KEITH MEADOWS and JOHN DEMPSEY,

Grievants,

v.

DOCKET NO. 97-22-451/464

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

and

TIM JAMES,

Intervenor.

D E C I S I O N

Grievants Keith Meadows and John Dempsey independently filed grievances on August 18, 1996 and August 22, 1996, respectively, protesting their non-selection as Music Teacher/Band Director at Guyan Valley High School . Although not clear from the record, it appears that the parties requested the two grievances be consolidated at the lower levels, which request was denied. Subsequently, the level two grievance evaluator agreed to consider the evidence presented in both cases in reaching his two separate decisions in the Meadows and Dempsey grievances.

Both grievances were heard at level two on September 17, 1997, and decisions were issued denying the grievances on October 8, 1997. Grievant Meadows appealed to level four on October 15, 1997, and a hearing was conducted by Administrative Law JudgeJennifer Meeks on November 20, 1997. Grievant Dempsey appealed to level four on October 24, 1997, and his case was submitted on the record. Thereafter, by Order dated January 9, 1998, the parties agreed to consolidate these two grievances for decision under the above style. The record in this case includes the level two

transcripts, exhibits, and decisions of the two grievances, a transcript of the deposition of Charles McCann, and the parties' proposed findings of fact and conclusions of law, which were submitted on or about February 23, 1998. (See footnote 1)

SUMMARY OF EVIDENCE

Grievant Meadows Exhibits

Ex. 1-3 -

Grievance documents.

Ex. 4 -

Lincoln County Schools Vacancy Bulletin, July 8, 1997 (same as Dempsey Ex. 4.).

Ex. 5 -

Hiring Criteria Matrix (same as Dempsey Ex. 5.)

Grievant Dempsey's Exhibits

Ex. 1 -

Copy of pertinent provisions of W. Va. Code § 18A-4-7a.

Ex. 2 -

March 4, 1996 letter to John Dempsey from Superintendent Dallas Kelley

Ex. 3 -

March 27, 1996 letter to John Dempsey from Superintendent Dallas Kelley

Ex. 4 -

Lincoln County Schools Vacancy Bulletin, dated July 8, 1997

Ex. 5 -

Hiring Criteria Matrix

Ex. 6 -

Level One Grievance Form

Ex. 7 -

Grogg v. Kanawha County Bd. of Educ., Docket No. 96-20-521 (Apr. 18, 1997). (See footnote 2)

Testimony

Grievants testified in their own behalf and presented the testimony of Charles McCann, Shelia Stapleton, Tim James, and Donna Martin. Intervenor James testified in his own behalf.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. The Board posted a position for Music Teacher/Band Director at Guyan Valley High School on July 8, 1997. G. Ex. 4.

2. Grievant Meadows applied for the vacancy. At the time he applied, Grievant Meadows was a regularly-employed professional with the Board, but was off on worker's compensation due to an injury received on the job.

3. Grievant John Dempsey also applied for the vacancy. At the time he applied, Grievant Dempsey was on the preferred recall list, having been reduced in force in the Spring of 1996.

4. Intervenor Tim James also applied for the vacancy, and was the successful applicant. At the time of the selection, Intervenor James was employed by the Cabell County Board of Education, and was, therefore, a new hire with the Lincoln County Board of Education ("Board").

5. The Board made its selection of Intervenor James on or about August 4, 1997.

6. The Board utilized a matrix of the applicants for the subject position in making its decision. The matrix showed that Grievant Meadows and Intervenor James were tied with 5 points for the position, and Grievant Dempsey was the next in line with 4 points. G. Ex. 5.

7. Charles McCann, Director of Personnel for the Board, asked Principal Eddie Smith of Guyan Valley High School, to interview the applicants and make a recommendation to him. Principal Williams recommended Intervenor James.

ISSUE

The issue is whether Grievants have proven by a preponderance of the evidence that either was entitled to be selected to the Music Teacher/Band Director position at Guyan Valley High School.

DISCUSSION

It is necessary to address the participants in this grievance one at a time with respect to each other. Since it is easy to dispense with Intervenor James at the outset, I will begin with Grievant Dempsey's argument that Intervenor James should never have even been considered for the position because Grievant Dempsey was on the preferred recall list at the time of the selection. The outcome of this particular issue is determined by pertinent provisions of W. Va. Code § 18A-4-7a, and this Grievance Board's prior decisions in Owensby v. Mercer County Bd. of Educ., Docket No. 97-27-131 (Aug. 26, 1997) and Grogg v. Kanawha County Bd. of Educ., Docket No. 96-20-521 (Apr. 18, 1997).

W. Va. Code § 18A-4-7a provides, in pertinent part:

> 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. . . .

As this Grievance Board held in Grogg, supra, "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 for a vacant position over new employees." (Emphasis added). This holding was reiterated in Owensby, supra. It is clear, then, that it was improper for the Board to hire Intervenor James, a new employee, when it had a certified, qualified employee, Grievant Dempsey, on the preferred recall list. Consequently, Intervenor James should never have been considered for the position as long as Grievant Dempsey was a candidate. Thus, Intervenor James simply could not have been selected for the position under the current law.

