BRAD A. FITTRO,

Grievant,

v.

CABELL COUNTY BOARD OF EDUCATION,

Docket No. 97-06-556

Respondent,

and

LISA COLLINS & DIANN STARK,

Intervenors.

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., Brad A. Fittro (Grievant) filed this grievance against Respondent Cabell County Board of Education (CCBE) on September 3, 1997. Grievant contends CCBE violated W. Va. Code § 18A-4-7a when it selected Intervenors to fill two posted teaching vacancies in Business Education/Business Math at Cabell Midland High School. After the grievance was denied at Level I, Grievant appealed to Level II. Lisa Collins and DiAnn Stark (Intervenors) intervened pursuant to W. Va. Code § 18-29-3(u), and an evidentiary hearing was conducted on November 3, 1997. Thereafter, the grievance was denied by CCBE Superintendent Richard Jefferson on December 11, 1997. Grievant waived consideration of his appeal by CCBE at Level III,as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on December 18, 1997. An evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on March 30, 1998. The parties waived post-hearing briefs, and this matter became mature for decision at the conclusion of that hearing. (See footnote 1)

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 Respondent Cabell County Board of Education (CCBE) as a substitute teacher.

2. On May 27, 1997, CCBE posted two Business Education/Business Math teaching positions at Cabell Midland High School. Ex 4 at L II.

3. The posting indicated that the positions involved “inclusion and block scheduling.” The posting further stated that the applicant “must have taught or had experience in” a number of computer software programs, including Microsoft Works 3.0, WordPerfect 6.1 for Windows, Automated Accounting Pegasus, Netscape Navigator, and Microsoft Office Professional. The posting went on to state that the applicant should have knowledge of a network system and business law, and that a hands-on computer test would be required. Ex 4 at L II. 4. Grievant was one of seven applicants for the posted positions. L II HT at 14.

5. All seven applicants were interviewed by Cabell Midland High School Principal John Flowers and Mary Hendricks, Chair of the Business Department. Each applicant was asked the same set of prepared questions. Mr. Flowers and Ms. Hendricks had access to and reviewed the personnel files of Grievant and Intervenors.

6. Grievant and Intervenors successfully completed the hands-on computer “test.” However, those test results were not a significant factor in determining the successful applicants. L II HT at 24, 40.

7. Grievant brought a notebook or portfolio to the interview. The notebook included a resume, letters of recommendation, references, copies of degrees and evaluations, sample lesson plans and examples of projects developed in classes he previously taught. Grievant offered the portfolio during the interview, but Mr. Flowers and Ms. Hendricks declined to review it. Both Intervenors submitted resumes with their job applications.

8. Intervenor Collins received a Bachelor of Science in Education from West Virginia State College in May 1996, and is certified by the West Virginia Department of Education to teach

Business Education 9-12, and Business Math 9-12. Intervenor Collins also received a Bachelor of Business Administration in Finance with a minor in Accounting from Marshall University in May 1983. See Ex 1 at L II.

9. Starting in August 1996, Intervenor Collins worked as a substitute teacher for CCBE. As a substitute teacher, she taught Computer Literacy, Basic Computer Applications, and Introduction to Business to students in grades nine through twelve at Cabell Midland High School. 10. Intervenor Collins worked for West Virginia State College from August 1994 through December 1995, as a computer lab technologist. In that capacity, she was responsible for a computer laboratory including maintenance and trouble-shooting of hardware and software. She also taught WordPerfect to college typing students, and served as a tutor in Business Math. As a student teacher at St. Albans High School in Kanawha County, Intervenor Collins taught Keyboarding, Basic Computer Applications, and Accounting. While teaching at St. Albans, Intervenor Collins had experience with block scheduling.

11. From August 1996 through December 1996, Intervenor Collins taught Word Perfect and Keyboarding at the Putnam County Adult Education Center.

12. From 1984 to 1989, Intervenor Collins performed accounting duties in private businesses.

13. Intervenor Stark began working as a substitute teacher for CCBE in December 1991, resigned to take another position, and returned as a substitute in November 1996. Intervenor Stark has a Bachelor of Business Administration degree in Business Finance from Marshall University. She also has a Master of Arts degree in Education. She is certified in Business Principles 9-12, a certification which includes Business Math.

14. From March through June 1992, Intervenor Stark worked as a long-term substitute at CCBE's vocational school teaching Word Processing, Keyboarding and Transcription. Intervenor Stark taught in the Business Education Department at Charleston Catholic High School for two years. In that position, she taught Keyboarding, AccountingI and II, and Word Processing. She also developed and taught that school's first course in Business Law.

