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LYGIA MCCOOL

v.

Docket No. 15-89-018

HANCOCK COUNTY BOARD OF EDUCATION

DECISION

Grievant Lygia McCool has been employed by respondent Hancock County Board of Education (HCBE) since October 1987 as a music teacher and assistant band director at Weir High School (WHS) in Weirton. When she was not promoted to the head band director vacancy for the 1988-89 school year, she filed a level one grievance alleging violations of,

W.Va. Code §18A-4-8b Seniority Rights for professional teachers, W.Va. Code §18A-4-5a Supplemental salary for county teachers, W.Va. Code §18-29-2(o) Favoritism, W.Va. Code §18-29-2(n) Harassment.

The record indicates adverse decisions were rendered on the grievance October 13, 1988, November 15, 1988,¹ and December 5,

¹The level two decision noted that HCBE had instituted procedures to compensate grievant for the duties she performed as acting, then interim band director. Grievant did not pursue the Code §18A-4-5a supplementary salary issue at level four and it is presumed the matter was settled to her satisfaction. The allegation of harassment was not developed and is likewise considered abandoned.

1988. The grievance was advanced to level four January 1989 and a hearing was conducted February 15, 1989.² Grievant filed proposed findings of fact and conclusions of law March 23, 1989; HCBE's proposals were received June 30, 1989. A summary of facts giving rise to the grievance, gleaned from testimony at levels two and four³ is in order:

Grievant is certified in music education, K-12. Prior to employment by HCBE, grievant had taught music and served as assistant band director for two years at a high school in Ohio and taught music and served as sole band director one year for a junior high school in Ohio County, West Virginia. HCBE has employed both a head band director and assistant band director at its two high schools for a number of years. Although grievant was technically a WHS staff music teacher, only the head band director remained on-site at WHS during the instructional day. Grievant's duties for HCBE thus required that she

²A level two hearing was conducted November 4, 1988, and the transcript of the proceeding was submitted at level four. Grievant and Superintendent Russell Slack testified extensively at level two.

At level four, grievant subpoenaed the HCBE members, Michael Nogay, Patsy Brancazio, Connie Sherensky, John Manypenny and Jay Wright; George Tokash, Principal of WHS; and Raymond Seifert, the successful applicant for the band director/music teacher position. Testimony was extensive from these persons. In addition, grievant testified briefly and HCBE called upon Mr. Slack for some brief testimony.

³The record consists of over 225 pages of transcription and numerous documents. Post-hearing, HCBE provided a list and additional submission of various documents referenced in testimony, e.g., board minutes, school schedules, etc.; these materials were received March 22, 1989.

travel to various schools in the morning hours to instruct beginner fifth and sixth grade bands and return afternoons to WHS to assist with the high school varsity band, jazz band and ensembles.

In late July 1988, Mr. Glenn Scheid, head band director and full-time music teacher at WHS, submitted a letter of resignation.⁴ The matter was not formally acted on until HCBE's August 1, 1988, meeting and on that date the separate positions for music teacher and head band director were posted jointly. An attachment to the announcement listed only the duties and qualifications for the band director's position:

DUTIES: To assist with . . . training and directing band, . . . practice sessions, drills, parades, and any other performance assigned by the principal

REQUIRED QUALIFICATIONS:

1. At least a bachelor's degree from a regionally accredited institution of higher learning.
2. Experience as a director of a high school band.
3. A West Virginia teaching certificate.
4. Effective oral and written communication skills.

DESIRED QUALIFICATIONS:

1. A quality background in music education.
2. A demonstrated ability to produce quality bands.
3. A demonstrated ability to work with parents, other school personnel, and the public.
4. Demonstrated abilities to interact with individuals and groups in motivating school and community interest in a marching band, concert band, and jazz.

⁴The record reveals that Mr. Scheid's quest to leave the system was known as he had been unhappy with the position for at least part of his four-or five-year tenure. His departure was indicative of an pattern of turnover in the band director position for a number of years and some persons were aware that Scheid was leaving sometime after the end of the 87-88 school year. Mr. Seifert testified he knew in advance of Scheid's impending resignation and the record indicates some board members also knew.

