

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**CATHY BRIGHT,
Grievant,**

v.

Docket No. 2018-0449-MrnED

**MARION COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Cathy Bright, employed by Marion County Board of Education, Respondent, as a substitute teacher's aide/sign support specialist, filed this action on September 26, 2017, alleging:

Grievant, a substitute teacher's aide/sign support specialist, applied for a sign support specialist vacancy at East Fairmont Pre-K. Grievant did not receive this position as it was awarded to Elizabeth Duckworth, an applicant who did not have any employment relationship with Respondent. Grievant alleges a violation of West Virginia Code § § 18A-4-8b, 18A-4-8g, and 18A-4-8e.

Grievant seeks the following relief:

Grievant seeks instatement into this position, wages, benefits, and seniority retroactive to the date of the filling of this vacancy. Grievant also seeks an award of interest on all monetary sums.

A Level One conference was conducted on October 30, 2017, by the designee of the county superintendent, Andy Neptune. By decision dated December 22, 2017, Mr. Neptune denied the grievance. Grievant perfected her appeal to Level Two on January 5, 2018. A Level Two mediation session was conducted on March 9, 2018. Grievant perfected her appeal to Level Three on March 15, 2018.

A Level Three evidentiary hearing was conducted before the undersigned at the Grievance Board's Westover office on June 4, 2018. Grievant appeared in person and by her representative, John Everett Roush, American Federation of Teachers - WV, AFL-CIO. Respondent appeared by Andy Neptune and its counsel, Richard S. Boothby, Bowles Rice, LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on August 6, 2018.

Synopsis

Grievant, a substitute employee, alleged Respondent violated W. VA. CODE §18A-4-8b in filling of Sign Language Specialist position with a new employee. Record established that when a position involves highly specialized skill and the relative skill level of the applicant so dramatically affects a special education student's ability to succeed academically, focusing on seniority to the exclusion of qualifications, not only is contrary to West Virginia's personnel laws, and also subjects Respondent to liability for violating federal special education laws. Grievant failed to prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner in hiring the successful applicant for the Sign Support Specialist position.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is currently an employee of the Marion County Board of Education as a Substitute Aide and Substitute Sign Support Specialist.
2. On or about November 16, 2015, Grievant began working for Respondent as a substitute Sign Support Specialist. Respondent did not test or otherwise verify Grievant's

sign language skills prior to hiring her as a substitute Sign Support Specialist.

3. Grievant has had almost no formal training in sign language communication. Grievant learned some sign language to communicate with her brother and grandparents who are deaf.

4. Prior to Grievant's hire in late 2015, Respondent did not employ any substitute Sign Support Specialists. Prior to Grievant's hire, when a special education student's regular Sign Support Specialist or Interpreter was ill, the best Respondent could do was assign a substitute aide to the student for the day.

5. To meet the needs of its special education students with hearing and/or speech disabilities as best it could on days when regular Sign Support Specialists or Interpreters were not at work, Respondent sought out persons who had any sign language experience to apply for the position of substitute Sign Support Specialist.

6. There is no State Board of Education authorized competency test for demonstrating one's qualifications as a Sign Support Specialist.

7. State Board Policy 2419 explains when a Sign Support Specialist may be assigned to students who have some hearing and students who are deaf or hard of hearing. Sign Support Specialist are ordinarily assigned to students who can hear but nevertheless use American sign language to communicate for one reason or another. Sign Support Specialists may be assigned to children who are deaf or hard of hearing only if there are no qualified interpreters available.

8. No West Virginia law or State Board of Education Policy explains what qualifications or skills are needed for a service employee to be qualified as a Sign Support Specialist.

9. A parent of a student who is deaf/hard of hearing recently filed a complaint against Respondent complaining that Respondent was not providing her child with a qualified substitute Sign Support Specialist when her child's regular Interpreter was ill and absent from work. Grievant was the substitute about whom the complaint was filed. Respondent was ordered by the State Department to provide the student with compensatory education because of the time that the student was with Grievant rather than her regular qualified Interpreter.

10. On August 17, 2017, Respondent posted a regular Sign Support Specialist/Aide position for a Pre-K classroom at East Fairmont High School.

11. The successful applicant for this position would work with a special education pre-K student. Although this student is not deaf, she does use a hearing aid and has speech-related disabilities. This student uses American sign language and various gestures to communicate. Her IEP requires that she receive "Sign Language Support Services: throughout the day in both the classroom and other school settings."

12. Both Grievant and Melyssa Duckworth applied for this regular Sign Support Specialist position.

13. Melyssa Duckworth is one class short of earning her associate's degree in American Sign Language Interpreter Education from Pierpont Community and Technical College.

14. The Educational Interpreter Performance Assessment (EIPA) is an assessment tool specifically designed to evaluate the voice-to-sign and sign-to-voice interpreting skills of interpreters who work in an elementary and/or secondary school classroom setting.

