FRANK CONLEY,

Grievant,

v. **DOCKET NO. 97-20-323**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Frank Conley, Grievant, grieves Respondent having "improperly posted jobs and improperly excluded [him] from consideration of posted jobs." Grievant objects to Respondent's excluding from consideration for vacancies those applicants currently subject to plans of improvement (IPs), and to Respondent excluding him from consideration for numerous positions. At Level IV (See footnote 1), the relief requested was clarified, with Respondent's concurrence. As Grievant prevails, for reasons explained below, Respondent must review its selections for all positions for which Grievant applied and was qualified, since May 6, 1997 (fifteen working days prior to the filing of the grievance), using the second set of criteria found in W. Va. Code §18A-4-7a; and Respondent must allow Grievantto review the "grids" by which the relative qualifications of candidates are assessed.

ISSUES

1. Is it a violation of any legal requirement for Respondent to exclude from consideration applicants for teaching positions who are currently on IPs?

2. Is Respondent's practice of including a minimum requirement on professional position postings, which requires that applicants not be on an IP, a validly adopted policy, or a posting standard?

3. Is it a violation of any legal requirement for Respondent to exclude Grievant from consideration through application of its minimum requirement, based on the assertion that Grievant's principal would have placed him on an IP had he not taken extended medical leave?

FINDINGS OF FACT

1. Grievant has been a regularly employed teacher for Respondent for nine years. During school year 1996-97, Grievant was assigned to Holtz Elementary School (Holtz) as a resource teacher for special education students.

2. Beginning on approximately November 14, 1996, Grievant took approved medical leave of absence, and did not teach the rest of the 1996-97 school year.

3. Ms. Dorothea Fuqua is the Principal at Holtz. On or about October 31, 1996, Ms. Fuqua made her only observation ofGrievant's classroom and teaching. In Ms. Fuqua's opinion, Grievant's performance was deficient. (L IV, Gr. Ex. 1.)

4. Ms. Fuqua planned to conduct a second classroom observation, evaluate Grievant's performance, and then place Grievant on an IP. Due to Grievant's medical leave, the second observation was never conducted, no evaluation form was filled out, and no IP was drafted.

5. Grievant was never formally evaluated or placed on an IP.

6. It is Respondent's general practice to include in job postings the following statement: "Minimum requirements for all professional jobs-- must not be on a plan of improvement." (L IV, Gr. Ex. 6 & 7.)

7. Beginning on May 8, 1997, Respondent posted numerous teaching position vacancies for which Grievant was certified and applied. On several of the job postings, Respondent failed to include the requirement that professional employees not be on an IP. Those job postings were later amended to include the requirement. (L II, Gr. Ex. 4 and Jt. Ex. 1; L IV, Gr. Exs. 6 and 7.)

8. Respondent excluded Grievant from consideration as a qualified applicant for any of the posted positions, as it considered Grievant to be on an IP.

9. Grievant is again teaching in his position at Holtz, for the 1997-98 school year. Grievant had not been placed on any formal, written IP, as of September 10, 1997 (the date of the Level IV hearing).

DISCUSSION

In this non-selection grievance, Grievant bears the burden of proving all elements of his grievance by a preponderance of the evidence. W. Va. Education and State Employees Grievance Board Procedural Rules, 156 C.S.R. 1, §4.19; Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994). See also, W. Va. Code §18-29-6. Grievant alleges that 1) Respondent's practice of

excluding teachers on IPs from consideration for vacancies is impermissible under the second set of selection criteria specified in W. Va. Code §18A-4-7a; 2) the practice is not a properly adopted policy; and 3) even if the practice were both permissible and properly-adopted, it could not be applied to Grievant, as he was not on an IP. Grievant asserts the practice nullifies the statutory mandate that equal weight be given to each of the seven selection criteria, by placing determinative emphasis on the criterion "receiving an overall rating of satisfactory in evaluations over the previous two years." This result is due to the fact that an unsatisfactory evaluation must precede placement of a teacher on an IP. See W. Va. Code §18A-2-12. Grievant further argues that Respondent was arbitrary and capricious in unilaterally declaring Grievant to be on an IP, without following legal requirements for placing him on an IP.

Respondent asserts that 1) its practice is imminently reasonable, justifiable, and in the best interests of the schools; 2) its practice is not a formal policy, but a discretionary standard applied to job postings; and 3) it acted reasonably inexcluding Grievant from consideration for the vacancies, as his performance problems would have resulted in an IP, had he not taken medical leave. Respondent analogizes its "No IP" standard to imposing specific certification area requirements in order to qualify for a particular teaching position. It asserts that its practice helps to ensure performance problems are corrected, and that students are protected from less-than-competent teachers, by preventing those with problems from moving from position to position.

