

**DAVID HOPKINS,**

**Grievant,**

**v. DOCKET NO. 95-10-486**

**FAYETTE COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

David Hopkins, Grievant, filed a grievance against the Fayette County Board of Education (Respondent) on September 6, 1995. Grievant states "I wa[s] an unsuccessful applicant for the science position at Collins Middle School (CMS). I have more seniority and am better qualified than the individual hired." As relief, Grievant states "I want to be hired immediately and receive all back pay and benefits to include reimbursement for health insurance".

Grievant's immediate supervisor denied relief at Level I, on September 13, 1995. At Level II, the grievance was denied on October 30, 1995, by Respondent's Associate Superintendent, after a hearing on October 12, 1995. Following the adverse decision at Level II, this matter was waived to Level IV pursuant to W.Va. Code§18-29-4(c). The parties agreed to submit this case for decision based on the record developed at the lower levels of the grievance procedure, with the right to file briefs. Upon receipt of the parties briefs and lower level documents, the case became mature on February 26, 1996. ([See footnote 1](#))

The following Findings of Fact were derived from the record developed at the lower levels of the grievance procedure.

### **FINDINGS OF FACT**

1. Grievant is certified to teach General Science 7-12 and Mathematics 7-9.

2. Grievant was assigned to teach mathematics at Fayetteville High School from 1991-1993. He was terminated at the end of the 1992-1993 school year, because of a reduction in force (RIF).
3. During the 1994-95 school year, Grievant taught chemistry on a permit at Mount Hope High School.
4. Grievant did not complete the credits necessary to renew the permit.
5. Grievant was aware that if he failed to renew his permit, he could not continue teaching chemistry for the 1995-96 school year.
6. On July 5, 1995, Respondent posted a General Science Teacher's position (5-8) at CMS.
7. In July 1995, grievant verbally indicated, to Respondent's Director of Personnel, Douglas Kincaid, that he would resign his half time chemistry position. However, Grievant never resigned. At this time, Grievant also applied for the CMS position.
8. Grievant returned his "contract" (assignment letter) for the 1995-96 school year, because he did not intend to complete the credits necessary to renew his permit.
9. All eleven applicants for the CMS position were interviewed. The same basic pre-interview questionnaire was completed by all of the applicants and all of the interviews were similarly uniform in length and content covered.
10. The successful applicant for the CMS position was Joel Harris.
11. Mr. Harris is certified in Science grades 5-12, which encompasses the appropriate area, and in Biology 9-12.
12. Mr. Harris had a higher baccalaureate grade point average than Grievant.
13. Grievant did not have any experience at the middle school programmatic level or at the lower level programmatic sciences. Mr. Harris has experience in the particular programmatic level and with the new curriculum, which includes: hands-on critical thinking, analytical thought, and lab activities.

## **DISCUSSION**

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). 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 his judgment for that of a board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W.Va. 1982). The Grievance Board 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 same problem, explained its decision in a manner contrary to the evidence before it, or reached a 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).

With regard to the 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. That Code Section requires that each factor be weighted equally. W.Va. Code §18A-4-7a provides, in pertinent part:

A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. Further, the county board shall make decisions affecting the hiring of new classroomteachers 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 positing, 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 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.

Because Grievant argues that Respondent erred by applying the "first set" of criteria of Section 7a, the first issue to be addressed is which selection standard contained in the first paragraph of

Section 7a applies in this case. This depends upon the employment status of the applicants for a position.

It is clear from the record that Grievant was not "permanently employed". Therefore, Grievant's argument plainly has no merit because he was working "on permit" with conditions tied to his employment. [\(See footnote 2\)](#) He was not permanently employed in the sense of having a continuing contract or tenure. It cannot be concluded that because he was accorded the same benefits as probationary and regularly-employed classroom teachers that the basic nature of his contractual relationship with the county board of education had changed. It is therefore concluded that "teachers on permit" are not "permanently employed instructional personnel" within the meaning of Section 7a.

Furthermore, there is no evidence in the record which shows that any of the eleven applicants, including Grievant, for the CMS position were "permanently employed". Therefore, the "second set" of criteria does not apply because no permanently employed instructional personnel applied for the position. The "first set" of criteria is applicable.

