DEBRA G. HALL,

Grievant,

v. DOCKET NO. 96-27-175

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Debra Hall, filed this grievance alleging that the Mercer County Board of Education (MCBOE) violated W. Va. Code §18A- 4-7a by selecting a less qualified applicant for a posted position. As relief, she requested instatement into the position.

The grievance was denied at Levels I, II and III. Appeal to Level IV followed. The case was submitted on the record, and became mature for decision on November 27, 1996, the deadline for submission of proposed findings of fact and conclusions of law. The case was reassigned for administrative reasons on January 30, 1997. The material facts in this case are not in dispute, and are found as follows:

FINDINGS OF FACT

1 1. Grievant Hall has 15 years of experience teaching Science in Mercer County middle schools and, at the time of the Level IIhearing (See footnote 1) , taught Science at Montcalm High School. She is certified in General Science 5-12, Biology and Science 7-12. She has a Bachelor's Degree in Science, and a Master's Degree in Vocational Education. (Tr. pp. 36-38.)

2 2. Kathryn Sarver, the successful applicant for the position at issue, has 12 years of experience teaching in Mercer County elementary schools and, at the time of the Level II hearing, taught at Memorial Elementary School. She is certified in Elementary Education 1-6 and Science 4-8. Mrs.

Sarver has taught 6th grade self-contained classes for 4 years; Science 4-6 for 6 years; and 5th grade Science and Math for 2 years. Mrs. Sarver has a Master's Degree plus 15 hours in Elementary Education. (Tr. pp. 6-7.)

3 3. Roger Daniels is the Administrative Assistant and Director of Human Resources for MCBOE. (Tr. p. 8.)

4 4. Bluefield Middle School includes students in grades 6 through 8. (Tr. p. 16.)

5 5. A science teacher position was posted on February 1, 1996 at Bluefield Middle School. The posting states that applicants must have a "valid West Virginia teaching certificate with proper endorsement to teach Science, grades 6-8 required. (Job Description #156)." (Tr. pp. 8, 15; Board Exhibit I, item 3.)

6 6. Job Description #156 is for generic secondary school teacher positions, Grades 7-12. The terms used in the Job Description apply to all secondary school teachers in every subjectarea, without reference to any particular area of study or certification. (Tr. p. 25.) Under the heading "Specialized Training," the Job Description states, "[t]raining relevant to fulfilling items listed under REGULAR DUTIES." Regular Duties listed include generic items such as "[a]dheres to the prescribed county and state instructional program," "[t]eaches ideas, concepts and appreciations," and "[d]irects learning activities." (Board Exhibit III.)

7 7. Grievant and Mrs. Sarver both received credit for five out of the seven statutory criteria used to rank candidates. (Tr. p. 14.)

8 8. Grievant was given credit in the following criteria: appropriate certification or licensure; total amount of teaching experience; existence of teaching experience in the required certification area; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority. (Board Exhibit IV.)

9 9. Mrs. Sarver was given credit in the following criteria: appropriate certification or licensure; 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; and receiving an overall rating of satisfactory in evaluations over the previous two years. (Board Exhibit IV.)

10 10. Mrs. Sarver was given credit for her Master's Degree in Elementary Education. (Tr. p. 9.) 11 11. Grievant was not given credit for her Master's Degree in vocational education. (Board Exhibit IV.)

12 12. Mrs. Sarver was given credit for specialized training. (Tr. p. 12.) She had taught a college-credit class to other teachers about the use of hands-on science, and attended workshops on cooperative learning, science curriculum guidelines, and KITS experiments. (Board Exhibit V.)

13 13. Grievant was not given credit for specialized training. (Board Exhibit IV.)

14 14. MCBOE determined that any Master's Degree encompassing science for grades 6-8 would be entitled to credit in the evaluation process. Credit could thus be given for a number of different types of Master's Degrees, not just for a Master's Degree in Science. (Tr. pp. 19-20.)

15 15. MCBOE followed its Policy G-10, which was adopted March 12, 1996, in resolving the "tie" between Grievant and Mrs. Sarver by selecting the applicant with "the most recent training applicable to the vacant position." (Board Exhibit II.)

