NANCY A. VILLERS,

Grievant,

v. **Docket No. 97-20-294**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., Nancy A. Villers (Grievant) filed this grievance against Respondent Kanawha County Board of Education (KCBE) on May 16, 1997. Grievant contends KCBE violated W. Va. Code § 18A-4-7a when it selected another professional employee to fill the position of Director of Special Education for Kanawha County Schools. Grievant's immediate supervisor did not have authority to resolve the grievance at Level I, and Grievant proceeded to Level II where an evidentiary hearing was conducted on June 4, 1997. Thereafter, this grievance was denied by the Superintendent's designee, Rebecca H. Goodwin, on June 18. Grievant appealed to Level III where KCBE waived participation in accordance with W. Va. Code § 18-29-4(c) on June 19, 1997. Thereupon, Grievant appealed to Level IV on June 24, 1997. An evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on August 13, 1997. The parties were given an opportunity to submit post-hearing briefs, and this matter became mature for decision on September 11, 1997. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at both levels.

FINDINGS OF FACT

1. Grievant is employed by the Kanawha County Board of Education (KCBE) as Principal of

Edison Elementary School. See G Ex B. Grievant has been employed by KCBE for thirty-three years.

2. Grievant applied for a posted position of Director of Special Education Services.

3. Jack McClanahan is Deputy Superintendent of Kanawha County Schools. Prior to becoming Deputy Superintendent, Mr. McClanahan served as Associate Superintendent for Administration and Instruction.

4. The job description for Director of Special Education Services was revised prior to the posting in a joint effort between Deputy Superintendent Jack C. McClanahan, and Sandy Barkey, the previous Director of Special Education Services. Ms. Barkey drafted the revised job description and Mr. McClanahan approved the revised job description.

5. Mr. McClanahan specifically sought to reduce the minimum qualifications for the position of Director of Special Education so as to expand the pool of qualified applicants to as large a group as possible.

6. The previous job description for this position, then entitled "Director of Exceptional Students," was last revised in December 1993, and included minimumqualifications of a master's degree in elementary or secondary education with specializations in at least three major areas of special education, and three years of teaching experience in special education. See G Ex H.

7. The revised job description for Director of Special Education, employed to fill the position at issue, contains minimum qualifications of a master's degree in elementary or secondary education, specialization in two major areas of special education, and three years of successful experience as a special educator. See G Ex E.

8. Neither the current nor former job description for Director of Special Education requires any form of administrative certification. See G Exs E & H.

9. The Director of Special Education vacancy was posted on February 13, 1997, with a closing date of February 24, 1997. G Ex E.

10. Mr. McClanahan was directed by KCBE to insure the posting for Director of Special Education was communicated outside the Kanawha County school system to the college and university community in West Virginia. Accordingly, the posting was extended for thirty days in an effort to obtain applicants from outside Kanawha County. This extension was communicated by facsimile machine to colleges and universities throughout West Virginia. See G Ex E. In addition, the KCBE employees who had previously applied were advised that the application deadline in the

posting had been extended. However, the extended posting was not communicated generally to employees of KCBE at their places of employment.

11. The successful applicant submitted her application for the Director of Special Education Services on March 21, 1997, prior to the extended deadline for applications. 12. Karen Ruddle is employed by KCBE as an Itinerant Special Education Teacher. In the course of her duties, Ms. Ruddle routinely sought assistance from the prior Director of Special Education when working to resolve problems that could not be resolved through the local school Principal or Area Superintendent. Ms. Ruddle was an unsuccessful applicant for the position at issue.

13. KCBE employs a number of Itinerant Special Education Teachers (See footnote 1) who have limited oversight responsibility for the special education program in Kanawha County Schools. These teachers, who report directly to their Area Superintendent, are required to hold certification in "the three major areas of special education (mentally impaired (MMI), specific learning disabilities (LD), and behavioral disorders (BD))." See G Ex I.

14. Approximately eighty percent of the Special Education Teachers in Kanawha County Schools either hold, or are working toward, certification in LD, BD and MMI.

15. KCBE spends approximately $20 million annually on special education programs serving 5000 students through approximately 400 employees. The Director of Special Education is responsible for managing all special education programs as they relate to the general education process in the county schools.

16. Dr. Jorea Marple is employed by KCBE as its Superintendent. Dr. Marple holds certification in special education and has experience teaching LD students. From her perspective, the Director of Special Education must be able to resolve disputes between parents and teachers relating to the education and treatment of special education students. 17. The Director of Special Education previously reported to the Associate Superintendent for Administration and Instruction, Mr. McClanahan. See G Ex H. Mr. McClanahan has never held certification in any area of special education.

