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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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NANCY ELY

v.

Docket No. 89-06-602

**CABELL COUNTY
BOARD OF EDUCATION**

DECISION

Grievant Nancy Ely, a teacher employed by Respondent Cabell County Board of Education, filed a claim May 31, 1989, alleging a violation of W.Va. Code §18A-4-8b(a) in failing to select her for a physical education/health teaching position at Barboursville High School (Barboursville). No authority to decide the grievance was found at Level I, the grievance was denied at Level II, and consideration was waived at Level III. The Level IV appeal was filed October 11, 1989, and hearing held November 17, 1989, where the parties agreed the evidence submitted at Level II, supplemented at Level IV, would constitute the record for consideration. With receipt of proposed findings of fact and conclusions of law from both parties on and before December 15, 1989, this matter may be decided.

In alleging a violation of W.Va. Code §18A-4-8b(a),¹ Grievant has throughout these proceedings alleged she was the most qualified applicant for the position, contending that arbitrary criteria were applied in choosing another person, Barbara Ellis.²

Grievant, who testified at Levels II and IV, has been employed by Respondent for 20 years and was the most senior applicant for the position. Over the years she has taught English, reading, health, and physical education for 17 years. For the last three years she has been a full-time health teacher at Barboursville Junior High.³ She has certification in language arts 7-9, physical education K-12, health and physical education 7-12. Although her

¹That provision provides in pertinent part, "A county board of education shall make decisions affecting promotion and filling of any classroom teacher's position occurring on the basis of qualifications."

²The record is less than clear as to exactly what are Grievant's contentions. Grievant's representative's opening statements at Levels II and IV did not mesh in whole with Grievant's own statements of the grounds for the grievance, and Grievant's proposed findings of fact and conclusions of law do little to clarify. In particular, while Grievant provides principles of law, she does not state how the circumstances of this case violated the stated principles and therefore actually provides no proposed conclusions of law, as normally constituted. For example, while she gives as a conclusion of law, "Only in certain circumstances may evaluative information outside formal performance reviews be considered," she does not state what, if any, "evaluative information" in this case was improperly considered.

³She remains at the school as a health teacher. The school has, apparently with the 1989-1990 school year, become a middle school.

certification shows a Masters plus 30, she testified that she actually has 65 hours above her master's degree, many of which are in guidance counselling. She has been a coach for cheerleading, track, and girls' basketball.

Ms. Ellis, who testified at Level IV, has 18 years with Respondent. Her full teaching history was not provided, but prior to receiving the position at issue here she was a health education teacher at Milton Junior High School, where she was chairman of the health and physical education department. Other than an elective aerobics class, she had not taught a physical education class for six years. She is certified in health and physical education 7-12, speech 7-12, and counselling 7-12. She has a master's degree in counselling rehabilitation plus 9 hours. She has coached girls' track and basketball and also volleyball. She has also set up a clinic for volleyball competition and is an official for that sport. She also does Nautilus weight-conditioning. Both Ms. Ellis and Grievant gave detailed information on other school activities they have been involved in, such as training on how to counteract drug-usage by students.

Grievant, Ms. Ellis and a third applicant were interviewed twice, the first time by then-Principal of Barboursville Lawrence Childers and Assistant Principal John

Flowers, who later became the principal of the school,⁴ and second by Mr. Flowers; Drexina Dilly, a physical education teacher at Barboursville; and Rodney May, a health teacher at the school. The evidence relates to the second interviews, on which the record supports the decision to award Ms. Ellis the position was based. The reasons provided Grievant for not being selected were the following:

1. Ms. Ellis has more experience in teaching physical education in the following areas of the curriculum: aerobics; weight-training; volleyball; advanced volleyball; tennis; and racquet sports.
2. In the last five years Ms. Ellis has attended workshops, held and instructed clinics and camps in volleyball and aerobics to keep updated in these areas.
3. Ms. Ellis displayed more confidence in her ability to participate and demonstrate in all areas of physical education. Whereas, you were apprehensive and not confident about teaching physical education. You prefer[r]ed teaching health and all updating in the last five years has only been in health, not physical education.
4. Ms. Ellis's qualifications and experience as a substitute guidance counselor would be an asset with teaching the areas of health curriculum. She holds certification as a school counselor.
5. Ms. Ellis exhibited enthusiasm for the position.

Mr. Flowers testified at Levels II and IV. At Level II he explained that administration was looking for a teacher who was equally capable of teaching health and physical education. He explained that the physical education classes

⁴Grievant testified at Level II that the first interview was conducted, without prior notice, immediately after she had met with Mr. Childers and Mr. Flowers on some issue regarding her son, who was a student at Barboursville. Afterward, she requested a second interview because she thought the first one not fair.

that the incumbent would initially teach were Fundamental Fitness classes, which are divided into three six-weeks blocks, one in volleyball; one in conditioning, which includes weight-training, aerobics, and other pursuits such as running; and one in racket sports, in particular badminton and tennis. Mr. Flowers stated that the candidates were equally qualified for the health part of the position; the differences were in the area of physical education. He stated,

We were looking for a candidate who we felt could meet the physical demands and the physical stress involved in teaching of physical education, and we felt that Mrs. Ellis could better handle those demands and those stresses.

II Tr. 30. When asked how he arrived at that conclusion, he replied,

[F]rom questions we asked, we felt Mrs. Ellis was in a better physical condition to handle those stresses and those demands that -- Well, in particular, Mrs. Ellis could demonstrate all the physical skills required of physical education herself. Mrs. Ely stated that she didn't always do that. That the skills she could not demonstrate, she often used videotapes or films or had the kids demonstrate them, and we were looking for someone who could physically do these skills and demonstrate them to the kids and they could teach them to the kids in that manner. Also one thing that we felt made a difference is Mrs. Ely's enthusiasm for teaching physical education wasn't as much as it was for health. She stated in the interviews that she would prefer teaching health rather than physical education, and she was a little leery about the physical education.

