DEBORAH MAYS

v. **Docket No. 95-33-311**

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Deborah Mays, is employed by the McDowell County Board of Education (Board) as a kindergarten teacher at Fall River Elementary School (FRES). She filed this grievance May 4, 1995, protesting her nonselection for the position of pre-kindergarten teacher at FRES. Her supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held June 12, 1995. The Board, at Level III, declined to address the matter and appeal to Level IV was made July 20, 1995. The parties subsequently agreed that a decision could be rendered on the record developed at Level II. The grievant submitted proposed findings of fact and conclusions of law by August 25, 1995 and the Board elected to rely on the Level II evaluator's findings.

Background

There is no dispute over the facts of the case. The grievant has been employed by the Board for sixteen years. She was evaluated by former FRES Principal Betty Williams as "Satisfactory"overall for the 1992-93 school year and the record at least suggests that she received similar assessments in prior years. The grievant was not evaluated during the first semester of the 1993-94 school year.

In January 1994, William Campbell assumed the principalship of FRES. After making several observations of the grievant's classroom, Mr. Campbell concluded that she was experiencing difficulties maintaining control of her students and that her instruction was not well organized. He contacted Regional Education Service Agency I (RESA I) Instructional Coordinator Robert Gunter and asked him to observe the grievant and make recommendations aimed at correcting the problems. (See footnote 1)

Mr. Gunter observed the grievant's classroom in February 1994 for approximately two hours. He subsequently reported to Mr. Campbell that the grievant appeared to be under a great deal of stress

and that its source was most likely some recent event in her personal life. Mr. Campbell and Mr. Gunter met with the grievant and at least broached the subject of counseling. (See footnote 2) Mr. Gunter ultimately concluded, and Mr. Campbell agreed, that a negative evaluation would only increase the grievant's stress level. Mr.Gunter suggested that the grievant's performance be reevaluated after she was afforded a reasonable period of time to address her personal problems.

In a June 8, 1994 evaluation, Mr. Campbell assessed the grievant's performance for the 1993-94 school year as overall satisfactory. In the "Suggestions" section of the evaluation, Mr. Campbell commented, "At the beginning of the next year a cooperative behavior management plan needs to be developed between classroom and administration."

At the beginning of the 1994-95 school year, Mr. Campbell asked RESA I Staff Development Coordinator Linda Price to observe the grievant's classroom performance. Ms. Price later reported that the grievant was having "a problem with organization skills and problems within the classroom." Because FRES was implementing a new curriculum plan during the 1994-95 school year, the school's Faculty Senate requested and Mr. Campbell agreed, that personnel evaluations should not be issued until the second semester. Mr. Campbell did, however, continue his observations of the grievant's classroom.

At some point, Mr. Campbell advised Superintendent of Schools J. Kenneth Roberts that the grievant was experiencing difficulties and that he was at least considering placing her on an improvement plan. On April 5, 1995, Mr. Campbell conducted a thirty minute observation of the grievant's classroom and recorded his findings on an observation form. Of the forty-five specific performancestandards provided for on the form, Mr. Campbell found the grievant deficient in six.

The position of pre-kindergarten teacher at FRES was posted April 7, 1995. The only minimum requirements listed in the posting were "certification in Nursery or Pre-Kindergarten and Biannual tuberculin skin test." The grievant, and Diana Lockhart, a fifteen-year teacher assigned to War Elementary School made timely applications. (See footnote 3)

Superintendent Roberts, as required by W.Va. Code §18A-4-7a, assessed the candidates per the following categories: 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 performance of the job as stated in the job description, receiving an overall rating of satisfactory in evaluations over the previous two years,

and seniority. He determined that the grievant and Ms. Lockhart were tied in the certification category and that Ms. Lockhart, by virtue of her Masters Degree, exceeded the grievant in the degree level area.

Mr. Roberts further determined that the grievant exceeded Ms. Lockhart in the areas of seniority and total amount of teaching experience. Since there was no specialized training announced inthe job description for the position, he disregarded that category. He also assigned no value to the "existence of teaching experience in the required certification area" because the pre-kindergarten program was new to the school system and neither applicant had taught in that field. (See footnote 4)

Finally, Superintendent Roberts also concluded that the grievant had not received "an overall rating of satisfactory in evaluations over the previous two years." This conclusion was predicated on Mr. Campbell's report that she was experiencing difficulties.

Superintendent Roberts ultimately recommended to the Board that Ms. Lockhart be awarded the position. The Board accepted the recommendation on April 18, 1995. Ms. Lockhart was slated to begin her new duties at the beginning of the 1995-96 school year.

