NANCY HLEBICZKI,

Grievant,

v. **DOCKET NO. 97-35-037**

OHIO COUNTY BOARD OF EDUCATION,

Respondent,

and

LISA NICKERSON,

Intervenor.

DECISION

Grievant, Nancy Hlebiczki, initiated this proceeding pursuant to the provisions of W.Va. Code §§ 18-29-1, et seq. She alleges that she should have been selected for a bus operator position with the Ohio County Board of Education ("OCBOE"), rather than the successful candidate, Lisa Nickerson, the Intervenor in this matter. Grievant seeks instatement to the position with retroactive wages and benefits to November 18, 1996.

Relief could not be provided by Grievant's immediate supervisor. A level two hearing was conducted on January 10, 1997, followed by a written decision denying the grievance on January 15, 1997. Consideration at level three was waived pursuant to the provisions of W. Va. Code § 18-29-4(c). The parties agreed to submit the matter upon the existing record at level four, accompanied by written submissions received by April 21, 1997. This grievance was reassigned to the undersigned for administrative reasons on August 21, 1997.

The following findings of fact are made from a preponderance of the evidence submitted.

Findings of Fact

1. On November 1, 1996, Grievant was regularly employed as an aide by OCBOE. She had been so employed since the beginning of the 1993-1994 school year.

2. Prior to 1993, Grievant had been employed by OCBOE as a substitute aide.

3. As of November 1, 1996, Grievant had completed all requirements and obtained all licenses and/or certifications necessary to be qualified as a bus operator, including the required competency test.

4. Intervenor, Lisa Nickerson, was regularly employed as a bus operator on April 23, 1996, for the remainder of that school year. She was then placed on the preferred recall list as a bus operator.

5. Prior to being regularly employed on April 23, 1996, Intervenor had worked as a substitute bus operator since January 23, 1990.

6. On November 1, 1996, OCBOE posted an opening for a full-time bus operator for the remainder of the 1996-1997 school year.

7. Both Grievant and Intervenor applied for the posted bus operator position, and Intervenor was selected, due to her preferred recall status.

Discussion

Grievant asserts that Respondent has improperly applied pertinent provisions of W.Va. Code § 18A-4-8b in its selection process, which provides as follows:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
>
> Qualifications shall mean that the applicant holds a classification title in hiscategory of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:
>
> (1) Regularly employed service personnel;
>
> (2) Service personnel whose employment has been discontinued in accordance with this section;

(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

Also applicable to the instant situation are the following portions of the same Code section:

> All employees 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 and shall be recalled to employment by the county board on the basis of seniority.
>
> Employees placed upon the preferred list shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to any lateral position for which the employee is qualified or to a lateral area for which an employee has certification and/or licensure.
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> * * *
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> No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

Grievant asserts that, as a regularly employed individual in a service personnel position, she had preference over Intervenor, who was on the preferred recall list. She further argues that her seniority, qualifications, and past service should not be compared to Intervenor's, because, although Code § 18A-4-8b states that all positions are to be filled by measuring these three criteria, the criteriaare to be applied to all applicants in each of the descending categories of regularly employed service personnel, those whose employment has been discontinued (preferred recall), etc. Therefore, regularly employed personnel would only be compared to other regularly employed service personnel as to seniority, qualifications, and past service.

Respondent defends its selection of Intervenor solely on the basis of her preferred recall status. It argues that the latter portion of the section cited above requires that employees on preferred recall be given preference for all vacancies, and only after this is accomplished is the order of preference for

consideration to be followed. Respondent further asserts that any other interpretation of the statute would make preferred recall status meaningless.

As both parties have noted, this Grievance Board's decisions are quite clear in holding that Code § 18A-4-8b gives hiring preference to school service personnel holding regular employment status over those who have been placed on preferred recall. Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). Furthermore, these decisions are also clear in concluding that the second group of applicants, i.e. those " whose employment has been discontinued in accordance with this section," refers specifically to employees on the preferred recall list. See Messer, supra; Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987).

The interpretation of the relevant provisions urged by Respondent is inconsistent with the plain meaning of the statute and this Board's prior decisions. Respondent has attempted to distinguish the cases cited above on the basis that the regularly employed service personnel who were the successful applicants either were currently working in the classification of the vacancy orhad previously held such classification. Because Grievant has not actually worked as a bus operator, although undisputedly qualified, OCBOE argues that an employee on preferred recall status in the bus operator classification has hiring preference over her. However, close inspection of the ALJ's analysis in Harrison, supra, reveals that the classifications possessed by the various employees was not the determinative factor, but rather their respective statuses as regular employees or employees on preferred recall, the former having clear preference under Code § 18A-4-8b.

