DARLENE SIMMONS and SHARI WILSON,

Grievants,

v. DOCKET NO. 96-30-239

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and,

EDITH JETT,

Intervenor.

DECISION

Grievants are teachers employed by the Monongalia County Board of Education (Respondent). Each Grievant alleges:

[a] violation of W. Va. Code §18A-4-7a. (See footnote 1)

> The Monongalia County Board of Education improperly posted a teaching position for an Adult Basic Education instructor. [T]he posting contained a certification requirement that was not applicable to the position. The posting, therefore, renders the hiring process invalid.
>
> The remedy sought is to repost the Adult Basic Education position with the proper certification requirement, and if the grievant, through the bidding process, receives such position, be awarded any back pay and/or benefits due her.

Grievants were denied relief at Levels I and II. Pursuant to W. Va. Code §18-29-4(c), Grievants appealed the Level II decisionto Level IV on June 17, 1996. A Level IV evidentiary hearing was held on October 17, 1996. This case became mature for decision on November 12, 1996, with the receipt of Grievants' and Respondent's rebuttal submissions.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievants and Intervenor (See footnote 2) are employed as teachers by Respondent.

2. On July 27, 1995, Respondent posted a vacancy for a half- time Adult Basic Education (ABE) instructor and a half-time English as a second language (ESL) instructor. The posting required a Master's degree (no specific content area was specified), and West Virginia teaching certification in either foreign language and/or linguistics certification.

3. Grievant Simmons, Intervenor, and Robert Klein applied for the position posted on July 27, 1995. Mr. Snider, Adult Basic Education Specialist, recommended Mr. Klein, but the recommendation was not accepted by Respondent. None of the applicants met all of the position requirements, and Respondent decided not to fill the position. No applicant grieved Respondent's decision not to fill the position.

4. On October 11, 1995, Respondent posted a vacancy for afull-time ABE instructor. The qualifications listed on the posting included a Master's degree, West Virginia teaching certification (no specific field was specified for either the degree or certification), three years of teaching experience, excellent written and verbal communication skills, and experience working with adults in one-to-one, small group, and large group situations. The job description listed ESL responsibilities such as training and experience in working with adult, non-native Americans in beginning, intermediate, and advanced levels of the English language.

5. Mr. Klein, Intervenor, and both Grievants applied for the position posted on October 11, 1995. Mr. Snider recommended Mr. Klein, but the recommendation was not accepted by Respondent. None of the applicants met all of the position requirements, and Respondent decided not to fill the position. No applicant grieved Respondent's decision not to fill the position.

6. When Mr. Snider created the first two postings (of July 27, 1995, and October 11, 1995) he was operating under fiscal constraints that forced him to combine ABE and ESL needs.

7. On November 30, 1995, Respondent posted a part-time teaching position and a full-time teaching position. The part-time position was an ESL teaching position which required a Master's degree and West Virginia teacher certification. Once again, Mr. Snider recommended Mr. Klein. Mr. Klein met all of the qualifications for the position, and Respondent hired him for the part-time ESL position. 8. The full-time position, posted on November 30, 1995, was an ABE teaching position.

The posting required a Master's degree (Adult Education or Vocational Administration), Vocational Certification, West Virginia teaching certification, three years of teaching experience, excellent written and verbal communication skills, and experience working with adults in one-to-one, small group, and large group situations. Grievant Simmons and Intervenor applied for this position.

9. Neither Grievant has a Master's degree in adult education, or possess vocational certification.

10. Intervenor met the qualifications of the November 30, 1995 ABE posting. Intervenor has a master's degree in adult and technical education from Marshall University, vocational certification, West Virginia teaching certification in grades 7-12, and more than three years of teaching experience. LII, Gr. Ex. 8.

11. On December 12, 1995, Intervenor was selected for the full-time position outlined in the November 30, 1995 ABE posting.

12. Prior to the November 30, 1995 postings, an anticipated retirement and the salary money freed by the time lag in filling the ABE/ESL position alleviated fiscal constraints to the point that Respondent could hire a full-time ABE teacher and a part-time ESL teacher.

