SUE ANN BELCHER,

Grievant

v. **Docket No. 97-17-389**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent

D E C I S I O N

Grievant, Sue Ann Belcher, employed by the Harrison County Board of Education (Respondent or Board) as a substitute teacher, filed a level one grievance on July 18, 1997, complaining of her non-selection for the position of second grade teacher at Wilsonburg Elementary School (WES). The grievance was denied at levels one and two. Grievant waived consideration at level three as is permitted by W. Va. Code §18-29-4(c), and advanced this matter to level four on August 26, 1997. The grievance became mature for decision following a level four hearing held on September 29, 1997, and the filing of post-hearing submissions by both parties on or before October 22, 1997.

The following findings of fact are made from a preponderance of the evidence submitted from the record developed through level four.

Findings of Fact

1. Grievant has been employed by the Harrison County Board of Education as a substitute teacher for eight years.

2. Grievant has worked more than 133 days each year since 1991. Her record of employment for that period of time is as follows:

1991-92	142.5 days
1992-93	200 days
1993-94	200 days
1994-95	168 days
1995-96	154 days

3. By posting dated May 8, 1997, the Board advertised the vacant position of first grade

teacher at Wilsonburg Elementary School. (See footnote 1)

4. Fifty-one applications were filed in response to the posting. Both regular and substitute employees were among the applicants.

5. Janet Weatherholt, a regular employee of the Board, was determined to be the most qualified applicant, and was appointed to the vacancy, under the second set of criteria set forth in W. Va. Code §18A-4-7a. (See footnote 2)

6. Because the Board receives a vast number of applications for teaching positions, it has been determined that it is impossible to conduct a review of all applicants. If one fully qualified regular employee applies for the position, substitutes and other applicants are not evaluated using the statutory criteria. This practice is characterized by the Board as reasonable for the efficient operation of the school system, and with the knowledge that any substitute employee who does not receive a position may file a grievance and receive a timely review of the decision.

7. Subsequent to the filing of this grievance, Administrative Liaison Robert Skidmore reviewed the applications of both Grievant and the successful applicant under the statutory criteria, and determined them to be equally qualified with each receiving five points. Grievant and Ms.Weatherholt were both credited with holding the appropriate certification and/or licensure, the existence of teaching experience in the required certification area, degree level in the required certification area, and receiving an overall rating of satisfactory in evaluations over the previous two years. Grievant prevailed in the category of total amount of teaching experience, while Ms. Weatherholt was credited in the category of seniority. Neither Grievant nor Ms. Weatherholt received credit for specialized training directly related to the performance of the job as stated in the job description.

8. Respondent's policy is that whenever individuals are tied under the statutory factors, the regularly employed applicant with the most seniority receives the position.

Discussion

In grievances which do not involve disciplinary matters, such as a claim regarding nonselection, the grievant has the burden of proving each element of the complaint by a preponderance of the evidence. Lipinski v. Marshall County Bd. of Educ., Docket No. 97-25-286 (Oct. 2, 1997); Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997). See W. Va. Code §18-29-6. Quite simply, Grievant asserts that she is more qualified than the successful applicant. Respondent

argues that, at best, Grievant is tied with the successful applicant, who then prevails during the tie-breaking process, but that even if Ms. Weatherholt had not been chosen, Patricia Alkire, another substitute would have been selected.

The first criterion challenged by Grievant is the “total amount of teaching experience”. Grievant has eight and one-half years of experience, three and one-half years as a regularly-employed teacher in Monongalia and Harrison counties, and five years as a substitute working more than 133 days per year. On the bid sheet completed for the position in question, Ms. Weatherholt stated thatshe had three years experience in response to the question “[w]hat is your total amount of teaching experience?”

It has previously been held that “all . . . teaching, in whatever employment status and however attained” qualifies for consideration in this factor, and “[t]he statute does not require that the 'amount' of experience . . . only include full-time, regular teaching.” Lipinski, supra; Hill v. Marshall County Bd. of Educ., Docket No. 91-25-508 (July 23, 1992). Grievant clearly has more experience than Ms. Weatherholt, and was entitled to the credit in this category.

The next category addressed by Grievant is “the existence of teaching experience in the required certification area”. The required certification area was Elementary Education, and Respondent credited both Grievant and Ms. Weatherholt in this category. Grievant argues that the experience must be quantified, and that only she is entitled to credit in this category. Nearly all of Grievant's experience has been in elementary education while Ms. Weatherholt's experience was earned teaching special education. At the level two hearing, Mr. Skidmore testified that he did not know the specifics of Ms. Weatherholt's experience teaching elementary education, but she indicated that she had such experience, and the amount was not crucial.

Because Code §18A-4-7a requires only “the existence of teaching experience in the required certification area,” any amount of time would entitle an applicant to credit, with the amount of time taught considered under “total amount of teaching experience”. As previously noted, Ms. Weatherholt stated her total amount of teaching experience to be three years. Since she had taught special education for three years, she could not have earned any experience teaching in an elementary classroom. It is likely that she has taught elementary students, but not in an elementary classroom setting. Therefore, Grievant has proven that Ms. Weatherholt has no experience teaching in anelementary classroom, and she was not entitled to credit in this area.

