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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
**GASTON CAPERTON**  
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**JAMES BLACK**

**v.**

**Docket No. 06-88-238**

**CABELL COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant James Black is, and has for several years been, employed by Respondent Cabell County Board of Education as a classroom teacher at Barboursville High School (BHS). On September 8, 1988, he filed this action at Level I, complaining that he should have been selected for "the posted position at Milton High School [(MHS)] in social studies." He was denied relief at that level and the next, Respondent waived Level III consideration per W.Va. Code §18-29-4(c), and Grievant initiated this complaint at Level IV on December 7, 1988. The parties have agreed, with leave of the undersigned, that decision may appropriately be made

on the record below,<sup>1</sup> supplemented by the proposed findings of fact and conclusions of law which were submitted by January 20, 1989.

Grievant has over eighteen years' experience as a social studies teacher in Respondent's employ. He is certified for grades 7-12 in that field and in physical education, and possesses a masters' degree plus thirty hours in educational administration. The only other and successful applicant for the post in question was Ms. Claren Perkins. Ms. Perkins has twelve years' professional service with Respondent, in secondary social studies and science, and a masters' degree in history. For at least the past three school years, she has been an instructor at MHS.

Grievant's argument is that he and Ms. Perkins are equally qualified<sup>2</sup>, see T. 4, and that his undeniably greater seniority mandates his hiring for the job per Code §18A-4-8b(a) and Dillon v. Bd. of Educ. for the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986). In pertinent part, §18A-4-8b(a) reads as follows:

A county board of education shall make decisions affecting. . .filling of any classroom teacher's

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<sup>1</sup>The transcript of the Level II hearing and the exhibits then admitted into evidence are a part of the record at Level IV.

<sup>2</sup>Interestingly, Grievant does not contend, even in the alternative, that he is more qualified than Ms. Perkins. Grievant's assertion, at T. 48, that "[s]ince. . .[he] is duly certified and qualified and the most senior applicant,. . .he should therefore be granted the [MHS] social studies position" ignores applicable law. See Conclusion of Law 1.

position occurring on the basis of qualifications. If the applicant with the most seniority is not selected for the position a written statement of reasons shall be given to the applicant with the most seniority with suggestions for improving the applicant's qualifications.

The Supreme Court of Appeals of West Virginia concluded in Dillon "that [in promulgating §18A-4-8b] the legislature must have intended seniority to be the determinative factor when the applicants for a . . . vacant teaching position are otherwise so similarly qualified as to make a rational choice among the candidates impossible." At 62, emphasis supplied.

Mr. Richard Fillmore, MHS Principal for at least the last three school terms and the person responsible for recommending Ms. Perkins over Grievant for hiring, testified at Level II that he had not considered formal evaluations of either; however, he had participated in recent past formal evaluations of Ms. Perkins. He further advised that, while Assistant Principal for seven years at BHS, he had observed but never officially evaluated Grievant.<sup>3</sup> His statement, in the September 13, 1988, letter advising Grievant of the reasons for his non-hiring, that he, Grievant, "responded negatively about the events and how others in the [education] system are against you," was based on those observations and on informal "chit-chat" in which the two engaged

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<sup>3</sup>Fillmore chose not to confer with current supervisory personnel at BHS regarding Grievant's application. T. 47.

on July 22, 1988. T. 26-29, 35-36, 41-44, 46.<sup>4</sup> Fillmore conceded that Grievant's interviews were "positive," as were Ms. Perkins'.<sup>5</sup> T. 47.

Respondent contended that, notwithstanding Grievant's perceived negative attitude, Ms. Perkins was the most qualified applicant and therefore entitled to the post. This determination was said to be based on her advanced education in history; her late involvement in professional activities designed to enhance her teaching abilities; and her volunteer contributions to the local and educational communities. While Grievant presented evidence of his own community and extracurricular involvement, none of it was of recent date, nor was any of Grievant's graduate work in social studies.

Respondent's Policy GBBC, "Posting of Teaching Vacancies and Selection Procedure,"<sup>6</sup> provides, in pertinent part:

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<sup>4</sup>There is no evidence that Fillmore ever discussed his impressions from these "observations" or their "chit-chat" with Grievant, or that Grievant was otherwise ever made aware of them prior to his filing the within complaint. Fillmore also opined, apparently as asides, that Grievant was weak in the areas of "the ability to work with other employees", T. 29, and "control of classroom", T. 43.

