

JANE BECKLEY

v.

DOCKET NO. 95-22-107

LINCOLN COUNTY BOARD OF EDUCATION

D E C I S I O N

This grievance was initiated October 19, 1994 [\(See footnote 1\)](#), by Jane Beckley ("Grievant") against the Lincoln County Board of Education ("LBOE"), alleging a violation of W. Va. Code § 18A-4-7a occurred when she was not selected for the posted, one year temporary position of band director/music at Hamlin High School. [\(See footnote 2\)](#) Grievant asserts she was the most qualified applicant for the position. The remedy sought is a ruling that Grievant should have been selected for the position, and backpay in the amount of the difference between her salary for the 1994-1995 school year, and what she would have received that school year had she been selected for the position, and any difference in benefits.

The following Findings of Fact were made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. On July 27, 1994, LBOE posted a temporary (one year) classroom teaching position, for a "Teacher - Music K-12/Band Director" at Hamlin High School. Joint Ex. 1.
2. Five people applied for the position, including Grievant and Kim Cook. Three applicants were interviewed by Larry Prichard, Assistant Superintendent, LBOE. Grievant and Ms. Cook met the minimum requirements of the posting. Ms. Cook was selected for the position.
3. All applicants interviewed were permanently employed instructional personnel.
4. Grievant had been employed by LBOE 13 years in various music teaching positions, and had 19 years of music teaching experience.
5. Ms. Cook had seven years of music teaching experience, all as a LBOE employee.
6. Grievant and Ms. Cook held the same certification (Music Education K-12) and degree level (Bachelors), and their evaluations were satisfactory over the two years preceding the posting. The

required certification area was Music K-12.

7. Most of Grievant's music experience and training was in vocal/choral music, not band. At the time of the posting, Grievant was a Music Teacher at Guyan Valley High School. Prior to that, she was the Assistant Band Director at Guyan Valley High School for three and a half years. In that capacity she assisted in teaching music to the band, worked with the color guard, went to Band Camp, helped teach marching, and worked on special effects. The band participated in competitions, football games and parades.

8. Grievant's other band related experience which LBOE was aware of was her employment as a substitute Band Director at Duval High School for six weeks, and her volunteer work with the Harts High School Band and the Hurricane High School Marching Band. [\(See footnote 3\)](#)

9. Ms. Cook was the Harts High School Band Director five or six years, had marched with the Marshall University Band, toured 38 states and Europe with bands, worked with the local Sounds of America Band for four summers, and worked in band fund raising. Harts High School has a small Marching Band which participates in parades and the state band competition.

10. The person filling the posted position would teach Music 7-12, and work with bands at the elementary level, in addition to performing the duties of Band Director at Hamlin High School.

11. LBOE voted at the Level III hearing held on January 3, 1995, that this grievance was timely filed at Level I, and timely appealed to Level II.

Discussion

Respondent's counsel raised timeliness of the filing of the grievance and of the appeal to Level II as an issue. W. Va. Code § 18-29-3(a) requires the employer to raise the argument that the grievance was not timely filed at or before the Level II hearing. In this case, the transcript of the January 3, 1995 Level III hearing reflects quite clearly that the employer ruled this grievance was timely filed, and that it was timely appealed to Level II. This matter was then remanded to Level II for a hearing on the merits. Respondent did not argue at Level IV that its own ruling at Level III was erroneous. Rather, Respondent ignored its own ruling on this issue. In fact, Respondent's counsel stated at the Level IV hearing that a vote was never taken by LBOE at the Level III hearing on the timeliness issue. When the Level III transcript was received after the Level IV hearing, however, it showed otherwise. Having ruled the grievance was timely filed, the issue has been waived by the

employer and need not be addressed further.

In evaluating the selection issue, county boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). With regard to hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the "qualifying factors" set forth in W. Va. Code § 18A-4-7a (1992). That Code Section requires that each factor be weighted equally. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The burden of proof is on the Grievant.

W. Va. Code § 18A-4-7a ([See footnote 4](#)) sets forth, among other things, the criteria to be used by county boards of education in evaluating the candidates for classroom teaching positions. It is unclear from the record what scores were given by LBOE to the applicants. ([See footnote 5](#)) Assistant Superintendent Prichard stated, "[w]e don't keep score." Level II transcript, p. 20. LBOE found that Ms. Cook had more band experience than Grievant, and awarded her the position based upon this conclusion.

Grievant and Ms. Cook have the same qualifications in four of the 7a criteria: "appropriate certification and/or licensure", "degree level in the required certification area", "existence of teaching experience in the required certification area", and "overall rating of satisfactory in evaluations over past two years". LBOE, in its proposed findings of fact, gave Ms. Cook more credit than Grievant in the criterion "existence of teaching experience in the required certification area", apparently because

of Ms. Cook's greater band experience. This is an erroneous application of the clear language of the statute. First, the required certification area is Music K-12, not band, and this is the certification held by both Grievant and Ms. Cook. All of Grievant's 19 years of experience were in this certification area, as were Ms. Cook's seven years of experience. Further, this criterion "does not refer to the amount of teaching experience an individual has in his/her area of certification, because the word 'existence' is not a quantitative word." Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993).

