JUDY MONK

v. Docket No. 95-27-245

MERCER COUNTY BOARD OF EDUCATION

DECISION

In the summer of 1994, the Mercer County Board of Education (Board) posted a business teacher position at Pikeview High School (PHS). Judy Monk, the grievant, Greg Dalton, and June Symonds made timely applications. Mr. Dalton was ultimately awarded the post and the grievant protested, claiming that her total amount of teaching experience had been miscalculated during the selection process.

At Level II, the hearing evaluator agreed with her contentions. In a decision dated March 1, 1995, the evaluator specifically found that PHS Principal Dan Zirkle had miscalculated the grievant's "Total amount of teaching experience" in that category in a mathematical matrix used in the selection process. He further found that if the grievant were given an additional two years in that category, she would be in a tie in overall matrix scores with Mr. Dalton. Mr. Zirkle was directed to "conduct a reassessment of the credentials of the grievant and applicant Greg Dalton." He also directed the principal to "take intoconsideration all information gleaned in the interview process on all the criteria utilized in WV Code 18A-4-7a and shall not be based upon seniority only."

By letter dated March 21, 1995, the evaluator advised the grievant that Mr. Zirkle had completed the reassessment; he had found Mr. Dalton more qualified; and that her grievance was, therefore, denied. The grievant subsequently filed an appeal to Level IV alleging the reassessment was flawed. By order dated May 11, 1995, Administrative Law Judge Albert C. Dunn Jr. determined that, since the grievable event involved in the appeal, i.e., the reassessment, was different than that in the original grievance, the matter should be remanded to Level I.

The grievance was processed per Judge Dunn's order. It was denied at Level II following a hearing held June 7, 1995, and the Board, at level III, declined to address the matter. The second appeal to Level IV was made June 13, 1995, where a hearing was held August 2, 1995. At this hearing, the undersigned granted the parties' motion that the evidence developed in the grievant's

original complaint be considered part of the record herein to the extent that it is relevant to the claims she raises in this appeal. (See footnote 1) Proposed findings of fact and conclusions of law were received by August 23, 1995.

W.Va. Code §18A-4-7a, in pertinent part, provides,

> A county board of education shall make decisions affecting the hiring of professional personnel other thanclassroom teachers on the basis of the applicant with the highest qualifications. Further, the county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications. In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged. 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 certificate and/or licensure; total amount of teaching experience; the existence of teaching experience required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated over the previous two years; and seniority. Consideration shall be given to 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.

The parties agree that since one or more of the candidates were regularly employed by the Board, the "second set" of criterion was applicable and the statute mandated that each of the seven "factors" be given equal weight. (See footnote 2)

The parties also agree, for the most part, on the relevant facts of the case. Per Board practice, upon receipt of theapplications for the post, Mr. Zirkle displayed the factors on a matrix and assigned scores on a scale of 1 to 20 to each applicant for each category. Since each candidate held the appropriate certification and had received satisfactory evaluations for two years, all were given 20 points in those matrix categories. They also scored twenty points in the criterion, "Existence of teaching experience in the required certification area," since each had taught in the business field.

After he corrected the grievant's score in the "Total amount of teaching experience" category, (See footnote 3) per the Level II evaluator's directions, Mr. Zirkle's matrix scores for the grievant and Mr. Dalton (See footnote 4) were as follows.

	Dalton	Grievant
Certification	20	20
Total teaching exp.	20	20
Existence of teaching exp. in cert. area	20	20
Degree Level	19	20
Specialized training	20	20
Evaluations	20	20
Seniority	20	19

Mr. Zirkle also concluded that it was the intent of the evaluator's further directions that he reexamine his assignment of scores in the remaining categories in order that the numerical tie between the grievant and Mr. Dalton might be broken. He further determined that the "Specialized training" category was the only one in which he had "leeway" to change scores. Mr. Zirkle reviewed notes made during his interviews with the candidates and, contrary to his initial finding, concluded that Mr. Dalton had more specialized training than the grievant. He did not alter their scores in that area of the matrix. Rather, as previously discussed, he merely reported to the evaluator that he had reconsidered his assessment and had determined that Mr. Dalton was the most qualified applicant for the position.