<sup>5</sup>Both candidates were interviewed twice. It is not contended herein that any unfairness existed in the conduct of these meetings.

<sup>6</sup>Grievant's ancillary argument, that the written vacancy notice did not include a description of relevant qualifications for the job in question, would seem to be effectively disposed of by his constructive notice of this policy.

The selection of teachers for job-posted vacancies shall be based on qualifications. Qualifications may include but [are] not limited to education, certification, experience, job knowledge, organizational ability, communication ability, professional attitude, maturity, stability, motivation, assertiveness, initiative, confidence, leadership ability, and ability to work with other employees.

The remainder of this Decision will be presented as findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant has over eighteen years' experience as a social studies teacher with Respondent.
2. He and Ms. Claren Perkins, who has twelve years' experience with Respondent as a social studies and science teacher, were the only two applicants for a social studies teacher position at Milton High School (MHS). Grievant clearly had greater seniority; Ms. Perkins was awarded the post.
3. Ms. Perkins has an advanced degree in history and significant community and extra-curricular involvement of recent date; Grievant's graduate work is in education administration, and he has participated marginally, at best,

in community and extra-curricular activities in the past few years.

4. Mr. Richard Fillmore, MHS Principal, after fairly-conducted interviews, recommended to Cabell County Superintendent of Schools Frum that he refer Ms. Perkins' name to Respondent for hiring. In arriving at this decision, Fillmore did not consult formal written evaluations, on file with and easily accessible from Respondent, of either candidate; however, he was responsible for recent evaluations of Ms. Perkins and so had knowledge of them, and he considered informal observations he had made of Grievant's teaching performance in the past, and perhaps other extraneous information as well.

#### CONCLUSIONS OF LAW

1. A county board of education must fill a professional vacancy with the most qualified applicant. W.Va. Code §18A-4-8b(a); Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986). Seniority is the determinative factor only if the top applicants are, in effect, equal in qualifications. Id.

2. The totality of an individual's experience should be considered in determining his or her qualifications. Oser

v. Haskins & Marshall Co. Bd. of Educ., #18373  
(W.Va.S.Ct.App. 10/26/88); also see Cabell County Board of  
Education Policy GBCC. In this regard, extracurricular and  
community involvement may be pertinent.

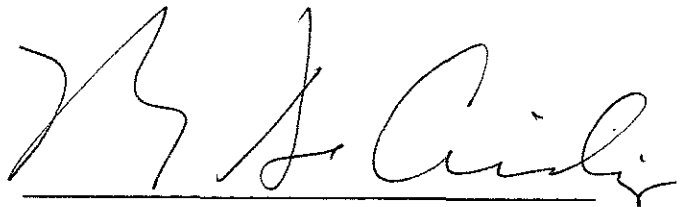
3. A county board of education has substantial discretion  
in matters relating to the hiring of school personnel, but  
must exercise the same in an open and reasonable and not  
arbitrary and capricious manner. Dillon.

4. Evaluations of a teacher's past performance are relevant  
to the process of personnel decision-making. Ginn v. Hardy  
Co. Bd. of Educ., Docket No. 16-88-185 (Dec. 9, 1988); West  
Virginia Board of Education Policy 5300(6). Only in certain  
circumstances may evaluative information outside formal  
written evaluations be considered in filling positions. See  
Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107  
(Nov. 9, 1988).

5. "When a grievant has the greatest seniority of the  
candidates for a professional position he was denied, in  
order to prove a violation of [W.Va.] Code §18A-4-8b(a), he  
must prove by a preponderance of the evidence that he was  
[at least] equally qualified for the position as the other  
candidates or that the interview/selection process used to  
fill the position was flawed." Kizer v. Roane Co. Bd. of  
Educ., Docket No. 44-88-143 (Jan. 12, 1989).

6. The selection process for social studies teacher, MHS, was flawed in that Grievant's written evaluations were not considered, while Ms. Perkins' constructively were, and in that inappropriate extraneous information was a factor in the outcome.

Accordingly, this grievance is GRANTED, only insofar as it seeks fresh review of the applications, including past formal performance evaluations, of Grievant and Ms. Perkins for the position of social studies teacher, MHS; and DENIED, insofar as it seeks this Grievance Board to, by this Decision, instate Grievant in that job.

A handwritten signature in cursive script, appearing to read "M. Drew Crislip", written over a horizontal line.

M. DREW CRISLIP  
HEARING EXAMINER

Dated: January 31, 1989