In the 7a criteria "total amount of teaching experience" and "seniority", Grievant has more seniority and more teaching experience than Ms. Cook.

The only 7a criterion remaining at issue is "specialized training directly related to the performance of the job as stated in job description". In that criterion, LBOE rated Ms. Cook ahead of Grievant because she had more experience as a band director, and LBOE argued the position placed more emphasis on band experience.

The posting is vague regarding the job duties of the position. It merely states "Teacher - Music K-12/Band Director" at Hamlin High School. If there is a separate job description, it was not made a part of the record in this case. However, testimony was given that, in addition to being a Band Director, the person filling this position would teach Music 7-12, and would work with elementary band students. Both Ms. Cook and Grievant had excellent music training and experience. Ms. Cook's training had been more band focused than Grievant's. LBOE's determination that Ms. Cook had more specialized training directly related to the job was not arbitrary and capricious. The final score then, after eliminating the ties, left Grievant ahead in two criteria, and Ms. Cook ahead in one. ([See footnote 6](#)) Therefore, LBOE was required by W. Va. Code § 18A-4-7a to select Grievant for this position.

Conclusions of Law

1. County boards of education have substantial discretion in matters relating to the assignment of school personnel, so long as they act reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

2. With regard to the hiring for a classroom teaching position, boards of education must

exercise their discretionary authority by considering the seven "qualifying factors" set forth in W. Va. Code §18A-4-7a (1992). That Code Section requires that each factor be weighted equally. Sisk v. Mercer County Bd. of Educ., Docket No. 95-27-113 (Sept. 25, 1995).

3. Grievant has proven by a preponderance of the evidence that she should have received more points than the successful applicant in the 7a factors, and that Respondent, Lincoln County Board of Education violated, misinterpreted and misapplied W. Va. Code § 18A-4-7a, in the selection of Kim Cook for the position of Teacher - Music K-12/Band Director at Hamlin High School rather than Grievant. 4. Once a county board of education has ruled at Level III that a grievance was timely filed, that issue has been waived by the employer.

Accordingly, this grievance is **GRANTED**. Grievant is awarded backpay in the amount of the difference between her salary for the 1994-1995 school year and the salary she would have earned had she been selected for the position instead of Ms. Cook, and any difference in benefits.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: February 29, 1996

[Footnote: 1](#)

The grievance was denied at Level I on October 19, 1994, and was found to be untimely filed, and therefore, denied at Level II on December 1, 1994. LBOE held a Level III hearing on January 3, 1995, during which it ruled that the grievance was timely filed and remanded the grievance to Level II for a hearing on the merits. The Level II hearing on the merits was held on January 19, 1995. The grievance was denied at Level II on February 14, 1995, and Level III was waived by LBOE on March 3, 1995. A Level IV hearing was held on June 1, 1995. This case became mature for decision on October 23, 1995, the deadline for submission of post-hearing written argument; however, the undersigned accepted Respondent's proposed findings of fact and conclusions of law filed December 13, 1995.

[Footnote: 2](#)

The person holding this position was on a leave of absence for the 1994-1995 school year.

[Footnote: 3](#)

This Board has held that an applicant has a duty to inform the person making job recommendations of her experience or credentials pertinent to the position, and that the failure of an applicant to do so cannot be considered a flaw in the selection process. See Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991). While Grievant offered evidence of additional band related experience at the hearing, she did not prove that she made LBOE aware of this experience in her application or during the interview, and it would not have been contained in her personnel file. Therefore, such experience cannot be considered in this grievance.

[Footnote: 4](#)

The "second set of criteria" found in 7a is applicable to this case, and reads as follows:

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.

[Footnote: 5](#)

In fact, the undersigned concluded from the testimony of Mr. Prichard and the statement of reasons given to Grievant that LBOE had properly given Grievant and Ms. Cook the same rating in the category "degree level", yet when Respondent's proposed findings of fact were received, Respondent raised for the first time the argument that Ms. Cook received more points in this category than Grievant because she had 15 more hours toward a Master's Degree than Grievant. This argument cannot be considered because Grievant was not placed on notice that this would be an issue. Even if it were addressed, it would be rejected, because both Grievant and Ms. Cook had the same degree: a Bachelor's Degree. Any additional credit hours earned have not changed the degree level. See Richmond v. Raleigh County Bd. of Education, Docket No. 92-41-363 (May 27, 1993).

[Footnote: 6](#)

No testimony was presented regarding the qualifications of the third person interviewed for the position, except that he was on the RIF list at the time the job was posted, and he had been an assistant band director. From the testimony of Mr. Prichard, the statement of reasons given to Grievant, and the arguments made by both parties, the undersigned has concluded that the question facing LBOE when it made its selection was whether Grievant or Ms. Cook was more qualified for the position, and that the third applicant interviewed had already been eliminated from consideration.