CAROLYN ELSWICK,

Grievant,

v. Docket No. 98-03-395

BOONE COUNTY BOARD OF EDUCATION,

Respondent,

and

STEVE FLORES,

Intervenor.

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., Carolyn Elswick (Grievant) filed this grievance against Respondent Boone County Board of Education (BCBE) on August 20, 1998. Grievant contends BCBE violated W. Va. Code § 18A-4-7a when it failed to select her to fill a teaching position in the Boone County Alternative School. After her grievance was denied at Level I, Grievant appealed to Level II, where an evidentiary hearing was conducted on September 29, 1998. Steve Flores (Intervenor) intervened at Level II in accordance with W. Va. Code § 18-29-3(u). Thereafter, this grievance was denied by the Superintendent's designee, Joe Tagliente, on October 7, 1998. Grievant waived consideration of her appeal by BCBE at Level III, as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on October 14, 1998. An evidentiary hearing wasconducted in this Board's office in Charleston, West Virginia, on December 8, 1998. This matter became mature for decision on December 28, 1998, following receipt of the parties' proposed findings. (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 Boone County Board of Education (BCBE) as a regular teacher.

2. On August 5, 1998, BCBE posted two contractual instructor positions in the Boone County Alternative School (BCAS). See R Ex 7 at L IV. Grievant and Intervenor both filed timely applications for these vacancies. See R Ex 6 at L IV.

3. The BCAS position at issue involves teaching multiple subjects to high school students at various grade levels, including students who have dropped out of high school or been expelled from their regular schools. There were approximately 14 students in the BCAS for the 1998-99 school year. L III HT at 80-81.

4. BCBE ultimately filled only one BCAS position, and Intervenor was the successful applicant for that teaching position. In selecting Intervenor for the BCAS position, BCBE applied standards contained in the legislative rule of the West Virginia Board of Education governing Alternative Education Programs for Disruptive Students, 126C.S.R. 20 (1996), rather than the criteria for selection of classroom teachers contained in W. Va. Code § 18A-4-7a. Those same standards were listed in the job posting under "qualifications." See G Ex 2 at L III.

5. Intervenor previously taught in the BCAS as a long-term substitute from February 1998 to the end of the school year, a period of approximately four months. L III HT at 80. Intervenor has been certified in Physical Education since May of 1997, and holds a temporary permit to teach Alternative Education. L III HT at 67, 72. See Admin Ex 1 at L III.

6. Intervenor taught Physical Education for one-half year in North Carolina, before becoming a substitute teacher for BCBE in May 1997. L III HT at 83.

7. During the school year immediately before the selection at issue, Intervenor performed his duties as a long-term substitute classroom teacher in the BCAS in an excellent manner. L III HT at 67, 92.

8. Grievant holds a professional teaching certificate with specialization in Mathematics, 5-12. G Ex 1 at L II. She currently holds a Master's Degree plus 15 hours in Adult Technical

Education. L III HT at 9-10.

9. Grievant began teaching home economics for BCBE at Sherman High School and Sherman Junior High School during the second semester of the 1990-91 school year. Grievant then taught mathematics in the Alternative Education Program (AEP) at the Boone Career and Technical Center (BCTC) for the 1991-92 and 1992-93 school years. Grievant taught a "food industry" vocational course at BCTC for the 1993-94 school year. L III HT at 11. During the first semester of the 1994-95 school year, Grievant taught Chapter I mathematics at Sherman Junior High School. Since the second semester of the1994-95 school year, she has been teaching computer applications at Madison Middle School. L III HT at 11.

10. In the course of her AEP teaching assignments at BCTC and Madison Middle School, Grievant has routinely taught students who were categorized as Behavior Disordered (BD), and Learning Disabled (LD), or both. L III HT at 12. Grievant also taught students who require specialized instruction in accordance with the Job Training Partnership Act.

11. In the course of her employment in the AEP at BCTC for two school years, and the Chapter I program at Sherman Junior High School for one semester, Grievant dealt with students in an alternative education setting as they were "pulled out" of their regular classes and assigned to Grievant for instruction. L III HT at 19. These programs involved teaching as many as four or five students at one time, but usually involved only two to three students at one time. L III HT at 53. Some BD and LD students were included in these groups.

12. Although Grievant taught in an AEP, the students participating in those programs were not selected for inclusion primarily on the basis of having been expelled from school, or having previously dropped out of school.

13. Grievant has had satisfactory evaluations for the two years previous to applying for the position at issue in this grievance. See G Ex 3 at L III.