On April 11, 1995, Mr. Campbell provided the grievant the results of his April 5, 1995 observation. He again observed her classroom on April 27, 1995, for thirty minutes and found her unsatisfactory in four of the standards. Mr. Campbell completed an April 28, 1995 observation form which indicated that the grievant was deficient in only one. This report was designated as "on-going" and it does not appear that it was based on an identified period of observation. Mr. Campbell noted on the form that he hadnot observed the grievant's performance in sixteen of the standards and there was no ranking for those areas.

On April 28, 1995, Mr. Campbell also completed the grievant's evaluation for the 1994-95 school year. He found her performance unsatisfactory in the categories "Classroom Climate" and "Instructional Management System." The grievant was rated satisfactory in the remaining categories of "Communication," "Professional Work Habits," "Student Progress" and "Programs of Study." Under "Identified deficiencies," Mr. Campbell listed the following objectives:

> Establish procedures and rules that enhance learning.
>
> Create and maintain an environment that supports learning.

Instructional pacing that ensures student understanding.

Maximize student time on task.

The evaluation form did not call for an overall ranking of satisfactory or unsatisfactory and Mr. Campbell provided none. The grievant received and signed the evaluation on May 3, 1995. She attached an addendum to the assessment which noted her disagreement with Mr. Campbell's findings.

Argument

The grievant first asserts that Mr. Roberts erred in his determination that Ms. Lockhart had a Masters Degree in the pre-kindergarten field. She further avers that since Mr. Campbell had not evaluated her overall performance for 1994-95 at the time the job was filled, the Board was required to look to her satisfactory 1992-93 and 1993-94 evaluations for the purpose of the Code §18A-4-7a assessment.

The Board appears to assert that the statute permitted consideration of the grievant's performance problems during the 1994-95 school year despite that no formal written evaluation had then been completed. The Board asserts generally that Ms. Lockhart was the most qualified applicant for the post. For the reasons discussed below, the undersigned concludes that the grievant must prevail.

Analysis

The pertinent part of Code §18A-4-7a provides,

> If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, the county board of education shall make decisions affecting the filling of such positions on the basis of the following 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 performance of the job as stated in the job description; receiving an overall rating of satisfactory in evaluations 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 applicant's qualifications.

This statute restricts a county board's otherwise broad discretion in personnel matters when one or more regular employees make application for transfer to a particular vacant post. Since the factors to be considered in such situations are primarily objective ones and must be afforded equal weight, the statute mandates a rather mechanical process for determining whether a regular employee should be permitted to transfer to the post orwhether a "new-hire" should be appointed. See, Basler v. Putnam County Bd. of Educ., Docket No. 93-40-215 (April 27, 1994). In that subjective assessments of qualifications is largely excluded and consideration of seniority and past evaluations is mandated, the process, in most instances, favors the regular employee. The record here reveals that Superintendent Roberts erred in his assessment of the two applicants in the degree level and evaluation categories and otherwise did not adhere to the "formula" provided for in the statute.

As discussed, Superintendent Roberts did not consider the existence of teaching experience and specialized training criterion because the applicants had no prior experience in the pre-kindergarten field and there was no specialized training required in the job posting for the position. The grievant does not take issue with this approach and the undersigned finds that it was not violative of the statute. Indeed, the approach is consistent with the holdings in Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993). Of course, the statute's mandate that the criteria be given equal weight would still apply to the other five factors. Id.

Since the record reflects that both applicants met the certification requirements of the posting, logic and mathematics dictate that whichever candidate achieved or should have achieved the highest ranking in a majority of the remaining four categories should have been awarded the position. There is no dispute that the grievant had greater seniority and total teaching experiencethan Ms. Lockhart, and Superintendent Roberts conceded, during his Level II testimony, that he had erred in concluding that Ms. Lockhart had a Masters Degree in the required certification field. Ms. Lockhart's Level II testimony confirms that she did not have a Bachelors or a Masters degree in the pre-kindergarten field. The grievant's testimony established that she had a Bachelors Degree in that area. Thus, the grievant exceeded Ms. Lockhart in three of the four areas. She would be entitled to relief on that finding alone.

