FINIS BOYCE,

Grievant,

v. DOCKET NO. 97-15-219

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent,

and

DENISE MILLER,

Intervenor.

DECISION

Grievant, Finis Boyce, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1, et seq., challenging his non-selection for a Learning Disabilities teaching position at Allison Elementary School. He seeks instatement into the position with all associated back pay and benefits. Denise Miller was the successful applicant for the Allison Elementary position, and she was allowed to intervene in this matter at level two.

After denials at the lower levels, a level four hearing was conducted in this Grievance Board's office in Wheeling, West Virginia, on June 5, 1997. Only the Intervenor filed a post-hearing brief, which was received on July 14, 1997. For administrative reasons, this matter was reassigned on September 30, 1997.

Procedural History

Grievant initiated this matter with his immediate supervisor on October 9, 1996, at which time the grievance was denied. He subsequently appealed to level two, where a hearing was conducted on October 23, 1996, and both Grievant and Intervenor appeared with representatives andtestified. Superintendent Charles Chandler, Jr., issued a level two decision on November 6, 1996, determining

that the grievance should be granted in part, and ordered that the position in question be reposted for bidding by applicants.

It is at this point that some confusion occurred. Grievant did not take any immediate action to appeal the level two decision, based upon his belief that Intervenor planned to appeal the decision, but that Intervenor and the Board had agreed to a mutual waiver of the time limits on filing such appeal. Unfortunately, there is no evidence of record indicating that Intervenor appealed this matter at any level.

After an extensive delay of time, during which a level three hearing was not held and the position in question was not filled, Grievant filed a level three appeal. Subsequently, on April 29, 1997, the Board elected not to hear the matter at level three, at which time Grievant appealed to level four. Intervenor's counsel represented at the level four hearing that only Intervenor had appealed the lower level decision to levels three and four; however, there is no evidence of record that Intervenor filed a level four appeal. Nevertheless, Grievant did appropriately appeal to level four, and this matter is deemed to be properly before the undersigned, and both Grievant and Intervenor are proper parties to this proceeding.

Intervenor also argued at level four that this was “her appeal,” prohibiting Grievant from challenging the merits of the level two decision. This argument is without factual or legal basis. Grievant did, in fact, file both level three and level four appeals of the lower decision. No challenge has been raised to the timeliness of any of his appeals, and he has been deemed to be properly before this Grievance Board at level four. Accordingly, the merits of the claims asserted by all parties hereto will be addressed. The following findings of fact are appropriate, based upon a preponderance of the credible evidence of record.

Findings of Fact

1. At the beginning of the 1996-1997 school year, the Board posted a position for a Learning Disabilities (“LD”) teacher at Allison Elementary School.

2. Numerous applications for the position were received by the Board, including those of Grievant and Intervenor.

3. Intervenor was selected for the LD position, based upon the Board's belief that she was the most qualified candidate and that she was the only “permanent employee” who applied.

4. At the time she applied for the position at Allison Elementary, Intervenor held a permit to teach Learning Disabilities, K-12. She had received the permit for the 1994-1995 school year, so that she could teach in a Learning Disabilities position at Oak Glen Middle School. During the spring semester of 1995, Intervenor applied for and received a renewal of that permit.

5. When Grievant applied for the position at Allison Elementary, he was employed by the Board as a substitute teacher and had never been a full-time employee. He held the LD position at Allison Elementary as a long-term substitute until it was posted in September of 1996.

6. At the time of the posting, Grievant held a state certification in Learning Disabilities, K-12.

Discussion

Grievant contends that Intervenor should not have been selected to fill the position, because she did not hold the appropriate certification. Intervenor has contested the level two decision of the Superintendent, which accepted Grievant's argument, and ordered the position to be re-bid. Thehiring of classroom teachers in West Virginia schools is governed by the provisions of W. Va. Code §18A-4-7a, which states:

> A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. Further, the county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications. In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged. If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, the county board of education shall make decisions affecting the filling of such positions on the basis of 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. Consideration shall be given to each criterion with each criterion being given equal weight. If the applicant with the most seniority is not selected for the position, upon the request of the applicant a written statement of reasons shall be given to the applicant with suggestions for improving the applicant's qualifications.