DISCUSSION

Grievants allege the general proposition that Respondent “improperly posted a teaching position” because “the posting contained a certification requirement that was not applicable tothe position.” Level IV grievance forms. Although Grievants failed to assert the job-related standards they felt were appropriate in this case, Grievants questioned the need for a Master's degree in Adult Education or Vocational Administration, and Vocational Certification for the ABE position posted on November 30, 1995. Grievants do not possess either a Master's degree in Adult Education or Vocational Administration, or Vocational Certification. Grievants must prove by a preponderance of the evidence that Respondent improperly included qualifications in the posting for the ABE position at issue. See Lett v. Putnam County Bd. of Educ., Docket No. 95-40-514 (Apr. 23, 1996); Jones v. Summers County Bd. of Educ., Docket No. 94-45-153 (Nov. 16, 1994).

The Grievance Board has consistently ruled that a county board of education has the right to determine the needs and standards for vacant positions. E.g., see Melchiori v. Marshall County Bd. of Educ., Docket No. 92-25-103 (Apr. 30, 1992). Furthermore, “[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 the most minimally certified or qualified persons.”

Gilkey v. Brooke County Bd. of Educ., Docket No. 91-05-489 (June 25, 1992). "[A] school board may control the filed of applicants by setting minimum certification standards on the job posting, per the statute, which the prospective teachers must meet, as long as those standards are reasonably related to the particular assignment." Id. (Emphasis added.) "By setting forth reasonable and job-related standards inits posting, a school board is thereby empowered to place the most qualified applicant." Id.

Mr. Snider was trying to build "a team" and employ personnel who could complement each other's talents, without unnecessary overlapping of qualifications, to perform different functions within the Learning Center. He credibly testified:

> The focus of Adult Education is changing almost yearly, and with the new initiatives with federal funding, with state and federal programs, the demands on the workplace, the workplace skills that are required now in businesses - its changing to meet those needs, and through the work SCANS (See footnote 3) program, and working with the JTPA (See footnote 4) participants, and those who are in transition, who are out of jobs and need to find their way back into the workplace, it takes that specialized training. Its moving into an entirely different direction, and we're still keeping the basic skills part as well.

Level IV hearing.

Given the facts of this case, there is nothing unreasonable in Respondent wanting an Adult Learning Center instructor to possess both a Master's degree in Adult Education or Vocational Administration, and Vocational Certification for the ABE position posted on November 30, 1995. Moreover, in this case, there is nothing unreasonable, or arbitrary and capricious concerning Respondent's desire to develop a team approach concept for its Adult Learning Center. The mere fact that Grievants feel they could perform the same duties as Ms. Jett does not invalidate the above findings. The propriety of a team-building concept was tested in Lett, supra. The Putnam County Board of Education (Putnam) operated its middle schools using interdisciplinary teams. It preferred to maintain a balance of specific content area trained teachers and generally trained elementary education teachers on its interdisciplinary teams. Putnam would deliberately post positions in its middle schools at various times as requiring elementary certification and at other times require content-area certification. Putnam's team approach concept was left undisturbed by the Grievance Board.

Similarly, the Supreme Court of Appeals of West Virginia in Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995), did not find, in that case, that the board's curricular

decision was arbitrary and capricious, although it found the board acted arbitrarily and capriciously in misleading some teachers to believe that their 1-6 certification would be sufficient, and later requiring certification above the sixth grade level. The Court, in reaching its holding, added substantial discretion to county boards of education in matters involving curricular programs and qualification, and placement of personnel implementing those programs to the Dillon standard which allowed county boards of education substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel. (See footnote 5)

At the Adult Learning Center, Ms. Bumgard (who is certified in elementary education) teaches the literacy and other basic skills, Ms. Cindy Hawley (who has an accounting degree) works part-time as the Center's math specialist, and Mr. Ed Gallaher (who has a degree in education) teaches social studies on a part-time basis. The two postings dated November 30, 1995, added Mr. Klein (who has a degree in ESL) as a part-time ESL instructor, and Intervenor (whose qualifications are specified in Finding of Fact number 10) as the Center's vocational specialist.

