MARSHALL GROGG,

Grievant,

v. Docket No. 98-20-205

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Marshall Grogg, filed this grievance over the Kanawha County Board of Education's ("KCBOE") failure to grant him priority status for a teaching position at the new Riverside High School ("RHS"), pursuant to W. Va. Code § 18A-4-8f. This grievance was waived at Level I, denied at Level II, and by-passed Level III. Grievant appealed to Level IV, and a hearing was held on August 13, 1998. This case became mature for decision on September 3, 1998, upon receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact. These facts are based on the Stipulations agreed to by the parties both at Level II and Level IV, as well as the evidence deduced from the record.

Findings of Fact

1. Grievant is a teacher with seventeen years of seniority with KCBOE.

2. At the beginning of the 1997-1998 school year, Grievant was assigned as a Physical Education teacher at Cedar Grove Community School.

3. In September 1997, a position for a Diversified Cooperative Training ("DCT") teacher was posted for East Bank High School ("EBHS"). This posting contained the language from W. Va. Code § 18A-4-7a, explaining that any teacher hired five days after a school term started could not transfer to the position, if selected, until the following semester.

4. Grievant applied for the DCT position and was notified on September 19, 1997, by the

EBHS principal that he had been selected to fill the position.

5. Although Grievant hoped he would be allowed to transfer sooner through a special exception of the school board, his transfer was not approved until the December 18, 1997 board meeting with an effective date of January 21, 1998.

6. Grievant started his employment at EBHS on January 21, 1998.

7. EBHS and Dupont High School are two of the schools scheduled to be consolidated into the new school, RHS, in August 1999. The ninth grade students from the surrounding junior high schools will also be included in the consolidation. Pursuant to W. Va. Code § 18A-4-8f, the county's teachers approved priority placement of the teachers from the schools to be closed and consolidated into RHS.

8. On January 8, 1998, a special posting of the positions for RHS was sent out with a closing date on January 23, 1998. The posting time for this listing was longer thanthe usual five days because of the length of the posting, and the fact that there was no need to fill the positions quickly.

9. Grievant applied for a physical education position at RHS as a result of this posting.

10. Pursuant to the consolidation of the schools and in response to questions, a memo was written to the Dupont Junior High School Faculty Senate on October 24, 1997, by then Superintendent Jorea Marple. This memo contained a proposed administrative regulation which had already been amended once after receiving employee input. This letter stated in pertinent part:

> **A__.O1 Only those classroom teachers (including itinerant classroom teachers) who provide instruction to the grade level to be removed for at least one half of their classes, at the time the new positions are posted, shall be given priority status as authorized by W. Va Code § 18A-4-8f.**
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> **Note: The priority posting is determined based upon the classes taught at the time of the posting.**

Joint Ex. 6, Level II.

11. The purpose of this memo was to clarify that only junior high teachers who spent at least half their time teaching ninth graders would be eligible for priority status.

12. This proposed administrative regulation was generated by the Superintendent's RHS Team (See footnote 2) composed of the Superintendent, her assistants, the treasurer, the heads of the principals' associations, and KCBOE's general counsel. This proposed administrative regulation was not an approved school board policy. 13. Grievant was informed during his interview for various RHS positions that his name was not on the list for priority status. He was directed to discuss the issue with Greg Bailey, KCBOE's attorney, for clarification.

14. Grievant contacted Mr. Bailey and was informed by letter dated March 9, 1998, that he did not have priority status in connection with his application for positions at RHS.

15. The determination that Grievant did not have priority status was based on the language of the October 24, 1997 letter. The key language was seen as "at the time of the posting" as opposed to "during" the time of the posting. KCBOE believed that because Grievant was not teaching at EBHS at the time the posting went up he could not receive priority.

16. If Grievant had received priority he would have been placed in one of the positions at RHS due to his seniority.

17. This grievance was filed on March 12, 1998. ___

Issue and Arguments

The issue in this grievance is whether Grievant should have received priority status. While this question would appear to be a simple one; however, it is not, given the lack of clarity in the statute, and other issues that will be discussed below.

Grievant argues KCBOE's action and interpretation of its proposed administrative regulation was arbitrary and capricious. Grievant also notes that W. Va. Code § 18A-4-7a states "[n]o opening shall be filled until after the five-day minimal posting period."(emphasis added). Respondent avers that its interpretation of its policy is entitled to deference and must stand unless it is arbitrary and capricious, and its interpretation of its proposed administrative regulation was reasonable.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving his 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.