II Tr. 31. Later he reiterated that Ms. Ellis was more fit, able to demonstrate the physical education skills personally. II Tr. 39. He also stated that, while all of Grievant's updating was in the health area, Ms. Ellis had updated

herself in the physical education skills, having been involved in volleyball clinics, and having had her own private weight-training program.

Mr. Flowers' Level IV testimony mainly reiterated his prior testimony. He did add that, since Barboursville offers a number of electives in individual and team sports, someone who could teach those sports was also wanted. He also stressed that Ms. Ellis had recently taught aerobics. Finally, he added that he thought Ms. Ellis's experience as a guidance counsellor would be helpful to teaching health, due to the subjects covered therein.

Ms. Dilly and Mr. May appeared only at Level II. Like Mr. Flowers, both testified that they considered Ms. Ellis the better qualified. Also like Mr. Flowers, Ms. Dilly found Ms. Ellis much more enthusiastic about teaching physical education than Grievant. She thought Ms. Ellis's experience of the last five years superior, noting that the rules of volleyball are changing rapidly and that Ms. Ellis is eminently qualified to teach that sport, including, in the future, advanced volleyball. She also stated that Ms. Ellis was very enthusiastic about getting back to teaching physical education, where Grievant

had said she was very apprehensive about getting back into teaching physical education and she preferred teaching health over physical education, so that gave us the conclusion that Barbara [Ellis] was much more excited and enthusiastic, and with her background was the better candidate for the job.

II Tr. 54.

Mr. May's testimony was in agreement with the other interviewers', for he too stated that the candidates were all essentially equally suited for the health part of the position, but that Ms. Ellis's updating in physical education and her ability to demonstrate the activities made her the better applicant.

At Level II Grievant denied that she had expressed lack of confidence in teaching physical education, stating that she had merely stated she preferred teaching health because that was where her current training had been. She also denied that she had said she could not demonstrate all the skills, although she conceded she had told the interviewers she was weak in weight-training. She testified,

I was asked if I would participate with the students. I stated that in the past I chose to participate at times with my students. That's a difference in philosophy. If your goal is there to play with the kids or if your goal is to teach, guide, and instruct, then you need to be up front doing so and observe and monitor the students. And it was also asked how I would present a new skill, and I gave various examples of using various kinds of audio/visual aids. ...I would use a variety of techniques, which is teaching strategy for any teacher to use a variety of ways to demonstrate. For example, I never did a roundoff back tuck, but I have several cheerleaders that do.

II Tr. 47. She stated that she told the interviewers she had taught and taken aerobics courses, conceding that she had "been out of it for a little while." II Tr. 48.

At Level IV she reiterated that she had explained that she would use a variety of techniques for teaching skills, again deleting any reference to demonstrating them and again stating her philosophy that active participation in the

sport was "playing" with the students. She again denied she said she was leery of teaching physical education.

If Grievant had merely been judged for "preferring" health, such reason for nonselection would be arbitrary since the position involved teaching both disciplines. However, it is clear from this record that Grievant's interview convinced the panel that she was unsure and unenthusiastic of teaching physical education. Since both Mr. Flowers and Ms. Dilly testified that Grievant expressed some apprehension about physical education, the evidence preponderates that that was the situation. In any case, even if Grievant did not expressly indicate to the interviewers such apprehension but her manner showed it, the interviewers were free to consider it, as they were the relative enthusiasm of the candidates for the position. See Higgins v. Bd. of Educ., Randolph Co., 286 S.E.2d 682 (W.Va. 1981).

Moreover, no abuse of discretion can be found in the determination that a teacher who personally demonstrates skills to students would be preferable to one who does not. While the record is not clear whether Grievant stated in her interview that she is unable to perform some of the skills, her testimony establishes that she made it clear that it was not her policy to demonstrate techniques. Finally, no abuse of discretion can be found in the panel's determination that Ms. Ellis's recent activities better qualified her for the position.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Conclusions of Law

1. "Under W.Va. Code, 18A-4-8b(a) (1983), decisions of a county board of education affecting teacher promotions and the filling of vacant teaching positions must 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 Co. of Wyoming, Syl. Pt. 3, 351 S.E.2d 58 (W.Va. 1986).

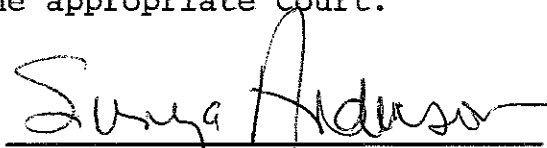
2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon.

3. "Interviews, when conducted fairly, are relevant to making a determination as to applicants' qualifications for professional positions." Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107 (Nov. 7, 1988). See also McCallister v. Logan Co. Bd. of Educ., Docket No. 89-23-617 (Jan. 22, 1990).

4. Grievant established no abuse of discretion on the part of the interviewers in their determination that Grievant was not as enthusiastic or confident about being a physical education teacher as was the successful applicant, Barbara Ellis, see Higgins v. Bd. of Educ., Randolph Co., 286 S.E.2d 682 (W.Va. 1981), or in their determination that a teacher who demonstrated physical education skills was more qualified than one who did not. Finally, Grievant established no abuse of discretion in the determination that Ms. Ellis's recent activities and her training better qualified her for the position.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.


SURYA ANDERSON
HEARING EXAMINER

Dated: January 22, 1990