The record supports that Mr. Zirkle, in his initial and subsequent assessments, considered the private sector experience of the two applicants to be "specialized training" within the meaning of Code §18A-4-7a. It appears that he also assigned weight to the applicants' attendance at two workshops on computer software and a"Program for Instructional Effectiveness." There was no specialized training requirement included in the job description for the position. (See footnote 5)

The grievant does not appear to take exception with Mr. Zirkle's decision to "reopen" the specialized training category. She simply asserts that Mr. Zirkle simply erred in his "re-determination" that Mr. Dalton had more such training than she. Specifically, the grievant characterizes the graduate-level courses she completed in order to obtain her Masters Degree as specialized training, and contends that Mr. Zirkle failed to take them into consideration.

The Board asserts that since the grievant achieved a higher score in the "Degree Level" criterion

than Mr. Dalton, (See footnote 6) it would be violative of the "equal weight" mandate in W.Va. Code §18A-4-7a to grant her additional credit for her Masters Degree course work in other categories. The Board generally avers that Mr. Dalton was the most qualified applicant for the post.

It is first noted that the case is an unusual posture at Level IV in that the grievant is protesting Mr. Zirkle's implementation of a Level II evaluator's decision. There is, however, no substantive difference between the grievant's complaint and one filed over a reassessment conducted pursuant to a Grievance Boarddirective. See, Cahill v. Mercer County Bd. of Educ., Docket No. 91-27-132 (Sept. 30, 1992). Further, the parties agreement to submit the record developed in the original claim effectively places the entire selection process, i.e., the initial and the ordered assessments, under review at Level IV. Finally, since the ultimate question posed is whether the Board complied with the above-cited provisions of Code §18A-4-7a, the analysis herein is not confined to the specific argument advanced by the grievant. It is clear from the language in Code §18A-4-7a regarding consideration of specialized training that the Legislature intended that such training should be afforded weight only if the job description for a posted position required such training. Unless a county board has exercised its discretion to include a training requirement over and above what is necessary to obtain a degree and/or licensure in a particular field, the criterion must be excluded from consideration. Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993); Sisk v. Mercer County Bd. of Educ., Docket No. 95-27-113 (Sept. 22, 1995).

Moreover, regardless of the restrictive language of Code §18A-4-7a, Mr. Zirkle erred in equating the applicant's private sector experience with specialized training. While the grievant's employment as a church secretary and Mr. Dalton's service as a clerk for an A & P grocery store may well have introduced them to or helped them maintain basic business skills, such experience is not, in any sense, specialized. To the extent that such experience can even be considered training, the undersigned concludes that itsapplicability to the day-to-day duties of teaching business classes is tenuous and certainly not "directly" related to those duties.

Further, the scant evidence of record concerning the nature of the two workshops attended by both applicants supports that neither was particularly relevant to the business teaching field. Accordingly, the criterion should have been excluded in the initial assessment of the candidates. It follows that it was improper to "reassess" it.

The record fully supports that under any scoring system aimed at affording the six remaining

criteria equal weight, the grievant and Mr. Dalton would be tied. The Grievance Board has addressed Code 18A-4-7a ties on only two occasions.

In a very limited holding, the Administrative Law Judge in Jamnick v. Kanawha County Bd. of Educ., Docket No. 92-20-172 (Aug. 24, 1992) rejected the assertion of the grievant therein that her seniority should have been the factor used to break a tie. The ultimate conclusion in the case was that the use of seniority a second time would violate the statute's directive on equal weight by affording the beneficiary of its use a "double-dip" in that criterion. Since there were no other arguments advanced, no further conclusions on the issue were made. Thus, since the grievant herein was given credit for achieving her Masters degree, her claim that her graduate-level course work should also have been counted in the specialized training criteria would fail regardless of the propriety of assessing that criterion.

In Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993), the county board broke an apparent tie between two permanent employee applicants by reassessing the certifications criterion and determining that one candidate's certification would permit more flexibility in scheduling at the school where the position in issue was located. The Administrative Law Judge acknowledged that Code §18A-4-7a does not provide a means of breaking a tie and found that the Board's approach was not arbitrary or capricious.

A close review of Richmond, reveals, however, that the county board had required "appropriate certification" for the position and had determined in its initial assessment that the certification of the successful applicant was "better" than the grievant's in that it permitted him to teach a broader range of mathematics classes. Curiously, the Administrative Law Judge found that this determination was in error but permitted the county board to use that very criterion to break the tie. It is simply not clear from the decision whether the two applicants were in a true tie.