18. The successful applicant is certified by the West Virginia Department of Education to teach Hearing Impaired K-12, and Speech and Hearing 1-12. See G Ex C.

19. Grievant is certified to teach Elementary Education 1-8, English 1-9, General Science 1-9, Behavioral Disorders K-12, Learning Disabilities K-12, and Mental Retardation K-12. See G Ex D. In

addition, Grievant holds administrative certifications as an Elementary Principal 1-9, Middle/Junior High/Senior High/School Principal 5-12, Superintendent, Supervisor of General Instruction, and Vocational Administrator. See G Ex D.

20. Applicant profiles on each applicant were prepared by Chris Courtney and provided to the members of the interview committee in advance of the interview. See G Exs A & B. The profile for Grievant erroneously states that Grievant holds a Master's Degree in Special Education. Grievant actually holds a Master's in Educational Administration.

21. Grievant and the successful applicant had substantially equivalent records of academic achievement. Likewise, the two most recent performance evaluations of Grievant and the successful applicant were satisfactory.

22. On April 23, 1997, six applicants were interviewed by an eight-person committee which included Director of Personnel William G. Milam and Deputy Superintendent Jack McClanahan. See KCS Ex 1 at L II. 23. Immediately after interviewing the six applicants, the committee gave its highest ratings to the successful applicant, Karen Ruddle, and Grievant, in that order.

24. Following the interviews, Mr. McClanahan obtained verbal recommendations of the top three applicants from the Area Assistant Superintendents who supervised each of those applicants, as well as from Ms. Barkey.

25. Dennis Davis, the Area Assistant Superintendent who supervises Grievant, was unable to recall discussing Grievant with Mr. McClanahan. Mr. Davis acknowledged that although he did not recall the conversation specifically, he had forgotten similar conversations in the past. Mr. McClanahan recalled that Mr. Davis gave a favorable recommendation for Grievant and Karen Ruddle for the position of Director of Special Education. Mr. Davis confirmed that, if the conversation took place, that would have been his recommendation.

26. Following the interviews, Mr. McClanahan determined that three applicants, Grievant, Karen Ruddle, and the successful applicant, were "very well qualified" for the Director of Special Education position.

27. Superintendent Marple considered all criteria set forth in W. Va. Code § 18A- 4-7a for evaluation of applicants for administrative positions in deciding which applicant to recommend to KCBE for the Director of Special Education position. Deputy Superintendent McClanahan recommended the successful applicant, and related that Ms. Barkey, the retiring Director of Special

Education, likewise recommended her. Ultimately, Superintendent Marple relied upon the interview results in determining that the successful applicant was best qualified to perform successfully as KCBE's Director of Special Education.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 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.

County boards of education are authorized to fill vacancies in administrative positions under the more flexible standards contained in the so-called "first set of factors" in W. Va. Code § 18A-4-7a:

> 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. . . . 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 [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with Dillon, a county board is free to determine the weight to be applied to each of the above-listed factors in W. Va. Code § 18A-4-7a whenassessing an applicant's qualifications for an administrative position, so long as this substantial discretion is not abused. Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). See Pockl v. Ohio County Bd. of Educ., 185. W. Va. 256, 406 S.E.2d 687 (1991).

Grievant argued that the successful applicant did not meet the minimum qualifications for the

position because she did not have the certifications required by the posting. The posting required certification in "two (2) major areas of Special Education." G Ex E. The successful applicant held certifications in Hearing Impaired K-12 and Speech and Hearing Therapy 1-12. KCBE determined that these certifications met the requirements in the posting. Ordinarily, where language in the posting is clear and unambiguous, no interpretation of the terminology is required. See Watts v. Dept. of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, to the extent there is any ambiguity in the qualifications required by the posting, this Grievance Board will defer to the expertise of the school board in interpreting such language. See Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp, Inc, 166 W. Va. 775, 277 S.E.2d 613 (1981), appeal dismissed, 454 U.S. 1131 (1982). Accordingly, the undersigned administrative law judge accepts KCBE's determination that the successful applicant held the minimum certifications required by the posting.

