

**MARY K. TIBBS**

**v. Docket No. 96-27-074**

**MERCER COUNTY BOARD OF EDUCATION**

### **DECISION**

The grievant, Mary Tibbs, is employed by the Mercer County Board of Education (Board) as a substitute teacher. She filed a grievance at Level I November 16, 1995, protesting her non- selection for a full-time teaching position. Her supervisor was without authority to grant relief. At Level II, Lucinda Presley, the successful substitute applicant for the post, was allowed to intervene per W.Va. Code §18-29-3(u). [\(See footnote 1\)](#) The grievance was denied at that level in a February 9, 1996 decision. [\(See footnote 2\)](#) The Board, at Level III, declined to address the matter, and appeal to Level IV was made February 21, 1996. A hearing was held May 14 and 31, 1996. The parties submitted proposed findings of fact and conclusions of law by July 8, 1996.

### **Background**

There is no dispute over the facts of the case. The position in issue, designated “Title I Kindergarten-4 yr. olds,” was established per the provisions of W.Va. Code §18-5-18c, which authorize a county board of education to provide “developmental kindergarten” programs for students below the traditional kindergarten age of 5 years. [\(See footnote 3\)](#) The October 5, 1995 announcement for the job specified “valid West Virginia teaching certificate with proper endorsement to teach Kindergarten” as the only minimum requirement. The grievant, Ms. Presley, and at least twenty-five other substitutes made timely applications. Two regularly-employed teachers expressed interest but later withdrew.

The scant evidence on the remainder of the process by which the position was filled reveals only

that most if not all applicants were interviewed, and, at some point, ranked on a 1 to 20 point scale in each of the following six categories: appropriate certification, total amount of teaching experience, the existence of teaching experience in the required certification area, degree level in the required certification area, evaluations, and seniority. [\(See footnote 4\)](#) It appears that each candidate was then assigned a 1 through 6 “final” ranking which reflected the number of categories in which he or she either achieved the highest score of any applicant or tied other applicants with a 20 score.

At least fifteen applicants, including the grievant, achieved a final ranking of 4. With 5 points, Ms. Presley was the high scorer. The record does not reveal the date of her appointment to the post.

All candidates met the announced kindergarten certification requirement. The grievant and five others held additional endorsements in “pre-kindergarten” or “early education.” To obtain the endorsement, they were required to complete approximately twelve more college hours in early childhood development and/or education than those persons holding “K through 8” certification only. Their schedules may also have included a longer practicum.

### **Argument**

Relying heavily, if not wholly, on the testimony of Barbara Brazeau, a West Virginia Department of Education (DOE) licensing official, the grievant asserts that the Board had a legal duty to require a pre-kindergarten endorsement for the position in issue. She maintains that she would have been awarded the position had the endorsement been a prerequisite.

The Board responds that DOE has not formally adopted regulations requiring the endorsement, and, until it does, county boards have the discretion to establish reasonable certification standards for pre-kindergarten positions. The Board maintains that teachers with K through 8 licenses are fully qualified to instruct four-year old students. [\(See footnote 5\)](#)

### **Findings and Conclusions**

Initially, it is concluded that the grievant has not shown that she was more qualified than the other applicants who possessed the pre-kindergarten endorsement. Her evidence only marginally addresses other facets of the selection process. A finding that the Board had a duty to require the endorsement would, at best, entitle the grievant to a reassessment of candidates who held it at the time of the posting. See, *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1986).

Ms. Brazeau testified that, in response to an inquiry from the grievant or her representative, she

consulted her licensing staff and was advised that early childhood certification was a requirement for teachers in pre-kindergarten programs. She readily conceded, however, that DOE “had nothing in writing” to that effect. Ms. Brazeau's testimony further reflects that if she and/or her staff have ever advised any county board of education of the requirement, it has been through informal, oral communications.

Ms. Brazeau did not explain the process by which DOE establishes a specific license as a requirement for teaching in a particular field. She indicated that West Virginia Board of Education Policy 5202, entitled, “Minimum Requirements for the Licensure of Educational Personnel and Advanced Salary Classifications,” was DOE's official policy on teacher certification; she acknowledged that it did not designate pre- kindergarten certification as a requirement for instructing four- year old students. Policy 5202's stated purpose is “to specify the minimum requirements that must be met to license an individual to work in the public schools.” Several statutes are cited as authority to promulgate the regulations contained therein; the document indicates that the regulations have received the approval of the Legislative Rulemaking Committee. [\(See footnote 6\)](#)

\_\_\_The policy references W.Va. Code §18A-3-1, which, in relevant part, provides,

The state board of education, after consultation with the secretary of education and the arts, who shall represent the board of directors of the state college system and the board of trustees of the university of West Virginia system, shall adopt standards for the education of professional educators in the state and for the awarding of certificates valid in the public schools of this state.

Also cited is W.Va. Code §18A-3-2a, which provides,

In accordance with state board of education rules for the education of professional educators adopted after consultation with the secretary of education and the arts, the state superintendent of schools may issue certificates valid in the public schools of the state.

