PATRICIA OWENSBY,

Grievant,

v. **DOCKET NO. 97-27-131**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Patricia Owensby, Grievant, grieved her non-selection for a teaching position. Grievant alleged she was on the preferred recall list, and was qualified for the position, and that a person not on the preferred recall list nor currently employed by Respondent was selected, and was less qualified for the position. As relief, she seeks instatement into the position and compensation.

The grievance was denied at all lower levels, and was submitted for decision at Level IV based upon the record developed below. The record includes the lower level decisions, and a transcript of hearing at Level II, which consists of stipulations of fact and legal argument. The facts of this matter are not disputed, and are taken from the Level II transcript and exhibits.

ISSUE

Do the preferred recall provisions of W. Va. Code §18A-4-7a apply, where at least one of many applicants is a regular, full- time professional employee, and the employer wishes to fill a teaching position with a new employee?

FINDINGS OF FACT

1 1. Grievant is a former teacher for Respondent, certified in and having previously taught Math 5-12. After a reduction in force in 1995, Grievant was placed on the preferred recall list.

2 2. On August 22, 1996, Respondent posted an itinerant math teacher position, requiring endorsement in Mathematics, grades 7- 12; 9-12 or 5-12.

3 3. Thirteen people applied for the position, at least one of whom was a regular, full-time teacher employed by Respondent. (See footnote 1)

4 4. Candidates were assessed by applying the second set of factors set forth in W. Va. Code §18A-4-7a.

5 5. Respondent determined that Heather Austin was most qualified for the position.

6 6. Grievant was qualified for the position at issue, and was most senior on the preferred recall list.

7 7. At the time this position was filled, the successful applicant, Ms. Austin, had never been employed as a regular, full- time professional employee by Respondent, nor was she on Respondent's preferred recall list. She had been employed on a contract basis as a psychologist.

DISCUSSION

This grievance presents a case of first impression, involving a purely legal question. Do the preferred recall provisions of W. Va. Code §18A-4-7a apply, where at least one of many applicants is a regular, full-time professional employee, and the employer wishes to fill a teaching position with a new employee? For reasonsexplained below, I find that the preferred recall provisions do, in fact, apply in this situation, and therefore grant this grievance.

It is agreed that Grievant was properly qualified for the posted mathematics position, had previously been employed in such a position, and was the most senior on the preferred recall list for such a position. Grievant asserts that, consequently, the preferred recall provision mandates that she be selected so long as no regular, full-time professional personnel accepted the position. Grievant relies upon W. Va. Code §18A-4-7a, paragraph nine, which addresses preferred recall of a former employee. Paragraph nine states as follows:

> As to any professional position opening within the area where [a person on the preferred recall list] 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.

Respondent believes that it was prohibited from recalling Grievant because at least one of its regular, full-time professional personnel ("current employee") was qualified and had applied for the position. Respondent asserts it was then required to apply the second set of criteria in determining which applicant was the best qualified, without regard to preferred recall rights. Respondent relies on W. Va. Code §18A-4-7a, paragraph one, which supplies the criteria for selecting professional employees of the board of education. That provision states, in pertinent part, "[i]f 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 makedecisions affecting the filling of such positions on the basis of the following criteria..." Seven specific criteria, each given equal weight, are then identified. W. Va. Code §18A-4-7a (emphasis supplied). (See footnote 2) Respondent asserts the mandatory language requires it to abandon all consideration of preferred recall rights, once a current employee applies for a position. Respondent believes it must then offer the position to the most qualified applicant, (in this case, Ms. Austin) regardless of that person's employment status. (See footnote 3)

It is well settled that the preferred recall provision "was designed to guarantee or to entitle employees to regain employment, by order of seniority, in the certification area in which they had been previously employed or in another area in which they have been certified or licensed." Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993) at 6; aff'd Cir. Ct. of Kanawha County, #93-AA-64 (June 9, 1994). It "establishes a right for the preferred recall list personnel to be hired over new employees." Conclusion of Law 2, Grogg v. Kanawha County Bd. of Educ., Docket No. 96-20-521 (Apr. 18, 1997). In other words, a former employee on the preferred recall list "has reemployment priority over a new applicant" in his or her area of certification. Stewart v. Tyler County Bd. of Educ., Docket No. 93-48-163 (Aug. 20, 1993) at 10. See also W. Va. Code §18A-2-2, paragraph 3. Clearly, Grievant would have been entitled to instatement in the position, had no current employees applied for it. In that situation, no comparison of the relative qualifications of Grievant with any new applicants would have occurred. "[Q]ualifications are not a factor to be considered when a position is filled from the preferred recall list....No reference is made, and none will be inferred, that seniority may be discounted in favor of qualifications." Johnson, et al., v. Webster County Bd. of Educ., Docket No. 94-51-633 (June 30, 1995) at 5-6 (See footnote 4). See also Conclusion of Law 4, Fadoul v. Ohio County Bd. of Educ., Docket No. 96-35-330 (Mar. 7, 1997); Stewart v. Tyler County Bd. of Educ., Docket No. 93-48-163 (Aug. 20, 1993).

