SCOTT BEANE,

Grievant,

v v.

Docket No. 03-20-008

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Scott Beane, filed this grievance on July 25, 2002, against his employer the Kanawha County Board of Education ("KCBOE"). His Statement of Grievance asserts KCBOE misinterpreted W. Va. Code § 18A-4-8e when it decided he could not be hired to fill a vacancy. He also asserts he has been discriminated against. His Relief Sought is to receive the position or the same rate of pay for the position he currently holds.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on January 9, 2003. A Level IV hearing was held February 13, 2003, and this case became mature for decision on March 19, 2003, after receipt of Respondent's proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed by KCBOE as a General Maintenance worker. At the time of the posting for the position, he was employed as a bus operator.

2. On December 12, 2001, Respondent posted a Painter/General Maintenance 261-day position. 3. Many employees applied for the position, including Grievant and Harold Boggs.

4. Both Grievant and Mr. Boggs had worked as Painters in the summer for many years. Karen Williams, Coordinator of Human Resources, incorrectly believed Mr. Boggs had previously passed

the competency exam, and since he had the greatest seniority, Ms. Williams recommended him for the position.

5. Mr. Boggs was transferred into the position on January 17, 2002.

6. Grievant then called Ms. Williams and informed her Mr. Boggs had not passed the competency exam.

7. Ms. Williams checked this information, and found neither Grievant nor Mr. Boggs had passed the competency exam.

8. Ms. Williams then set up competency exam training and testing for all the applicants. None of the applicants successfully completed all portions of the test.

9. Mr. Boggs was transferred from the Painter's position back to his prior position on March 21, 2002.

10. On April 23, 2002, the Painter/Maintenance position was reposted.

11. Both Grievant and Mr. Boggs again applied, as well as Dana Vealey, the subsequent, successful applicant.

12. Ms. Williams informed Grievant and Mr. Boggs they could not receive the position because of KCBOE's interpretation of the W. Va. Code §18A-4-8e(d), but could retake the training and testing, and if they passed would be qualified for a subsequent position. 13. Grievant, Mr. Boggs, and Dana Vealey, as well as other applicants, took the training and competency exam.

14. Grievant and Mr. Vealey passed the competency exam. Mr. Boggs did not.

15. Mr. Vealey has more regular seniority than Grievant, as his date of hire is September 15, 1989, and Grievant's is November 13, 1989.

16. Grievant was not considered for the position because of KCBOE's interpretation of W. Va. Code §18A-4-8e. Mr. Vealey was selected for the position.

17. Contrary to Grievant's assertion, no applicant for a position with KCBOE has been allowed to retake a competency exam for a particular position after they have failed it, and then been offered that same position.

Issues and Arguments

Respondent asserts its decision is required by W. Va. Code §18A-4-8e(d), and there was no violation of the statute. This Code Section states, "[a]n applicant who fails to achieve a passing score

shall be given other opportunities to pass the competency test when making application for another vacancy within the classification category." (Emphasis added).

KCBOE has interpreted this Code Section to mean that once an applicant has taken the test for a position and failed it, they cannot be offered that same vacancy even if they retake the test and pass it. Subsequent vacancies in that classification can be offered to that applicant.

Grievant makes several arguments. First, he asserts Respondent's interpretation of W. Va. Code §18A-4-8e is incorrect. Second, he argues his summer work, after the expiration of each summer contract, should be counted as regular painter seniority, as itwas outside the contracted time. Third, Grievant maintains since KCBOE never told him Mr. Vealey, the successful applicant, was more senior, that information should not impact his grievance in any way, and the Decision at Level IV should be based on the above two assertions. In essence, this argument would require the undersigned Administrative Law Judge to ignore the seniority requirement in W. Va. Code §18A-4-8b(a).

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 § 4.21 (2000); 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.

The first issue to address is Respondent's interpretation of W. Va. Code §18A-4-8e. While it is true that this Code Section states, "application for another vacancy," KCBOE's interpretation could result in an unjust outcome, especially if all the applicants fail the test as occurred here. When that situation occurs, the position must be reposted, and if the prior applicants are not allowed to retest and reapply, a county must rely on a whole new set applicants, one of whom who must pass the test. This second applicant pool could be very small, especially in West Virginia's less populated counties. Additionally, this type of process could result in substitutes or non-employees receiving the positions, as opposed to regular employees. The undersigned Administrative Law Judge does not believe this statute was intended to bar or prohibit an applicant's consideration for a vacancy that must be reposted. Accordingly, Respondent erred in its interpretation of the statute. The purpose of this

section of the statute was to ensure that employees would have "another"opportunity to pass the competency examination when another vacancy occurred, not to prevent employees from applying again when a vacancy must be reposted.

