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

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MARY VIA

v.

Docket No. 89-34-710

NICHOLAS COUNTY BOARD OF EDUCATION

D E C I S I O N

Mary Via, a French and English instructor at Respondent Nicholas County Board of Education's Richwood Junior High School, grieved as follows at Level IV on December 12, 1989:

1) Capricious and arbitrary treatment of position in French, English, Journalism posted in a creative way 5-22-89. Journalism was added to exclude. I am merely qualified and experienced in literary/art/photography magazines, yearbooks and school papers (news). Neither of the two teachers who left were in student publications. Just English and French-English. Two staff members (remaining at RHS [(Richwood High School)]) are experienced and certified in Language Arts/Journalism.

2) Seriously consider my qualifications, actually verify my "requested" references, and show some bona fides by filling the job posted. Please.

Previously, the claim had been denied at Levels I and II¹ and waived at Level III. At Level IV, the matter was

¹ The Level II hearing transcript, sans exhibits, and decision are of record.

submitted for disposition on the record below.² With the parties' presentation of fact-law proposals by March 30, 1990, the case is ripe for resolution.

Grievant's eleven proposed findings of fact are essentially accurate statements of undisputed information. The findings as stipulated are reproduced below, numbered as in the document from which they come.

1. The Grievant, Mary Via, has been employed by the Respondent[] as a classroom teacher at Richwood Junior High School for the past thirteen years.
2. Ms. Via is duly certified and licensed to teach the subject areas of English, French and Social Studies.
3. On or about May 22, 1989, the Respondent[] issued a job posting for a vacancy at Richwood High School. Said job posting indicated that Respondent[] desired to fill a vacancy in English, French and Journalism.
4. Grievant, in accordance with the time limits set forth by the Respondent[], made application for the vacancy by reason of her certification in French and English, as well as her experience in the area of journalism.
5. On May 30, 1989, the Respondent[], acting through. . .[its] agent, Mr. Prendergast [RHS Principal], interviewed the Grievant for the vacancy in question.
6. At the request of Mr. Prendergast, the Grievant provided the Respondent[] with her resume and references on June 9, 1989.

² At the time of her filing at Level IV, Grievant requested a hearing, and one was scheduled for early January. Upon motion of Grievant, to which Respondent did not object, a continuance until late February was granted. Thereafter, the parties agreed that in lieu of this hearing the matter could be decided on the record generated at Level II, as presented to this Grievance Board by March 30, 1990.

7. Grievant contends that she had no further oral or written communications with the Respondent[] concerning the aforementioned position until the latter part of August.

8. Upon receiving. . .[information which she believed to be] confirmation that the Respondent[] had neither filled nor abolished the position in question, the Grievant in accordance with. . .[W.Va. Code §]§18-29-1, et seq., initiated a grievance citing a violation of. . .[W.Va. Code] §18A-4-8b(a).

9. In her grievance, Ms. Via asserted that Respondent[] failed to thoroughly review her qualifications, neglected to check her references, and subsequently failed to either fill or abolish the position in question.

10. To resolve the grievance, Ms. Via requested that Respondent[] thoroughly review her qualifications by means of a more extensive interview, properly verify her references, and fulfill. . .[its] statutory responsibilities [as Grievant perceives them to be] relative to the. . .French, English and Journalism position.

11. Respondent[], for. . .[its] part, do[es] not dispute the Grievant's claim that she was adequately qualified for the vacancy at Richwood High School, but. . .[it] contend[s] that Ms. Via's areas of certification would not allow her to assume a position teaching Journalism. [It]. . .further claim[s] that in the absence of fully-certified applicant[s], . . .[it has] no statutory responsibility to either fill or abolish the position in question.

At Level II, it was also established that French is not being taught at RHS during the 1989-90 term; that the position was not filled or expressly abolished, but that a later job posting, for a language arts/journalism teacher, "replaced" the one in question; that the instructor hired under that posting, for which Grievant did not apply, is

fully certified³; and that Grievant's English certification does not qualify her to teach language arts or journalism. See generally T. 32-53.

The resolution of a primary issue will direct the scope of this decision. Grievant, citing Cook v. Logan Co. Bd. of Educ., Docket No. 23-86-076 (Mar. 6, 1986), argues that Respondent is obliged to either fill or formally abolish each professional position it posts. T. 55. Cook simply does not stand for this proposition⁴; further, there is no basis for it in the statutory law.⁵ A county board of education may, as Respondent did herein, take reasonable action to replace an original posting with a new and revised one.

Even accepting that the first posting remains active, however, Grievant would still have to establish that Respondent's decision not to hire her, an applicant not certified although well-experienced in one of the required

³ Grievant opined she might have applied under this posting had she been aware of it. T. 28.

⁴ In Cook, one of two unsuccessful applicants to become a cheerleading coach, grieved. The originally-selected candidate was at some point found unqualified and removed from the job, and another person, who had not previously sought the post, was "placed" therein by an agent of the board of education. Chief Hearing Examiner Leo Catsonis ordered the employer to vacate the position and to reconsider the bids of the two remaining original applicants, including the grievant.

