

**DIANA BOSSIE,**

**Grievant,**

**v.**

**Docket No. 99-03-473**

**BOONE COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Diana Bossie (Grievant) alleges violations of W. Va. Code §§ 18A-4-7a and 18-29- 2(m) in the filling of an Assistant Principal position at Van High School. She seeks placement in the position, along with back pay and benefits, plus interest. This grievance was initiated on September 3, 1999. After an unfavorable decision at level one, a level two hearing was conducted on October 28, 1999, followed by a written decision denying the grievance dated November 4, 1999. Level three consideration was bypassed, and Grievant appealed to level four on November 8, 1999. The parties agreed that a decision could be rendered based upon the record developed below, supplemented by proposed findings of fact and conclusions of law, which were submitted by December 14, 1999. Grievant was represented by Anita Mitter of the West Virginia Education Association, and Respondent was represented by counsel, Timothy R. Conaway. This matter was reassigned to the undersigned administrative law judge for a decision on December 16, 1999.

The following findings of fact are made from a preponderance of the evidence of record.

### **Findings of Fact**

1. Grievant is employed as a classroom teacher by the Boone County Board of Education ("the Board").
2. On July 26, 1999, the Board posted a notice of vacancy for the position of Assistant Principal at Van High School. Two people applied during the posting period-- Grievant and Tom Bias.
3. Grievant has a masters degree in Educational Leadership, plus 15 hours. She is certified in both teaching and professional administration. Grievant has ten years of experience as a classroom

teacher. As part of the requirements for completing her masters degree in 1999, Grievant completed a six-week internship program, during which time she was responsible for teacher evaluations, the hot lunch/breakfast program, and attendance. Grievant has also served as Schools to Work Coordinator, has worked with training in peer mediation, wrote the Unified School Improvement Plan, has conducted in- service training, and has helped write grants.

4. Mr. Bias is employed as a teacher by the Board and has approximately 24 years of teaching experience. He has a masters degree in education administration, plus 45 hours, and is certified as a teacher and administrator. Mr. Bias also has a masters in church administration, and most of his 45 post-graduate hours are in that area of study. He has served as an assistant principal in the past. He has also served as an assistant athletic coach and has been assigned administrative duties as the coordinator of the Southern Youth Enrichment Program for the State Department of Education. He has lived in the Van area for over twenty years and had previously served as a Boone County Deputy Sheriff, dealing directly with juvenile delinquency cases. 5. After conducting interviews of Grievant and Mr. Bias, an interview committee consisting of Dr. Richard Adkins, Director of Personnel, and Steve Pauley, Assistant Superintendent, recommended Mr. Bias for the position. This recommendation was based upon the committee's view that Mr. Bias had superior experience relevant to the position, particularly by having served previously as an assistant principal and having direct experience working with disciplining children. The board approved Mr. Bias and voted to place him in the position on August 17, 1999.

6. Mr. Bias served as Assistant Principal at Van High School for one day. At the conclusion of that day, Mr. Bias informed school administrators that he felt the job involved more responsibility than he had expected, and he asked to be relieved of his duties.

7. On August 26, 1999, the Board voted to rescind its action of placing Mr. Bias in the Assistant Principal position, and placed him back into his previous teaching position.

8. On August 30, 1999, the position of Assistant Principal at Van High School was posted by the Board. The second posting was identical to the first, except for the application deadline, which was September 7, 1999.

9. When the position was reposted, three people applied--Grievant, Rodney Cummings, and an unidentified applicant. Interviews were conducted with all three applicants by the same interview committee. Grievant's interview was brief, because she had just been interviewed for the position,

and the same questions were being asked. Grievant's previous interview responses were used to evaluate her application.

10. Mr. Cummings had been employed by the Lincoln County Board of Education as a classroom teacher since 1982, and is certified in teaching and administration. He has a masters in Educational Administration, plus 45 hours, much of which was in the area of athletic training. During the entirety of his tenure with Lincoln County, Mr. Cummings worked as an athletic trainer and coach. He had also served "unofficially" as the dean of students at Duval High School during the 1998-1999 school year and at the beginning of the 1999-2000 school year. As dean of students, Mr. Cummings spent half of his work time dealing with attendance, food service, and discipline for the entire student population. He had also received training on and had worked with the AS400 computer system used for attendance and food service records.

11. Mr. Cummings was selected to fill the position after the second posting, based upon his experience working with attendance and disciplinary issues as dean of students, along with his extensive experience as an athletic trainer.

12. The majority of the assistant principal's duties involve attendance, discipline, food service, and serving as the school's athletic director.

### **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. Grievant has essentially raised three issues. First, she alleges that she was more qualified for the position than either Mr. Bias or Mr. Cummings. Second, the position should not have been reposted after Mr. Bias' hiring was "rescinded," and third, she has been the victim of gender discrimination with regard to this hiring decision.

The position of assistant principal is an administrative position. Filling vacancies in such positions is accomplished 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.