Grievant, Ray Seifert and an undisclosed number of other persons made application. After interview of the applicants, WHS Principal George Tokash recommended to Superintendent Slack that grievant be employed as head band director. On August 22, 1988, Superintendent Slack advanced grievant's name and recommended her for transfer from her extra-curricular assignment of assistant band director to head band director, but the nomination was not approved. HCBE members from the northern section of the county, Wright and Manypenny, voted yes; Weirton members Brancazio and Sherensky voted no,⁵ and Nogay, newly seated on July 1, 1988, abstained.

HCBE took no further action on the matter and school began for students September 1, 1988; the football season began the next day. In what must have been trying circumstances, grievant assumed the responsibilities for WHS's music program and performed the duties of WHS full-time music teacher and head band director although she was not provided an assistant as the position required and the record does not indicate how her acting or interim assignment was effected. She directed

⁵Ms. Sherensky later that evening spoke to a comment she made at another HCBE meeting about Mr. Scheid's protracted resignation and the band's being "dead in the water" which she felt had been misinterpreted. Inexplicable in view of Ms. Sherensky's negative vote cast earlier that evening on grievant's recommended employment, Ms. Sherensky said her "dead in the water" comment referenced a concern that the band might not have a director in charge when school began and would thus be "dead in the water" for that reason.

the band at the September 2 football game and at an away game on September 9.

On Monday, September 12, 1988, Ray Seifert appeared spontaneously at the HCBE meeting as memorialized in its minutes of that date:

Mr. Seifert stated that the board had received telephone calls and letters from him regarding his application and interest in a position that was presently open, but he wanted to take this opportunity to personally introduce himself to the board. He then gave details regarding his certification, along with a detailed explanation of how he desired to go back to working with youth in an area that was very fulfilling to him.

Mr. Seifert's extensive, multi-page resume showed that he was a Weirton native, WHS graduate and former WHS band member. He obtained a bachelor's degree in music education, K-12, at West Liberty State College (WLSC) in 1975. After graduation, he worked in the accounting department at Weirton Steel and maintained an avid interest and participation in instrumental and vocal music endeavors. Among other things, he taught private music lessons to individual students of various ages and ran his own music school, Seifert School of Music, from 1980, directed the choir of several of Weirton's churches, played a trombone in a "wedding" orchestra, and consulted as a "brass" specialist on occasion at various schools. Apparently, his music teaching certificate had expired, but when he learned of the impending band director vacancy at WHS, he contacted State certification officials and relevant personnel at WLSC to obtain necessary credits for recertification.

During HCBE meeting of September 26, 1988, member Wright inquired about the latest status of the band director's

position. Superintendent Slack responded that, based on his discussion with legal counsel and Ms. Sherensky, he recommended that the board re-advertise the band vacancy at WHS. Members made a motion to that effect, but before it was acted on, Mr. Wright took the floor to voice concern on the re-posting procedure. According to the minutes,

Mr. Wright . . . explained that another person had approached the board regarding this position, Ray Seifert, and board members had received many calls from parents on his behalf who had spoken very positively about him.

Mr. Wright then noted that some problems had developed along the lines of the job description in relation to both parties, and there were some legal concerns which needed clarified; that the individual who had previously been recommended had some rights and privileges [sic] to the position, and Mr. Seifert had been cautioned that, if the board gave him the job, he might be jeopardizing his future because the other individual might grieve and take the job away from him.

He requested advice from counsel on the matter but no public response was made on Mr. Wright's comments. Instead HCBE members went into executive session and after fifteen minutes the public meeting resumed. The minutes denoted a call for a vote:

At the request of President Sherensky, . . . the recommendation of the superintendent and the motion on the floor regarding this matter, which was as follows: It was recommended that the board re-advertise the band vacancy at Weir High for the legal period of days.

The motion carried by unanimous vote.

On September 27, 1988, the position was re-posted exactly as it had been in August except the requirement for experience as a high school band director was deleted. Principal Tokash again recommended grievant be employed for the position. At

HCBE's meeting of October 10, 1988, Superintendent Slack instead recommended the employment of Ray Seifert for "Assignment-Certified," no job site mentioned, and for a separate extra-curricular assignment as "Head Band" at WHS, effective November 7, 1988, and HCBE members unanimously approved.

