**JUDITH S. BYRD,**

**Grievant,**

**v. DOCKET NO. 96-06-316**

**CABELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

**D E C I S I O N**

**Judith S. Byrd (Grievant) submitted this grievance pursuant to W. Va. Code §§ 18- 29-1, et seq., alleging that Respondent Cabell County Board of Education (CCBE) violated W. Va. Code §§ 18A-4-8b, and 18A-29-2(a), (m), and (o) in regard to her reduction-in-force (RIF), and the subsequent posting of a 261-day secretarial position. A Level II hearing was conducted on June 28, 1996. Following an adverse Level II decision issued by CCBE's Superintendent, Richard Jefferson, on July 8, 1996, Grievant appealed to Level III on July 15, 1996, and CCBE waived participation in the grievance as permitted by W. Va. Code § 18-29-4(c). Grievant timely appealed to Level IV on July 18, 1996, and a Level IV hearing was held at CCBE's Vocational-Technical Center in Huntington, West Virginia, on September 24, 1996. (See footnote 1) The parties subsequently took the deposition of an additionalwitness, Janice Tucker, and this matter became mature for decision upon receipt of the transcript of that deposition on December 2, 1996.**

**The facts which are dispositive of this grievance are set forth in the following Findings of Fact derived from the extensive record developed through Level IV. (See footnote 2)**

**FINDINGS OF FACT**

**1. Grievant is employed by the Cabell County Board of Education (CCBE) as a regular Secretary III, a school service personnel position.**

**2. In May 1987, Grievant was competitively selected to fill a 261-day Secretary III vacancy as the Financial Aid Secretary in CCBE's Vocational-Technical Center.**

3. In February 1996, CCBE determined that it would be necessary to reduce the number of service personnel as its staffing level exceeded the state funding formula. In particular, CCBE proposed eliminating two of seven secretarial positions at CCBE's Vocational-Technical Center. As a result, in accordance with the required statutory procedures, CCBE notified Grievant of its intention to eliminate her position and decrease her contract term from 261 days to 220 days.

4. A hearing regarding Grievant's proposed transfer was conducted on March 21, 1996. Thereafter, on March 29, 1996, CCBE voted to place Grievant on the transfer list and reduce her contract term to 220 days. R Ex 1 at L II.

5. Grievant subsequently applied for and received a 235-day Secretary III position as the Evening Secretary at CCBE's Vocational-Technical Center. This vacancy resulted when another Secretary III, Janet Day, elected to retire.

6. Grievant and another employee, JoAnne Drown, were the least senior of four 261-day Secretaries whose positions were eliminated by CCBE.

7. For the 1996-97 school year, various duties which Grievant previously performed while serving as Financial Aid Secretary were divided among the remaining secretaries at the Vocational-Technical Center. In addition, CCBE contracted with a private consultant, Diane Clothier, to assist with financial aid matters one day per week. Her compensation is not to exceed $10,000 per year.

8. When David Groves, Principal of CCBE's Vocational-Technical Center, was first informed of CCBE's plan to eliminate two secretarial positions in his organization, he opposed the reductions, contending that the remaining secretaries would be unable to keep up with the workload.

9. On March 29, 1996, CCBE eliminated Virginia Berkeley's position as a Secretary in CCBE's Maintenance Department for the 1996-97 school year. See R Ex 1 at L II.

10. Because of her seniority, Ms. Berkeley was eligible to displace Mr. Groves' Secretary, Janice Tucker. Prior to the end of the 1995-96 school year, Ms. Berkeley visited the Vocational-Technical Center to become familiar with the duties assigned to Ms. Tucker. Ms. Berkeley did not appear capable of performing the full range of duties then assigned to Ms. Tucker. Tucker Deposition at 5-6.

11. On June 7, 1996, CCBE posted a new 261-day secretarial position for an Executive Secretary assigned to the Vocational-Technical Center. This position was for the 1996-97 school year only. The duties of this new position are completely different from the duties performed by Grievant as Financial Aid Secretary.

12. Grievant did not apply for the position described in Finding of Fact Number 11, above.

13. Virginia Berkeley applied for and received the new secretarial position described in Finding of Fact Number 11, above.

14. Virginia Berkeley has greater seniority than Grievant in the Secretary classification of employment.

15. CCBE conducted a bona fide reorganization of job duties and assignments at CCBE's Vocational-Technical Center, based primarily on financial limitations beyond CCBE's control.

## DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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 complains that CCBE did not properly eliminate her position as Financial Aid Secretary because her duties were subsequently divided among the remaining secretaries and an outside consultant. In addition, Grievant contends that CCBE engaged in discrimination because other 261-day Secretaries who received transfer notices indicating that their positions were being eliminated and contract terms reduced did not actually experience these adverse changes. Finally, Grievant alleges that she was the victim of favoritism because a 261-day position was created expressly for Virginia Berkeley.

W. Va. Code § 18-29-2(m) defines "discrimination" to mean "any differences in the treatment of employees unless such differences are related to the actual job responsibili ties of the employees or agreed to in writing by the employees." Similarly, § 18-29-2(o) defines "favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a

grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

In this particular case, Grievant failed to establish by preponderant evidence that any of the favorable treatment received by other 261-day secretaries whose positions were not eliminated or employment terms reduced resulted from any consideration other than seniority. Indeed, all employees Grievant points to as receiving more favorable treatment, including Virginia Berkeley, had greater seniority. (See footnote 3) Thus, Grievant failed to establish of a prima facie case of discrimination or favoritism because the differences in treatment were justified by seniority considerations. (See footnote 4) See McFarland, supra.