The Superintendent's level two decision was correct insofar as it determined that Intervenor,

holding only a permit, could not be placed in the position when certified candidates had applied. Permits are granted to teachers who are still obtaining their educations and have not yet completed all of the requirements for certification, pursuant to West Virginia Board of Education Policy 5202, Section 7-A-1, which states:

> A permit is a one-year license issued at the request of the employing superintendent to staff a specific position. The county superintendent verifies that the applicant is the most qualified candidate.

(Emphasis added.)

Intervenor argued at level four that, because her permit, obtained so she could fill a position at Oak Glen Middle School, was renewed for the 1996-1997 school year, it was applicable to any position for which she applied. This contention is based upon the lack of any specific limitation to a specific school or position on the face of the permit. However, the policy unquestionably allows permits to staff specific positions, and prior Grievance Board decisions are quite clear on this issue. “Only if no certified applicant applies for a position may a county board of education petition the West Virginia Department of Education for a person to be granted a permit to fill the post.” Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991). Quite obviously, the renewal was allowed in contemplation of allowing Intervenor to retain the position for which the permit was granted, and, as found by the Superintendent at level two, was “not transferrable into other positions when certified employees have also bid upon the position.”

Accordingly, as of the time the Board made its hiring decision regarding the Allison Elementary position, Intervenor was not certified in Learning Disabilities, the required specialization in the posting. Therefore, she was not qualified to fill the position. See Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994); Via v. Nicholas County Bd. of Educ., Docket No. 89-34-710 (Apr. 11, 1990).

Intervenor further contends that, even if she were not given “credit” for having the appropriate certification and/or licensure under the criteria set forth in W. Va. Code §18A-4-7a, she was rightfully selected, due to her superior qualifications under the other criteria. However, Intervenor is not entitled to further consideration under the other criteria, because she did not meet the minimum requirements of the posting and was not qualified for the position through appropriatecertification. See Hopkins v. Fayette County Bd. of Educ., Docket No. 95-10-486 (March 15, 1996).

The final issue to be addressed is whether or not Grievant should be placed in the position, due to

the successful candidate's lack of certification. The evidence establishes that Grievant has prior experience teaching in the area of Learning Disabilities as a long-term substitute and has received satisfactory evaluations. (See footnote 1) He also has a masters degree in Special Education. Grievant has proven he was qualified for the LD position at Allison Elementary at the time it was posted. (See footnote 2)

Although the issue was not raised by the parties, it appears that the candidates for this position should have been evaluated under the first set of criteria set forth in W. Va. Code §18A-4- 7a, rather than the second. The Board used the second set of criteria, because it considered Intervenor to be a "permanently employed" candidate. However, teachers who are on permit "are not 'permanently employed instructional personnel' within the meaning of Section 7a." Hopkins, supra, at 6. Therefore, since all of the other candidates were substitutes and Intervenor was on a permit, the Board erred in using the second set of criteria. Nevertheless, there is no need in this case for reevaluation of the candidates. The successful candidate was ineligible to hold the position, and Grievant has proven he was qualified. Therefore, he is entitled to placement in the position. See Grossl, supra, at Footnote 1.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. Pursuant to Board of Education Policy 5202, permits are issued to non-certified teachers to staff specific positions, but only when no certified candidates apply. See Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991).

3. A teaching permit is used only to staff a specific position, and it cannot be transferred or used to apply for other teaching positions.

4. In order for an applicant to be basically qualified for a classroom teaching position vacancy in West Virginia, that person must hold the appropriate certification. Hopkins v. Fayette County Bd. of Educ., Docket No. 95-10-486 (March 15, 1996); Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994); Via v. Nicholas County Bd. of Educ., Docket No. 89- 34-710 (Apr. 11, 1990).

5. Grievant has proven by a preponderance of the evidence that the successful candidate was

not qualified to fill the Learning Disabilities position at Allison Elementary, and that he was fully qualified for the position.

Accordingly, this grievance is **GRANTED**, and the Board is **ORDERED** to instate Grievant into the Learning Disabilities teaching position at Allison Elementary School, effective September 18, 1996, with all back pay, seniority and benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the CircuitCourt of Hancock 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. 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 18, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

Ms. Bucci, Assistant Superintendent, testified that she "thought" Grievant had received an unsatisfactory evaluation as a substitute for the Board. However, she did not provide any documentation of this, and Respondent did not rebut Grievant's testimony that he had only received satisfactory evaluations.

Footnote: 2

The fact that Grievant held the Allison position as a long-term substitute also strongly supports his qualifications.