At level four grievant focused her attention on HCBE members' rationale for not approving on August 22, 1988, Mr. Slack's recommendation that she be appointed head band director; why and by whose authority the qualification for band director experience was deleted on the second posting; and what influences led to the approval of Mr. Seifert's employment on October 10, 1988.

With respect to the first matter, Mr. Nogay testified that he had abstained on August 22 because he did not know enough about grievant to vote for or against her recommendation. He stated that, when he campaigned for his seat on the board, it had been pointed out to him that there were "possibilities of problems with the WHS band, the depleted numbers, the fact that it had been having some other problems" He further testified that he recalled receiving a call from a parent or two that grievant had a problem projecting herself to the students and handling herself in that public situation. He also had come to learn by some means that there was an improvement package pending with regard to grievant.

Mr. Brancazio testified that, due to his involvement with the band as a member of the band parents' organization, he voted no because he did not feel that grievant was ready to be

a head band director. He stated that she seemed to have a little problem dealing with parents and even the students but he could not recall any specific incidents. He said he had no idea of how she acted in the classroom and had not reviewed her credentials.⁶

Ms. Sherensky testified that it was her "feeling to vote no" based on her "personal observation" (T4.92). She clarified that she had not actually observed grievant's professional performance in a band program but her child, in junior high school, had made "comments." She said that she based her opinions about grievant, in part, on their initial meeting,⁷ and as a result of that encounter, she then began to wonder if everything her daughter had said about "what was happening in the band program" was true.⁸ She also said she received

⁶When asked to specify about a particular incident on which he based his impression of grievant's capabilities for interpersonal relations, Brancazio stated that, during the coffee-and-cake social after band parents' meetings, other band directors and their assistants would mingle with the attendees but grievant would only converse with a few people and did not mingle or go around to introduce herself to everybody; she kept to herself. He said he only observed her a few times because she did not go to all the band parents meetings.

⁷Grievant filled in at Ms. Sherensky's daughter's school when the junior high band director became ill. Ms. Sherensky testified that when she first met grievant and thanked her for stepping into that school to help with the program, grievant's response to her was, "[A]s long as you pay me, I'll do it."

⁸Ms. Sherensky did not elaborate on her daughter's "comments" or clarify whether her daughter was describing the junior high or senior high band program, but it seems unlikely that her daughter would have knowledge of the senior high program. In toto, Ms. Sherensky's vague and non-specific
(Footnote Continued)

negative calls from parents about grievant starting in mid-August. One specific call she remembered was from a parent who said her child was being threatened by a "hostile" band member and that, when the parent confronted grievant about the incident, grievant "sloughed it off." She said the parent expressed doubt of grievant's ability to discipline and control the band members. Ms. Sherensky affirmed to the undersigned that the incident and call occurred in 1988, after the football season began, but before the recommendation was made for grievant to serve as band director and her, Sherensky's, dissenting vote.⁹

Testimony was somewhat ambiguous and contradictory about the altered qualifications on the second posting. Mr. Nogay said he could not remember who suggested the change but believed Mr. Slack made the change in response to what he, Slack, perceived about the board's initial 2-2-1 vote rejecting grievant's nomination, that there "may be a problem" with the candidate or that particular job description. Mr. Brancazio stated that he did not know who suggested the change or why the

(Footnote Continued)

testimony on this matter has no evidentiary value as to grievant's professional performance in any context.

⁹The alleged incident could not have occurred before Ms. Sherensky's negative vote as the 1988-89 football season began September 1, 1988, and HCBE met and decided on grievant's recommendation August 22, 1988. This was not overly clear until the undersigned received HCBE's March 23, 1989, submission of board minutes, school calendar and WHS football schedule.

change was made.¹⁰ Mr. Manypenny said he thought it was the consensus of the board during discussion on the matter that the job should be advertised in a different manner and the superintendent then made the change. He said he could not recall who made the suggestion, but that it had just came up in conversation.¹¹ Mr. Wright said he thought the recommendation came from Mr. Slack in order to broaden the field of possible applicants. When asked what she knew of the altered job posting, Ms. Sherensky responded that she had never been in agreement with the qualification which required experience as head band director.