Grievant contended her position as Financial Aid Secretary was not eliminated due to lack of need. CCBE agrees that its actions were primarily motivated by financial considerations resulting from reductions in the state aid formula. Certainly, this would constitute a matter beyond CCBE's control, requiring appropriate action to avoid a deficit. See Dial v. McDowell

County Bd. of Educ., Docket No. 96-33-259 (Apr. 30, 1997). Further, CCBE concedes that the primary consideration in eliminating positions was seniority of secretaries, not the specific duties the employee was performing. Thus, the duties Grievant performed in her previous position as Financial Aid Secretary must still be accomplished.

W. Va. Code § 18A-4-8 authorizes county boards of education to conduct a reduction in force whenever the board is "required to reduce the number of employees in a particular job classification." In this regard, a board of education has discretion to determine the number of positions it will fill, and the employment terms of any such positions. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994); Drown v. Cabell County Bd. of Educ., Docket No. 96-06-323 (Feb. 28, 1997). See Dial, supra. Moreover, a board of education must necessarily consider seniority when making reductions permitted under W. Va. Code § 18A-4-8b. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 446 S.E.2d 510 (1994); Bell v. Kanawha County Bd. of Educ., Docket No. 96-41-169 (Dec. 31, 1996).

In this matter, CCBE followed all applicable statutory procedures, notifying Grievant of her proposed transfer, affording her a hearing on that issue, and duly posting for competitive bid the subsequent 261-day position now held by Ms. Berkeley. In addition, CCBE properly reassigned the financial aid duties to other employees, obtaining the assistance of a part-time contract consultant to assist with matters requiring additional training and expertise not normally possessed by a Secretary. A preponder ance of the evidence indicates that these changes were made in a bona fide effort to reduce costs while continuing to accomplish the numerous duties assigned to the Vocational-Technical Center. Indeed, there was no credible evidence that Grievant's former duties were not being substantially accomplished. See Graham v. Wyoming County Bd. of Educ., Docket No. 55-88-141 (June 28, 1989).

In these circumstances, CCBE established that there was a lack of need for these duties to be performed by a single, full-time service employee, and there was a cost- effective alternative approach to accomplishing this work involving a reorganization of positions and reassignment of workload. (See footnote 5) Thus, Grievant failed to demonstrate any legal entitlement to remain in her former position as Financial Aid Secretary.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

## CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. Discrimination is defined in W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

3. Favoritism is defined in W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§ 18-29-2(m) and (o), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine,

450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

6. When a county board of education seeks to reduce the contract term of a school service employee, it must comply with the procedures set forth in W. Va. Code § 18A-2-6. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994); Bd. of Educ. v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982); Drown v. Cabell County Bd. of Educ., Docket No. 96-06-323 (Feb. 28, 1997).

7. A county board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code § 18A-4-8 are met. Lucion, supra; Drown, supra.

8. When a county board of education elects to reduce contract terms for service employees, it must take into account the seniority of the employees to be reduced. Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 446 S.E.2d 510 (1994); Drown, supra. See Newhouse v. Marion County Bd. of Educ., Docket No. 93-24-212 (Aug. 30, 1994).

9. Grievant failed to demonstrate by a preponderance of the evidence that CCBE engaged in any form of unlawful discrimination or favoritism prohibited under W. Va. Code § 18-29-2, or otherwise violated any law, statute, regulation or policy in regard to the reduction in her contract term and transfer to another service personnel position. See Drown, supra; McFarland, supra.

Accordingly, this grievance is DENIED.

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

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: May 23, 1997**

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***Footnote: 1***

***At that hearing, the parties agreed to consolidate the related case of Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-324, for purposes of developing the record at Level IV, but requested that separate decisions be rendered in each matter.***

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***Footnote: 2****That record includes a transcript of the transfer hearing conducted by CCBE on March 21, 1996, in regard to the proposed transfers of Grievant and JoAnne Drown, the Level II hearing transcripts from this matter and a related grievance discussed in F.N.1, supra, the testimony and evidence presented at Level IV, and the deposition of Janice Tucker.*

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***Footnote: 3****The newly-created 261-day secretarial position primarily resulted from concerns that there would be a period of adjustment during the first year the Vocational-Technical Center would have to operate with only five secretaries rather than seven. While Mr. Groves had no desire to see Ms. Berkeley displace his Secretary, Janice Tucker, he similarly opposed eliminating Grievant's position. In any event, the posted position could have been claimed by any Secretary with greater seniority than Ms. Berkeley. As Ms. Berkeley's position was being eliminated, she was the most likely person to bid on the position.*

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***Footnote: 4****Even if Grievant had established that CCBE engaged in favoritism in regard to creating a 261-day position for the 1996-97 school year at the Vocational-Technical Center for Ms. Berkeley as alleged, this would not entitle Grievant to the remedy she seeks: reinstatement to her former 261-day position as Financial Aid Secretary. Grievant was similarly situated to Ms. Berkeley, not Ms. Tucker. Ms. Tucker was not one of the two least senior employees at the Vocational-Technical Center in the Secretary classification and her position was not being eliminated. Ms. Berkeley, whose position was eliminated, did not benefit from any purported favoritism to the extent of retaining the same position and job duties she held during the 1995-96 school year, the remedy which Grievant requests.*

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***Footnote: 5****Cf. State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E.2d 176 (1996) (full-time teachers were subject to RIF while their duties were assigned to hourly employees); Rogers v. Berkeley County Bd. of Educ., Docket No. 96- 02-329 (Apr. 30, 1997) (service employee's position was eliminated and then re- established as an administrative position no longer subject to overtime restrictions). In this matter, CCBE's elimination of positions and realignment of its secretarial staff was conducted in response to a reduction in state funding. This is a proper basis for eliminating positions when, as here, the appropriate procedures are followed. See Dial v. McDowell County Bd. of Educ., Docket No. 96-33-259 (Apr. 30, 1997).*