W. Va. Code §18A-4-8f, provides, in pertinent part,

> **Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers, as defined in section one [§ 18A-1-1], article one of this chapter, who vote to do so, in accordance with procedures established herein, and who are employed by a county board of education, the board shall give priority to classroom teachers in any school or schools to be closed as a result of a consolidation or merger when filling positions in the new school created by the consolidation or newly created positions in existing schools as a result of the merger. . . . The teachers in the school or schools to be closed shall have priority in filling new positions in the new or merged schools for which the teachers are certified and meet the standards set forth in the job posting on the basis of seniority within the county: Provided, That a teacher shall only receive priority for filling a position at a school impacted by a merger, or consolidation with the position being created by the influx of students from a consolidated or merged school into the school receiving students from their closed school or grade level. The most senior teacher in the closed school or schools shall be placed first, the second most senior shall be placed next and so on until all the newly created positions are filled, or until all the teachers in the closed school or schools who wish to transfer into the newly created positions are placed: Provided, however, That if there are fewer new positions in the newly created school or merged school than there are classroom teachers in the school or schools to be closed, the teachers who were not placed in the new positions shall retain the same rights as all other teachers with regard to seniority, transfer and reduction in force: Provided further, That nothing herein shall beconstrued to grant any employee additional rights or protection with regard to reduction in force.**
>
> **For the purposes of this section only, a consolidation shall mean when one or more schools are closed, or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to a new school. For purposes of this section only, a merger shall mean when one or more schools are closed or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to another existing school.**

(emphasis added).

The above-cited Code Section gives priority status to teachers in the schools to be closed. Grievant was teaching in a school to be closed, and was doing so during the last days of the posting, but was not teaching at EBHS the first day of the posting. Unfortunately, this Code Section does not specify any time frames.

W. Va. Code § 18A-4-7a, as previously stated says,"[n]o opening shall be filled until after

the five-day minimal posting period." (emphasis added). Thus, there appears to be some conflict between KCBOE's interpretation of its proposed administrative regulation and W. Va. Code §§ 18A-4-7a and 18A-4-8f, in that teachers in the schools to be closed are to receive priority status, and successful applicants are not to be selected until after the entire posting period is completed. Additionally, it also appears that the proposed administrative regulation was written to clarify which junior high teachers would be eligible for priority status at RHS, and the phrase "at the time of the posting" refers to the classes taught the semester of the posting, i.e. first or second.

To further complicate this matter, while this Grievance Board has recognized that a school board's "interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of thelanguage, or is inherently unreasonable" this deference has not been extended to proposed administrative regulations. Dyer v. Lincoln County Bd. of Educ., Docket No. 95- 22-494 (June 26, 1996) See Watts v. W. Va. Dept. of Health & Human Resources, 465 S.E.2d 887 (W. Va. 1995); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996). See also W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

Additionally, although not directly on point, a prior grievance has stated W. Va. Code § 18A-4-8f "gives preference to those teachers 'affected by the school['s] closing.' [W. Va. Code § 18A-4-8f]. This Code Section does not limit the preference only to teachers at the exact time of the vote." Charles v. Mingo County Bd. of Educ., Docket No. 95-29-222 (Feb. 2, 1996).

After a review of all the applicable Code Sections, the Charles and Dyer Decisions, the question of whether a proposed administrative regulation deserves deference, and the directive from the West Virginia Supreme Court of Appeals in Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979), that "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee", the undersigned Administrative Law Judge finds Grievant is entitled to priority status because he was teaching at EBHS "during" the time of the posting. The interpretation given by KCBOE is arbitrary and capricious as it partially conflicted with the directives and apparent intent of W. Va. Code §§ 18A-4-7a and 18A-4-8f, and arbitrarily deprived Grievant of his statutory preference. Further, because the language

interpreted by KCBOE is only a proposed administrative regulation and not a policy, it is not entitled to the deference that would be granted to a board policy.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. A school board's "interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable", but this deference has not been extended to proposed administrative regulations. Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 26, 1996) See Watts v. W. Va. Dept. of Health & Human Resources, 465 S.E.2d 887 (W. Va. 1995); Jones v. Bd. of Trustees, Docket No. 94- MBOT-978 (Feb. 29, 1996). See also W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

3. Given there is some conflict with KCBOE's interpretation of a proposed administrative regulation and W. Va. Code §§ 18A-4-7a &18A-4-8f, Grievant has demonstrated he is entitled to priority status at RHS because he was teaching at EBHS during the time of the posting. See Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Accordingly, this grievance is GRANTED, and KCBOE is directed to give Grievant the appropriate priority status as is merited by his seniority and certifications.

Any party may appeal this decision 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 24, 1998

Footnote: 1

Grievant was represented by Ms. Rosemary Jenkins and Mr. Steve Angel of the West Virginia Federation of Teachers, and Respondent was represented by Attorney Greg Bailey, KCBOE's General Counsel.

Footnote: 2

The total composition of the team was unclear from the testimony, but it was sufficient to clarify that the proposed administrative regulation came from the RHS Team, not from KCBOE.