SUZANNE FADOUL,

Grievant,

v. DOCKET NO. 96-35-330

OHIO COUNTY BOARD OF EDUCATION,

Respondent,

and

MICHAELA JELLEN-TENNANT,

Intervenor.

DECISION

Grievant, Suzanne Fadoul, filed a level four grievance on July 31, 1996, alleging as follows:

> I was not selected for the Bridge Street Middle School guidance counselor position. I am more qualified for the position than the person that was selected. Furthermore, I believe my recall rights as a teacher on the preferred recall list have been violated. Both issues in this grievance are a violation of WV Code, 18A-4-7a.

Ms. Fadoul seeks placement in the guidance counselor position with all back salary, benefits, and seniority. Michaela Jellen-Tennant was granted intervenor status on August 26, 1996, pursuant to W.Va. Code § 18-29-3. The grievance was waived at level one, denied at level two, then waived to level four, where a hearing was conducted in this Board's Wheeling, West Virginia, office on October 24, 1996. This matter became mature for decision on December 11, 1996, the deadline for receipt of the parties' proposed findings of fact and conclusions of law. The relevant, undisputed facts in this grievance are set forth below.

Findings of Fact

1. Grievant has been employed by the Ohio County Board of Education ("OCBOE") since 1986

as a substitute teacher and as a regular teacher since 1995. 2. In March of 1996, Grievant was placed on the preferred recall list as part of OCBOE's reduction in force.

3. On April 24, 1996, Respondent posted a vacancy for a guidance counselor at Bridge Street Middle School.

4. At the time of the posting of the guidance counselor position and the subsequent filling of the position by OCBOE on June 10, 1996, Grievant had a master's degree and state certification in counseling.

5. Grievant applied for the guidance counselor position within the required posting period, was interviewed, and completed all requirements necessary to be considered for the job.

6. On June 10, 1996, OCBOE awarded the Bridge Street Middle School counselor position to Michaela Jellen-Tennant, who had never before been employed by OCBOE.

7. Grievant's preferred recall status was not considered by OCBOE when she applied for the guidance counselor position, because it did not consider guidance counselor to be a lateral position to the classroom teacher position Grievant held at the time of the reduction in force.

8. No other regular, full-time employees of OCBOE, besides Grievant, applied for the guidance counselor position.

Discussion

Grievant has made two alternative arguments as the basis for the allegation that she was entitled to the guidance counselor position instead of the Intervenor. First, she argues that, as a classroom teacher on the preferred recall list with the required certification in counseling, she should have been placed in the position pursuant to the preferred recall provisions of W.Va. Code §18A-4- 7a. Alternatively, she claims that, in the absence of preferred recall status, she was simply more qualified than Ms. Tennant, and that OCBOE considered inappropriate factors in making its decision. As the following analysis will reveal, the preferred recall issue is dispositive of the outcome of this grievance, so the qualification issue will not need to be addressed.

The preferred recall provision pertinent to this case states as follows:

> All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. 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 such position. Before position openings that are known or expected to extend for twenty consecutive

> employment days or longer for professional personnel may be filled by the board, the board shall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause such employee to forfeit any right to recall.

W.Va. Code §18A-4-7a (emphasis added).

OCBOE has introduced no evidence nor made any argument that any other regular, full-time, qualified employee applied for the guidance counselor position aside from Grievant; neither does it dispute that Grievant possessed the necessary certification required for the position. Rather, Respondent argues that Grievant's recall rights were completely irrelevant to the hiring process for this position, because she had not "previously been employed" as a guidance counselor, and counseling is not a "lateral area" to regular teaching. If Respondent is correct, the provisions of Code§ 18A-4-7a are simply inapplicable to this situation.

"Guidance counselor" is not individually defined by any of the statutes applicable to school employees. However, Code § 18A-1-1, which defines all terms applicable to school personnel, states that "professional educator" is synonymous with "teacher." "Professional educator" includes four separate classifications, i.e. classroom teachers, principals, supervisors, and administrators. "Classroom teacher" is defined as "[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity." Code § 18A- 4-7a(c)(1) (Emphasis added.) OCBOE contends that the reference to a counseling relationship is not meant to include guidance counselors within this definition.

"Lateral positions" are defined in § 18A-4-7a as follows:

> For the purpose of this article, all positions which meet the definition of classroom teacher as defined in section one, article one of this chapter, shall be lateral positions. For all other professional positions the county board of education shall adopt a policy by the thirty-first day of October, one thousand nine hundred ninety-three, and may modify said policy thereafter as necessary, which defines which positions shall be lateral positions.

Although Respondent contends that guidance counselors are not included within the definition of "classroom teacher," it has produced no evidence of its lateral position policy.

OCBOE attempts to distinguish guidance counselors from instructional teachers in two major respects. First, because a guidance counselor position is not "instructional," it cannot be equated with

positions which are. Second, OCBOE argues that, since the school personnel statutes carve out separate treatment for counselors and teachers with respect to seniority accumulation, they cannot be considered equal or even similar positions for purposes of hiring decisions pursuant to Code § 18A-4-7a. Both of Respondent's contentions are flawed.

