" be changed to "A." However, when the respondent was notified by a counseling official at WVU in August of some processing and other problems with respect to grievant's certification, problems which existed through no fault of her own, it withheld the information from grievant until after Ms. Byrer had been formally hired. Inexplicably, Superintendent Law traveled to WVU September 15 or 16, 1987, to discuss grievant's

credentials with Dr. Yura. The propriety of such an investigation after grievant had been denied the counseling position is subject to question: Mr. Law certainly could have investigated grievant's certifiability prior to the hiring action and, in fact, he had a duty to do so. See, Evans v. Berkeley County Board of Education, Docket No. 2-88-026-2.

Grievant was indeed certifiable and she had taken the proper steps to obtain provisional certification. Moreover, the respondent required that the candidate be certified in all grade levels. The respondent board based its certainty on Ms. Byrer's certifiability on a letter from a WVU official which stated that under new regulations in effect in August, Ms. Byrer could be certified in all grade levels. However, the same advisory letter clearly stated, "It is the discretion of the county to employ either at the K-8 certification level or the 5-12 certification level." (Emphasis Added). (Grievant Exhibit No. 8, 12/16/87). Finally, the evidence supports a finding that grievant was more qualified than Ms. Byrer. Grievant's credentials included superior seniority, education (Master's +30) and experience as a teacher and counselor. She had completed her SELC, had been given satisfactory evaluations within the school system for her counseling duties, was eligible for provisional certification in counseling 5-12 and could have been temporarily certified for the elementary levels in accordance with the new State regulations alluded to in the letter from WVU on Ms. Byrer's behalf. Conversely, the record reveals that at the time of hiring Ms. Byrer did not possess a teacher's

license; had completed only fourteen hours graduate courses beyond the master's degree; had not completed her SELC; had no employment evaluations or recommendations on her behalf, which could have been produced by the respondent if they existed; and was not eligible for licensure/certification in counseling in both the elementary and secondary levels.

Due to the extensive testimony and documentation in this matter, the foregoing narration as well as the following shall serve as the specific findings of fact in this grievance.

FINDINGS OF FACT

1. Grievant is employed by the Ritchie County Board of Education and served as a guidance counselor at Pennsboro and Cario Middle Schools during the 1986-87 school year. As the result of a reduction in force at the end of the 1986-87 school year, grievant's position was terminated and she was subsequently reassigned to the classroom to teach French.

2. According to his testimony, Mr. Dixon Law, Superintendent of Schools, received a letter of interest dated July 9, 1987, from Dianne Byrer, who sought a guidance counselor position in Ritchie County. Mr. Law sent Ms. Byrer an application; the completed application she returned to the board was received on July 29, 1987. (T4.31,32).

3. On approximately August 10, 1987, the position of guidance counselor at Ritchie County High School (RCHS) was posted. Grievant applied for the position on August 13, 1987. (T2.9,10). Mr. Law considered Ms. Byrer for the position as her completed application had been received by that time. (T4.31,32). Superintendent Law himself interviewed Dianne Byrer "somewhere between August 10 and 14." (T4.25). Principal Crawford could not remember exactly when he interviewed Ms. Byrer but he testified that Ms. Byrer was probably in the high school sometime during the second week of August, "We had her in several times talking with her and going over what we expected of her." (Emphasis added).

4. Barbara Robinson, a teacher at RCHS, testified that on approximately August 12 or 13, the school's principal, Russell Crawford, introduced her to Dianne Byrer and identified Byrer as the new high school guidance counselor. Ms. Robinson was very sure she had not misunderstood the introduction as she clearly recalled extending her hand to Ms. Byrer and saying, "Congratulations...." (T2.17). Donna Pratt, another teacher at RCHS, testified that in mid-August, as she was rushing in and out of the school to complete some school matter, she met with a group of several persons including Mr. Crawford and Ms. Byrer. Ms. Pratt stated that she was introduced to Ms. Byrer and Ms. Byrer was referred to as "our new guidance counselor." (T4.5).

5. On August 20, 1987 grievant was interviewed for the posted position by Principal Crawford (T2.10) but he did not inquire about her qualifications nor mention any problem with her certification (T4.72). Mr. Crawford did express his view that grievant was needed as a French teacher. (T2.11).