Mr. Slack discussed the experience qualification in question at level two and said the reason for the deletion was to draw in more good candidates, those that could not

¹⁰When asked by grievant's representative if it was true that the change lowered the standards for band director, Mr. Brancazio replied, "If you say so." Mr. Brancazio appeared somewhat irritated and defensive about the level four proceedings. At one point he denied to grievant's counsel that the interaction between his daughter, a senior band member during the 1987-88 school year, and grievant had anything to do with his vote on grievant's recommendation. He referred to grievant and said something to the effect that "if [she] were woman enough, she would admit that I have never mistreated her." The outburst caused grievant's representative to tell him grievant never accused him of mistreating her. Mr. Brancazio said he did not know what things were said prior to his testimony and he wanted to emphasize.

¹¹Mr. Manypenny testified that he was sure the format of the second posting was based on the board's recommendation that the posted qualifications be changed and he believed that the qualifications were changed after the vote on grievant but before Mr. Seifert's spontaneous appearance before the board. His recall was inaccurate as the alteration did occur after Seifert's board visit.

necessarily comply with the previous posting. At level four, taking a different turn, he stated that, according to the testimony of most of the board members, especially one particular individual, it was their consensus that it was a regulation that should not be. He did not elaborate any further.¹²

Mr. Nogay responded to questions about why he approved the October 10, 1988, recommendation to hire Mr. Seifert. He testified that, after grievant's nomination was advanced and rejected August 22, 1988, he investigated Mr. Seifert and grievant and was convinced Seifert possessed qualifications superior to grievant's and could lead and motivate the band in a more positive direction.¹³ He also stated that subsequent to the board's rejection of grievant, he had occasion to observe the band under her direction at several football games and was not pleased with the performance; i.e., the students did not seem motivated, the performance was "lackluster," and the selection of music an embarrassment. Mr. Nogay testified that, although he had received calls pro and con on grievant's behalf, endorsements for Mr. Seifert, while not great in number, were from "quality" people and "community leaders" such

¹²Notably, no directive to delete the qualification was publicly aired, formally approved or even mentioned in the minutes of HCBE's September 26, 1988, meeting when the announcement was made to re-post the position.

¹³Nogay said he was aware that Mr. Seifert was not certified at the time of the first posting inasmuch as he had not taught public school in the many years since he had obtained his teaching degree, but that he believed Seifert could take courses and remedy the problem.

as a doctor's wife whose daughter was musically motivated by Seifert; his law partner, who took guitar lessons from Seifert and was impressed by his patience and excellence; his brother-in-law, an electrical engineer residing in Canada who had heard Seifert was interested and wished to endorse him; a few individuals who had been band members at the time Seifert had been in the WHS band, one a Weirton police officer; and from several other Weirton police officers.¹⁴ Mr. Nogay agreed that he had not examined grievant's qualifications extensively, that he was unable to determine whether either candidate met some of the required or desired qualifications, and that he was unsure whether the persons whose endorsements he relied on were able to make unbiased judgements between Mr. Seifert and grievant (T4.51).

Mr. Brancazio testified that, by the time Mr. Seifert was recommended after the second posting, he had seen grievant lead the band at football games and the performance was so bad the crowd ridiculed the WHS band. However, he admitted that he had never seen a band produced by Mr. Seifert and had no idea whether Seifert could produce a quality band.

¹⁴According to Mr. Nogay, these people expressed various beliefs, e.g., that Mr. Seifert was a fine man, would make a good band director and had a good music reputation in the community. Mr. Nogay said one of the officers told him it would be a great steal for the school system to get a man who would give up his Weirton Steel job and take a pay cut from \$40,000 to \$20,000 per year.

Ms. Sherensky testified that she had known Mr. Seifert for approximately 25 years, from the time she was in school and he was in the band at WHS, and he was also very well known in the community. She said her judgement on his teaching abilities was based on his experience with the Seifert School of Music.¹⁵ She spoke of the band's performance the first several football games and felt that it was not "up to par" the first game and did not come "up to snuff" with the opposing school's band.¹⁶

Mr. Manypenny ascertained in testimony that he did not "look at" Mr. Seifert's teaching abilities when he voted the second time, but he said he had received some telephone calls on Mr. Seifert's behalf and other people had approached him with endorsements.¹⁷

Mr. Wright testified that his first contact with Mr. Seifert was when Seifert appeared at the board meeting and he had been impressed with Seifert's multi-page resume and

¹⁵According to the record, Ms. Sherensky's daughter was one of Seifert's private music students at his school.