Additionally, the rules on statutory construction could be applied to this situation. "'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' N.L.R.B. v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' Pristavec v. Westfield Ins. Co., 400 S.E.2d 575 (W. Va. 1990)(citing Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925))." Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992). While this fact pattern does not strictly fit the meaning of the word of absurd, it could easily lead to "injustice." Accordingly, KCBOE is directed to allow prior applicants to test and to be considered for the reposted position, if no applicant passed during the prior testing.

The next issue is Grievant's contention that some of his summer seniority should count as regular seniority when he applied for this position. This issue has already been addressed by the Grievance Board. The employment of summer employees and their "seniority" is covered under a different statute, W. Va. Code § 18-5-39. W. Va. Code § 18-5-39 states:

> The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to allrights, privileges and benefits provided in sections five-b [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14], eight, eight-a, ten and fourteen, article four, chapter eighteen-a of this code . . . .

It is clear from this Code Section that the rights and privileges concerning seniority which are afforded regular employees are not extended to summer employees. The seniority of summer and regular employees is not considered to be the same and can not be commingled.

Additionally, even if Grievant's argument was accepted, he could not have accrued any seniority as a painter in prior summers, as he had not passed the competency exam, and he would not have been classified as a painter.

Next, Grievant wishes the undersigned Administrative Law Judge to ignore the issue of seniority because the successful applicant had greater seniority, and he asserts he was never told this. Whether Grievant had this information is immaterial.

W. Va. Code §18A-4-8(b) must apply to this selection as to all others. This Code section requires the factors of seniority, evaluations, and qualifications be considered. Grievant presented no evidence that the successful applicant's evaluations were not satisfactory for the past two years, and it is clear the successful applicant had greater seniority and was qualified for the position because he passed the competency exam. Accordingly, Mr. Vealey was correctly placed into the position at issue.

Next, Grievant asserts he has been discriminated against and treated differently than other similarly situated employees. 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 2) of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the fol lowing:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981);

Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

Grievant asserted at Level IV hearing that several employees had been allowed to test at least twice for the same position, and when they passed the test the second time were placed in this position. Since KCBOE did not know this testimony would bepresented by Grievant, the parties agreed to allow KCBOE to research these situations and submit an affidavit about its findings. An affidavit by Ms. Williams indicates Grievant's assertions were incorrect. There were employees who did take a test more than one time before they passed it, and there were employees who were hired in those same classifications after they eventually passed the test. No employees has been allowed to test twice for the same position.

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 § 4.21 (2000); 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. Even if Grievant had been considered for the position, he would not have been selected because he had less seniority than Mr. Vealey.

3. "'Where a literal interpretation of a statutory provision would not accord with the intended purpose of legislation, or produce an absurd result, courts must look beyond the plain words of the statute.' N.L.R.B. v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir., 1971). Our West Virginia Supreme Court has also held that 'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such constructionwould lead to injustice and absurdity.' Pristavec v. Westfield Ins. Co., 400 S.E.2d 575 (W. Va. 1990)(citing Syl. Pt. 2, Click v. Click, 98 W. Va. 419, 127 S.E.2d 194 (1925))." Lasure v. Tyler County Bd. of Educ., Docket No. 90-48-330 (Mar. 26, 1992).

4. KCBOE erred in interpreting W. Va. Code § 18A-4-8e(d) to prohibit consideration of an employee for a vacant position that had to be reposted to obtain a qualified applicant.

5. The seniority granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. Va. Code §§ 18-5-39; 18A-4-8b; & 18A-4-8g. Bowmen v. Kanawha County Bd. of Educ., Docket No. 99-20-039B (Mar. 31, 1999).

6. The W. Va. Code § 18A-4-8(b) requirements apply to all to selections for regular service personnel positions.

7. 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."

8. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

9. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v.

W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

10. Grievant has not met his burden of proof and established he has been treated differently than other similarly situated employees.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. KCBOE is directed to follow the directions in this decision regarding the interpretation of 18A-4-e(d). The selection decision remains the same.

Any party may appeal this decision to the Circuit Court of Kanawha 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 Judges is 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 30, 2003

Footnote: 1

Grievant was represented by former employee Clarence Basham, and KCBOE was represented by its Attorney Jim Withrow.

Footnote: 2

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).