While Richmond cites Jamnick, it does not attempt to reconcile the "double dip" pronouncement with the conclusion that a county board has the discretion to "reassess" one of the criteria. Nevertheless, the undersigned concludes that Jamnick was effectively overruled and that, despite its ambiguity, Richmond stands for the proposition that a board has the discretion to use the applicable statutory criteria in some manner to break a tie.

The undersigned further finds that Richmond does not bind a county board to rely exclusively on the statutory criteria in devising a method of breaking ties. (See footnote 7) It is implicit in the case that

once applicants have been fully and adequately assessed against the seven criteria, a board's duty under the statute is completed. Indeed, since the statute does not address ties created by its "equal weight" provision, it can be inferred that the Legislature intended to leave such matters to the county board's discretion. (See footnote 8)

It appears, however, that it would be inherently arbitrary to choose a "tie-breaker" criterion or devise some other qualifications-based method to resolve a draw subsequent to the assessment of applicants for a particular professional post. The present case illustrates the point. Principal Zirkle could not clearly articulate his reasons for choosing the specializedtraining criterion to break the deadlock between the grievant and Mr. Dalton or explain why the second assessment of that factor was more accurate than the first. While it is accepted that he was attempting to fairly address the problem, it appears that he was acting capriciously. Accordingly, it is concluded, as a corollary to Richmond, that a county board of education may devise its own system for resolving ties between candidates, but that if the system is to be predicated on some aspect of the candidate's credentials, it should be established prior to and independent of any particular hiring decision. Challenges to the method or its application would be reviewed under the "arbitrary and capricious" standard pronounced in Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

To reach a resolution of the present case, it is necessary to resort to the Grievance Board's authority under W.Va. Code §18-29-5(b), to "provide such relief as is deemed fair and equitable." It appears that a random selection process is the only viable "neutral" method by which the tie in scores of the grievant and Mr. Dalton could be settled. Any method which would involve further assessment or use of the statutory criteria would, for obvious reasons, be inappropriate.

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

FINDINGS OF FACT

1) The grievant and Greg Dalton, permanent employees of the McDowell County Board of Education, applied for the posted position of business teacher at Pikeview High School.

2) Pikeview Principal Dan Zirkle and an interview committee assessed the candidates per the applicable portion of W.Va. Code §18A-4-7a. It was initially determined that Mr. Dalton exceeded the grievant in the seniority and total amount of teaching experience "factors." They were considered tied

in the degree level, evaluations, certification, specialized training, and existence of teaching experience in the required certification area categories.

3) The scores in the specialized training criterion were based on Mr. Zirkle's and the committee's assessment of the applicants' various private sector experience and their attendance at two workshops.

4) Mr. Dalton, who scored the highest total points in the Board's computations, was ultimately awarded the post.

5) The grievant protested her rejection and, at Level II of the grievance procedure for education employees, prevailed on her claim that Mr. Zirkle had miscalculated her "total amount of teaching experience. The Level II evaluator determined that a correction would place Mr. Dalton and the grievant in a tie in total points. He directed Mr. Zirkle to credit the grievant with two additional years of teaching experience and "reassess" the remaining factors.

6) Mr. Zirkle concluded that he was to break the tie between the two applicants by reassessing one of the criteria. He subsequently reported to the evaluator that he had reexamined the specialized training criteria and found that Mr. Dalton exceeded the grievant in that area. The grievant filed this protest over the reassessment.

CONCLUSIONS OF LAW

1) Unless a county board of education has exercised its discretion to include specialized training as a component in a job description for a particular position, it cannot give consideration to such training when a vacancy in the position occurs and a permanent employee makes application therefor. W.Va. Code §18A-4-7a; Mays v. McDowell County Bd. of Educ., Docket No. 95-33-311 (Sept. 26, 1995). It was error for the Board to assign scores in the specialized training criteria when the job description for the post in issue called for none.

2) Notwithstanding the error, the private sector experience assessed by Mr. Zirkle was not specialized training within the meaning of Code §18A-4-7a.

3) When one or more permanent employees makes application for a teaching post, Code §18A-4-7a mandates a rather mechanical, quantitative analysis to determine whether a regular employee should be permitted to transfer to the post or whether an applicant new to the school system should be appointed. Basler v. Putnam County Bd. of Educ., Docket No. 93-40-215 (April 27,

1994).