However, a current employee did apply for the position at issue here. There are no preferred recall rights over current employees who are qualified and apply for a position. Persons on the preferred recall list are nonetheless entitled to compete equally with current employees for new positions, according to Grogg. Where a current employee applies for a position, the second set of criteria is applied to assess the relative qualifications of both current and former employees. Grogg at

5. Preferred recall rights are inapplicable. "[T]he 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." Grogg at 5. By the terms of the statute, preferred recall rights apply whenever no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position. It is this last phrase that Respondent's argument overlooks. There is no conflict between the two parts of the Code Section at issue here. The fact that some regular employees apply for the position is not determinative, by the clear, plain language of the statute.

If a current employee is deemed most qualified, and accepts the position, those on preferred recall have no complaint. However, if no current employee accepts the position, the preferred recall provision then applies, and takes precedence over a relative assessment of qualifications of new applicants. Once the regular, full-time employees are disqualified or decline the position, vested recall rights are determinative. The former employee on preferred recall is then entitled to the position, as if no regular, full-time employee had applied.

Here, Grievant showed that she was entitled to the position, rather than the successful applicant. Grievant must be instated into the position and given back pay and benefits, as if she had been instated into the position for the 1996-1997 school year. (See footnote 5)

CONCLUSIONS OF LAW

1 1. In a non-disciplinary grievance, Grievant bears the burden of proving each element of her case by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 89-06- 707 (March 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, #90-AA-181 (March 25, 1993).

2 2. W. Va. Code §18A-4-7a requires that "[i]f 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 specific, and equally weighted, criteria.

3 3. W. Va. Code §18A-4-7a also requires that persons on the preferred recall list and qualified for a position "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."

4 4. Both of the above provisions apply where a new position is posted, one or more applicants are current employees by Respondent, one or more applicants are currently on Respondent's preferred recall list, and one or more applicants are neither current employees of Respondent nor on its preferred recall list. In these circumstances, Respondent must first assess the qualifications of the applicants, according to the second set of criteria. If noregular, full-time professional personnel are offered and accept the position, Respondent must fill the position with a person on Respondent's preferred recall list, in order of seniority among those qualified for the position. If no person on the preferred recall list accepts the position, Respondent may select the most qualified of the remaining applicants, according to the second set of criteria.

5 5. Grievant proved that she was entitled to the position, by virtue of her status on the preferred recall list.

Accordingly, this grievance is **GRANTED**, and Respondent is hereby **ORDERED** to instate Grievant into the position and give her back pay and benefits, as if she had been instated into the position for the 1996-1997 school year.

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

Dated: August 26, 1997 _____ **JENNIFER J. MEEKS**

Administrative Law Judge

Footnote: 1

Neither party identified the regular, full-time professional employee applicant(s), although names of all applicants for the position appear on Board Exhibit II.

Footnote: 2

These are referred to as the "second set" of criteria, to distinguish them from similar criteria applied when no current employees apply for a position.

Footnote: 3

As Grievant did not challenge the assessment of the seven criteria, no discussion of the criteria, or Respondent's assessment of the criteria, is warranted.

Footnote: 4

Although Johnson involved only applicants who were on the preferred recall list, its rationale applies here. If individual qualifications are irrelevant when comparing persons on the preferred recall list, they are irrelevant when comparing those on preferred recall with those not previously employed.

Footnote: 5

It is assumed that the current employee applicants either withdrew or declined the position, or that Grievant was more qualified or was otherwise entitled to the position over any current employee applicants. This assumption is buttressed by the fact that Respondent did not argue that a current employee might be entitled to the position over Grievant, and by the fact that none of the named individuals on Board Exhibit II, which identifies all applicants, filed a grievance. By not grieving, or intervening in this grievance, any current employees effectively waived their right to contest the filling of this position.