The third criterion challenged by Grievant is “degree level in the required certification area”. Again, Respondent awarded both Grievant and Ms. Weatherholt credit in this area. The evidence establishes that both Grievant and Ms. Weatherholt have Bachelor degrees in Elementary Education. Additionally, Grievant has earned thirty-three post-graduate college credits in reading and computer classes. Ms. Weatherholt has earned a Masters degree in special education. Mr. Skidmore testified that both candidates were credited for their Bachelor degrees, and that the post-graduate work was considered for neither because Grievant had not acquired a Masters degree, and Ms. Weatherholt's Masters degree was in another area. It cannot be determined that Respondent's analysis was incorrect in this category.

Grievant next argues that she was entitled to credit for “specialized training directly related to the performance of the job as stated in the job description”. Grievant states that she has a specialization in Early Childhood Education (ECE) which includes nursery, kindergarten, first and second grades. Ms. Weatherholt does not have this specialization. Respondent argues that no applicant was credited in this category, because no specialized training is required in the job description. While Grievant's training would be more specialized to the education level involved, undoubtedly making her better prepared for this assignment, the determination as to whether there will be a requirement for such training is properly within the discretion of the Board. See Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996), which addresses a board's discretion in requiring subject specific certification for middle school assignments. Because the Board did not require an ECE certification, Grievant may not be credited in this category.

The final criterion challenged by Grievant is “seniority”. Grievant asserts that under the “133day rule” set forth in Code §18A-4-7a, she has accrued five (5) years of seniority, while Ms. Weatherholt has only three (3) years. (See footnote 3) Grievant further cites Butcher v. Gilmer County Bd. of Educ., 189 W. Va. 253, 429 S.E.2d 903 (1993); Cahill v. Mercer County Bd. of Educ., 195 W. Va. 453, 465 S.E.2d 910 (1995) and Bd. of Educ., v. Enoch, 186 W. Va. 712, 414 S.E.2d 630 (1992), which state that seniority should be considered only when all other factors are equal. Because she prevails in the prior categories, Grievant asserts that it is unnecessary to consider seniority.

Respondent distinguishes seniority earned by substitute employees, and argues that it is intended only to establish a preference among substitute employees vying for a regular position. Respondent asserts that to place seniority earned by substitute employees on a plane equal to regular employees

could lead to the absurd situation of a substitute employee being given hiring preference over the regular employee.

W. Va. Code §18A-4-7a states that seniority is 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 by the county board of education.” Further, “upon completion of [133] days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee . . . said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher.” The Grievance Board recently held that “[f]or purposes of applying for vacancies, there is no distinction between 'regular' and 'substitute' seniority”. Townsend v. Mercer County Bd. of Educ., Docket No.97-27-093 (Nov. 4, 1997). Applying these guidelines, Grievant has more seniority than Ms. Weatherholt.

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); Worrell v. Mercer County Bd. of Educ., Docket No. 94-27-054 (Feb. 24, 1995). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). In the present matter, the Board's failure to evaluate all of the applicants was arbitrary and capricious. Further, Grievant has proven by a preponderance of the evidence that she was more qualified for the position than the successful applicant.

The final remaining matter to be addressed involves the appropriate relief to be granted. Grievant requests instatement to the position of first grade teacher at WES effective the beginning of the 1997-98 school year, backpay, seniority, interest, benefits, and costs. The Board argues that the proper relief is to remand the matter for a full review of all the applicants. This argument is contrary to Respondent's previously stated practice that substitute employees were not considered for the position with the knowledge that any qualified applicant could pursue his or her rights through the grievance procedure. Respondent is correct that any of the substitute employees could have filed a grievance; however, Grievant was the only applicant to do so. Therefore, it isdetermined that the

remaining applicants have waived their rights to contest the decision.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a nondisciplinary grievance, Grievant bears the burden of proving each element of the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

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

3. "Upon completion of [133] days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee. [133] days or more of said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher." W. Va. Code §18A-4-7a, paragraph 3. For purposes of applying for vacancies, there is no distinction between "regular" and "substitute" seniority. Townsend v. Mercer County Bd. of Educ., Docket No. 97-27-093 (Nov. 4, 1997).

4. Grievant has proven by a preponderance of the evidence that she was more qualified than the successful applicant under the "second set of criteria" found in W. Va. Code §18A-4-7a.

Accordingly, the grievance is **GRANTED**, and Respondent Ordered to instate Grievant asfirst grade teacher at WES, with backpay, less any appropriate setoff, interest, seniority, and benefits, effective the beginning of the 1997-98 school year. Absent a showing of bad faith, the Grievance Board does not have authority to award costs at level four.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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 Boa rd 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: December 9, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Bid sheets indicate the position was for a second grade position at WES; however, the record indicates that the position was in fact for a first grade slot.

Footnote: 2

Ms. Weatherholt did not intervene in this matter and transferred to another position after the level two hearing and prior to the start of the 1997-98 school year.

Footnote: 3

The relevant portion of Code §18A-4-7a states that "[u]pon completion of one hundred thirty-three days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee."