JEFF DYER,

Grievant,

v. **Docket No. 98-22-347**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jeff Dyer, states the Lincoln County Board of Education ("LCBOE") violated W. Va. Code § 18A-4-8b when he applied for a posted position, and it was filled by a more senior driver on the transfer list, who did not apply for the position. He seeks as relief to be placed in the position. This grievance was denied at Level II and was appealed to Level IV on September 9, 1998. The case was submitted on the record developed below, and the parties' proposed Findings of Fact and Conclusions of Law were received by September 30, 1998, the date this case became mature for decision. (See footnote 1) LCBOE's attorney, Mr. Erwin Conrad, stated in his submissions that he became involved in the case after Level II, LCBOE was not represented at Level II, and he would have requested a hearing if he had received the file from LCBOE's former attorney in a timelymanner and before the response date. Nevertheless, he did not make a request for a Level IV hearing. (See footnote 2)

The evidence in this case is sparse, and in their submissions both parties stated facts not in evidence from the lower level record. Additionally, Ms. Mitter attached a copy of an LCBOE policy to her submission that was not previously admitted below. In the interest of clarity, the substantially identical Findings of Fact proposed by both parties were treated as stipulations. (See footnote 3) In the interest of fairness, the Board Policy was not considered, as LCBOE did not have a chance to present additional evidence.

The following Findings of Fact are derived from the record below and the parties' submissions.

Findings of Fact

1. Grievant is the least senior bus operator in the Lincoln County School System.

2. In the Spring of 1998, Grievant, the least senior bus operator, received a timely notice he was being reduced in force ("RIF") because of decreased student enrollment and the need to reduce the number of bus operators by one. Grievant was placed on the preferred recall and substitute lists.

3. Grievant asked for and received a RIF hearing, and after this hearing LCBOE voted to uphold Grievant's RIF and placed Grievant on the Preferred Recall List.

4. During the Summer, this position was posted, and Grievant was sent a notice of the posting as well as a bid sheet.

5. Grievant 's run was considered one of the worst runs in the county.

6. Grievant and several substitutes applied for the position.

7. Mr. Alvin Watts, the most senior bus operator in LCBOE who was currently unassigned and on the transfer list, did not apply for the position.

8. At some time, unclear from the record, LCBOE transferred Mr. Watts into the vacant posted position, as there were no other vacant bus runs in the county in which to place him.

Issues and Arguments

Grievant argues that once LCBOE posted the position it was required to select a candidate from the list of people who applied, and since Grievant was the only employee on the preferred recall list who applied, the position should be his.

LCBOE avers it violated no Code Sections in its placement of Mr. Watts in the bus operator position as it is required to retain the more senior employee in a RIF situation. LCBOE noted that to follow Grievant's line of reasoning would require LCBOE to retain the least senior employee and create a situation where the most senior bus operator remained unassigned on the transfer list, and was without a position.

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.

Grievant did not argue his RIF was improperly conducted; thus, the only issue to resolve is whether he was entitled to the vacant position because Mr. Watts, who was on transfer for subsequent reassignment, did not apply. Grievant maintains Mr. Watts cannot be placed in a posted position for which he did not apply, and relies on the case of Scott v. Mason County Bd. of Educ., Civil Action No. 93-C-195 (Sept. 17, 1993). This reliance is misplaced. Scott involved the posting of a position for professional educators and focused on the judge's interpretation of W. Va. Code § 18A-4-7a, the Code Section which discusses the promotion and transfer of professional personnel.

Although not cited by the parties as relevant, it would appear appropriate for clarity to distinguish this case from the case of Webster v. Johns, 191 W. Va. 664, 447 E.S.2d 599 (1994), at this point in the discussion. Syllabus Point 2 of Johns states in pertinent part:

> [A] board of education clearly exceeds its discretion in assigning an individual to a newly-created service personnel position who did not apply for the position, but was otherwise qualified for the opening, when another individual, holding the necessary qualifications and superior seniority, applied for the position.

This present grievance differs from the directions given in Johns in three ways:

1) the position at issue was not a newly created position; 2) the assigned individual in Johns was not on transfer due to elimination of the position; and more importantly;

3) the assigned individual in this case was the most senior bus operator in Lincoln County and had more seniority than Grievant.

The outcome of this case is guided by W. Va. Code § 18A-4-8b which addresses rights for service personnel in employment and RIF situations. W. Va. Code § 18A-4-8b clearly directs that "[a]ll decisions by county boards of education concerning reduction in work force of service personnel shall be made on the basis of seniority . . . ." Additionally, that Code Section states "the employee with the least amount of seniority within that classification . . . shall be properly released . . .". Grievant agrees he is the least senior bus operator in LCBOE, and he did not argue in this grievance that his RIF was improperly done.

This Code Section is supported by the ruling in Board of Education of Kanawha v. Casey and Gillespie, 176 W. Va. 733, 349 S.E.2d 432 (1986). It that case a secondary principal's school was closed and a position was eliminated. The West Virginia Supreme Court of Appeals directed the board of education to notify and release the least senior secondary principal and to place the more

senior principal from the closed school in the position. The board of education was required to transfer the more senior employee into the position vacated by the RIF of the least senior employee. See Quinn v. W. Va. Northern Community College, 197 W. Va. 313, 475 S.E.2d 405 (1996).

Because of Mr. Watts' seniority he is entitled to a position with LCBOE. Because of his lack of seniority, Grievant is not entitled to a position with LCBOE. Although it appears Mr. Watts did not want Grievant's position, the position was vacated by the properRIFing of Grievant, and Grievant could not be given a position while a more senior employee within his classification was unassigned on the transfer list and remained unemployed.

The above discussion will be supplemented by the following Conclusions of Law.

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. Grievant has not met his burden of proof and demonstrated he was entitled to a position when a more senior bus operator on the transfer list would have remained unemployed.

Accordingly, this grievance is **DENIED**.

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: November 30, 1998

Footnote: 1

Grievant was represented by Anita Mitter from the West Virginia Education Association, and LCBOE was represented by Attorney Erwin Conrad.

Footnote: 2

Mr. Conrad consolidated his argument in this case with his proposed submissions for Watts v. Lincoln County Board of Education, Docket No. 98-22-348, but neither party asked for the grievances to be consolidated. Since in his submissions Mr. Conrad expressed the opinion that consolidation would be against the best interest of Grievant, and since Ms Mitter did not ask for consolidation, these cases were not joined.

Footnote: 3

It is also noted that these same Findings of Fact were stated in the Level II Decision.