MARSHALL A. GROGG,

Grievant,

v.

DOCKET NO. 96-20-521

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Marshall A. Grogg, filed this grievance on October 11, 1996:

> I applied for a Physical Education/Health Teaching position at Sissonville High School and it was awarded to a teacher on preferred recall. This is a violation of WV Code 18A-4-7a and I ask to be awarded the job. (See footnote 1)

A level two hearing was conducted on November 20, 1996, and the Superintendent's designee, Lou Ann Lanham, denied the grievance by decision dated December 12, 1996. Thereafter, Grievant appealed to level four on December 17, 1996, and the parties agreed to submit the case on the record developed at level two. Grievant filed proposed findings of fact and conclusions of law on February 11, 1997, at which time this case became mature for decision. The Kanawha County Board of Education ("Board") elected to rely on the decision rendered at level two. The material facts in this grievance are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievant is employed as a teacher at Cedar Grove Community School. He is certified to teach physical education, health and safety, and cooperative education.

2. A vacancy for a physical education and health teacher was advertised for Sissonville High School from August 29, 1996 to September 5, 1996. Grievant submitted an application for the

position.

3. The applications were reviewed by Director of Personnel William Milam who applied the second set of criteria found in W. Va. Code § 18A-4-7a in selecting the best qualified applicant.

4. Three candidates, Beverly Stevens, Kenneth Holley, and Thomas Sutherland, tied in the assessment of qualifications.

5. Mr. Sutherland, a teacher on the preferred recall list, who had been laid off due to a reduction in force at the end of the 1995-96 school year, was ultimately the successful applicant for the position.

6. Mr. Sutherland received a point for total amount of teaching experience, with a total of 30 years experience, which gave him four points, along with Mrs. Stevens and Mr. Holley.

7. Had Mr. Sutherland not been considered for the position, Grievant would have received the point for total amount of teaching experience, with a total of 18 years experience, which would have placed him in the three-way tie with Ms. Stevens and Mr. Holley. 8. Grievant does not contest the matrix utlized by Mr. Milam in selecting the most qualified applicant for the position.

Discussion

Grievant contends it was improper for the Board to consider Mr. Sutherland's application for the subject position because, as a teacher on the preferred recall list, he could not have been hired over a regular employee. In support of his argument, Grievant relies on the portion of W. Va. Code § 18A-4-7a which states:

> All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position. . . .

Grievant argues this portion of Code § 18A-4-7a stands for the proposition that an employee on preferred recall can be recalled only if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority are qualified, apply for and accept such position. Grievant argues that since there were several regular, full-time professional employees who were

qualified, and applied for, the position at Sissonville High School, Mr. Sutherland could not have even been considered for the position by Mr. Milam.

The Board argues that Code § 18A-4-7a clearly contemplates that teachers on the preferred recall list be able to compete for all available vacancies, citing the second half of the above-cited paragraph, which states:

> Before position openings that are known or expected to extend for twenty consecutive employment days or longer may be filled by the board, the boardshall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause such employee to forfeit any rights to recall. The notice shall be sent by certified mail to the last known address of the employee, and it shall be the duty of each professional personnel to notify the board of continued availability annually of any change in address or of any change in certification and/or licensure.

The Board argues that if Grievant's position is correct, then the above-cited portion of Code § 18A-4-7a is rendered meaningless. There would be no purpose to be served in notifying persons on the preferred recall list of vacancies if the Legislature did not intend for them to be considered for a position for which they applied. Further, the second set of criteria in Code § 18A-4-7a does not restrict such persons from being considered for employment. (See footnote 2)

The first cited portion of Code § 18A-4-7a cited by Grievant clearly contemplates that, when a professional position opening exists, and no regular, full-time professional, nor one returning from a leave of absence, who is qualified has applied and accepted the position, the position shall automatically be filled from the preferred recall list on the basis of seniority alone. Thus, an employee on the preferred recall list is entitled to be hired fora vacant position over new employees. However, that portion does not address what happens when regular, full-time professionals do apply for the position, as well as professionals on the preferred recall list.

It is evident from the remaining portion of the paragraph that when a vacancy occurs, all employees who are certified and/or licensed for the position are to be given an opportunity to apply, including those on preferred recall. What the remaining portion of the statute indicates is that, when regular, full-time, as well as preferred recall, employees apply for a position, the employee on the preferred recall list does not automatically become vested with recall rights, unless and until the regular, full-time employees either are not qualified, or are not interested in the position. If the regular, full-time employees are both qualified and wish to be considered for the vacancy, then the

administrator must look to the criteria set forth for selection in Code § 18A-4-7a to select the most qualified candidate for the position.

Thus, in this instance, the Board correctly notified Mr. Sutherland, on the preferred recall list, of the vacancy in which he held appropriate certification so that he had the opportunity to apply. Mr. Sutherland did apply, as did several regular, full-time professionals, including Grievant, who were both qualified and interested in the position. Thereafter, it was proper for the Board to apply the second set of criteria in W. Va. Code § 18A-4-7a in selecting the most qualified applicant. As there is no dispute regarding the method chosen for selecting the applicants, the Board's final decision to select Mr. Sutherland is determined to be a valid application of the selection criteria.

Conclusions of Law

1. It is incumbent upon the Grievant to prove his case by a preponderance of the evidence.

2. W. Va. Code § 18A-4-7a establishes a right for the preferred recall list personnel to be hired over new employees. It does not prevent such employees from otherwise being entitled to compete for vacancies.

3. Grievant has failed to meet his burden in establishing a violation of W. Va. Code § 18A-4-7a in the hiring of Mr. Sutherland for the vacant position at Sissonville High School.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of * 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 18, 1997

Footnote: 1

Grievant changed his request for relief in his proposed findings of fact and conclusions of law, and now asks that the Board be required to reevaluate the applicants, determine the most qualified, and offer the job to the qualified applicant that is still interested in the position.

Footnote: 2

The pertinent section of Code § 18A-4-7a provides that :

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