15. While at Charleston Catholic High School, Intervenor Stark worked on that school's computer network. She also worked with the computer network employed by the Cabell County Vocational Technical Center. Intervenor Stark has had experience working with most of the software applications listed in the posting.

16. Grievant began working for CCBE as a substitute teacher in 1995. During the 1995-96 and 1996-97 school years, he worked in excess of 133 days as a substitute teacher. Grievant previously worked in a bank for five years, where he developed experience working with computers and dealing with business and financial matters.

17. Grievant is certified in Business Principles 8-12, Safety Education 9-12, Pre- Vocational Exploration, and Business Education 9-12. Grievant substituted for one semester at Huntington East High School teaching Keyboarding. Grievant also taught Computer Literacy at CCBE's Enslow Middle School for one semester. Grievant taught a class in Keyboarding at Marshall University for one semester. Grievant has a full semester's experience teaching special education as a long-term substitute.

18. During his student teaching, Grievant taught Business Law at Huntington High School for eight weeks. Grievant has worked with computer networks at Enslow Middle School. He has had approximately two years of substitute teaching experience working with block scheduling. Grievant had experience with all of the computer applications listed in the posting for the positions at issue.

19. Grievant's undergraduate grade point average (GPA) was 2.69. L II HT at 67; Ex 2 at L II. Intervenor Collins had an undergraduate GPA of 2.96 at MarshallUniversity and a 3.4 GPA at West Virginia State. Intervenor Stark had an undergraduate GPA of 2.92. She had at least a 3.6 GPA in her graduate program.

20. Grievant's and Intervenors' past performance evaluations have all been satisfactory.

21. Intervenor Stark has been notified that she is to be terminated from her position at the end of the 1997-98 school year as the result of a reduction in force. (See footnote 2)

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

When, as here, no “permanently employed instructional personnel” apply for a teaching vacancy, the county board is authorized to apply the more flexible standards in the "first set of factors" set forth in W. Va. Code § 18A-4-7a as follows:

> 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 certifi cation 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 conductedpursuant 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 foregoing Code provision does not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See 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).

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). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Christian v. Logan County Bd. of Educ., Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the grievance procedure is not intended as a “super interview” but merely an analysis of the legal sufficiency of the selection process at the time it occurred. Stover v. Kanawha County Bd. of Educ., Docket No. 89- 20-75 (June 26, 1989). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997).

Grievant's only significant complaint with the hiring process was the refusal of the interviewing committee to accept his portfolio for review. However, there was no evidencethat CCBE either solicited or accepted portfolios from other applicants. Moreover, there was insufficient evidence presented to establish that there was any information in Grievant's portfolio that would have been likely to change the outcome of CCBE's hiring decision. In order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might

reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover, supra.

The record indicates that Grievant and Intervenors were all well qualified to fill the teaching positions at issue in this grievance. Principal Flowers' testimony at Level II indicated that he and Ms. Hendricks determined that Intervenors had more experience with computers and business education that directly related to the position. While another individual might have selected Grievant for the position at issue based upon his teaching experience in the county, 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 CCBE's decision was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such professional determinations.

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 his 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. When no permanently employed instructional personnel of a county board of education make application for a classroom teaching position, the county board of education must assess and consider the applicants' credentials in the following areas: appropriate certification and/or licensure, the amount of teaching experience in the subject area, the amount of 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. W. Va. Code § 18A-4-7a; Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996).

3. In reviewing a county board's exercise of discretion in a hiring decision, the inquiry into the

process by which the decision was made must be thorough and searching, but considerable deference must be afforded those conducting it. Jenkinson, supra; Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

4. In order to obtain instatement to a position or a reevaluation of the applicants, a grievant must not only demonstrate flaws in the process, but must also show that had the process been more accurate and/or fair, the ultimate selection might reasonably have beendifferent. Hopkins, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. Grievant failed to establish that he was more qualified for the positions at issue than either of Intervenors, or otherwise demonstrate that Respondent did not comply with the requirements of W. Va. Code § 18A-4-7a.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Cabell County or 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: May 22, 1998

Footnote: 1

Grievant was represented by Susan Hubbard of the West Virginia Education Association. Respondent was represented by counsel, Howard Seufer of Bowles Rice McDavid Graff & Love. Intervenors were represented by Kathleen Smith of the West Virginia Education Association.

Footnote: 2

This fact is relevant only in regard to the remedy available to Grievant, should he ultimately prevail in this grievance.