16 16. MCBOE selected Mrs. Sarver to fill the posted position on March 26, 1996. (Tr. p. 19.)

17 17. The use of the specialized training criterion created the tie between Grievant and Mrs. Sarver, and it also was used to break the tie.

DISCUSSION

In this non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been the successful applicant. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990). Grievant must establish that she was the most qualified applicant or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Civil Action No. 90-AA-181 (Circuit Court of Kanawha County March, 1993).

The selection process in this instance is governed by W. Va. Code §18A-4-7a. Use of the "second set of criteria" in that provision is mandated where, as here, permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting. Selection of an applicant is to be based on 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... with each criterion being given equal weight.

W. Va. Code §18A-4-7a.

Here, Grievant has challenged the consideration of criteria regarding teaching experience, degree level, and specialized training. She alleges that proper consideration of these criteria would not have resulted in a "tie" between Grievant and thesuccessful applicant. Grievant argues that she is the better qualified of the two. In addition, Grievant has challenged the use of Respondent's Policy G-10, in using the applicants' most recent specialized training to break a "tie" in qualifying criteria.

A. TEACHING EXPERIENCE CRITERIA:

Grievant was given credit for the criterion "total amount of teaching experience", while Mrs. Sarver was not. This reflects that Grievant's greater total amount of teaching experience was properly recognized in assessing this criterion.

Both applicants were given credit for "the existence of teaching experience in the required certification area." This was appropriate, as the criterion "does not refer to the amount of teaching experience an individual has in his/her area of certification." Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993) at 8 (emphasis supplied). Rather, any teaching experience in the area qualifies an applicant for credit in this criterion. See also Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996); and West v. Wetzel County Bd. of Educ., Docket No. 96-52-172 (Feb. 18, 1997). Mrs. Sarver had taught sixth grade Science in elementary school, which qualifies as experience in teaching Science 6-8. Thus, she was entitled to equal credit in this criterion, despite the fact that Grievant had more experience in teaching middle school Science courses. Respondent appropriately assessed this criterion.

B. DEGREE LEVEL CRITERION: Mrs. Sarver was given credit in the criterion "degree level in the required certification area," while Grievant was not. Mr. Daniels explained Mrs. Sarver's Elementary Education degree was considered to be "in the required certification area" because it encompassed teaching Science to students in grades K or 1-8. In other words, Elementary Education or Multi-subject are alternative certifications acceptable for this position. Conversely, Mr. Daniels stated that a Master's degree in Vocational Education would not get credit, as it did not pertain to teaching Science to grades 6-8. Alternative certifications were not specified on the posting itself. (See footnote 2)

The initial question posed herein is: "Can the board broaden the 'certification area' from that specified in the job posting, for purposes of evaluating the degree levels earned by applicants?" This question must be answered, because the degree must be in the "required certification area" to be considered. On its face, the posting required certification "with proper endorsement to teach Science,

grades 6-8." Grievant argues that the requirement of certification to teach Science 6-8 entails that only degrees in Science can be considered. Many prior cases involving selections based upon certification have addressed whether a county board of education may consider or refuse to consider applicants with Multi-subject or Elementary Education certificates as certified in a specific content area. Several cases have held that a board may exercise its discretion by refusing to consider applicants with the general certification to be adequately certified in a specific content area. For example, in Crum v. Mingo County Bd. of Educ., Docket No. 95-29-224 (Feb. 9, 1996), grievants certified in Multi-subject K-8 were held not certified in Math 5-8, and thus could not fill middle school Chapter I Math positions through preferred recall, where successful applicants were certified in Math 5-8. In Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996), grievant's Multi-subject K-8 and various reading certifications did not make her certified in Math. Thus, she could not be recalled to fill an ECIA Math position. See also Runyon v. Mingo County Bd. of Educ., Docket No. 95-29-375 (May 24, 1996), holding that requiring subject matter certification for Math positions but not for other positions was not an abuse of discretion.