Grievant also argues that he is more qualified than the successful applicant. However, with respect to the applicable provisions of W.Va. Code §18A-4-7a, this Board has held that when a grievant is not qualified for a posted position, then no violation has occurred in the non-selection of a grievant for the position. Lewis v. Mercer County Bd. of Educ., Docket No. 94-27- 604 (Feb. 23, 1995); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). Furthermore, personnel decisions must be based upon the credentials on file at the time of appointment to a position. Dunford v. Mercer County Bd. of Educ., Docket No 94-27-618 (Dec. 21, 1994); Adams v. Mercer County Bd. of Educ., Docket No. 92-27-445 (Mar. 30, 1993). Grievant did not possess the necessary certification to teach Science, grades 5-8, at the time of selection; therefore he did not meet the minimum requirements of the posting and was not qualified for the position.

Furthermore, in order for Grievant to pursue the issue of whether Mr. Joel Harris was properly certified for the position, he must show he was "adversely affected" by that employment decision. Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 5, 1994); Pomphery v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). Therefore, since Grievant was not qualified for the position in question at the time the position was filled, he does not have standing to challenge Respondent's selection of Mr. Harris. Weaver, supra. at 8. Because Grievant does not

have standing to challenge the selection process, the issue of Mr. Harris's qualifications need not be addressed.

In addition to the foregoing narration, it is appropriate to make the following conclusions of law.

### **CONCLUSIONS OF LAW**

1. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. Pursuant to the provisions of W.Va. Code §18A-4-7a, decisions of a county board of education affecting teacher promotions and the filling of vacant teaching positions must be based primarily upon the applicants' qualifications for the job. Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).
3. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler County Bd. of Educ. and Roy Truby, State Superintendent, 375 S.E.2d 911 (W.Va. 1981).
4. 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, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W.Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W.Va. 1994).
5. Grievant failed to prove his grievance by a preponderance of the evidence and failed to demonstrate he was entitled to the position in question as a matter of law.
6. Appropriate subject-matter certification is the most basic qualification for a position. Bailey v. Mingo Co. Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996); Argabright v. Wyoming Co. Bd. of Educ., Docket No. 93-55-053 (Apr. 6, 1993).
7. If Grievant was not qualified for the posted position, then no violation has occurred in the non-selection of Grievant for the position. Lewis v. Mercer County Bd. of Educ., Docket No. 94- 27-604 (Feb. 23, 1995); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994).
8. Personnel decisions must be based upon the credentials on file at the time of appointment to a position. Dunford v. Mercer County Bd. of Educ., Docket No. 94-27-618 (Dec. 21, 1994); Adams v. Mercer County Bd. of Educ., Docket No. 92-27-445 (Mar. 30, 1993).

9. Given that Grievant was not minimally qualified for the position, he lacks standing to complain about alleged improprieties in the selection of another individual for the position as he has not shown that he was "adversely affected" by the employment decision being challenged. Mullins, supra; Weaver, supra; Pomphrey, supra.

Accordingly, the grievance must be DENIED.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Fayette 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.

DATED: \_\_\_\_\_

JEFFREY N. WEATHERHOLT  
ADMINISTRATIVE LAW JUDGE

DATED: 3/15/96 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE

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[Footnote: 1](#)

*The record in this case consists of the following: (1) the grievance forms from Level IV; (2) the Level II transcript; (3) Respondent's four exhibits admitted at Level II; (4) two joint exhibits admitted at Level II; (5) Grievant's briefs from Levels II and IV; and (6) the Level II decision. The Undersigned has considered all matters of record.*

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[Footnote: 2](#)

*See also, Perry and Baisden v. Logan County Bd. of Educ., Docket No. 91-23-297 (Mar. 31, 1992); Jaskiewicz v. Hancock County Bd. of Educ., Docket No. 91-15-055 (Aug. 30, 1991); and Suan v. Lewis County Bd. of Educ., Docket No. 91-21-074 (Aug. 28, 1990); wherein the Grievance Board likewise has held that substitute teachers are not "permanently employed".*