14. On August 4, 1998, Grievant was hired by BCBE to teach a Computer Science class at BCTC one evening per week. See R Exs 1, 2 & 3 at L IV. This class is one of several which BCBE offers in cooperation with Southern West Virginia Communityand Technical College. Grievant would have to resign from this contractual position to accept the position at issue in this grievance.

15. While employed to teach in the BCAS, Intervenor continues to work for BCBE as a

substitute teacher with no limitation on the number of days per week he is allowed to substitute. L III HT at 98.

16. Grievant's regular teaching day concludes at 3:00 p.m. The BCAS classes at BCTC begin at 3:15 p.m. Under normal circumstances, Grievant would be able to commute from Madison Middle School to BCTC in time to perform the duties required of a BCAS teacher.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. More particularly, in order to prevail on her claim of improper selection, Grievant must establish that she was more qualified than the successful applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process was used. Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990). See Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

The primary dispute between the parties involves whether BCBE should have applied the criteria set forth in W. Va. Code § 18A-4-7a, when selecting the successfulapplicant for the position in question, rather than the criteria contained in the legislative rule of the West Virginia Board of Education governing Alternative Education Programs for Disruptive Students, 126 C.S.R. 20 (1996). In particular, because Grievant was then permanently employed by BCBE as a classroom teacher, she contends BCBE should have applied the "second set of factors" in W. Va. Code § 18A-4-7a, which provides:

> **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 past two years; and seniority. Consideration shall be given to each criterion with each criterion being given equal weight.**

BCBE, on the other hand, contends that it properly relied upon provisions in the West Virginia Board of Education's legislative rule governing Alternative Education Programs for Disruptive Students, 126 C.S.R. 20 (1996). In particular, BCBE relied upon the following language pertaining to selection of personnel to teach in such programs:

5.1.6 Personnel

a. Selection Criteria - It is the responsibility of the county board of education to select the most qualified applicant(s) to implement the alternative education program. Classroom teachers shall be selected on the basis of the teacher's demonstration of competence in meeting the following standards:

A. any West Virginia professional teaching certificate

B. ability to effect positive behavior in disruptive students

C. effective leadership and/or mentoring skills in working with youth

D. successful experience in providing education to troubled or disruptive youth

E. specialized training or experience in non- traditional programs

F. specialized training in behavior management skills

126 C.S.R. 20 § 5.1.6 (1996).

This Grievance Board has previously recognized that some teaching positions are filled under criteria other than the ones specified in W. Va. Code § 18A-4-7a. For example, W. Va. Code § 18-5-39, which governs the establishment of summer school programs, provides:

> **Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and the length of time the professional has been employed in the county summer school program.**

Given this explicit language, this Grievance Board determined that the county board erred by applying the second set of factors in W. Va. Code § 18A-4-7a, when it selected the successful applicant for a summer school position. Baisden v. Logan County Bd. of Educ., Docket No. 94-23-549 (Jan. 13, 1995); Molnar v. Berkeley County Bd. of Educ., Docket No. 91-02-355 (Oct. 17, 1991). Likewise, W. Va. Code § 18A-4-7a does not apply to the selection of professional personnel to extracurricular coaching positions being filled in accordance with W. Va. Code § 18A-4-16. Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Dunn v. Cabell County Bd. of Educ., Docket No. 92-06-142 (Oct. 30, 1992) . Grievant argues that once an applicant meets the "standards" in the legislative rule to minimally qualify for an alternative school position, the successful applicant must be chosen by applying the criteria in W. Va. Code § 18A-4-7a, as in filling any other classroom teaching vacancy. Although the legislative rule does not contain an explicit clause stating that the criteria in W. Va. Code § 18A-4-7a, need not be followed, the provision stating "classroom teachers shall be selected" on the basis of the standards specified is irreconcilably inconsistent with such criteria as "seniority" and "total amount of teaching experience" listed under the second set of factors in W. Va. Code § 18A-4-7a. A legislative rule may only be disregarded if the agency has exceeded its constitutional or statutory authority in enacting the rule, or the rule is arbitrary and capricious. W. Va. Health Care Cost Review Auth. v. Boone Memorial Hosp., 196 W. Va. 326, 472 S.E.2d 411 (1996) (hereinafter "HCCRA"). In this regard, W. Va. Code § 18-2-6 provides:

> **The state board also may establish policies and procedures for the approval of alternative education programs for disruptive students who are at risk of not succeeding in the traditional school structure. These policies and procedures may provide for the waiver of other policies of the state board, the establishment**

> **and delivery of a nontraditional curriculum, establishment of licensure requirements for alternative education program teachers, and the establishment of performance measures for school accreditation.**