¹⁶Ms. Sherensky emphasized that she wanted a strong band program at WHS and she wished to bring back the days when the community was proud of its outstanding band.

¹⁷Mr. Manypenny said he believed the employment of Seifert was good for the students because he understood Seifert had a good rapport with students. Manypenny agreed that he did not know if Seifert had effective oral and written communication skills but he believed that, based on the content of the letter and resume he received from Seifert and people with whom he had spoken who revealed to him Seifert's enthusiasm, Seifert could produce a quality band. He admitted that Mr. Seifert's resume had no reference to producing any sort of school or marching band but stated that Seifert's community support was a factor to consider.

proposals for the band. Mr. Wright said he was aware that Seifert had no public school teaching experience, but knew from references made to him that Seifert could run a music school and was highly thought of by the parents of his private music students. Mr. Wright explained that he could not answer specifics about Seifert in relation to the posted qualifications because he did not interview or hire personnel and he relied on Mr. Slack to make certain that all certification matters were satisfied.¹⁸

With respect to Mr. Seifert's certification, Superintendent Slack testified at level four that he had ascertained from state education officials while on a business trip to Charleston on September 1, 1988, that Mr. Seifert was certified, as of that date, although the paper work was not completed until a later time. He explained that after the second posting, he and Principal Tokash could not see eye-to-eye on a recommendation and thus he made the decision to advance Mr. Seifert's name although Tokash recommended grievant a second time.

Grievant contends that Mr. Seifert met only one required qualification on the August posting and one desired qualification listed on both the August and September postings. She further questions the board's decision to hire an applicant to

¹⁸Mr. Wright said hiring Seifert was not a luxury when qualified people were in the system because he believed grievant was the only applicant other than Seifert for the second posting and he saw no reason to put the same name back up again.

teach music and serve as head band director who had never taught in a public school system. Grievant also suggests a problem with Ms. Sherensky's long-standing friendship with Mr. Seifert. In her proposed conclusions of law grievant argues, in part:

- The two board members who voted against the grievant's recommendation by the principal could not make a rational objective decision without looking at grievant's resume, evaluation or interview.
- The board did not follow their own procedure in promoting people from within the school system. This change must be deemed as an arbitrary act because their decision was not based upon any objective criteria.
- The board based their decision not to promote the grievant . . . and to hire Mr. Seifert . . . upon a subjective criteria.

Grievant cites Brumfield v. Kanawha Co. Bd. of Educ., Docket No. 20-86-126-1 (Sept. 10, 1986), specifically, for the proposition that a board of education may not rely on unsubstantiated evaluations and opinions and ignore an applicant's superior credentials in the selection process to fill a teaching position, and that such abuse of discretion is violative of Code §18A-4-8b(a) and entitles the aggrieved to instatement to the contested position and back-wages. Grievant further avers that,

- [T]he board's decision to change the qualifications required for the stated position, coupled with the board's president friendship with the successful applicant, had to subconsciously favor him.
- Pursuant to West Virginia Code 18-29-3(o) "Favoritism" "means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

Grievant requested instatement to the extra-curricular head band director position and reimbursement for any income lost as

a result of not being placed in that position at the beginning of the school year.

HCBE denied wrongdoing in the exercise of its discretion to employ the most qualified applicant for head band director.¹⁹ HCBE contends, in part:

- The grievant, at the end of her probationary year, to-wit: in May, 1988, received and reviewed a written "Plan for Improvement" from her principal, which set forth several areas relating to public and scholastic relations, work habits and positive role imaging in which the grievant was found to be lacking.

- That the qualifications needed for a head band director are different from those required of a music instructor and it was felt that the grievant had not demonstrated an ability to meet the additional public relations and organizational abilities needed to succeed as a head band director.

