REBECCA HURD,

Grievant,

v. Docket No. 04-10-283

FAYETTE COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance against her employer, the Fayette County Board of Education ("Respondent") on May 4, 2004, claiming a violation of W. Va. Code § 18A-4-7a when Respondent "refused to consider Grievant's qualifications because she had taken the Praxis test and was awaiting the results." Grievant seeks "to receive the position of Title I Instructor at Rosedale Elementary."

Having been denied at levels one and two, level three was waived and the parties agreed to submit the matter for decision at level four based on the record developed at the lower levels. Grievant is represented by Anita Mitter of the West Virginia Education Association, and Respondent is represented by counsel, Erwin L. Conrad. This matter became mature for decision on August 23, 2004, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a teacher at Rosedale Elementary School, and had 20.97 years of experience and 21 years of County seniority. 2. On April 5, 2004, Respondent posted a position opening for a Title I Reading Specialist to be assigned to Rosedale Elementary School.

3. The position required that the successful applicant hold a Masters' Degree in the area of specialization and also to have passed the State-required Praxis examination for the position. Due to its being federally-funded, the position could not be filled by a candidate who had not passed the Praxis and therefore did not meet the No Child Left Behind Requirements for being “highly qualified.”

4. At the time of the position posting, Grievant held a Masters' Degree but had not received a passing score on the Praxis. Grievant took the Praxis test on April 17, 2004, the posting closed on April 19, 2004 and Grievant received the (passing) results of her examination on May 20, 2004.

5. There were 14 applicants for the position who met all of the requirements necessary to be certified as a Title I Reading Specialist, including passing the Praxis examination.

6. The position in question was filled on May 3, 2004.

7. The applicant with the most teaching experience and seniority among those fully certified withdrew and the successful applicant had 11.235 years of total experience and ten years of seniority.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant argues that she had more seniority than the successful applicant and, by the time the position began, had passed the Praxis test and was fully-qualified. Respondent counters it selected the most senior applicant who was fully-qualified at the time of the selection.

Grievant relies on *Keatley v. Mercer County Bd. of Educ.,* 200 W. Va. 487, 490 S.E.2d 306 (1997), which held, “The certification requirement for professional personnel under W. Va. Code § 18A-4-7a (1993) permits interviewing or hiring an applicant who does not physically possess the required certification, but who has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results.” In that case, the grievant applied for a position that required a professional administrative certificate, and had completed all requirements for one, but had not yet received the physical certificate. Nonetheless, it was found he should have been awarded the position he was denied due to his lack of the piece of paper.

Respondent argues *Keatley* is inapposite to this case as there was no indication that, at the time of the interviews and hiring, the Grievant had successfully completed the requirements. In *Keatley,*

issuance of the paper certificate was a mere formality, whereas in this case the certificate would not have been issued at all had there been a failing score and a necessity for a later retesting which occurred in several instances in Fayette County.

The distinction is a narrow but important one, and in this case, Respondent must be found to have acted appropriately. As elicited from testimony, it was not uncommon for applicants to fail the Praxis and be required to take it two or more times. Without someway of knowing one way or another whether Grievant had passed, information that did not come to light until well after the interviews, selection and filling of the position, Respondent could not know it was making the right choice in hiring Grievant. Grievant's passing of the test did not occur at the time she took the test, but at the time it was scored.

Lastly, Respondent does have a large measure of discretion in determining how soon the candidate must possess the certification.

> The provision cited from W.Va. Code [§] 18A-4-7a does not establish the deadline by which an applicant must possess the appropriate certification. The absence of such a reference clearly indicates legislative intent for county boards of education to exercise discretion on this issue."[I]f the statute is silent ... with respect to the specific issue, the question for the court is whether the [Board's] answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694, 703 (1984). See *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-98, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604, 623-25 (1991). Therefore, we review the Board's decision, only to determine if the Board's statutory construction is one the legislature would have sanctioned. *See United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560-61, 6 L.Ed.2d 908, 915 (1961).

Keatley, *supra.* However, Respondent was required to fill the position within thirty days of the close of the application period by W. Va. Code § 18A-4-7a(o)(E). Grievant's test results had not been returned within that time frame, and in this case it cannot be found to be an abuse of discretion to ignore an applicant who was without certification at the time of the posting and would still be without certification by the time the position must be filled.

If the case had been that the Praxis had been scored and Grievant and/or Respondent informed of her passing, but had not yet received written confirmation thereof, the result would be different. As it was, Grievant was not qualified for the position at the time of the hiring, and so Respondent did not act improperly in failing to hire her.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. "The certification requirement for professional personnel under W. Va. Code § 18A-4-7a (1993) permits interviewing or hiring an applicant who does not physically possess the required certification, but who has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results." *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997)

3. Grievant had not completed all the requirements for certification as a highly- qualified Title I teacher at the time of the interview or date of hiring.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County. Any 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 byW. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: September 14, 2004

M. Paul Marteney

Administrative Law Judge