Several other cases have held that a board may exercise its discretion by considering applicants with the general certification to be adequately certified in a specific content area. For example, in Lewis v. Mercer County Bd. of Educ., Docket No. 94-27- 1053 (June 23, 1995), grievant's certification in General Science 7-12 and Biology 7-12 was found not to be superior to another employee's Multi-subject K-8 certification. In Tibbs v. MercerCounty Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996), grievant failed to prove the respondent's decision was arbitrary or capricious in requiring only K-8 certification to teach 4 year olds, rather than a more specialized certification for pre- kindergarten teaching. Indeed, the decision was found to be reasonable. Tibbs shows that a board has broad discretion to set the certification requirements, in the absence of controlling law or policy.

> 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).

Tibbs at 8. Tibbs thus sets out the standard for reviewing exercises of discretionary powers. Deference is due the Respondent's decision on discretionary matters, unless the decision is shown to be arbitrary and capricious. Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648, 195 W.Va. 377

(1995).

Grievant has not cited any authority which prohibits the Respondent from considering an Elementary Education degree to be "in the required certification area" for this position. The cited cases hold that either setting the alternative certifications acceptable for any given job posting is within the discretion of the county board of education. They strongly suggest that setting equivalent "certification areas" for purposes of assessing thedegree level criterion would be equally within the discretion of the board.

In Lewis, it was explained that "[b]oth certifications are valid licenses to teach science courses in the grades designated and the undersigned is unaware of any policy...which dictates that one take precedence over the other in any personnel action implemented by a county board of education." Lewis at 4. The rationale of Lewis is convincing, and applies equally well in assessing "certification areas." While the better practice may be for the job posting to reflect the acceptable alternative certifications and degree areas (See footnote 3), Grievant has not identified any law or policy which requires this information in the job posting, as it pertains to accepting less specialized alternative certifications. Therefore, the fact that Elementary Education was not identified as an acceptable alternate "certification area" in the posting is not fatal to the Respondent's case. In this instance, the Respondent acted reasonably and within its discretion in considering a general Elementary Education degree as being "within the required certification area" for a Science 6-8 position. Thus, credit in this criterion properly was given to Mrs. Sarver.

C. SPECIALIZED TRAINING:

Mrs. Sarver also got credit for "specialized training directly related to the performance of the job as stated in the jobdescription," while Grievant did not. Grievant argues that no specialized training was identified on the posting, and that Respondent's selection process therefore should not have considered this criterion. Grievant relies on Sisk v. Mercer County Bd. of Educ., Docket No. 95-27-113 (Sept. 25, 1995), appeal den'd, Civil Action No. 95-CV-777 (Mercer County Circuit Court); and Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993). Broadly stated, Richmond stands for the proposition that, if Respondent wants to rely on specific criteria and considerations in selecting an applicant, it must give notice thereof in its postings.

In Sisk, the only qualification listed in the posting was a "valid WV teaching certificate with proper endorsement in Music, grades K-12." It was found that the board "erred in assessing the specialized

training of the applicants when there was none announced in the job description for the post in issue." Sisk at 6. Specifically, Sisk concluded that the specialized training criterion in W. Va. Code §18A-4-7a must be interpreted to mean that consideration of the criterion is only required when the board has exercised its discretion to include special training requirements in its job description for a particular post.

Another case closely parallels the situation here. In that case, the job description at issue was also a "'generic' description which appears to cover all classroom teaching positions" rather than a specific description for the business teacher position in controversy. Monk v. Mercer County Bd. ofEduc., Docket No. 95-27-245 (Sept. 28, 1995), footnote 5 at 6. In Monk, it was held to be "clear from the language in Code §18A-4-7a regarding consideration of specialized training that the Legislature intended that such training should be afforded weight only if the job description for a posted position required such training. Unless a county board has exercised its discretion to include a training requirement over and above what is necessary to obtain a degree and/or licensure in a particular field, the criterion must be excluded from consideration. [citing Richmond and Sisk.]" Monk at 7, emphasis supplied. Monk, like Sisk, demands the job description include separate listed requirements for specialized training before that criterion can be considered.