In addition to authorizing county boards to begin pre- kindergarten instruction, W.Va. Code §18-5-18c specifically directs the state board to “establish and prescribe guidelines and criteria relating to the establishment, operation and successful completion of early childhood programs in accordance with the other provisions of this section.” Policy 5202 scarcely mentions such programs; Ms. Brazeau indicated that DOE had not complied with the statute's directive. It seems clear from W.Va. Code §§18A-3-1 and 18A-3-2a that some action is required of the state board and state superintendent

before license requirements are established for a particular teaching field. It appears that Code §18-5-18c merely requires the state board to take such action with regard to early childhood programs.

The reference in Code §18A-3-2a to “state board of education rules for the education of professional educators” is interpreted as a reference to the rules in Policy 5202. The absence of any provision in the policy specifying pre-kindergarten endorsement as an entry-level requirement for employment in a pre-kindergarten program and Ms. Brazeau's testimony establishes that no official action has been taken on such a requirement.

Further, it is reasonable to conclude that formal written notice of certification standards to county boards, employees and potential employees was at least one objective of the cited statutory language. Evidence in the case illustrates the problems inherent in informal advisories. Roger Daniels, the Board's Human Resources Director, testified credibly that prior to developing the announcement for the post in issue, he consulted Ms. Brazeau and was advised that K through 8 certification was the appropriate license. The import of Ms. Brazeau's testimony was that while she did not recollect the content of their conversation, she could not say that Mr. Daniels was mistaken.

After a thorough review of the above-cited statutes and Policy 5202, the undersigned is persuaded that licensing requirements cannot be implemented “in-house” by DOE and must be established per official action of the state board and state superintendent. Such requirements most likely need the approval of the Legislative Rulemaking Committee. The grievant herein has failed to show that DOE has properly established the pre-kindergarten endorsement as a minimum requirement for teaching four-year old students.

Absent a controlling statute or regulation, the Board's decision to require only K through 8 licensure for the post is subject to review under the “arbitrary and capricious” standard announced in Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 599 (W.Va. 1986). The standard entails close examination of the process by which a particular personnel decision was made but also requires that considerable deference be afforded the professional judgment of those conducting it. Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). The burden is upon the grievant to show by a preponderance of the evidence that the board abused its discretion.

The grievant presented no evidence which even tends to show that a teacher with K through 8 certification is not qualified to instruct four-year old students in a curriculum which appears to be only slightly different from the normal Kindergarten program. It is accepted that the grievant's additional

endorsement gives her an “academic” edge, but it cannot be said that the Board acted arbitrarily in deciding that a K through 8 minimum requirement might draw a larger pool of applicants with experience in pre- school instruction. The record supports that the K through 8 minimum did just that. Certainly, it was not unreasonable for the Board to prefer teachers with experience over those with an additional twelve college credit hours.

Further, it cannot be ignored that the decision to require only K through 8 certification was made after discussion with a DOE official. It is accepted that Mr. Daniels was advised that the license minimally qualified the holder to work with four-year olds. His consultation is not indicative of capriciousness. In short, the grievant has not demonstrated that the Board's decision on certification was predicated on reasons other than a desire to obtain the most qualified applicant for the job.

Accordingly, the grievance is **DENIED**.

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: October 31, 1996**

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[Footnote: 1](#)

*"Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties."*

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[Footnote: 2](#)

*A Level II hearing was held February 7, 1996; the transcript of this proceeding and the exhibits admitted are part of this record.*

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[Footnote: 3](#)

*The statute, in pertinent part, provides,*

*County boards shall provide by the school year one thousand nine hundred eighty-nine - ninety, and continuing thereafter, programs and instructional procedures that recognize the variability in achievement, development, and background experience of the early childhood years.*

*Such programs and instructional procedures may include, but shall not be limited to, developmental kindergarten, developmental first grade, early first grade, transitional first grade, and/or developmental second grade.*

*Placement of children in any of the aforementioned early childhood programs shall be based on the judgment of the teacher and other professional personnel after consultation with the parent or guardian and in accordance with the evaluation model for children as set forth in section two [§ 18-2E-2], article two-e of this chapter. Counties may designate one or more classes or schools for such early childhood programs and may transport children to these schools.*

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[Footnote: 4](#)

*The criteria were drawn from W.Va. Code §18A-4-7a; the statute provides different processes for a county board's selection of professional employees depending on whether regularly employed teachers make application for a particular position. As noted, initially, there were two such applicants for the post in issue, and it appears that the Board did not change processes after their withdrawal. The grievant takes no exception with this decision, and the undersigned finds that to the extent that the Board proceeded under the wrong portion of the statute, it was harmless error.*

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[Footnote: 5](#)

*The intervenor's position is essentially the same as the Board's. Both initially made assertions regarding the timeliness of the grievant's appeal from Level I to Level II; the claims were disposed of in the May 14, 1996 portion of the Level IV hearing. Subsequent to the presentation of the testimony of several witnesses, including a secretary to the grievant's union representative, the undersigned ruled that while the appeal was not received by the Board until well after the period provided for in W.Va. Code §18-29-4(a), it was posted timely, and was most likely misdirected by the United States Postal Service. That ruling is here affirmed without further discussion.*

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[Footnote: 6](#)

*See, W.Va. Code §29A-3-10.*