The best course in deciding this grievance is to take the "last" issue first: whether Respondent could exclude Grievant from consideration, based upon Respondent's assertion that, but for his medical leave of absence, he would have been placed upon an IP. This issue is dispositive of the case at hand, and makes moot the issue of whether Respondent's general practice is legitimate.

Assuming arguendo the legality of Respondent's practice of excluding from consideration applicants on IPs, (See footnote 2) the issue becomes whether Respondent could apply that practice to Grievant. Grievant clearly was not on a written IP as contemplated by law, and Respondent conceded that point. Respondent's "minimum requirement" is that applicants "must not be on a plan of improvement." It does not state that applicants must currently be performingsatisfactorily. As "plan of improvement" is a term of art within the education law of this State, it must be construed accordingly.

W. Va. Code §18A-2-12 addresses IPs. The statutory language contemplates that all teachers

will be apprised of their performance and, if necessary, "given notice of deficiencies" through regular formal evaluations. Should deficiencies be found, the teacher and the employer working together develop a "written improvement plan, which shall be specific as to what improvements, if any, are needed" and which shall provide "a reasonable period of time for remediation of the deficiencies." State Board of Education Policy 5310, 126 C.S.R. 142, requires observations of a teacher's classroom performance as the basis for an evaluation, (See footnote 3) and the evaluation then serves as the basis for an IP, should a teacher's performance be unsatisfactory. 126 C.S.R. 142, §11. Clearly, an IP must be in writing, and written with the employee's input. Cohenour v. Greenbrier County Bd. of Educ., Docket No. 13- 87-058-4 (June 22, 1987).

In this instance, Grievant's principal completed one formal observation, noting deficiencies in Grievant's performance. (L IV, Gr. Ex. 1.) However, she did not conduct an evaluation. Although Principal Fuqua stated that she would have placed Grievant on an IP had he continued to teach, no IP was drafted. Any plans toevaluate Grievant's performance or develop an IP were jettisoned once Grievant went on medical leave. There was no written IP.

Respondent nevertheless argues that it should be permitted to treat Grievant as if Principal Fuqua's plans had actually been implemented in accordance with legal requirements. Grievant's performance problems had been noted and discussed with him prior to his taking medical leave, and his leave prevented Ms. Fuqua from pursuing the formal evaluation and imposition of a formal improvement plan. (See footnote 4) Essentially, Respondent asserts that Grievant was or may be trying to "hide" from a negative evaluation and resultant IP, by taking an extended medical leave when his performance was informally criticized. He should not be permitted to escape the sure results of his poor performance in such a fashion, Respondent asserts.

Respondent's argument on these points might be more persuasive were there any evidence that Grievant was acting in bad faith by taking medical leave. There is no such evidence. Respondent's argument might also bear more consideration, had it shown Grievant's performance was marginal prior to his assignment to Holtz. However, Respondent did not allege that Grievant had ever had performance problems, prior to school year 1996-97. Grievant,of course, denies that his performance was unsatisfactory even then.

Clearly, an employee is entitled to due process in such matters. Deadrick v. Marion County Bd. of Educ., Docket No. 90-24- 071 (Jan. 30, 1991), citing Wall v. Putnam County Bd. of Educ., Docket No.

89-40-561 (Nov. 22, 1989). A school employee should not be affected negatively by a correctable problem of which he has not been advised and granted an opportunity to improve. Farmer v. Logan County Bd. of Educ., Docket No. 23-88-207 (Sept. 22, 1989), citing Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237, 240 (W. Va. 1989); and Shaver v. Jackson County Bd. of Educ., Docket No. 15-88-107 (Nov. 7, 1988). Consequently, reliance by an employer on accounts of a candidate's deficient performance and other negative factors which are undocumented or are not fairly made known to the applicant can fatally flaw the selection process when those factors primarily resulted in the candidate's non- selection. See Oser v. Haskins, 374 S.E.2d 184 (W. Va. 1988); Deadrick, supra (See footnote 5) ; Wall, supra; Bayza v. Marshall County Bd. of Educ., Docket No. 89-25-538 (Feb. 26, 1990). See also McCool v. Hancock County Bd. of Educ., Docket No. 15-89-018 (Aug. 25, 1989).

In Oser, a mandamus action, the Supreme Court of Appeals stated that Mr. Oser's application for a teaching position had notbeen properly considered, as the superintendent had considered some negative information about him which was neither brought to Mr. Oser's attention nor reflected in his personnel file or evaluations. The Court concluded that "[b]ased on hearsay, innuendo and unfounded allegations, the appellees conducted the evaluation of the appellant and concluded he was unqualified." Oser at 187 (footnote omitted). The Court found the super- intendent's actions arbitrary and capricious, resulting in failure to evaluate the applicants fairly. Oser shows that unverified, undocumented concerns about an applicant's abilities cannot disqualify him from consideration, particularly where objective information shows the applicant qualified, and the undocumented concerns are not brought to the applicant's attention.

