JENNIFER LIPINSKI,

Grievant,

v. **DOCKET NO. 97-25-286**

MARSHALL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Jennifer Lipinski, initiated this proceeding pursuant to the provisions of W.Va. Code §§ 18-29-1, et seq., alleging that she should have been selected for a classroom teaching position at Washington Lands Elementary School. She requests placement in the position. Relief could not be granted by Grievant's immediate supervisor, so she appealed to level two, where a hearing was conducted on May 2, 1997. A level two decision denying the grievance was issued on May 21, 1997. The grievance was denied at level three on June 10, 1997, and appealed to level four on June 18, 1997. In lieu of a level four hearing, the parties agreed to submit the matter upon the existing record, accompanied by proposed findings of fact and conclusions of law submitted by August 20, 1997. (See footnote 1) This matter was transferred to the undersigned for administrative reasons on August 15, 1997.

The following findings of fact are made from a preponderance of the evidence submitted, including all testimony and exhibits of record.

Findings of Fact

1. Grievant is employed by the Marshall County Board of Education ("Board") as aclassroom teacher at Limestone Elementary School.

2. On April 2, 1997, the Board posted a position vacancy for a second grade teacher at Washington Lands Elementary School for the 1997-1998 school year. Qualifications for the position

were described in the posting as:

> Minimal qualifications will include an AB degree and valid West Virginia teaching certification endorsed to teach Elementary Education or Multi-subjects at grade levels commensurate with the assignment. Applicant must possess the ability to successfully manage an instructional program for primary school age children.

The posting did not state that any specialized training was required to be qualified for the position.

3. On April 15, 1997, Susan Inclan, another full-time Board employee, was hired to fill the posted vacancy, after the Board determined that she was more qualified than Grievant under the "second set of criteria" set forth in W. Va. Code § 18A-4-7a.

4. Grievant and Ms. Inclan were equally entitled to credit for the following criteria: appropriate certification and/or licensure, the existence of teaching experience in the required certification area, specialized training directly related to the performance of the job as stated in the job description, and receiving an overall rating of satisfactory in evaluations over the previous two years.

5. Ms. Inclan prevailed in the category of "total amount of teaching experience," because her teaching experience totalled 14.2425 years, and Grievant's total experience was 14.0225 years. (See footnote 2) Both candidates' total teaching experience included substitute teaching and regular employment.

6. Ms. Inclan also prevailed in the category of "degree level in the required certification area." She held a master's degree in elementary education, while Grievant held only a bachelor's degree in elementary education.

7. The Board awarded credit in the category of seniority to Grievant. She had 14 years of seniority, while Ms. Inclan only had 11.063 years.

Discussion

In a non-disciplinary matter, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). The parties do not dispute that the awarding of the position in question is governed by the "second set of criteria" of W.Va. Code § 18A-4-7a (See footnote 3) , which reads, in pertinent part, 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.

Grievant argues that the Board incorrectly denied her credit in the category of "total amount of teaching experience," because substitute teaching experience was combined with regular, full-time experience. (See footnote 4) She contends that this is unfair, because the two types of teaching experience are not combined for purposes of calculating seniority. (See footnote 5) If Grievant were to prevail and receive credit for this criterion, then she would be the more qualified applicant for the position. However, Grievant's argument is misplaced, because, although W. Va. Code § 18A-4-7a quite specifically addresses how seniority is to be calculated for substitute teachers who apply for full-time employment, there is no similar provision for calculating the "total amount of teaching experience." Grievant has cited no Code provision which designates that teaching experience includes only full-time employment.

Moreover, this Grievance Board has previously resolved this exact issue, holding that "all . . . teaching, in whatever employment status and however attained" qualifies for consideration, and "[t]he statute does not require that the 'amount' of experience . . . only include full-time, regular teaching." Hill v. Marshall County Bd. of Educ., Docket No. 91-25-508 at 9 (July 23, 1992). In addition to this Grievance Board's prior ruling, Respondent has also relied upon an opinion of the State Superintendent of Schools in support of its contention that its actions in this matter were appropriate. In that opinion, dated December 15, 1993, Dr. Marockie, Superintendent, responded to the question "Does 'teaching experience' include substitute experience?" as follows:

> The phrase 'teaching experience' is mentioned in two of the seven criteria. The Legislature could have said: "teaching experience as a regular, full-time employee' or words of similar import, but it did not. We therefore see no reason why substitute teaching experience may not be considered in applying these criteria.

It has been long-recognized that the State Superintendent's interpretation of school law is entitled to great weight, unless it is clearly wrong. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994); Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775 (W. Va. 1992); Harmon/Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997); Jerden v. Lewis County Bd. of

Educ., Docket No. 93-03-034 (July 7, 1993). Grievant has presented no authority to the contrary on this issue.

Grievant has not proven by a preponderance of the evidence that she was entitled to more credit than Ms. Inclan for the criterion of total teaching experience. Accordingly, Ms. Inclan prevails in two categories, and Grievant only prevails in one, so the Board's decision must stand.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. The criterion “total amount of teaching experience” as set forth in W. Va. Code § 18A-4-7a includes both regular, full-time teaching experience and substitute teaching experience. Hill v. Marshall County Bd. of Educ., Docket No. 91-25-508 (July 23, 1992).

3. As the chief interpreter of school law, an interpretation of the State Superintendent of Schools is entitled to great weight, unless it is clearly wrong. Smith v. Greenbrier County Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994); Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775 (W.Va. 1992); Harmon/Chiles v. Fayette County Bd. of Educ., Docket No. 96-10-500 (Aug. 25, 1997); Jerden v. Lewis County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993).

4. Grievant did not prove by a preponderance of the evidence that the Superintendent's opinion that “total amount of teaching experience” includes both substitute and regular, full-time teaching is clearly wrong.

5. Grievant did not prove by a preponderance of the evidence that she was entitled to prevail over the successful applicant in the category “total amount of teaching experience.”

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred, 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.

DATE: October 6, 1997 _____ V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant submitted a brief response to certain provisions of Respondent's arguments to the undersigned on August 29, 1997.

Footnote: 2

In post-hearing submissions at level two and at level four, Grievant raised the argument that she should have received credit in this category for her work as a coach. However, as pointed out by Respondent's counsel in the Board's level four written proposals, Grievant did not present any evidence on this issue at the level two hearing. Grievant was given the option of having a level four hearing, where additional evidence could have been introduced, which she waived. Grievant bears the burden of proof, and she cannot be allowed to raise arguments based upon evidence not ofrecord, which has not been subject to cross examination or rebuttal on the part of Respondent. Accordingly, this grievance will be decided only upon the evidence properly submitted below, and Grievant's coaching experience will not be addressed.

Footnote: 3

The Code section contains an initial set of criteria, which pertains to the hiring of new employees to fill classroom teaching positions. The second set of criteria applies in situations, such as this one, wherein one or more permanently employed, qualified teachers apply.

Footnote: 4

Grievant had also argued at level two that she was improperly denied credit for "specialized training," but withdrew her claims in that regard in her level four brief.

Footnote: 5

W. Va. Code § 18A-4-7a provides that seniority for classroom teachers is based upon "the length of time the employee has been employed as a regular full-time . . . professional educator." It further provides that, exclusively for purposes of applying for permanent, full-time employment, substitute teachers shall accrue seniority "upon completion of one hundred thirty-three days of employment in any one school year."