Respondent in the instant matter has essentially done exactly what Putnam did in Lett. It chose to build a team with varied skills at the Adult Learning Center. To effectuate this objective, it posted the ABE position as requiring Vocational Certification and expressed a preference for a Master's degree in adult education or Vocational Administration. Respondent, similarly to Cowen, exercised its discretion involving curricular programs, established a program to provide curriculum to meet the needs of approximately 150 adults annually who were learning English as a second language, and also created vocational and occupational programs to meet the needs of approximately 800 adults (utilizing the Adult Learning Center annually for vocational and occupational services rather than for literacy and G.E.D. preparation). Again, Mr. Snider credibly testified:

> [I]n the category of vocational training, I knew the individual would have extensive training in working with vocational career choices and counseling. They have the ability to work with employability skills, working with people who are out of jobs, people who need trained or re-trained to go back into the job market, and of coursewith the Master's degree in Adult Ed. and the market experience that Ms. Jett has, that just enhanced that entire program.

Level IV hearing.

Grievants also assert that the Master's degree in either Adult Education or Vocational Administration listed in the November 30, 1995 posting for the full-time ABE position was a mere

preference. Grievants cite Murdock v. Raleigh County Bd. of Educ., Docket No. 91-41-149 (Apr. 8, 1992), for the proposition that “a preference for a particular credential does not constitute a 'standard' or minimum qualification for a professional position with a county board of education.” Grievants post-hearing submission, p. 11. However, the Administrative Law Judge concluded in Murdock that “[i]t was arbitrary for the Board to announce a preference for certain experience in the posting for the position in question and then afford it no weight in the selection process.” Id at 14. Therefore, even if the Master's degree in either Adult Education or Vocational Administration were mere preferences, which is contrary to the clear requirements listed on the posting, Respondent was bound to credit Intervenor in these areas.

Grievants also made much of the fact that there were four postings for positions at the Adult Learning Center, and that the first two were not filled. However, neither Grievant filed a grievance concerning either the posting of July 27, 1995, or October 11, 1995.

Finally, Grievants felt that all four postings were for similar positions, and that Respondent kept posting the positionand changing the requirements so that it could hire the person it wanted. This assertion is without merit. There were not four separate postings, and the part-time ESL position posted on November 30, 1995, was not similar to the vocational position posted on the same date.

Moreover, if there is any indication of molding a position for a particular individual, it was for Mr. Klein's position. He was recommended for three out of the four postings. However, Grievants did not grieve his selection, and do not want his position. Intervenor applied for the July 27, October 11, and the November 30, 1995, postings for the full-time vocational position. If Respondent was trying to mold the requirements around her qualifications, surely it could have achieved this task by the next posting, and without the need for two or three additional postings. Furthermore, if Respondent wanted Intervenor for a position, why did it not recommend and hire her after the first posting, or after the second posting? The record simply does not support the conclusion that Respondent was molding a position for Intervenor.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. A county board of education must exercise its substantial discretion to employ professional personnel based upon the best interests of the schools and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of Wyoming County, 177 W.Va. 145, 351 S.E.2d 58 (1986). See also Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

3. W. Va. Code §18A-4-7a requires that all professional positions be filled by a county board of education on the basis of qualifications. Triggs v. Berkeley County Bd. of Educ., 188 W.Va. 435, 425 S.E.2d 111 (1992).

4. A county board of education has the right to determine the needs and standards for vacant positions. See Lett v. Putnam County Bd. of Educ., Docket No. 95-40-514 (Apr. 23, 1996); Melchiori v. Marshall County Bd. of Educ., Docket No. 92-25-103 (Apr. 30, 1992).

5. “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 the most minimally certified or qualified persons.” Gilkey v. Brooke County Bd. of Educ., Docket No. 91-05-489 (June 25, 1992).

6. Grievants failed to prove, by a preponderance of the evidence, that Respondent violated W. Va. Code §18A-4-7a, or that Respondent's decision to post and fill the position in question in the manner it did was arbitrary and capricious or not in the best interests of its schools.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Monongalia 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 are 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:5/14/9 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievants did not specify or identify what portion of W. Va. Code §18A-4-7a Respondent violated.

Footnote: 2

Intervenor status was granted at Level II.

Footnote: 3

SCANS is an acronym for Secretary's Commission on Achieving Necessary Skills.

Footnote: 4

JTPA is an acronym for Job Training Partnership Act.

Footnote: 5

See Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).