STEVE JACKSON,

Grievant,

v. DOCKET NO. 97-12-224

GRANT COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Steve Jackson, Grievant, filed a grievance against his employer, the Grant County Board of Education (Respondent), on February 28, 1997. He alleges:

> I applied for the mentor teacher position for beginning teacher Shawn Cutright. Diane Mielecki was recommended and hired. I have seniority and experience over her and I teach subjects in the same area as Mr. Cutright (Science). Mrs. Mielecki teaches English. I should have been hired for that position.

Grievant was denied relief at Level I by Principal Mark Nicol on March 7, 1997. At Level II, the Grievance Evaluator ruled in favor of Grievant, and directed Respondent to instate Grievant as Mr. Cutright's mentor with full remuneration as prescribed in the mentor's contract ($60.00 per month for ten months).

On May 2, 1997, the Grievance Board received Respondent's appeal (See footnote 1) of the Level II decision. In this case, at Level II, the Grievance Evaluator did not adopt Grievant's first argument, thathe should prevail because he has more seniority and experience than Ms. Mielecki, the successful applicant. However, this issue does not need to be addressed because Grievant did not appeal these issues to Level IV.

The parties submitted the grievance on the record as developed at Levels I and II of the grievance procedure. The case became mature for decision on July 14, 1997, with receipt of the Grievant's proposed findings of fact and conclusions of law.

When a county board of education appeals the Level II Grievance Evaluator's decision, the county board of education has the burden of proof, and the standard of review at Level IV is found in W. Va. Code §18-29-3(t), (See footnote 2) which provides:

> Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four
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> [§18-29-4] of this article and provided both parties in section seven [§18-29-7] of this article.

Because Respondent's appeal is based solely on an issue of law, and the interpretation of a statute, the decision of the Level II Grievance Evaluator will be reviewed de novo. See Hale v. Mingo County Bd. of Educ., ___ W. Va. ___, 484 S.E.2d 640 (1997); Bd. ofEduc. of Mercer County v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994). Respondent did not assert, and the record will not support a finding, that the Grievance Evaluator's Findings of Facts were incorrect. Accordingly, the undersigned adopts the Findings of Fact contained in the Level II decision, which are reproduced verbatim below:

> 1. [Grievant] was recommended by Mr. Nicol and was trained as a mentor by the W[est] V[irginia] Department of Education.
>
> 2. [Grievant] conducted staff development to train other Grant County Board of Education employees to be mentors.
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> 3. [Grievant] is certified in the subject areas of general science and physics and is presently teaching in these areas.
>
> 4. Mr. Shawn Cutright is certified in the subject area of biology and his schedule includes general science, biology and chemistry.
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> 5. In a memo dated February 11, 1997[,] written by Mr. Mark Nicol, principal, and directed to Mr. Harold Garber, [S]uperintendent, it states: “Yes, Mrs[.] Mielecki is out of field but Mr. Cutright does not need assistance with curriculum ....”
>
> 6. In his testimony Mr. Nicol indicated that he did not believe that policy addressed the

> issue of the mentor being in the same area of study or certification as the beginning teacher.
>
> 7. [Grievant] was qualified to fulfill the duties of a mentor and was, under W[.] V[a.] Code, in good standing
>
> to serve in this capacity at the start of the 1996-97 s[chool] y[ear].
>
> 8. Testimony revealed that Mr. Nicol had conferenced with [Grievant] and Miss Hanley relating to his concerns about this internship assignment. However, Mr. Nicol could not recall if this subject was addressed in support team meetings.
>
> 9. Mrs. Mielecki was recommended by Mr. Nicol to serve as mentor to Mr. Shawn Cutright.
>
> 10. Mrs. Mielecki was recommended by Mr. Harold Garber, [S]uperintendent, and was employed by the [Respondent] to serve as mentor to Mr. Shawn Cutright.

Respondent asserts that the Level II Grievance Evaluator's "decision is clearly wrong and is based upon a misinterpretation and misapplication of applicable policy." (See Respondent's Argument and Proposed Findings of Fact and Conclusions of Law.) In support of its appeal, Respondent asserted:

> neither 18A-3-2b nor State Policy 5900 provide any criteria nor qualifications for selecting a mentor teacher. Therefore, it is ... necessary to review the County Policy. Under Section IV, C.[,] of the policy it states,
>
> > "Whenever possible, pairings will be made dependent on shared specialty and area of the building."
>
> Grievant claimed, and obviously the [Grievance Evaluator] concluded, that since Grievant's certification is in the area of science, he should have been assigned as mentor for Mr. Cutright who is also certified in the area of science. However, both Grievant and the [Grievance Evaluator], totally ignored the overall purpose and the directives of the policy.

Id.

W. Va. Code §18A-3-2b, in pertinent part, provides:

> [a] professional support team comprised of the school principal, who shall be the chair of the professional support team, a member of the county professional staff development council and an experienced classroom teacher at the school who teaches the same or similar subject and grade level as the beginning teacher and who shall serve as a mentor for the beginning teacher; ...

It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation. See Syl. Pt. 1, Nelson v. Public Employees Insurance Bd., 171 W. Va.445, 300 S.E.2d 86 (1982).

In the instant case, the record contains little evidence concerning the nature of the difficulties, and how the alleged problems would inhibit Grievant from mentoring Mr. Cutright. Respondent's reasoning for not hiring Grievant for the mentor position was allegedly because of problems when he was Ms. Susan Hanley's mentor during the 1995-1996 school year. The evidence against Grievant was weak, general, and hearsay. This type of evidence will not support Respondent's "discretion" under Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986) . In summary, Respondent did not establish that the Grievant's previous performance as a mentor should exclude him from consideration as a mentor, and its decision was arbitrary and capricious. (See footnote 3) Respondent's selection of Ms. Mielecki violated W. Va. Code §18A-3- 2b.

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

CONCLUSIONS OF LAW

1. When a county board of education appeals the Level II Grievance Evaluator's decision, the county board of education has the burden of proof, and the standard of review at Level IV isfound in W. Va. Code §18-29-3(t).

2. W. Va. Code §18A-3-2b(a)(1), in pertinent part, provides:

> [a] professional support team comprised of the school principal, who shall be the chair of the professional support team, a member of the county professional staff development council and an experienced classroom teacher at the school who teaches the same or similar subject and grade level as the beginning teacher and who shall serve as a mentor for the beginning teacher; ...

3. Respondent did not establish that the Grievant's previous performance as a mentor should exclude him from consideration as a mentor.

4. Respondent's selection of Ms. Mielecki violated W. Va. Code §18A-3-2b.

5. Respondent failed to prove by a preponderance of the evidence that the Level II Grievance Evaluator's decision was contrary to the grounds provided in W. Va. Code §18-29-3(t).

Accordingly, Respondent's appeal is **DENIED**, and Respondent is **ORDERED** to comply with the relief provided in the Level II decision.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Grant 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. Anyappealing 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:_October 16, 1997_____ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992), Syl. pt. 2, "Under W. Va. Code, 18-29-3(t) 1985, a county board of education or its superintendent may appeal a grievance decision made by the superintendent's designee at level two or by an independent hearing examiner at level four."

Footnote: 2

See Harmon v. Fayette County Bd of Educ., Docket No. 96-10- 500 (Aug. 25, 1997).

Footnote: 3

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).