KAREN MOUNTS,

Grievant,

v. Docket No. 96-29-479

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

TERESA JONES,

Intervenor.

D E C I S I O N

Grievant, Karen Mounts, argues the Mingo County Board of Education ("MCBOE") improperly filled two positions. First, she alleges MCBOE improperly filled a middle school position with a new employee, instead of recalling her from the Preferred Recall List. Second, she argues another teacher, Jackie Starr, was placed in a position at Delbarton Grade School ("DGS") that was not posted. She requests as relief that she be placed in the posted, multi-subjects/math position at Burch Middle School ("BMS"). This grievance was denied at Levels I and II and was waived at Level III. A Level IV hearing was held on February 3, 1997. This grievance became mature for decision on that date, as the partieselected not to submit proposed findings of fact and conclusions of law.

The facts in this case are not in dispute, and the issues to be decided are ones of law.

Findings of Fact

1. Dr. John Huff, an educational consultant from Marshall University, was hired by MCBOE to assist it through the change from junior high schools to middle schools, which occurred during the Summer of 1996. He instructed the principals to request content specific teachers whenever possible for their middle school positions.

2. Before the 1996-1997 school year began, BMS's principal, Mr. Thomas Slone,

reviewed his middle school schedule, saw he needed another teacher, and requested Assistant Superintendent Johnny Fullen to post a Multi-subject, K-8 position for BMS. Mr. Fullen did so, and Ms. Jackie Starr, a teacher with ten or eleven years of seniority who was on the transfer list and who had Multi- subject, K-8 certification, received the position.

3. After the 1996-1997 school year began, Ms. Starr transferred back to DGS. After this transfer, Mr. Slone again reviewed his schedule and found he had only one certified Math teacher for all his middle school students. He determined he needed another certified Math teacher, especially in light of the fact that changes were under way to mandate that middle schools teach pre-Algebra and Algebra I to all their students. Algebra I cannot be taught by a Multi-subject teacher unless she has receivedadditional certification. Mr. Slone also determined he would like this teacher to have Multi-subject certification as well, to allow him greater flexibility in scheduling.

4. Principal Slone requested that Assistant Superintendent Johnny Fullen post a Multi-subject/Math 5-8 position for BMS, and on September 6, 1996, MCBOE posted a position at BMS for a "Multi- Subject Math 5/8 teacher" for the 1996-1997 school year only.

5. Both Grievant and Intervenor, and at least one other full-time employee applied, for the position. **(See footnote 1)**

6. Grievant has nine years of seniority and is certified in Multi-subjects, K-8, only. She was on the Preferred Recall List at the time she applied for the position in question.

7. Intervenor, Teresa Jones, is a new teacher and certified in Multi-subjects, K-8 and Math-Algebra I, 5-8.

8. The posting did not state that Multi-subjects or Math certification was required, as the listing was for a Multi- subject/Math teacher. MCBOE's practice is to list the required certification, only if the requirement is not clearly discernible from the posting. Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996), at Finding of Fact 12.

9. Because Intervenor had all the certifications required in the posting, she was selected for the position. 10. Intervenor currently teaches four, sixth-grade math classes and one social studies class per day.

11. Ms. Starr returned to her former position at DGS. Ms. Starr was promised by MCBOE, at her transfer hearing, that she would be returned to her former position at DGS if the stated

reasons for her transfer, lack of need, did not materialize.

Discussion

The issue of multi-subjects certification versus content certification is one that has been considered many times in recent years by this Grievance Board. See Crum v. Mingo County Bd. of Educ., Docket No. 96-29-452 (May 31, 1997); Bailey, supra; Crum, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-224 (Feb. 9, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29- 357 (Jan. 31, 1996). County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be in 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 West Virginia Supreme Court of Appeals has expanded this discretion "to matters involving curricular programs and the qualification and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 381, 465 S.E.2d 648, 652 (1995). 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. In this instance,MCBOE must comply with a professional's preferred recall rights as set forth in that Code Section, which reads as follows:

> **As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept the position.**

As Grievant's certification is in Multi-subject, K-8, and she is not certified in Math, 5-8, she did not meet the requirements in the job posting or the requirement in the above-cited Code Section. Thus, no further assessment of the factors in W. Va. Code § 18A-4- 7a is required.