However, as between Grievants Dempsey and Meadows, "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 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 [second set of] criteria set forth for selection in Code § 18A-4-7a to select the most qualified candidate for the position." Grogg, supra. Thus, the comparison shifts to Grievant Dempsey versus Grievant Meadows, utilizing the second set of selection criteria in Code § 18A-4-7a.

The Board conducted an evaluation of all candidates for the subject position and created a hiring criteria matrix ranking the applicants. G. Ex. 5. The matrix indicates that of the four candidates for the position, Grievant Meadows and Intervenor James were tied with 5 possible points, Grievant Dempsey received 4 points, and the other candidate received 2. Taking Intervenor James out of the equation leaves Grievant Meadows with 5 points and Grievant Dempsey with 4 points. Grievant Dempsey does not challenge the method utilized to rank the applicants, nor does he find any flaws in the process. Indeed, Grievant Dempsey acknowledges that Grievant Meadows was more qualified than he for the subject position. Thus, Grievant Dempsey has not proven that he would have been the successful candidate but for Intervenor James. Rather, it is clear that Grievant Meadows would have been the successful candidate had Intervenor James not been considered for the position. It is also clear that Grievant Meadows would have accepted the position had it been offered to him. (See footnote 3)

Intervenor James has requested that this Grievance Board provide guidance to the Board on how to address his future employment situation. It is extremely unfortunate for Intervenor James that the Board caused him to leave a long-time teaching position with Cabell County, when it was well aware his selection would probably be challenged, successfully, through the grievance process. Assistant Superintendent Donna Martin testified she was aware of the law prohibiting the hiring of a new professional employee if there was a qualified candidate on the preferred recall list. However, Ms. Martin acknowledged she failed to inform Mr. McCann, the Director of Personnel, or the Superintendent, of this information when consideration was being given to IntervenorJames. Mr. James has provided some authority that the appropriate relief in a case like this is to place the injured party back into his original position. See Adkins v. Logan County Bd. of Educ., 97-23-216 (Sept. 28, 1997); Belcher v. Mingo County Bd. of Educ., Docket No. 95-29-024 (July 26, 1995). I do not

disagree with Mr. James, however, the authority he cites is limited to employment decisions made within one county. Clearly, if Mr. James had been an employee of Lincoln County before he took this position, the Board would have the authority to place him back in his original position. In this instance, of course, the Lincoln County Board of Education has no authority to place Mr. James back in his position with the Cabell County Board of Education, and because Cabell County is not a party to this proceeding, I am without that authority, also.

However, I can and do strongly suggest that Lincoln County place Mr. James on transfer notice within the statutory time frame and do everything in its power to find Mr. James an alternate position in Lincoln County, if he wants to remain employed there.

CONCLUSIONS OF LAW

1. 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 for a vacant position over new employees. Grogg v. Kanawha County Bd. of Educ., Docket No. 96-20-521 (Apr. 18, 1997).

2. 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 are not qualified, or arenot 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 [second] criteria set forth for selection in Code § 18A-4-7a to select the most qualified candidate for the position. Grogg, supra.

3. As between Grievants Dempsey and Meadows, the matrix used to evaluate the candidates under the second set of criteria in Code § 18A-4-7a was neither flawed, nor arbitrary and capricious.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART.** It was unlawful for the Board to consider Intervenor James for the subject position as long as Grievant Dempsey, on the preferred recall list, was a candidate for the position. Between Grievants Dempsey and Meadows, Grievant Meadows was the most qualified candidate for the position. Because it is now so late in the school year, I do not wish to disrupt the students at this late date. Therefore, the Board is hereby **ORDERED** to instate Grievant Meadows into the subject position at the beginning of the next school

year, but to pay him any back pay he is entitled to as soon as practicable.

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

MARY JO SWARTZ

Administrative Law Judge

Dated: March 17, 1998

Footnote: 1 *This case was reassigned to the undersigned for administrative reasons.*

Footnote: 2 *Exhibits will reference the Dempsey exhibits, as the Meadows exhibits are duplicates.*

Footnote: 3 *None of the parties raised the issue of whether Grievant Meadows was "qualified" for the vacant position. There was evidence presented that Grievant Meadows was off on Workers' Compensation and would not be available to enter into the position at the start of the school year. Indeed, at the time of his level four hearing on November 20, 1997, Grievant Meadows still had not returned to work. This Grievance Board has previously held that an employee off on Workers' Compensation who applies for a vacant position, but cannot enter into the duties of that position, is not "qualified" for the position. See Harless v. Boone County Bd. of Educ., Docket No. 96- 03-186 (Sept. 26, 1996). Cf., Stewart v. Wyoming County Bd. of Educ., Docket No. 95- 55-381 (May 30, 1996), rev'd, Circuit Court of Kanawha County, Civil Action No. 96-AA- 95 (Jan. 30, 1997).*