MARY BETH HOWARD,

Grievant,

v. Docket No. 03-25-316

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Mary Beth Howard ("Grievant"), employed by the Marshall County Board of Education ("MCBE") as a teacher, filed a level one grievance on September 18, 2003, in which she alleged a violation of W. Va. Code § 18A-4-7a when she was not selected for a Title I Reading position. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at level two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c). Appeal to level four was made on March 10, 2004. Grievant, represented by Owens Brown of the West Virginia Education Association, and MCBE, represented by Superintendent Fred Renzella, agreed to submit the grievance for decision based upon the lower-level record. The case became mature for decision on August 25, 2004, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following facts derived from the record are undisputed, and may be set forth as formal findings of fact

Findings of Fact

1. Grievant has been employed by MCBE for approximately six years. In Spring 2003, her employment was terminated during a reduction in force, and she was placed on the preferred recall list. 2. During the 2002-2003 school year Grievant was certified to teach Elementary, Grades 1 - 6. She completed the requirements for Reading Specialist on August 8, 2003, and received her Master's degree on August 15, 2003. Grievant promptly filed the paperwork with the State Department of Education to receive her certification as a Reading Specialist.

3. On or about August 13, 2003, MCBE posted a vacancy for the position of Title I

Reading Teacher. Qualifications for the position included a valid West Virginia teaching certification with an endorsement as a Reading Specialist. Grievant timely submitted an application for the position, along with a transcript showing her degree, and documentation that she had passed the required Praxis test.

4. MCBE approved Kari Ray for the position on August 28, 2003. Although Grievant had more experience and seniority, Ms. Ray held the required certification at the time she was placed as a Reading Specialist. MCBE did not receive Grievant's certificate until September 17, 2003.

5. MCBE employed Grievant as a substitute teacher the first fourteen days of the 2003-2004 school year, and she was hired as a regular teacher on September 15, 2003. Grievant transferred to the position of Reading Specialist at Cameron Elementary School, effective September 29, 2003.

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 § 4.21 (2000); Holly v. LoganCounty 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 argues she provided documentation establishing that she had completed all the requirements for certification as a Reading Specialist, and was simply waiting for WVDE to process the paperwork. MCBE asserts that it has filled a position in the past with an applicant in a similar situation, only to learn that certification would not be granted, making it necessary to remove and replace the teacher.

Hiring decisions relating to classroom teachers in West Virginia are governed by the provisions of W. Va. Code § 18A-4-7a. The portion of that statute pertinent to this grievance provides:

(d) 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:

(1) Appropriate certification and/or licensure;

(2) Total amount of teaching experience;

(3) The existence of teaching experience in the required certification area;

(4) Degree level in the required certification area;

(5) Specialized training directly related to the performance of the job as stated in the job description;

(6) Receiving an overall rating of satisfactory in evaluations over the previous two years; and

(7) Seniority.

(e) In filling positions pursuant to subsection (d) of this section, consideration shall be given to each criterion with each criterion being given equal weight. If the applicant with the most seniority is not selected for the position, upon the request of the applicant a written statement of reasons shall be given to the applicant with suggestions for improving the applicant's qualifications.

This grievance presents the issue of what course of action a school board should follow when the senior applicant for a position has completed the requirements, but does not have the required certification "in hand" while a less senior applicant's certificate is a matter of record. In determining whether an applicant holds the necessary qualifications, a board of education is entitled to substantial discretion, but such discretion must not be exercised in an arbitrary and capricious manner. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Little guidance is available in this situation. In Johnson v. Cassell, 182 W. Va. 317, 387 S.E.2d 553 (1989), the West Virginia Supreme Court of Appeals determined that a board of education improperly obtained a special education teaching permit for an individual when a fully certified candidate had applied for the position. The Court stated: "County superintendents are obligated, pursuant to such policy, to utilize fully qualified teachers when they are available." Johnson, supra, at 555. In 1997, the Court upheld a Grievance Board decision which ruled that a board of education did not abuse its discretion when it interviewed and hired an applicant for an assistant principal position who did not physically possess the required certification, but obtained it before the beginning of the school year. Keatley v. Mercer County Bd. of Educ., 200 W. Va. 487, 490 S.E.2d 306 (1997). In Davidson v. Wyoming

County Board of Education, Docket No. 92-55-402 (Feb. 23, 1993), it was noted that school boards are authorized to "employ such qualified teachers, or those who will qualify by the time of entering upon their duties, necessary to fill existing or anticipated vacancies for the current or next ensuing school year." W. Va. Code § 18-5-4 (1993) (emphasis added).

Finally, in Grossl v. Mingo County Board of Education, Docket No. 93-29-496 (July 21, 1994), this Board found MCBE's hiring decision improperly failed to consider that the grievant, who like Grievant herein, was simply waiting for WVDE to process her certificate, was closer to obtaining both of the required certifications than the successful applicant in that case, who held only a permit in one of the required areas.

Certainly, a board of education may employ an individual who is simply waiting for her certification to be processed. W. Va. Code § 18A-3-2 provides in part:

If a teacher is employed in good faith on the anticipation that he or she is eligible for a certificate and it is later determined that the teacher was not eligible, the state superintendent of schools may authorize payment by the county board of education to the teacher for a time not exceeding three school months or the date of notification of his or her ineligibility, whichever shall occur first.

However, there is nothing in that statute that mandates a board of education do so, especially when there is a fully-certified educator available to fill the specific teaching position. Bailey v. Mingo Bd. of Educ., Docket No. 97-29-392R (Sept. 26, 2000). Because Grievant did not hold the required certification at the time the position was filled, and the successful applicant was fully certified at that time, Grievant has failed to prove that MCBE violated W. Va. Code § 18A-4-7a, or abused its discretion, when it selected the certified applicant. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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 § 4.21 (2000); 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. W. Va. Code § 18A-4-7a provides that when 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 seven criteria, including whether the applicant holds the appropriate certification and/or licensure.

3. W. Va. Code § 18A-3-2 permits a board of education to employ a teacher in good faith on the anticipation that he or she is eligible for a certificate; however, it does not require a board to do so. Bailey v. Mingo Bd. of Educ., Docket No. 97-29-392R (Sept. 26, 2000).

4. "County superintendents are obligated, pursuant to such policy, to utilize fully qualified teachers when they are available." Johnson v. Cassell, 182 W. Va. 317, 387 S.E.2d 553 (1989).

5. Grievant has failed to prove that MCBE violated W. Va. Code § 18A-4-7a, or abused its discretion, when it appointed a less senior, but fully certified applicant to the position of Reading Specialist. Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marshall 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 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: SEPTEMBER 24, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***MCBE did not file additional proposals.***