4) To the extent that Code §18A-4-7a presumes that employee applicants who have proper certification and satisfactory evaluations are qualified for a particular teaching position and makes seniority and other "numerical" factors determinative, it is similar to Code §18A-4-8b which sets forth the process for hiring and transferring school service personnel.

5) Code §18A-4-8b ¶11 provides for a random selection to break ties in seniority between or among school service personnel.

6) Once a county board has accurately assessed and properly weighed the seven criteria in Code §18A-4-7a, applicable in hiring decisions where one or more permanent employees make application for a professional post, its duty under the statute is complete. 7) A county board has broad discretion to develop a method for breaking ties between or among applicants. A board is not prohibited from using one of the criteria or other aspect of the candidate's credentials to break a tie between or among the candidates. To avoid the appearance of favoritism, methods based on credentials should be established prior to and independent of a particular hiring decision.

8) The present case requires a "fashioned" remedy. See, W.Va. Code §18-29-5(b). In that the qualifications of the grievant and Mr. Dalton have been assessed twice; the evidence supports that they are tied under any system designed to give equal weight to the statutory criteria; and further reliance on their credentials would be inappropriate, resort to the tie-breaking method provided for in Code §18A-4-8b, ¶11 is necessary.

Accordingly, the Mercer County Board of Education is hereby **ORDERED** to conduct a random selection between the grievant and Greg Dalton consistent with the provisions of W.Va. Code §18A-4-8b, ¶11. In the event the grievant prevails in the selection, she is to be immediately instated to the position in issue.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 28, 1995

Footnote: 1The parties presented only brief supplemental testimony at the Level IV hearing.

Footnote: 2The "first set" of factors, used for administrative posts and in instances where no permanent employee makes application for a teaching post, affords a county board a great deal more discretion. See, Blankenship v. McDowell County Bd. of Educ., Docket No. 92-33-220 (April 23, 1993).

Footnote: 3The grievant testified that she had served as a substitute for four years before becoming regularly employed by the Board and that during two of those years, she worked nearly full-time. The Level II evaluator determined, the grievant ultimately agreed, that the grievant's substitute service totaled two years actual teaching experience but that she could be credited with seniority for only one year of that service. Thus, while the grievant scored an additional point in the "total experience" criterion after the Level II decision was issued, she still had less seniority than Mr. Dalton and their scores, therefore, remained the same in that category. The evaluator's determinations were apparently made pursuant to the rule announced in Harkins v. Ohio County Bd. of Educ., 341 S.E.2d (W.Va. 1988), and subsequent Grievance Board decisions to the effect that a substitute who works more than 180 days in a given school year should be credited with one year of seniority.

There is insufficient evidence of record to make an independent conclusion regarding the accuracy of the evaluator's findings and the applicability of Harkins. Since neither party disputes them, it is assumed herein that the calculations were correct.

Footnote: 4Because she had less seniority and total teaching experience, Ms. Symonds was not a finalist for the position. Accordingly, her relative placement on the matrix is largely if not wholly irrelevant to the inquiry herein.

Footnote: 5The Board has not developed a specific job description for business teacher. The description of record is a "generic" description which appears to cover all classroom teaching positions.

Footnote: 6Mr. Dalton had only achieved a Bachelors Degree.

Footnote: 7Thus, a random selection process would not be violative of the statute. While such an approach is contrary to accepted notions regarding professional employment, it would be entirely consistent with the overall intent of the statute that the decision on whether to transfer a permanent employee be based on criteria which is objective and, for the most part, "mathematical."

Further, it is noted that the hiring process provided for in Code §18A-4-7a is similar, in a great many respects, to that established in Code §18A-4-8b for the selection of school service employees. The latter specifically provides, at ¶11, for a random selection method for resolving ties in the seniority of such employees. As hereinafter discussed, the undersigned

finds this the preferable method for breaking the tie in the present case.

Footnote: 8This holding is at least consistent with Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W.Va. 1991). The Grievance Board has relied on the case for the general principle that county boards have broad discretion in personnel matters which are not addressed by statute. See, e.g., Moses v. Mercer County Bd. of Educ., Docket No. 93-21-001 (April 8, 1993).