6. On August 24, 1987 grievant learned that the August 10 posting had been "terminated" and the position of "Guidance Counselor, Social Worker and Special Services at Ritchie County High School, Pennsboro Middle, Cairo Middle and all primary schools" was instead posted. The position required certification in all grade levels but no qualifications with respect to "Social Worker/Special Services" were listed for the newly-titled, extended service position. No statutory provision or school classification exists for the professional position of social worker in West Virginia schools. (T2.11,12); (Grievant Exhibit No. 7).

7. Grievant applied for the newly-posted position on August 25, 1987 but was not interviewed for this position by any Ritchie County administrator. Dianne Byrer applied for the newly-posted position via a handwritten note dated August 25, 1987: "Dear Superintendent, I wish to apply for the counseling position you have posted for the elementary and secondary levels." The note bears no return address or receipt stamp indicating when the board received it. Whether Ms. Byrer received a further interview for the altered position is not known.

8. The 1987-88 Ritchie County High School Handbooks were printed on August 26, 1987 (Documents submitted by Superintendent Law, 2/19/88) with Dianne Byrer's name listed as a guidance counselor. Materials must be in the printer's hands at least two weeks prior to the start of school, according to Principal Crawford, but he could not remember when he submitted the data to the printers. (TD.3). School officials characterized the inclusion of Ms. Byrer's name as counselor as a mistake and Principal Crawford attempted to adjust this "mistake" by whiting out Byrer's name on the handbooks distributed to teachers in late August on in-service days prior to the beginning of the instructional year. (TD.4).

9. Ms. Byrer was employed for the counseling position via a telephone poll conducted by Superintendent Law on September 1, 1987. Mr. Law personally expedited the certification process for Ms. Byrer on September 3; he used an application form signed by Ms. Byrer on August 11, 1987 when she obviously knew she had been ensured of a position in Ritchie County. The board finalized its action to place Ms. Byrer in the guidance counselor position at issue at its meeting on September 14, 1987. (T2.21,22; Board Exhibit No. 11, 10/13/87).

10. The probative evidence preponderates that the respondent treated the two candidates for the position in question, Dianne Byrer, the successful applicant, and Sandra Millikin, grievant, differently in its employment considerations, to grievant's detriment, and acted in violation of the spirit and intent of W.Va. Code, 18A-4-8b(a).

11. The evidence adduced preponderates that grievant was more qualified than Dianne Byrer for the guidance counselor position at issue as grievant was, in part, certifiable in all grade levels, a requirement of the position, and the board knew, or should have known, that grievant was fully certifiable at the time of hiring.

CONCLUSIONS OF LAW

1. 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); Miller v. McDowell County Board of Education, Docket No. 33-87-133-1; Smith v. Wyoming County Board of Education, Docket No. 55-87-209.

2. W.Va. Code, 18A-4-8b(a) requires that decisions affecting the filling of any classroom teacher's position be made on the basis of qualifications. Shoemaker v. Hampshire County Board of Education, Docket No. 14-87-256-2.

3. A county board of education may not ignore qualified applicants for a vacant position for the sake of expediency and no existing law or policy vitiates its responsibility to employ the most qualified applicant for the position vacancy. Crow v. Marshall County Board of Education, Docket No. 25-87-273-3.

4. When a county board of education assumes the responsibility of liaison between its employees and the State Department of Education in securing teaching licenses it must act in the employees' best interest in obtaining complete and correct certification. Evans v. Berkeley County Board of Education, Docket No. 2-88-026-2.

5. The presumption of good faith which is ordinarily accorded an official act cannot prevail and will not apply when a review of the facts warrants otherwise. Beverlin v. Board of Education of the County of Lewis, 216 S.E.2d 554 (W.Va. 1975); State ex rel. Linger v. Board of Education, 163 S.E.2d 790 (W.Va. 1968); Crow v. Marshall County Board of Education, supra.

6. Pursuant to W.Va. Code, 18-29-8(b), the West Virginia Education and State Employees Grievance Board is vested with the authority to provide relief not inconsistent with regulation or law and may instate grievants to a position to which he or she may be entitled. Phares v. Randolph County Board of Education, Docket No. 42-86-232-2; Brumfield v. Kanawha County Board of Education, Docket No. 20-86-126-1; Kilmer v. Wayne County Board of Education, Docket No. 50-86-234-1.

Accordingly, the grievance is GRANTED and the board of education is ordered to instate grievant to the counseling position at issue, effective immediately.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ritchie County and such appeal must be filed within thirty (30) 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.

DATED: September 20, 1988



NEDRA KOVAL
Hearing Examiner