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**WEST VIRGINIA EDUCATION AND
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JAMES T. NICOL

v.

Docket No. 89-28-504

MINERAL COUNTY BOARD OF EDUCATION

DECISION

Grievant, James T. Nicol, has been employed by the Mineral County Board of Education (Board) since 1977 and is presently assigned as an Assistant Principal at the Mineral County Vocational-Technical Center. Mr. Nicol filed a level one grievance on August 16, 1989 in which he alleged that the Board failed to fill the position of Director of Transportation with an applicant who met the qualifications listed on the job posting. Consideration of the matter was waived to level four by agreement of the parties on August 23, 1989 and the grievance was received by the Education and State Employees Grievance Board on August 29, 1989.¹ A

¹Although the grievance was allowed to proceed in this instance it is noted that the grievance procedure is intended to resolve problems at the lowest possible administrative level and must be construed to effectuate (Footnote Continued)

level four hearing was scheduled for September 20 and was subsequently held on October 5, 1989.

Sometime after May 8, 1989 the Board posted a notice of vacancy for the position of Director of Transportation. Three qualifications for the position were listed: a college degree in the area of administration/supervision with a safety background preferred, experience in transportation preferably earned in a school district, and demonstrated leadership and supervisory skills. Seven individuals applied for the position which was ultimately awarded to Edward Riley who had previously held the position until his retirement effective the end of the 1988-89 school term.

The grievant asserts that the Board acted with "malfeasance of office and an exhibition of gross disregard of a published job description and failure to abide by the job description relative to the hiring and filling of the posted position" as evidenced by the placement of an unqualified applicant into the position while he, the grievant, met all of the listed qualifications. Specifically, the grievant states that Mr. Riley does not hold a degree in administration while he, the grievant, has that degree, has demonstrated leadership abilities as evidenced by his

(Footnote Continued)
that purpose. W.Va. Code §§18-29-1, et seq.

evaluations, and has acquired transportation experience, albeit in the military and not in a school district.²

In support of his argument the grievant cites as authority Mineral County Board of Education Policy GCAAK-R which is the job description for the position of Transportation Director. The job description specifically requires that the Transportation Director hold a Masters degree in the area of administration/supervision. The second Board Policy referred to by the grievant, GCD-R, requires the Superintendent to insure that a person recommended to fill a vacancy be qualified to hold the position.

The grievant also cites W.Va. Code §18A-1-1(e) defining service personnel to mean those who serve the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch, and as aides; Code §18A-2-1 requiring that all personnel nominated and recommended for employment and for subsequent assignment shall meet the certification, licensure, training, and other eligibility classifications as may be required by provisions of statute and by state board regulation; Code §18A-4-8 defining supervisor of transportation as "qualified personnel employed to direct school transportation activities, properly

²Although worded somewhat awkwardly, the grievant's apparent contention is simply that he was entitled to the position because he is more qualified than the successful applicant.

and safely, and to supervise the equipment and repair of vehicles, buses and other mechanical and mobile equipment used by the county school system" and Code §18A-4-8b, cited by the grievant from subparagraph (b) defining "qualifications" for service personnel to mean that the applicant holds a classification title in his category of employment.³

The grievant cites Education and State Employees Grievance Board decisions in the matters of Rogucki v. Gilmer County Board of Education, Docket No. 11-87-260-3 (Feb. 17, 1988), Yearego v. Jackson County Board of Education, Docket No. 18-87-031-1 (May 29, 1987), Slade v. McDowell County Board of Education, Docket No. 383-38-050 (Jan 31, 1986); and Sharp v. Kanawha County Board of Education, Docket No. 20-85-001 (Dec. 27, 1985) in support of his assertion that the position was to be filled on the basis of qualifications.

The Board argues that none of the applicants met all three of the qualifications listed on the position vacancy

³It is important to note that although the grievant presented the above-cited statutory provisions to support his contention that the position was improperly filled he did not allege violations of these sections nor did he question whether the position was properly designated as "professional" rather than "service". Based on both the lack of a specific allegation that the position was improperly designated and in consideration of the fact the focus of the grievant's case was on qualifications, the primary basis on which professional positions are filled, it is reasonable to conclude that he concurred with the Board that the position was properly designated as "professional" and that W.Va. Code §§18A-1-1(e); 18A-4-8 and 18A-4-8b(b) were mistakenly cited.

but that Mr. Riley was determined to be the most qualified applicant based upon his previous experience as Transportation Director. The Board notes that while the grievant does possess the requisite degree in administration he had provided no information during the interview process regarding any experience in the area of transportation and even at the level four hearing made only vague references to some military experience.⁴ Based upon the overall qualifications of the applicants the Board asserts that its choice of Mr. Riley was correct and proper.

The primary focus in this matter is not to review the disparities of the applicants' relative qualifications but to determine the legal sufficiency of the selection process at the time it occurred. Johnson v. Upshur County Board of Education, Docket No. 89-49-508 (Jan. 16, 1990); Tyree v. Nicholas County Board of Education, Docket No. 89-45-516 (Dec. 29, 1989). Accordingly, it is the duty of this examiner to compare the applicants credentials only to the extent that they may reveal wide disparities which might be indicative of inadequate or biased assessment of qualifications, or arbitrary or capricious action by school officials

⁴The grievant did not provide any detailed disclosure of this transportation experience gained in the military but referred only to moving B-52's in heavy traffic and B-66 aircraft loaded with nuclear weapons. He offered no explanation as to his exact responsibilities and duties or how this experience might relate to transportation services in a school district.

relevant to the filling of the position in question. See Higgins v. Board of Education, Randolph County, 286 S.E. 2d 682 (W.Va. 1981); Surber v. Greenbrier County Board of Education, Docket No. 89-13-233 (Nov. 20, 1989); Harrison v. Wyoming County Board of Education, Docket No. 89-45-500 (Dec. 29, 1989).