⁵ Interestingly, Grievant seems to recognize this at one point, in her concession that Respondent is not time-bound in selecting professional personnel, T. 14-15, as it is in service staffing situations. Compare Code §§18A-4-8b(a), 18A-4-8b(b).

instructional areas, was erroneous. Clearly, she has not done so. County boards of education in West Virginia must fill professionals positions on the basis of qualifications. W.Va. Code §18A-4-8b(a).⁶ Certification is a basic element of qualifications; without proper certification, a candidate may not be found qualified.⁷ Grievant's arguments that her experience in journalism, T. 30-31, and/or her "related" English certification, T. 20-21, should qualify her to teach journalism are patently invalid. T. 36; see Code §18A-3-1; see also Ashworth v. Putnam Co. Bd. of Educ., Docket No. 89-40-560 (Oct. 19, 1989).⁸

⁶ Only if a review of qualifications does not produce meaningful distinction between the top applicants does another factor, i.e., seniority, come into play. Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58, 62 (W.Va. 1986).

⁷ As suggested by Grievant at Level II, persons not certified at the time a job is filled may become qualified therefor if they become certified prior to the work-entry date, or if they obtain a special instructional permit. T. 11; see W.Va. Code §§18A-3-1, 18A-3-2(3); see also Kilmer v. Wayne Co. Bd. of Educ., Docket No. 50-86-324-1 (Apr. 14, 1987), n. 7. However, Grievant has not to date become certificated or permitted; nor did she seem aware of detailed essentials of either course of action, T. 11. although she hinted it was Respondent's burden to "encourage" her to "look into" at least the permit option. Id. The undersigned is unaware of any such responsibility on Respondent's part.

⁸ Respondent's concession that Grievant was "qualified but not certified," see T. 10, Gr. Finding 11, is internally inconsistent. As established herein, one may not be found qualified, at least within the meaning of Code §18A-4-8b(a), if he is not appropriately certified, see n. 7.

In addition, there is no evidence, aside from Grievant's assertion, that journalism was added to the original job notice to exclude her from eligibility. Indeed, the record reflects that the journalism certification was the one most desired by Respondent; that the previous journalism teacher was not certified to provide instruction in that field was the catalyst for its inclusion. T. 33. Further, the second posting eliminated the other stated certifications, French and English, and not journalism; language arts was apparently included because a teaching certification in either language arts or journalism qualifies one to provide journalism instruction. T. 36.⁹

Besides those in the narrative, the following findings of fact and conclusions of law are made.

⁹ Grievant explained that she assumed French and English were the more-desired fields since they were listed first on the posting. T. 27. While this interpretation certainly was a reasonable and understandable one, it apparently was not accurate.

Although not part of this case by her own admission at T. 19 ("I agree. . .[my grievance is limited to the job]."), Grievant is concerned that RHS students do not have the option of studying French. Id. This is understandable and is shared by RHS Principal Prendergast. T. 35-38. In fact, Mr. Prendergast sought advice from appropriate sources, e.g., Respondent's Superintendent of Schools, the West Virginia Department of Education, West Virginia University, before making the decision to eliminate French, and made special arrangements for at least gifted pupils to study the language. Id.

The reader's attention is invited to Ashworth and Bumgardner v. Ritchie Co. Bd. of Educ., Docket Nos. 89-43-222/etc. (Oct. 6, 1989), both of which involved program-elimination situations.

FINDINGS OF FACT

1. Grievant applied for a position with Respondent which required certification in English, French and journalism. Grievant's only held certifications were and are English, French and social studies.

2. Grievant, the only applicant under this posting, was not awarded the job due to her lack of journalism certification. Accordingly, the position was not filled.

3. A "replacement" position, requiring only language arts and journalism certification, was later posted and filled by a fully-certified candidate. Grievant was not an applicant for this job.

CONCLUSIONS OF LAW

1. When a county board of education posts a professional position as vacant, and no qualified candidate applies, it may take reasonable steps to revise the posting and "replace," without filling or formally abolishing, the original one.

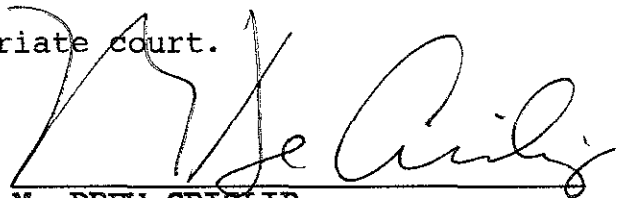
2. "Professional positions must be filled primarily on the basis of qualifications. W.Va. Code §18A-4-8b(a)." Ashworth v. Putnam Co. Bd. of Educ., Docket No. 89-40-560 (Oct. 19, 1989).

3. "Grievant was not certified, and thus not qualified, for the job in question and her non-selection was therefore

appropriate. . . .Code §18A-3-1." Id.; Prince v. Wayne Co. Bd. of Educ., Docket No. 89-50-046 (Apr. 7, 1989).

Accordingly, this grievance is **DENIED**.¹⁰

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



M. DREW CRISLIP
Hearing Examiner

Date: April 11, 1990

¹⁰ Grievant's proposed conclusion of law, "School personnel laws must be strictly construed in favor of an employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979)" is recognized as an essentially correct statement; however, this general truth does not operate to mandate a different outcome herein.