Finally, the record fully supports that the grievant has never been evaluated overall, formally or informally, as unsatisfactory during any school year. The evaluations, observation reports and Mr. Campbell's testimony establish clearly that at no time during his assessment of the grievant's performance, did he find her deficient in more than two of the designated six broad areas of responsibility. Further, there is no evidence of record that Board policy on evaluations required a finding of overall unsatisfactory performance when deficiencies are found in a given number of areas. Absent some policy provision to that effect, an employee who achieves a satisfactory to unsatisfactory ratio of four to two in the evaluation process has achieved an overall satisfactory assessment. Taylor v. Mercer County Bd. of Educ., Docket No. 93-27-534 (Aug. 22, 1994). (See footnote 5)

Moreover, regardless of whether Mr. Campbell or Superintendent Roberts ever ultimately concluded that the grievant's total performance was deficient, the record reflects that the assessment had not been completed at the time the job in issue was filled. Under those circumstances, Code §18A-4-7a contemplates that a county board will look to the evaluations for the preceding two school years for the purpose of assessing the evaluations criterion. See, Rakes v. Raleigh County Bd. of Educ., Docket No. 93-41-448 (March 17, 1994). Accordingly, it is concluded that the grievant should have achieved the same score in that criterion as Ms. Lockhart.

In summary, under any assessment scheme aimed at affording the statutory criteria equal weight, the grievant would achieve higher scores than Ms. Lockhart in the degree level, seniority, and total amount of teaching experience criteria. At best, Ms. Lockhart would only have "tied" the grievant in the certification and evaluations categories. The selection process provided for in Code §18A-4-7a mandated that the grievant be transferred to the position. (See footnote 6)

In addition to the foregoing, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) The Board posted the position of pre-kindergarten teacher at Fall River Elementary School on April 7, 1995, and the grievant, a kindergarten teacher employed at Fall River, and Diana Lockhart, a War Elementary teacher, made applications. Superintendent of Schools J. Kenneth Roberts conducted an assessment of the two applicants pursuant to the "second set of factors" found

in W.Va. Code §18A-4-7a. The Board ultimately accepted his recommendation that Ms. Lockhart be awarded the post.

2) Superintendent Roberts properly disregarded the "specialized training" and "existence of teaching experience in the required certification area."

3) Superintendent Roberts erred in determining that Ms. Lockhart had achieved a greater degree level in the pre-kindergarten field than the grievant. He also mistakenly concluded that the grievant's performance had been rated overall unsatisfactory for the 1994-95 school year. Given the grievant's greater seniority and total teaching experience, she should have achieved higher scores than Ms. Lockhart in three of the five areas left for consideration. She "tied" Ms. Lockhart in the remaining categories of evaluations and certification.

CONCLUSIONS OF LAW

1) When one or more regularly-employed professionals of a county board of education make application for a posted vacancy, W.Va. Code §18A-4-7a mandates a rather mechanical, quantitative analysis to determine whether the regular employee should bepermitted to transfer to the post or whether an applicant new to the school system should be appointed. Basler v. Putnam Bd. of Educ., Docket No. 93-40-215 (April 27, 1994).

2) The grievant herein has established by a preponderance of the evidence that the Board misapplied Code §18A-4-7a and did not afford equal weight to the various criteria listed therein, and, that but for the errors, she would have been selected for the position in issue.

Accordingly, the grievance is **GRANTED** and the McDowell County Board of Education is hereby **ORDERED** to instate the grievant to the pre-kindergarten position at Fall River Elementary School for which she applied.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of McDowell 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 26, 1995

Footnote: 1RESA's are multi-county service agencies created by the West Virginia Board of Education pursuant to authority granted in W.Va. Code §18-2-26. Under the statute, the agencies are to provide "educational services to the county board systems." Apparently, the Board has an arrangement with RESA I whereby the agency provides assessments and remediation plans for personnel experiencing problems related to performance.

Footnote: 2The record reflects that the grievant expressed an interest in counseling but it does not reveal whether she pursued that course of action.

Footnote: 3The record does not reveal whether other persons made applications. The manner in which the Board presented its case at the Level II hearing strongly suggests that there were no other candidates or that if there were, the grievant and Ms. Lockhart were the two "finalists" in the process.

Footnote: 4The record reflects that both applicants had taught summer sessions in what was termed a "Pre-K Handicap" program. Superintendent Roberts, during his Level II testimony, asserted, and the grievant did not dispute, that their duties in that program were very different from those assigned the position in issue. The record otherwise supports that the superintendent did not assign weight to the summer experience.

Footnote: 5Taylor is precisely on point. There, the grievant was also rated unsatisfactory in only two of six areas, but was still ranked overall as unsatisfactory.

Footnote: 6It should be noted that the holdings herein do not prohibit the Board from continuing its efforts to improve the grievant's performance. Placement in the pre-kindergarten position does not operate to relieve the grievant of her obligation to correct the deficiencies noted in the April 28 evaluation and the preceding observation reports.