DALE LEWIS,

Grievant,

v. **Docket No. 05-30-434**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

NELSON STATLER,

Intervenor.

DECISION

Dale Lewis ("Grievant") initiated this proceeding on October 31, 2005, alleging he should have been selected over Nelson Statler, Intervenor, for a Plumber II/Heavy Equipment Operator/Maintenance position. After denials at all lower levels, Grievant appealed to level four on December 2, 2005. A hearing was conducted in Westover, West Virginia, on February 15, 2006. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association; Respondent was represented by counsel, Jason S. Long; and Intervenor was represented by Paul Croston. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 6, 2006.

The following material facts have been proven by a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator since 2003. 2. On August 9, 2005, Respondent posted a vacancy for Plumber II/Heavy Equipment Operator/General Maintenance. The posting stated that the successful applicant must pass the competency test for

each of the three classifications, along with possessing a Class “A” CDL (commercial driver's license). The “employment effective date” was listed as October 17, 2005.

3. Grievant, Intervenor, and Ron Sigley applied for the position during the posting period. At that time, none of them had passed all of the applicable competency tests or held all the pertinent classification titles. (See footnote 1) Only Mr. Sigley already possessed a Class A CDL.

4. For reasons unstated in the record, the position was not filled on October 17, 2005.

5. On October 19, 2005, Grievant spoke with Rick Williams, Assistant Manager of Human Resources, and inquired when the applicants would need to fulfill all the requirements for the position. Mr. Williams stated that all requirements must be met by October 24, 2005.

6. All three applicants passed the Plumber test on September 29, 2005, and the Heavy Equipment Operator test on October 22, 2005. Grievant also obtained his CDL on October 22, 2005. Grievant and Mr. Sigley had met all requirements for the position as of October 22, 2005. 7. Although a Board meeting was scheduled for October 25, 2005, the meeting was cancelled because of inclement weather. (See footnote 2)

8. On October 29, 2005, Intervenor obtained his Class A CDL, fulfilling all requirements for the position.

9. Of the three applicants, Intervenor was most senior, Grievant was next, and Mr. Sigley was third.

10. At a Board meeting on November 1, 2005, Intervenor was determined to be the most senior, qualified applicant, and he was hired to fill the position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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.

Grievant contends that in reliance upon Mr. Williams' representations, he “rushed” to make sure that he had fulfilled all requirements of the position by October 24, 2005. As the most senior applicant who possessed the necessary qualifications at that time, he believes he should have been placed in

the position. Grievant argues that Respondent was obligated to fill the position in accordance with the "established deadline," as stated by Mr. Williams, and that Intervenor was not qualified as of that date. Pursuant to the requirements of West Virginia Code section 18A-4-8b(g), job vacancies are to be posted for at least five working days, and such vacancies "shall be filled within twenty working days from the posting date." (See footnote 3) In addition, Code section 18A-4- 8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." This provision has recently been interpreted by this Grievance Board as follows:

> West Virginia Code § 18A-4-8b, requires a county board of education to make hiring decisions for service personnel based on 'seniority, qualifications, and evaluation of past service,' where 'qualifications' means the service employee 'holds a classification title in his category of employment.' The most senior, qualified employee with acceptable evaluations must be given the first opportunity for promotion and filling vacancies, unless the board shows valid cause why the employee is not considered.

Mooney v. Kanawha County Bd. of Educ., Docket No. 05-20-342 (Jan. 6, 2006). Thus, the only remaining question in the instant case is whether or not Respondent was obligated to fill the position by October 24, 2005.

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, Dillon v.Wyoming County Bd. of Educ., 177 W. Va. 145, 351, S.E. 2d 58 (1986). To prevail on this non-selection grievance, Grievant would have to establish, by a preponderance, that Respondent's selection was an unreasonable exercise of discretion, was not in the best interests of the schools, or was arbitrary and capricious. Bays v. Cabell County Bd. of Educ., Docket No. 05-06-143 (June 30, 2005).

Since Mr. Williams did not testify, it is unknown why he specifically stated to Grievant that October 24 would be the deadline to complete all requirements of the position. One could assume that he believed a board meeting would occur the following day, but evidence indicated that, even if it had, this particular item was not on the agenda. Nevertheless, school employees may only become employed through official board action, which did not occur in this instance until November 1, 2005. As of that date, Intervenor was the most senior applicant who had completed all necessary

requirements, and, pursuant to West Virginia Code § 18A-4-8b and Mooney, supra, Respondent was obligated to hire him. The undersigned does not find this to have been an arbitrary and capricious act, given the circumstances of this case. There is no evidence of any duplicity or manipulation on Respondent's part to intentionally deprive Grievant or Mr. Sigley of the position in question; events just unfolded in a manner which obligated the Board to hire the most senior, qualified applicant when the decision was ripe to be made.

The following conclusions of law support this Decision.

Conclusions of Law

1. Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351, S.E. 2d 58 (1986).

3. "West Virginia Code § 18A-4-8b, requires a county board of education to make hiring decisions for service personnel based on 'seniority, qualifications, and evaluation of past service,' where 'qualifications' means the service employee 'holds a classification title in his category of employment.' The most senior, qualified employee with acceptable evaluations must be given the first opportunity for promotion and filling vacancies, unless the board shows valid cause why the employee is not considered." Mooney v. Kanawha County Bd. of Educ., Docket No. 05-20-342 (Jan. 6, 2006).

4. Grievant has failed to prove by a preponderance of the evidence that Respondent acted improperly when it selected Intervenor for the position at issue.

Accordingly, this grievance is **DENIED.**

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

of Monongalia 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 Judgesis 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: March 15, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant testified he had passed the General Maintenance test "a couple of years ago," and Mr. Sigley passed that test on September 8, 2005. It is unclear from the record when Intervenor took and passed the General Maintenance test, but he apparently did so prior to November 1, 2005.

Footnote: 2

There was also testimony that filling this position was not on the October 25 agenda, but this was not verified or explained.

Footnote: 3

Clearly, Respondent never intended to comply with the 20-day requirement, as the posting itself stated that the position would not take effect until October 17, and the selection decision was not made until late October/early November. However, the Grievance Board has upheld a board of education's discretion to fill a position after the 20- day period, especially when none of the applicants have had the opportunity to take applicable competency tests during that time period. See Nutter v. Harrison County Bd. of Educ., Docket No. 98-17-516 (June 25, 1999).