In Mays v. McDowell County Bd. of Educ., Docket No. 95-33-311 (Sept. 26, 1995), Ms. Mays' principal had observed performance problems in her teaching, which the employer considered in evaluating candidates for a teaching position using the second set of criteria in W. Va. Code §18A-4-7a. The employer assessed Ms. Mays as less qualified, and did not give her credit for having satisfactory evaluations (one of the seven selection criteria). The employer in Mays "assert[ed] 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 Grievance Board disagreed, stating that

> regardless of whether [the principal] ever ultimately concluded that the grievant's total performance wasdeficient, 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.

Mays at 10, citing Rakes v. Raleigh County Bd. of Educ., Docket No. 93-41-448 (Mar. 17, 1994). Mays shows that concerns about performance cannot be considered in the statutory selection criterion pertaining to satisfactory evaluations, when those concerns have not yet become part of a written evaluation. If performance concerns cannot be considered as implying unsatisfactory evaluations, surely they cannot be considered as implying an IP.

In Bayza, too, the grievant successfully challenged her non- selection. There, the principal had observed the grievant's performance, and had concerns about it. He claimed to have discussed these concerns with the grievant. However, he had failed to document these concerns in the grievant's personnel file. Her written evaluations indicated primarily satisfactory performance. The Grievance Board found respondent had considered aspects of the grievant's performance which had not been documented via formal evaluation or fairly made known to her, and had not considered her positive evaluations or other qualifications. It was held that this action was arbitrary and capricious, and the grievant prevailed.

In Wall, the superintendent was unfavorably impressed by a letter written by the grievant in support of his application for a principalship. The superintendent perceived the letter to imply apolitical threat to the superintendent should he not nominate the grievant for the position. The superintendent believed this displayed undesirable qualities in the grievant. As the superintendent did not advise the grievant of his concerns over the letter, or give the grievant an opportunity to respond, it was held that the grievant was deprived of due process and the selection was fatally flawed.

In examining the fact that Grievant took a leave of absence, it is clear that W. Va. Code §18A-2-2a provides that teachers may take an extended medical leave of absence without pay, and that upon their return they are to be given all benefits and rights which they possessed at the commencement of the leave. An employee returning from a leave of absence has the right to bid upon other positions, and should not be penalized for such absence. Prior cases hold that when an employee has not received a personnel evaluation due to an authorized leave of absence, the employer must look to evaluations performed prior to taking such leave when making hiring decisions pursuant to W. Va. Code §18A-4-7a. Rakes v. Raleigh County Bd. of Educ., Docket No. 93-41-448 (Mar. 17, 1994), aff'd on other grounds sub nom Raleigh County Bd. of Educ. v. Rakes, Cir. Ct.

Raleigh County, Civil Action No. 94-AD-421-A (June 19, 1996).

Applying the above cases here, significant flaws in Respondent's selection process are apparent. It disqualified Grievant as an applicant on the basis of concerns which were never made part of a formal evaluation, without giving him an opportunityto respond to concerns about his abilities (See footnote 6). Grievant was effectively penalized for taking an authorized medical leave of absence. Without following the legal procedures required for addressing unsatisfactory performance, Respondent imputed to Grievant performance so deficient as to warrant placing him on an IP, and then imputed the existence of the IP itself.

Even if its policy were valid for purposes of excluding from consideration those applicants currently subject to IPs, Respondent's application of the policy in this instance cannot be condoned. Respondent seeks to exclude applicants whom Respondent suspects could be placed on an IP sometime in the future, if proper procedures were followed. It is manifestly unfair to allow Respondent to treat an employee as if all due process procedures were implemented, where they have clearly not been implemented. In such a scenario, the employee has no recourse, and no way to contest Respondent's decision, regardless of how arbitrary, capricious, or manipulative it may be. Respondent's approach to Grievant's situation does not guard against arbitrary and capricious conduct, or ulterior motive. Where a teacher is not subject to a written IP, Respondent is prohibited from utilizing its "no IP" requirement to exclude the teacher from consideration when applying for vacancies.

CONCLUSIONS OF LAW

1. A county board of education has substantial discretion in matters relating to the hiring of school personnel, but it must exercise its discretion in an open and reasonable, and not arbitrary and capricious, manner. Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 58 (1986).