The "specialized training" criterion was intended to address specific qualifying criteria separate from, or emphasized in relation to, certification requirements. A reference to any training assisting in performing generic teaching duties is insufficient to allow consideration of the criterion. That Respondent labels a generic requirement "Specialized Training" is irrelevant. Such amorphous "specialized training" does not apprise applicants of what training is required over and above certification. In short, a generic reference does not constitute a requirement, and, more importantly, is simply not "specialized." Neither applicant should have been credited in this criterion, as specialized training was not required on either the posting or the job description. Consequently, the board erred in giving Mrs. Sarver credit in the specialized training criterion. When Mrs. Sarver's credit in the specialized training criterion is deducted, the two applicants are no longer tied. Rather, Grievant has 5 of the 7 criteria, while Mrs. Sarver has only 4. Grievant is therefore entitled to instatement into the position. The issue of tie-breaking procedures need not be addressed.

As the regular school year is nearly at a close, and there would likely be adverse impacts without significant benefit to students by instating Grievant at this late date, Respondent need not instate

Grievant during the few remaining weeks of this school year.

CONCLUSIONS OF LAW

1 1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (March 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45- 040 (Oct. 17, 1990), aff'd Civil Action No. 90-AA-181 (Circuit Court of Kanawha County March, 1993).

2 2. The selection process in this case is governed by the "second set of criteria" found in W. Va. Code §18A-4-7a.

3 3. In the circumstances presented here, in assessing the criterion pertaining to degree level in the required certificationarea, Respondent has not abused its discretion by considering degrees received in any certification area authorizing the holder to teach the specific courses identified in the job posting. See also Lewis v. Mercer County Bd. of Educ., Docket No. 94-27-1053 (June 23, 1995).

4 4. Grievant failed to prove that criteria concerning degree levels earned or teaching experience were improperly applied, or that she had better qualifications than recognized by Respondent in those criteria.

5 5. The Legislature intended that specialized training should be afforded weight as a selection criterion only if the job description for a posted position required specialized training. Unless a county board has exercised its discretion to include a training requirement over and above what is necessary to obtain a degree and/or licensure in a particular field, the criterion must be excluded from consideration. Monk v. Mercer County Bd. of Educ., Docket No. 95-27-245 (Sept. 28, 1995); Sisk v. Mercer County Bd. of Educ., Docket No. 95-27-113 (Sept. 22, 1995), app. den'd, Civil Action No. 95-CV-777 (Mercer County Circuit Court); Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993).

6 6. Identifying specialized training "relevant to fulfilling items listed under REGULAR DUTIES," when the regular duties referenced are generic teaching duties, is too vague to allow meaningful consideration of the specialized training criterion under the second set of criteria of W. Va. Code

§18A-4-7a. 7 7. Grievant proved that Respondent improperly afforded weight to the specialized training criterion, when such specialized training was not required by the posting or job description. 8 8. Grievant proved that she was more qualified than the successful applicant.

Accordingly, this grievance is hereby **GRANTED**. Respondent is ordered to instate Grievant to the position no later than the beginning of the next school term.

Any party may appeal this decision to the Circuit Court of Kanawha or Mercer County. 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.

Dated: April 30, 1997

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

The Level II hearing was held on April 29, 1996. The transcript of that hearing was submitted, and is referred to herein as "Tr. p.___." No other transcript was submitted.

Footnote: 2

Mr. Daniels testified that the Elementary Education and Multi-subject certifications would have to include grades 6-8 to be accepted, and that certifications limited to grade 6 and below would not be acceptable. There was no direct evidence regarding Mrs. Sarver's degree pertaining to any specific grades, although Mr. Daniels implied that her degree covered grades 6-8. Under other circumstances, it may have been imperative to have evidence on this point. However, as the case is resolved on the specialized training issue alone, it is not necessary to address this further.

Footnote: 3

Other job postings do so, and Mr. Daniels was under the mistaken impression that all of the alternative certifications had been listed on the posting.