15. Melyssa Duckworth earned a score of 3.0 on the EIPA, qualifying her to be an Interpreter I in West Virginia with an initial certificate.

16. Respondent hired Melyssa Duckworth for the position at issue on September 5, 2017, and she began working with the student at East Fairmont High School on September 7, 2017.

17. After Grievant filed this action at Level One, Respondent offered Grievant the opportunity to take the EIPA at Respondent's expense. Grievant refused to accept this offer.

18. Respondent indicated that concerning the requirement of providing a deaf/hard of hearing child with a Free Appropriate Public Education, that placing an employee who has never demonstrated her familiarity, let alone her proficiency in American Sign Language with a deaf/hard of hearing student, would not meet the Free Appropriate Public Education standard.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380

(Mar. 18, 1997). In other words, “[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

West Virginia school service personnel are considered for hire under W. VA. CODE § 18A-4-8(b)(1)-(7):

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

Grievant argues that she should have been hired for the Sign Support Specialist

position at issue for two reasons. First, Grievant claims that she is qualified for this position because she holds the Sign Support Specialist classification title and has some sign language experience. Second, substitute employees, like Grievant, must be hired before non-employees such as Melyssa Duckworth. Under ordinary circumstances, Grievant would be correct. This case presents unique circumstances. Title II of the Americans with Disabilities Act, and the Individuals with Disabilities Education Improvement Act of 2004, federal law, required Respondent to hire Ms. Duckworth rather than Grievant.

Some service personnel positions, such as custodians, cooks, secretaries, may not require highly specialized or relatively unique skills, and individuals holding such positions may be viewed as holding equal qualifications, thereby enhancing the importance of relative seniority between applicants. However, where as here, a position involves highly specialized skill and the relative skill level of the applicant so dramatically affects a special education student's ability to succeed academically and interact socially with her peers, focusing on seniority to the exclusion of qualifications, not only is contrary to West Virginia's personnel laws, but also subjects Respondent to liability for violating state and federal special education laws.

School districts must comply with Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 (Section 504). 29 U.S.C. § 794; 34 C.F.R. pt. 104. In the instant case, the special education student needed a Sign Support Specialist who could provide communication in the classroom setting that is as effective as the Respondent's communication with its other students. Respondent cannot discharge its legal duty by simply providing any school employee who has some familiarity with sign language. Respondent must provide an appropriate Sign Support Specialist, or risk

litigation, sanctions, and potentially the loss of federal funding. More importantly, meeting this obligation provides the student with the ability to access the general education curriculum.

When considering the reasonable application of personnel laws where the education of children is concerned, the focus is always on the best interest of the student. *Bd. of Educ. v. Scott*, 217 W.Va. 128, 617 S.E.2d 478 (2005). In *Scott*, the Court stated:

We further have held that “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.” Syl. Pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). By “best interest of the schools” we mean what is in the best interest of the children of this State. One of the State’s primary duties is to provide education to its citizens. . . Thus, in all cases dealing with our public schools, our first concern must be the impact our decision will have on the education that the State’s children will receive.

The *Scott* Court held that boards of education can add qualifications to aide job postings when it is in the best interest of students. The hiring of a less senior applicant for an aide position was upheld when the applicant was an LPN who would be working with two students who were diabetics. In the instant case, the qualification needed for the student’s access to the curriculum is a competent Sign Support Specialist, not a service employee who happens to hold the job title and has some familiarity with sign language. Accordingly, the undersigned finds that Respondent was permitted to hire the applicant who possessed the skills needed to provide the deaf/hard of hearing student with communication services that were effective, the provisions of W. VA. CODE § 18A-4-8b notwithstanding.

Finally, the Fourth Circuit, relying upon a long line of cases, had held that the substance and details of a child’s special education program is to be left to state and local

school officials and should not be second-guessed by the courts. *Barnett v. Fairfax County School Board*, 927 F.2d 146, 152 (4th Cir. 1991). Absent a state competency test for a particular service employee classification, a county board may develop its own competency test, so long as it is applied to everyone. County board personnel actions that are not encompassed by statute are reviewed against the arbitrary and capricious standard. *Vance v. Jefferson County Bd. of Educ.*, Docket No. 2010-0648-CONS (July 28, 2010). Respondent, recognizing the need to test the sign language skills of applicants for regular Sign Support Specialists positions, adopted the Educational Interpreter Performance Assessment as its Sign Support Specialist competency test. Ms. Duckworth scored a 3.0 on the EIPA and is one course short of completing her sign language degree. Grievant has no formal training in sign language and refused to take the EIPA when Respondent offered to provide the testing.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. Applicants for school service personnel decisions must be processed in the order found in W. VA. CODE § 18A-4-8b;

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first

opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

3. “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.” Syl. Pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. Grievant failed to prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner in hiring Ms. Duckworth for the Sign Support Specialist position rather than Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 24, 2018

Ronald L. Reece
Administrative Law Judge