"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). The selection of candidates for administrative 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); Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). Further, the grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended as a "super interview" but merely an analysis of the legal sufficiency of the selection process at the time it occurred. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); 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). Thus, W. Va. Code § 18A-4-7a permits county boards of education to determine the weight to be applied to each of the factors listed above in assessing a candidate's qualifications for administrative positions, so long as they do not abuse their discretion. E.g., Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). While each factor specified in the first set of factors of § 18A-4-7a must be considered, the board is free to consider one factor as more important than another. Frashier v. Jackson County Bd. of Educ., Docket No. 98-18-485 (May 26, 1999). See Saunders, supra.

Grievant has argued that the Board has abused its discretion by placing more importance upon Mr. Bias' and Mr. Cummings' prior experience and by allegedly failing to consider her prior work for the Board as relevant to the position. However, as set forth above, when making hiring decisions for administrative positions, a board of education is allowed to place more emphasis upon one factor than another, so long as all seven factors are given consideration. In this case, there is no evidence

which indicates that all factors were not given consideration, and it was within the Board's discretion to determine that certain prior experience was more pertinent to the position than Grievant's. Moreover, both Mr. Bias and Mr. Cummings had much more overall teaching experience than Grievant, along with having more pertinent administrative experience dealing directly with discipline and attendance issues. The undersigned does not find an abuse of the Board's broad discretion in their selection of either of these two applicants over Grievant in the circumstances presented here.

Grievant also contends that the Board erred in considering "relevant specialized training" when considering the applicants for the assistant principal position, because no particular specialized training was delineated in the job posting. While it is well-settled that a board must describe in the job posting what specialized training, if any, is required for a teaching position under the second set of factors in W. Va. Code § 18A-4-7a, there is no such requirement when dealing with the first set of factors in filling administrative positions. When filling administrative positions, a board must only give consideration to relevant specialized training, and there is no requirement that it even be placed in the job posting. Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998). Therefore, since the evidence establishes that the Board did consider relevant specialized training when evaluating these applicants, there has been no violation of the statute in that regard.

Grievant further contends that she has been subjected to gender discrimination in violation of W. Va. Code § 18-29-2(m), because both Mr. Bias and Mr. Cummings are men and were selected over her for this position. W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01- 543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. Dillon v. Cabell County Bd. of Educ., Docket No. 97-06-570 (May 29, 1998). See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Grievant has established a prima facie case of discrimination. However, as discussed above, Respondent has provided ample non-pretextual reasons for selecting Mr. Bias and Mr. Cummings over Grievant, based upon their qualifications, and there is simply no evidence of record indicating that gender was a factor in this hiring decision.

Grievant's final contention is that, after the Board rescinded its placement of Mr. Bias in the assistant principal position, it should not have been reposted. The following portion of W. Va. Code § 18A-4-7a is applicable to this situation:

Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period. If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within 30 working days of the end of the posting period.

Grievant argues that, when the hiring of Mr. Bias was rescinded, it was as if the hiring never took place; therefore, as the only remaining applicant, she should have been placed in the position. The West Virginia Supreme Court of Appeals recently addressed a similar situation, one in which the school board reposted a position when only one person applied, in order to get a wider pool of

applicants. In Mingo County Bd. of Educ. v. Jones, 512 S.E.2d 597 (W. Va. 1998), the Court held that reposting was not permitted under the provisions of W. Va. Code § 18A-4-7a, stating:

When a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7a (1993), and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period.

Jones, supra. Thus, because Mr. Jones applied during the posting period and was the only qualified applicant, he was entitled to placement in the position, and the board was not allowed to repost the position.

The instant case is distinguishable from the situation presented in Jones, supra. In fact, the Board did comply with the provisions of W. Va. Code § 18A-4-7a as interpreted by the Supreme Court, because it did "select" a qualified applicant for the position within the applicable time period. That applicant was hired and served in the position, and then effectively resigned. ([See footnote 1](#)) Therefore, the position then became vacant once again, and it is well-settled that all vacancies must be posted, per the provisions of the statute. See e.g., Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988). Therefore, the Board's decision to repost the position did not run afoul of the provisions of W. Va. Code § 18A-4-7a. Grievant has failed to prove by a preponderance of the evidence that posting of the position the second time was improper.

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

### **Conclusions of Law**

1. In non-disciplinary matters, a 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. "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).

3. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. In making its selection, a 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. W. Va. Code § 18A-4-7a.

4. County boards of education have wide discretion in choosing applicants to serve as administrators, once they have reviewed the criteria in W. Va. Code § 18A-4-7a. Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998); 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).

5. "When a school board posts a notice of vacancy pursuant to W. Va. Code § 18A-4-7(a), and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period." Syl. Pt. 2, Mingo County Bd. of Educ. v. Jones, 512 S.E.2d 597 (W. Va. 1998).

6. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989).

7. Grievant failed to prove by a preponderance of the evidence that the posting and selection



process for the Assistant Principal position at Van High School violated the provisions of W. Va. Code § 18A-4-7a.

8. Grievant established a prima facie case of discrimination pursuant to the provisions of W. Va. Code § 18-29-2(m), but Respondent articulated legitimate, non- pretextual reasons for the hiring decisions at issue in this grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Boone 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**Date: January 19, 2000** \_\_\_\_\_

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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[Footnote: 1](#)

*Whether or not it was proper for the Board to return Mr. Bias to his prior position without posting is not at issue in this grievance and will not be addressed.*