- That the Board, as a result of the initial failure to approve the Grievant, conducted extensive investigations into the qualifications, performance and abilities of the candidates as these related to the position of head band director

HCBE urges that it "reached an informed and rational decision" to employ Ray Seifert and further argues:

- Where persons possess relatively equal qualifications, seniority in the system is considered based on the belief that consistently positive evaluations reflect not only professional accomplishment, but indicate valuable practical knowledge that can be brought to a new position. See Dillon v. Board of Education 351 S.E. 2d 58 (1986) [Emphasis in original].

- One partial year of seniority in a school system, culminated by a need to establish a plan of improvement for the teacher in question is not the type of

¹⁹ Respondent claims both candidates met requisite requirements in the posting but that Ray Seifert had "extensive experience in dealing with the public and coordinating community and scholastic musical groups, while the grievant was felt not to be as qualified under all the listed job requirements."

"professional accomplishment" or "valuable practical knowledge" referred to by the Court in Dillon which would give a person with equal qualifications an advantage in bidding on a posted professional position.

At issue is whether grievant's "seniority rights" under W.Va. Code §18A-4-8b(a) were violated because she was not selected for the head band director vacancy. Neither Code §18A-4-8b(a) nor Dillon vests in a professional employee a "seniority right" to a vacant position since the statute clearly directs that the employment of professionals be based on qualifications. Hence, when a grievant with the greater seniority of two candidates for a professional position she was denied alleges a violation of Code §18A-4-8b(a), she must prove by a preponderance of the evidence that she was at least equally qualified for the position as the other candidate or that the interview/selection process used to fill the position was flawed. Mitchem v. Wayne Co. Bd. of Educ., Docket No. 50-88-244 (March 23, 1989). Grievant has met her burden in both regards.

The evidence of record supports grievant's allegations of favoritism and impropriety in the selection and hiring process. At level four, HCBE members consistently maintained that it was not their function to interview candidates, review credentials or otherwise pass judgement during the selection process. Thus HCBE had delegated the selection responsibilities to professionals trained to review the credentials of the applicants, conduct interviews, weigh the qualifications and make recommendations. This process was spurned by HCBE when it rejected

grievant. Further, the record suggests that certain of HCBE's members had predetermined that Ray Seifert would be hired as band director and the evidence preponderates that grievant was the victim of unlawful favoritism shown to Seifert in that regard. W. Va. Code §18-29-2(n).

For example, the record contains a July 29, 1988, correspondence addressed to Mr. Nogay which endorsed Mr. Seifert as "an applicant" for the WHS position, because he loved music and the WHS band. The letter predates the first, August 1, 1988, posting, and notably, certification matters for Seifert were not clear during the first posting. However, Superintendent Slack personally expedited Seifert's certification in Charleston on September 1, prior to Mr. Seifert's appearance before HCBE members September 12 and in advance of the second posting September 27. Thus Slack's testimony that the band director position was re-posted with a mind to obtain additional applicants lacks credibility and adds to the weight of the evidence that the qualification for experience was expressly eliminated to open the door for Mr. Seifert. Also, Mr. Wright's soliloquy on September 26 clearly demonstrates that Seifert's quest to be head band director was given serious consideration by HCBE at some time during or after his appearance before it on September 12 but prior to the official second posting.

Moreover, despite its contention otherwise, the evidence preponderates that HCBE did not conduct a meaningful appraisal of either grievant herein or the successful applicant, Ray Seifert. Superintendent Slack did not deny grievant's charge

that he told her she was not hired on August 22 because she had stepped on the toes of some board members. While Slack did make a valiant attempt at level two to justify his subsequent endorsement of Seifert, the entire record contains several remarks, made by Slack, to the effect that he could not put grievant through another rejection by the HCBE.

In addition, HCBE's reference to grievant's receiving a "Plan for Improvement" falls short of the truth of the matter. Grievant and WHS Principal Tokash testified that the plan was prepared by him and given to grievant in August, after she applied for the band director vacancy. Mr. Tokash established that the plan was not a remedial program but was in fact a list of objectives for management of the WHS band as guidance to improve a situation created by the former band director.