The foregoing statute, and W. Va. Code § 18-5-19, which authorizes county boards of education to establish such activities as night schools and alternative schools, comprise the statutory authorities cited by the Department of Education for the legislative rule in question. It must be presumed that the Legislature was aware of the language in W. Va. Code § 18A-4-7a, when it approved 126 C.S.R. 20 under the legislative rule-making process. See generally, W. Va. Code §§ 29A-1-1, et seq. Additionally, when there is aconflict between two statutory enactments, the most recent is considered to be the controlling expression of the legislative will. See HCCRA, supra. Finally, although it may be arguable that § 5.1.6 of the legislative rule exceeds the authority of the State Board of Education to enact such a rule, this Grievance Board does not have jurisdiction to declare an administrative rule promulgated through the legislative rule-making process invalid or unconstitutional. Boyles v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP- 027 (July 15, 1998); Wilson v. W. Va. Dep't of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dep't of Transp., Docket No. 89-DOH-605 (May 22, 1990). Accordingly, BCBE properly decided to follow the legislative rule, and not apply the standards in Code § 18A-4-7a.

In reviewing whether BCBE correctly applied the standards in 126 C.S.R. 20 when it selected Intervenor for the teaching position at issue, it must be recognized that the selection of candidates for educational positions is not simply a "mechanical or mathematical process." See Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990). Further, 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). Moreover, 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). Finally, in reviewing a county board's exercise of discretion in a hiring

decision, the inquiry into theprocess by which the decision was made must be thorough and searching, but considerable deference must be afforded those conducting it. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

Although Grievant has experience in various aspects of alternative education, and has received professional training in some approaches to alternative education, Intervenor had demonstrated success in the specific alternative school position at issue in this grievance. The record indicates that Intervenor and Grievant have each demonstrated competence in the standards stated in 126 C.S.R. 20 § 5.1.6. However, the undersigned administrative law judge is unable to conclude that Intervenor's prior success in this particular alternative education program should be outweighed by Grievant's more extensive experience in other alternative education programs. The county board has discretion to select the most qualified applicant under the standards listed in the legislative rule, and Grievant did not demonstrate that BCBE abused that discretion in selecting Intervenor for the BCAS position. See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

To the extent BCBE argued that Grievant was not "available" to perform the duties of the contested position, because she might not consistently be able to commute from her regular place of employment to the site of the BCAS, the established facts do not support this claim. See Blume v. Fayette County Bd. of Educ., Docket No. 95-10-560 (Apr. 29, 1996). Likewise, although common sense indicates that Grievant's capability to effectively handle two jobs might be taxed, BCBE presented no rule, policy, or law which would justifyexcluding her from holding the BCAS position simply because she is already employed as a full-time teacher.

BCBE further contends Grievant was precluded from competing for the Alternative School position, because she was already bound by a contract to teach an adult education class, which contract BCBE was not required to void so that Grievant could take another assignment with the county board. Because Grievant failed to show that BCBE applied the wrong standards in selecting Intervenor for the position at issue, it is not necessary to address this defense.

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 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. 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. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Jenkinson v. Greenbrier County Bd.of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

3. 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 been different. Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998); Hopkins, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

4. The West Virginia Board of Education Regulations for Alternative Education Programs for Disruptive Students, enacted as a legislative rule as authorized by W. Va. Code §§ 29A-1-1, et seq., require a county board of education to apply separate criteria from W. Va. Code § 18A-4-7a, when selecting teachers to implement the alternative education program covered by the rule. See 126 C.S.R. 20 § 5.1.6 (1996).

5. As an administrative agency, the West Virginia Education and State Employees Grievance Board does not have jurisdiction to declare an administrative rule promulgated through the legislative rule-making process invalid or unconstitutional. Boyles v. W. Va. Bureau of Employment Programs, Docket No. 98-BEP-027 (July 15, 1998); Wilson v. W. Va. Dep't of Tax & Revenue, Docket No. 93-T&R-061 (Nov. 30, 1993). See Akers v. W. Va. Dep't of Transp., Docket No. 89-DOH-605 (May 22, 1990).

6. Grievant failed to establish that she was more qualified for the position at issue than

the successful applicant, under the standards set forth in 126 C.S.R. 20 § 5.1.6 (1996). See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

Accordingly, this Grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Boone 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: January 29, 1999

Footnote: 1

Grievant was represented by Anita Mitter of the West Virginia Education Association. Respondent was represented by counsel, Timothy Conaway. Intervenor appeared pro se.