2. Respondent must evaluate all applicants' qualifications in a fair and complete fashion. Cusick v. Hancock County Bd. of Educ., Docket No. 89-15-179 (Oct. 31, 1989). Excluding candidates from consideration without first assessing their relative qualifications under the statutory criteria, even for apparently rational reasons, is highly suspect.

3. Concerns about performance which have not become part of a written evaluation cannot be considered in the selection process, as part of the criterion pertaining to satisfactory evaluations.

Mays v. McDowell County Bd. of Educ., Docket No. 95-33-311 (Sept. 26, 1995).

4. Reliance by an employer on reports of a candidate's deficient performance and other negative factors which are undocumented or are not fairly made known to the applicant can fatally flaw the selection process when those factors primarily result in the candidate's non-selection. See Oser v. Haskins, 374 S.E.2d 184 (W. Va. 1988); Deadrick v. Marion County Bd. of Educ., Docket No. 90-24-071 (Jan. 30, 1991); Bayza v. Marshall County Bd. of Educ., Docket No. 89-25-538 (Feb. 26, 1990); Wall v. Putnam County Bd. of Educ., Docket No. 89-40-561 (Nov. 22, 1989). Seealso McCool v. Hancock County Bd. of Educ., Docket No. 15-89-018 (Aug. 25, 1989).

5. When an employee has not received a personnel evaluation due to an authorized leave of absence, the employer must look to evaluations performed prior to taking such leave when making hiring decisions pursuant to W. Va. Code §18A-4-7a. Rakes v. Raleigh County Bd. of Educ., Docket No. 93-41-448 (Mar. 17, 1994), aff'd on other grounds sub nom Raleigh County Bd. of Educ. v. Rakes, Cir. Ct. Raleigh County, Civil Action No. 94-AD-421-A (June 19, 1996).

6. An IP is a formal document, which must be in writing, and written with the employee's input. W. Va. Code §18A-2-12; State Board of Education Policy 5310, 126 C.S.R. 142; Cohenour v. Greenbrier County Bd. of Educ., Docket No. 13-87-058-4 (June 22, 1987).

7. Grievant proved that Respondent improperly applied its minimum requirement to him, by excluding him from consideration for vacancies when he was not subject to an IP.

Accordingly, this grievance is **GRANTED**.

Respondent is hereby **ORDERED** to re-evaluate the applicants' relative qualifications as they existed at the time the original postings closed, and determine whether Grievant is the most qualified applicant for any of the positions. Respondent is further **ORDERED** to allow Grievant and/or Grievant's representativeto review the "grids" by which such re-evaluation determinations are made.

Any party may appeal this decision to the Circuit Court of Kanawha 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 appropri ate court.

Dated: October 17, 1997 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

The grievance was waived at Levels I and III, and was denied following a hearing at Level II. A brief hearing was held at Level IV on September 10, 1997. The matter became mature for decision on September 19, 1997, the deadline for the parties' submissions of Proposed Findings of Fact and Conclusions of Law. References to the transcript and exhibits submitted at Level II are identified as "L II, Tr. p. __" or "L II, Gr. Ex. __," while Level IV exhibits are identified as "L IV, Gr. Ex. __."

Footnote: 2

I do not hold that this practice is legal or permissible. That issue simply need not be reached at this time, and the Grievance Board does not provide advisory opinions. See Jones v. Cabell County Bd. of Educ., Docket No. 97-06-041 (Aug. 6, 1997) and cases cited therein.

Footnote: 3

126 C.S.R. 142, §§9-10, require certain numbers of observations for each evaluation, and certain numbers of evaluations per year, based upon the number of years a particular individual has been teaching. After seven years, a "professional growth and development cycle" is utilized "in lieu of the performance evaluation." 126 C.S.R. 142, §10.3.

Footnote: 4

This assertion is not particularly convincing, as there are no provisions of which I am aware that would prevent Respondent from sending a teacher on extended leave an evaluation, to be signed and returned, or even to create an incomplete evaluation, so long as a copy is sent to the teacher. Conversely, there certainly are statutory provisions which mandate that IPs be in writing, and include detailed descriptions of deficiencies and measures to be implemented to address them.

Footnote: 5

In Deadrick, an applicant for a principal's position was deemed disqualified by the employer, due to undocumented allegations that he was a poor communicator, without the employer apprising him of the concerns and offering him an opportunity to respond. The school board's action was invalidated, and the grievant was instated into the principalship.

Footnote: 6

While Grievant could have responded to Principal Fuqua's concerns in conjunction with the observation form (and may have done so), this does not substitute for the opportunity to respond during the selection process. Respondent did not give Grievant the opportunity to compete for positions, so he necessarily did not have the opportunity to address the concerns in a meaningful way.