The record is replete with oral and written recitations of the qualifications of both the grievant and the successful applicant. The grievant has been employed by the Board since 1977 and was first assigned as a teacher until 1986 from which time he has served in an administrative capacity as an assistant principal. Mr. Riley had completed thirty-four years of service with the Board at the time of his retirement in 1989 having served as a teacher, guidance counselor, and Transportation Director. Both applicants have earned Masters degrees, the grievant in the area of administration/supervision and Mr. Riley in Counseling and Guidance.⁵

Superintendent Karl Pfiefer and Assistant Superintendent Charles Kalbaugh were both involved in the hiring process and testified at the level four hearing during the application/interview phase it was determined that none of the applicants met all three qualifications. Mr. Riley did

⁵Mr. Riley's resume indicates that he has also completed an unspecified number of hours in the area of administration in addition to his degree in Counseling and Guidance.

not possess the requisite degree and the grievant had not provided any information indicating that he had experience in the area of transportation. When evaluating overall qualifications the administrators determined that experience was more important than a degree and that Mr. Riley's experience was extraordinary.

Based upon the information made available to the interviewers and at the level four hearing it cannot be concluded that the administrators erred in assessing the applicants' qualifications or that their weighting of experience more heavily than degree, resulting in the decision that Mr. Riley was the most qualified applicant, was arbitrary or capricious.

The grievant additionally raised the issue of whether Mr. Riley could legally be hired because he had retired under the temporary early retirement incentive program. He presented memos issued to all employers from the Teachers Retirement Board titled "Special Memorandum #4" which advised that an incentive retiree could not be appointed as a teacher or to a service personnel position but must be restricted to administrative and/or supervisory positions.⁶ He also submitted "Special Memorandum #5" which stated that a board could retain the services of an incentive retiree

⁶This document actually appears to confirm that Mr. Riley could be appointed to the position since it is administrative in nature.

only as an independent contractor and that these retirees could not be hired back under contract to perform the same service position that they fulfilled at the time of their retirement.⁷

Mr. Riley's testimony establishes that he had officially retired under the temporary early retirement incentive program; however, Superintendent Pfiefer testified that he had received approval prior to hiring Mr. Riley from the Attorney General's office, the State Board of Education and the State Retirement Board all which had assured him that rehiring of incentive employees under specific circumstances was permitted. The Board submitted an interpretation which it obtained from the Office of the Attorney General dated October 16, 1989 and directed to Superintendent Pfiefer. This document confirmed the information provided in "Special Memorandum #4" and determined that the position of Director of Transportation is an "appointive office"⁸ referred to by W.Va. Code §18-7A-35b(c). This section provides that any person retiring under the temporary incentive program who thereafter chooses to serve in an appointive office, as

⁷"Special Memorandum #5" is dated July 3, 1989 and thus predates "Special Memorandum #4" (July 17, 1989) by fourteen days. It is not clear which document superseded the other adding to the considerable confusion generated by the early retirement incentive.

⁸Appointive office has been interpreted by the Teacher's Retirement Board to mean a position requiring supervisory level expertise and above which cannot be performed by substitute personnel.

distinguished from an elective office, shall not receive an incentive annuity during the term of service in said office, but that said annuity shall be suspended, to be resumed at the cessation of service in the appointive office. Because the position of Director of Transportation met the qualifications of an "appointive office" and because Mr. Riley would receive neither an incentive nor regular annuity during any foregoing service, the Attorney General concluded that his reemployment was proper and in compliance with the State Board of Education policy interpreting Code §18-7A-35b(c). Since the grievant offered no evidence in rebuttal to the Board's authority it must be concluded that the Board did lawfully rehire Mr. Riley.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. In May 1989 the Board posted the position vacancy for Director of Transportation. The posting listed three qualifications: a degree in administration/supervision with a safety background preferred, experience in transportation preferably school related, and demonstrated leadership and supervisory skills. None of the applicants met all three qualifications.

2. During the evaluation process experience was weighted more heavily than educational degree. As a result, the position was subsequently awarded to Ed Riley, who does not have a degree in administration, but was determined to be the most qualified applicant based upon his having served as Transportation Director in Mineral County eight years prior to his retirement.

3. The grievant possesses a Masters degree in administration but did not identify any specific experience in the administration of a transportation system either in a school district or elsewhere.

Conclusions of Law

1. A county board of education is obligated to fill a vacant professional position with the most qualified applicant therefor. Dillon v. Board of Education of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986); Surber v. Greenbrier County Board of Education, Docket No. 89-13-233 (Nov. 20, 1989).

2. The grievance procedure set forth in W.Va. Code §§18-29-1, et seq., is not intended to be a "super-interview" for unsuccessful job applicants; rather, in this context, it allows analysis of the legal sufficiency of the selection process at the time it occurred. If the decision was properly based on the information then available to the board of education, and the process was not flawed to the

point that the outcome might reasonably have been different otherwise, the hiring will be upheld. Harrison v. Wyoming County Board of Education, Docket No. 89-55-500 (December 29, 1989); Stover v. Kanawha County Board of Education, Docket No. 89-20-75 (June 26, 1989).

3. Grievant has not proven, by a preponderance of the evidence, Lockhart v. McDowell County Board of Education, Docket No. 89-33-3362 (December 14, 1989), that the Board erred in its determination that Mr. Riley was the more qualified applicant for the position in question.

Accordingly, the grievance is **DENIED**.

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

DATED:

January 31, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER