LISA CLUTTER

v. Docket No. 95-51-439

WEBSTER COUNTY BOARD OF EDUCATION

D E C I S I O N

Lisa Clutter, targeted for reduction in force at the end of the 1994-95 school year, initiated a grievance against the Webster County Board of Education (WCBE) when she was not hired and/or recalled to fill a vacancy at Diana Elementary School for the 1995-96 school year and the job was instead awarded to another person on the recall list. Grievant prevailed at level two, but WCBE Superintendent Ronald Williams appealed to WCBE's members at level three, and the level two decision was reversed. Grievant took exception and appealed to level four. The parties agreed that a decision could be based on the record adduced at the lower grievance levels.1 The case became mature for deci sion on December 6, 1995, upon receipt of Grievant's fact/law proposals.

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1The record consists of the pleadings and lower-level decisions and the transcripts/exhibits of the level two and level three hearings.

There is little or no dispute about the underlying facts which gave rise to this grievance. Based on all matters of record, the following findings of fact are made.

Findings of Fact

1. On or about June 22, 1995, MCBE posted the following vacancy for the 1995-96 school year:

POSITION: Title I Teacher/Special Education Teacher -

LD/MMIH

SCHOOL: Diana Elementary

REQUIRED QUALIFICATIONS:

1. Valid WV teaching certificate endorsed in Multi.

Subjects K-8/Elem. Ed. 1-6.

2. Valid WV teaching certificate endorsed in LD/MMI

3. Successful applicant must complete Reading

Recovery training, at the applicant's expense.

In MCBE's school system, a Title I Teacher teaches "Reading

Recovery."

2. The West Virginia Department of Education (DOE) has no

particular certification for teachers in "Title I" or for the

specific subject-matter area, "Reading Recovery."

3. The two "finalists" for the position at Diana Elemen

tary were Grievant and William Hamilton.

4. Grievant, with approximately three years' seniority

at the time of the posting, met two of the three qualifications

listed on the posting. She is certified in elementary educa

tion, Multi-subjects, K-8, and in June 1995, Grievant had

already completed Reading Recovery training and experience

teaching the program. While she had also attained six hours of

special education credits, she had no experience teaching

special education classes.

5. At the time of the posting Mr. Hamilton had approxi

mately seven years' seniority, but met none of the qualifi

cations listed on the posting. He is certified in physical

education, K-12, health education, K-12, and safety education,

7-12. In June 1995, Mr. Hamilton had not completed Reading

Recovery training and had no experience teaching Reading Recov

ery. Mr. Hamilton had attained nine hours of credits in special

education and 74 days substitute experience teaching special education classes in 1988-89, prior to being regularly hired as a full-time elementary physical education teacher.

6. Due to their already-acquired credits in special education at the time of the posting, both Grievant and Mr. Hamilton were eligible for a DOE permit to teach out-of-field special education classes. Apparently, Mr. Hamilton was also eligible to receive a permit in elementary education.

7. Superintendent Williams initially considered recom mending Grievant for the position in question, but instead nominated Mr. Hamilton.

8. WCBE employed and/or recalled Mr. Hamilton to fill the position at Diana.

9. DOE permits in both elementary education and special education were obtained for Mr. Hamilton so that he could teach the Title I (Reading Recovery) and special education classes at Diana Elementary at the beginning of the 1995-96 school year.

Discussion

At issue in this case are certain provisions found in W.Va. Code §18A-4-7a. One portion of the statute provides for the employment of permanently employed instructional personnel for classroom teaching positions based on a specific seven-factor criteria.

Appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the perfor mance of the job as stated in the job description; receiving an overall rating of satisfactory in evalua

tions over the previous two years; and seniority. Consideration shall be given to each criterion with each criterion being given equal weight. If the applicant with the most seniority is not selected for the position, upon the request of the applicant a written statement of reasons shall be given to the applicant with suggestions for improving the appli cant's qualifications.

Another portion of the statute deals with the recall rights of professional personnel who have been the subject of a reduc tion in force. This section of the statute sets forth a differ ent set of standards for an employee's "reemployment" opportuni ties, as follows:

All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time profes sional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

According to Grievant's level four fact/law proposals, on or about September 25, 1995, WCBE transferred Mr. Hamilton to another teaching position and instated her in the position in question at Diana. Grievant argues that, although she

ultimately received the position at Diana Elementary, an issue remains regarding back wages and benefits from the beginning of the school year. She claims she was entitled to the position in the first place and seeks those back wages and benefits.