Although a superintendent has the option of employing Multi- subject teachers outside a self-contained classroom in middle school or junior high schools if the depth and breadth of the material stays the same as that taught in a self-contained classroom, he is not required to do so. He also cannot hire a Multi-subject teacher to teach Algebra. Thus, a county board could utilize Multi-subject teachers to teach core content in a middle school setting if it chose

to do so. MCBOE has chosen not to do so. MCBOE has set a standard for the certification of its junior high and middle school teachers, requiring content-specific certification in all subjects, when possible. "A board of education's right to set standards is crucial, especially when it desires to hire the most qualified person for a specific position[,] and the potential field of applicants may include themost minimally certified or qualified persons." Gilkey v. Brooke County Bd. of Educ., Docket No. 91-05-489 (June 25, 1992).

"The notion of favoring in-depth teachers for any content area . . . is educationally sound and directly relates to the interest of the schools." Id. Because "appropriate subject-matter certification is the most basic of qualifications for a position", and since Grievant does not have this certification, she cannot be awarded this position. Argabright v. Wyoming County Bd. of Educ., Docket No. 93-55-03 (Apr. 6, 1993). Thus, although Grievant could be allowed to teach some subjects, including some math classes, in a middle school setting by her certification, she is not certified to fill the position at issue because she does not possess the certification posted and required by MCBOE.

MCBOE has decided to require middle school positions to be filled by teachers certified in the content area, if at all possible. It chose to select a teacher specifically trained in the subject she will teach, instead of choosing the less specific, Multi-subject certification, which is intended for a self- contained, elementary setting. This action cannot be seen as arbitrary and capricious, and clearly falls within the discretion authorized by Dillon and Cowen.

As for the issue of not posting the DGS position, Ms. Starr indicated to MCBOE that it was making a mistake at her transfer hearing, and told the Board her services would be needed at DGS in the Fall. MCBOE's decision, at that hearing, to return Ms. Starr to her position at DGS if her prediction proved correct, appearslogical, and within its broad discretion as it relates to transfers. W. Va. Code §18A-2-7. In essence, MCBOE agreed if Ms. Starr's transfer lost its stated reasons, she would be returned to her former position. This is what happened. Additionally, it must be noted that Ms. Starr has more seniority than Grievant.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Grievant has the burden of proving her case by a preponderance of the evidence. Rupich

v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

2. "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer and promotion of school personnel" as long as they exercise this discretion "reasonably, in the best interest of the school, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of the County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. County boards of education have substantial discretion in "matters involving curricular programs and the qualification and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 381, 465 S.E.2d 648, 652 (1995).

4. Grievant failed to prove MCBOE violated W. Va. Code §18A- 4-7a when it selected Intervenor for a position for which Grievant was not certified. 5. Grievant, certified as a Multi-subjects, K-8 teacher, failed to demonstrate MCBOE acted in an arbitrary and capricious manner when it selected a new, but certified teacher, to fill a full-time teaching position at BMS instead of placing Grievant in that particular teaching slot. Donofoe v. Hancock County Bd. of Educ., Docket No. 93-15-188 (Nov. 30, 1993).

6. MCBOE's decision, at Ms. Starr's transfer hearing, to return Ms. Starr to her former position if the reasons for her transfer were no longer valid, was within its broad discretion pursuant to W. Va. Code § 18A-2-7.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 27, 1997

Footnote: 1

See Crum v. Mingo County Bd. of Educ., Docket No. 96-29-451 (May 30, 1997). Grievant Crum, a regular, full-time teacher certified in Multi-subjects, K-8, also applied for the position. Her grievance was denied as she did not have the required math certification. It must be noted that had she been properly certified, she would have priority over Grievant for the position pursuant to W. Va. Code § 18A-4-7a.