Under this state's statutes, it is irrelevant whether or not a guidance counselor “instructs”students, because § 18A-1-1 states quite clearly that teachers include both those who have an instructional “or counseling relationship” with students and spend the majority of their time in one capacity or the other. If this definition were meant to encompass only traditional classroom instructors, logic would dictate that the word “and” would have been used in place of “or,” in contemplation of the myriad responsibilities an instructor must assume when dealing with students throughout each school day. Rather, the definition of classroom teacher includes, in addition to such instructors, those who spend the majority of their time in only a counseling relationship with students, i.e. guidance counselors. In fact, this section has already been interpreted to mean that a school counselor is a “teacher” entitled to all contractual and legal rights to which teachers are entitled in West Virginia. Beine v. Bd. of Educ., 181 W.Va. 669, 383 S.E.2d 851 (1989).

Similarly, the West Virginia Supreme Court's recent decision in Putnam County Bd. of Educ. v. Andrews, No. 23288 (W.Va. Dec. 19, 1996) is helpful on this issue. Joyce Andrews, an “educational diagnostician” sought administrative seniority, claiming that her position fell within the definition of “central office administrator” or “supervisor,” rather than classroom teacher. The Court affirmed the Putnam County Circuit Court's ruling that Grievant's position was that of classroom teacher. An educational diagnostician conducts testing of students for special needs, then makes recommendations and develops an educational plan for each child needing assistance. The Court noted that, “[b]ecause § 18A-1-1 has only four categories of professional educators . . . each professional employee must fall within one of these categories for purposes of seniority.” Andrews, slip op. at 12. The Court ultimately concluded that, because the majority of Ms. Andrews' duties involved a direct working relationship with students, and also because her duties did not fit within the other definitions of principal, supervisor, or central office administrator (the other threecategories contained in § 18A-1-1), she was a “classroom teacher” as defined in § 18A-1-1(c)(1). Id. at 13. If an educator who engages chiefly in testing students is considered a classroom teacher, it would certainly follow that one who counsels them on a constant basis, as set forth plainly in the statutory

definition, is also a classroom teacher.

Respondent is correct in its contention that the § 18A-4-7a seniority provisions treat instructional teachers and guidance counselors differently. However, the very wording of the provision in question supports Grievant's interpretation. It states as follows:

> The seniority of classroom teachers as defined in section one, article one of this chapter with the exception of guidance counselors shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator . . . .

(Emphasis added.) If guidance counselors were not encompassed by the section one definition of "classroom teachers," it would not be necessary to specifically exclude them from this portion of § 18A-4-7a.

Accordingly, the undersigned finds that guidance counselors are included in the definition of classroom teacher, as set forth in § 18A-1-1. Therefore, it follows that, for purposes of the preferred recall provisions, guidance counseling is unquestionably a "lateral area" in which Grievant is certified but has not previously been employed by OCBOE.

Since this case does not involve a disciplinary issue, Grievant must prove all of the allegations constituting her grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990). Not only has Grievant established that she was entitled to have the guidance counselor position considered as a lateral move pursuant to her preferred recall rights, she has also proven that no other qualified employee of OCBOE applied for the position. When this statement was made by Grievant at level two, Respondent introduced noevidence to contradict it. Mr. Burial Holmes, head of the selection committee for OCBOE in this matter, testified at level two that the three qualified candidates for the position, in order of the committee's preference, were Ms. Tennant, an unnamed gentleman, and Grievant. L II Transcript, p. 66.

Code § 18A-4-7a states unambiguously that, if there is no opening in the area where an employee had previously been employed, she is entitled to placement in an opening in any lateral area for which she has licensure and/or certification. This is clearly the case with Grievant, and, since no other regular, full-time Board employees applied for the position, the preferred recall statutes give Grievant the right to be placed in the job. The hiring of a non-employee applicant over a regular employee on preferred recall under these circumstances is a blatant violation of § 18A-4-7a. See

Stewart v. Tyler Co. Bd. of Educ., Docket No. 93-48-163 (Aug. 20, 1993).

In addition to the foregoing findings and discussion, it is appropriate in this grievance to make the following conclusions of law.

Conclusions of Law

1. In non-disciplinary matters, a grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

2. School guidance counselors are included within the definition of "classroom teacher" set forth in W.Va. Code § 18A-1-1. See Beine v. Bd. of Educ., 181 W.Va. 669, 383 S.E.2d 851 (1989); See also Putnam County Bd. of Educ. v. Andrews, No. 23288 (W.Va. Dec. 19, 1996).

3. Guidance counselor is a "lateral area" to instructional teacher for purposes of the preferred recall provisions of W.Va. Code § 18A-4-7a. 4. An employee on the preferred recall list has the right to be recalled on the basis of seniority to fill 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, if no other regular, full-time qualified personnel apply for and accept the position. W.Va. Code § 18A-4-7a.

5. OCBOE violated § 18A-4-7a by hiring a non-employee instead of Grievant, who was an employee on the preferred recall list with the required certification and/or licensure for the position. See Stewart v. Tyler Co. Bd. of Educ., Docket No. 93-48-163 (Aug. 20, 1993).

Accordingly, this grievance is **GRANTED**, and Respondent is directed to place Grievant in the guidance counselor position at Bridge Street Middle School, effective June 10, 1996, with all attendant benefits, seniority and back pay with interest pursuant to W.Va. Code § 56-6-31.

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: March 7, 1997 _____ **DENISE MANNING**

Administrative Law Judge