It is not clear from the record whether WCBE assigned Mr. Hamilton to fill the Diana position based on the recall provi sions or the hiring provisions of Code §18A-4-7a. It appears that WCBE feels Mr. Hamilton was the correct choice based on either criteria. WCBE relies, in part, on Johnson/Clutter v. Webster County Bd. of Educ., Docket No. 94-51-633 (June 30, 1995), apparently to support its view that Mr. Hamilton was entitled to recall based on his seniority. WCBE also maintains that, based on the hiring requirements of W.Va. Code §18A-4-7a, and the fact that the seven factors to assess qualifications must be weighted equally, Mr. Hamilton was deemed more qualified than Grievant. In WCBE's view, Mr. Hamilton would be credited with more points than Grievant on a §18A-4-7a "matrix" because neither of them were "fully" certified for the posted position, but Mr. Hamilton exceeded Grievant in seniority and experience.2

Grievant must prevail in this matter. To begin, WCBE's reliance on Johnson/Clutter is misplaced. In that case, four teachers holding multi-subject, K-8, certification, including Grievant, had been reduced in force and placed on the recall

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2There is no evidence of record that a matrix with §18A-4-7a's factors and the candidates' names was actually produced and utilized in the selection process for the position at Diana.

list. Two of them, including Grievant, had previously taught

remedial reading courses. Prior to the beginning of the new school year, two jobs, one for grades 1-8 and one for grades 1-3, were posted, requiring multi-subject, K-8, or elementary education, 1-6, with a preference for persons trained in Reading Recovery. The two persons with more seniority than Grievant were awarded the positions. Grievant claimed she should have been recalled before them because she, and not them, had at tained Reading Recovery training, a qualification stated on the posting. The administrative law judge ruled that recall re quirements were primarily based on certification and seniority. Since all of the applicants held the proper certification, it was proper to recall based on seniority, not the hiring factors in Code §18A-4-7a. In other words, while Grievant had attained the desired specialized training, Reading Recovery, the speci ality Reading Recovery is not an area covered by a specific certification. Thus, it was proper for WCBE to recall the reading teachers on the basis of their seniority and the actual certifications held.

However, the facts in this case can be distinguished from those in Johnson/Clutter. In fact, Johnson/Clutter supports Grievant's view that, based on the recall provisions, she should have been recalled instead of Mr. Hamilton. Mr. Hamilton had neither certification listed on the posting, and was disquali fied for recall on that basis alone, regardless of his seniori ty. On the other hand, Grievant was certified in one of the listed areas. Since there was apparently no other person on the recall list more senior than Grievant and holding both required certifications, she was far more eligible for recall than Mr. Hamilton.

Further, Grievant should have been hired for the job based

on the seven-factor criteria which must be utilized when perma nently employed instructional personnel apply.3 It is true that Mr. Hamilton exceeded Grievant in total teaching experience and seniority. However, since applicants must be assessed based on qualifications, WCBE cannot discount four other relevant factors because Grievant was not "fully" certified for a job with two certification areas listed in the posting.4 Mr. Hamilton did not meet any posted standard in the four areas, including "the existence of teaching experience in the required certification area." Although he had briefly taught special ecucation classes at Diana, he was not certified in special ecucation at the time. However, Grievant met half of the standards for certifica tion, experience in certification area, and degree level in required certification area. She totally met the factor of "specialized training directly related to performance of the job as stated in the posting." Specifically, Grievant had already

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3The vacancy in question was posted June 22, 1995, prior to the effective date of Grievant's and Mr. Hamilton's termination due to the reduction in force, as the contract year for educational personnel does not end until June 30. Thus, the two were still technically permanently employed instructional personnel at the time of the posting and through the mandatory five-work-day posting period.

4It is assumed that both Grievant and Mr. Hamilton received satisfactory evaluations for the past two years.
attained the required Reading Recovery training. Mr. Hamilton not only did not possess the Reading Recovery training, he did not possess the required underpinning for the training, the

Elementary Education certification.

Conclusions of Law

1. A grievant must prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant has established that, pursuant to Code §18A-4-7a, she should have been employed for the Diana Elementa ry School position at the beginning of the 1995-96 school year.

3. Because the Webster County Board of Education failed to place Grievant in the Diana Elementary School position at the beginning of the 1995-96 school year, Grievant is entitled to all lost wages and benefits as a result of the board's initial non-selection of her for that position.

Accordingly, the grievance is GRANTED, and the Webster County Board of Education is Ordered to pay Grievant the appro priate back wages and to bestow all of the benefits she would have received had she been properly instated in the Diana position when the 1995-96 school year began.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Webster 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

NEDRA KOVAL

Administrative Law Judge

Date: December 29, 1995