Grievant further contends KCBE's decision to reduce the number of certifications required by the position was arbitrary and capricious. The previous job description called for certification in three major areas of special education. Further, Grievant notes thatcertain Area Specialists who work in KCBE's special education program are required to have certification in three major areas of special education, specifically MMI, LD and BD. However, county boards of education have substantial discretion in determining the minimum qualifications for professional positions. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Moreover, Grievant cites no authority for the proposition that an administrator must hold the same certifications as the teachers she is responsible for overseeing. Just as school Principals supervise teachers who hold credentials in a number of disciplines, a Director of Special Education certified and experienced in speech and hearing impairments could reasonably be expected to oversee a program involving students, parents and teachers where the particular impairments dictate intervention by a professional holding different special education certifications. Indeed, limiting consideration for filling the vacancy in question to those employees who hold certification in LD, MD, and MMI, or two of those three certifications, would be unfair to the successful applicant, as well as unduly limit the discretion of the county board of education under Dillon, supra.

There was no credible evidence to support Grievant's argument that KCBE lowered the requirements for the Director of Special Education in order to select the successful applicant for the

position. Grievant suggested that the position should have a requirement for administrative certification. Coincidentally, Grievant holds multiple administrative certifications while the successful applicant does not. However, the record indicates that the Director's job did not have an administrative certification requirement attached while Ms. Barkey held the position. Mr. McClanahan's rationale for reducing the minimum qualifications to broaden the pool of potential applicants for the position appears logical,while representing the direct antithesis to preselection. Moreover, the undersigned notes that employers must be mindful of Title VII of the Civil Rights Act of 1964 when setting minimum qualifications for positions, avoiding barriers to employment which disparately impact on classifications of applicants or employees protected by that statute, unless they can be shown to be job-related. See Armstead v. Starkville Mun. Separate School Dist., 461 F.2d 276 (5th Cir. 1972). See generally Albemarle Paper Co. V. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Therefore, Grievant has not shown that KCBE abused its discretion in setting the minimum qualifications for this position.

The record indicates that Grievant had more experience in teaching and special education generally than the successful applicant. Likewise, Grievant had substantially more administrative experience as a Principal. However, W. Va. Code § 18A-4-7a permits school boards to look beyond such factors as experience and certifications when selecting applicants to fill vacancies in these types of management positions. Indeed, the Code allows the school board to consider "other measures or indicators upon which the relative qualifications of the applicant may be fairly judged." Further, while each factor specified in the first set of factors of § 18A-4-7a must be considered, the board is free to assign more weight to one factor over another. See Saunders, supra.

Superintendent Marple explained that KCBE employed an interview process to go beyond the applicant's credentials and work history, in an effort to have a diverse panel of evaluators identify the applicant with the skills necessary to manage the responsibility of a $20 million special education program. That process identified the successful applicant as the employee who most impressed the interview panel. That impression was confirmedby Mr. Clanahan's calls to the applicant's supervisors, and discussion with Ms. Barkey.

While another individual might have selected Grievant for the position at issue based upon her greater length of experience and service, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board.

Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Grievant failed to establish that KCBE's decision was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such professional determinations.

Grievant's complaint that the time limit for filing applications was not properly extended by KCBE must also be rejected. It was not shown that KCBE lacked discretion under W. Va. Code § 18A-4-7a to extend the application deadline for 30 days. Further, Grievant did not demonstrate how she was harmed by KCBE's action, because she was not precluded from competing for the vacancy. Ultimately, Grievant attempted to weave a conspiratorial cloth out of a few loose threads. The board properly exercised its discretion to make a tough choice among three well-qualified candidates for an important position. That decision was not shown to have been made in violation of any statute, policy, rule or regulation applicable to such matters.

Consistent with the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 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. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the highest qualifications. In making its selection, the board must give consideration to appropriate certification, experience relevant to the position, course work and/or degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the relative qualifications of the applicants may be fairly judged. County boards have wide discretion in choosing administrators once they have reviewed the criteria in W. Va. Code § 18A-4- 7a. Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Marsh v. Wyoming County Bd. of Educ., Docket No.

94-55-022 (Sept. 1, 1994). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

3. County boards of education have substantial discretion in determining the minimum qualifications for professional positions. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). See Jones v. Summers County Bd. of Educ., Docket No. 94-45-153 (Nov. 16, 1994). Grievant failed to demonstrate that KCBEimproperly reduced the minimum qualifications for the position of Director of Special Education Services to permit a less-qualified applicant to seek and obtain the position.

4. Grievant failed to establish that she was more qualified than the successful applicant for the position in issue, or otherwise demonstrate that Respondent either abused its discretion or failed to comply with the requirements of W. Va. Code § 18A-4-7a. See Pockl, supra; Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997).

Accordingly, this Grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 30, 1998

Footnote: 1

The formal title for these positions is "Itinerant Special Instructional Assignment/Special Education." See G Ex I.