Suggestions that grievant lacked composure dealing with parents was based on one incident and are unfounded for Mr. Tokash testified that a disciplined student's parent, also a HCBE educator, who confronted grievant on the matter was the party whose behavior was rude and abusive during the interaction. Moreover, the record does not contain clear and convincing evidence that grievant had problems with any of her students. Any conclusions about grievant's performance as music teacher at WHS in Fall 1988 were unfairly made as her status and authority was uncertain after August 22 and she had no assistant to conduct the various programs. As to the band's performance under grievant's brief leadership, even Mr. Seifert testified that it would take several years of dedicated work to

"shape up" the band, in his opinion. While HCBE may have had what it perceived to be good intentions on the matter of Mr. Seifert's employment, had it not been for the tainting of the selection and hiring process herein, grievant would have been employed as head band director at WHS.

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

FINDINGS OF FACT

1. Grievant, who had taught in other school systems as music teacher and band director for several years, was employed by HCBE in October 1987 as WHS assistant band director. The then-head band director, Glenn Scheid, was unhappy and seeking employment elsewhere for the 1988-89 school year.

2. HCBE announced the position opening for music teacher and head band director at WHS on August 1, 1988, after the departing teacher's resignation was formalized. Grievant and Ray Seifert were applicants for the vacancy.

3. Mr. Seifert, a private citizen, learned of the impending vacancy for WHS band director and began in Summer 1988 the necessary steps to correct his lapsed teaching certificate. In addition to Mr. Seifert's full-time employment in the private sector and participation in many community music activities, he owned and operated a private school of music. However, he had no post-college experience managing a marching band or teaching in a public school.

4. Grievant's qualifications for band director were at least equal to Mr. Seifert's, despite his long-standing community and private musical endeavors and experiences, because her teaching experiences were direct, on-the-job experiences in public school education. Furthermore, the entire record does not show any substantiated evidence that grievant was a deficient music teacher or band director.

5. HCBE promotes its teachers from within as a matter of practice, but grievant was not promoted to the head band director's vacancy when she was recommended for the position by WHS Principal Tokash and so nominated by Superintendent Slack on August 22, 1988, after the interview and selection process was completed. Mr. Seifert was employed in October 1988 after the position was re-posted.

6. Grievant met all the required qualifications on the posting for head band director and HCBE's members who rejected her nomination had no basis to form a rational opinion as to whether grievant met the desired qualifications.

CONCLUSIONS OF LAW

1. W.Va. Code §18A-4-8b(a) requires that decisions of a county board of education affecting the filling of vacant professional positions be based primarily upon the applicants' qualifications for the job, with seniority having a bearing on the selection process when the applicants have otherwise equivalent qualifications or where the differences in

qualification criteria are insufficient to form the basis for an informed and rational decision. Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986); Bailey v. McDowell Co. Bd. of Educ., Docket No. 33-88-236 (July 5, 1989).

2. A grievant with the greater seniority of two candidates for a professional position she was denied who alleges a violation of W.Va. Code §18A-4-8b(a) must prove by a preponderance of the evidence that she was at least equally qualified for the position as the other candidate or that the interview/selection process used to fill the position was flawed. Mitchem v. Wayne Co. Bd. of Educ., Docket No. 50-88-244 (March 23, 1989); Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

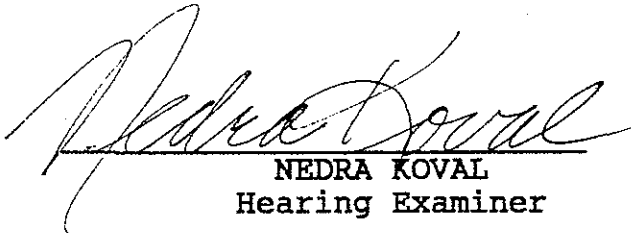
3. While the musical accomplishments of the successful applicant were of some merit, he had no public school teaching experience and grievant was at least as qualified for the public school positions at issue due to her music teaching and band directing experience in the public school context.

4. Grievant has met the burden of proof of her allegations on matters at issue herein and is entitled to reinstatement to the contested positions. Dillon.

Accordingly, this grievance is **GRANTED** and the HCBE board is Ordered to instate grievant to the head band director and full-time music teacher positions at WHS, effective 1989-90, and remit appropriate backwages for 1988-89.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Hancock County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-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: August 25, 1989


NEDRA KOVAL
Hearing Examiner