The undersigned agrees with Grievant's interpretation of the statute. Although it clearly states that vacancies are to be filled based upon the three criteria of seniority, qualifications, and evaluations, it also states quite unambiguously that applicants are to be considered in a specific order. Therefore, applicants who are on the preferred recall list are not even considered until all regularly employed applicants have been fully considered and the three criteria applied to them. In the instant case, Grievant is unquestionably a regularly employed individual. Her seniority has not been called into question, nor is it disputed that she has received satisfactory evaluations in the past. As to the third criterion, qualifications, Grievant has met all requirements to be qualified as a bus operator. It is irrelevant that she has not actually worked in that classification, and does not technically "hold" that

classification title, because she has undisputedly met the requirements. However, if another regularly employed individual who already held the title of bus operator had applied for this position, pursuant to the first two sentences of the second paragraph of W. Va. Code § 18A-4-8b, that person would have been given first opportunity over Grievant. In this case, the successful applicant was on preferred recall status, and, therefore, not entitled to hiring preference over Grievant just because she "held" the classification title of bus operator.

Respondent has also made contentions regarding the portion of Code § 18A-4-8b whichstates that no vacancies may be filled until all preferred recall employees have been properly notified. If this provision were meant, as Respondent argues, to give preferred recall employees first preference, instead of second preference after regularly employed personnel, there would be no purpose to the provision setting forth the hiring order of preference. Rather, the logical reason for this notification provision is to ensure that all employees on preferred recall receive proper notice of vacancies. Code § 18A-4-8b provides that county boards must notify all employees on preferred recall of all vacancies which exist, by certified mail, whether they may be qualified to fill the vacancy or not. These provisions are merely safeguards to ensure that preferred recall employees do not miss out on opportunities to fill vacancies for which they may be qualified. It does not give them hiring preference over regularly employed personnel.

Finally, Respondent has asserted that the Supreme Court of Appeals' opinion in the case of Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331 (W. Va. 1993), is supportive of its position, citing the following portion of the decision:

> Thus [§ 18A-4-8b] requires that except for a preference given to personnel on the preferred recall list, decisions of a county board of education affecting service personnel's promotion and filling of vacant service personnel positions must be based on seniority, qualifications and evaluation of past service and the board must consider first the applicants who are regularly employed service personnel.

The language quoted is undoubtedly ambiguous and could be interpreted to support either interpretation of the statute asserted by the parties in this case. However, as discussed above, Respondent's assertion that this provides first preference to preferred recall employees over all others is inconsistent with the plain language of the statute. Surely the Court did not mean to say that the order of preference set forth in the statute should be disregarded in favor of preferred recall employees, which would ignore their status as the second group of employees to be considered

inhiring situations. This Grievance Board has previously recognized that the Coffman decision supports the proposition that boards of education are required to hire regularly employed personnel before considering those on the preferred recall list. Messer, supra.

Because Grievant was a regularly employed individual having first preference for the bus operator position under the provisions of Code § 18A-4-8b, her seniority, qualifications, and past service need not be compared to Intervenor's. As a regular employee who applied for the position whose qualifications are not disputed, Grievant was entitled to the position instead of Intervenor.

In accordance with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with regularly employed personnel receiving preference over service personnel who have been awarded preferred recall status as a result of their employment being discontinued. Harrison v. Logan County Bd. of Educ., Docket No. 95-23- 459 (May 31, 1996); Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

3. In each category of preference set forth in W. Va. Code § 18A-4-8b, the criteria of seniority, qualifications, and evaluation of past service are to applied to employees in that category to determine the appropriate candidate for a position. See Cramer/Castle v. Preston County Bd. ofEduc., Docket No. 95-39-400 (Mar. 27, 1996).

4. Grievant was a regularly employed service employee and was qualified to serve as a bus operator on November 1, 1996, giving her hiring preference for the position over employees on preferred recall status.

Accordingly, this grievance is **GRANTED**, and OCBOE is **Ordered** to instate Grievant in the bus operator's position with back pay, benefits and seniority retroactive to November 18, 1996.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred, 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.

DATE: September 30, 1997 _____ **V.**

DENISE MANNING

Administrative Law Judge