ROY D. BAYS,

Grievant,

v. **Docket No. 05-06-143**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Roy D. Bays, ("Grievant"), challenges the decision of his employer, respondent Cabell County Board of Education ("BOE"), to award the position of Coordinator of Maintenance ("Maintenance Coordinator") to John Ryder, rather than Grievant. At the time the vacancy was posted, Grievant was employed by BOE as a Mechanic, and Ryder was employed by BOE as an Electrician II/Foreman II.

The "chief complaint" identified by Grievant in his fairly lengthy Statement of Grievance "is the fact that another employee, with minimal supervisory experience, (electrician foreman with Cabell County Schools) was hired when the specific job posted is for a supervisory position involving supervisory activities[.]" Grievant believes that he was the most qualified applicant for the service personnel position of Maintenance Coordinator and, as such, should have received the job. Although not expressly stated as such, it is clear from reading his statement of grievance that Grievant seeks instatement into the Maintenance Coordinator position.

PROCEDURAL BACKGROUND

Grievant and his immediate supervisor, Patty Pauley, met on February 8, 2005, for an informal conference relating to Grievant's complaints about his non-selection for the Maintenance Coordinator position. Ms. Pauley issued a written response, dated February 9, 2005, in which she stated that she did not "see any grounds for a grievance on this issue." Thereafter, Grievant submitted a written Level I grievance, which was denied by decision dated February 24, 2005.

On appeal to Level II, an evidentiary hearing was held on March 3, 2005. (See footnote 1) Grievant, who bore the burden of proof, did not testify, did not call any witnesses, and did not introduce any evidence. Nonetheless, the grievance evaluator issued a Level II decision, dated March 8, 2005, denying the grievance on the merits. BOE voted, on April 19, 2005, to uphold the Level II decision denying this grievance.

On April 26, 2005, the West Virginia Education and State Employees Grievance Board ("the Grievance Board") received Grievant's Level IV appeal. A Level IV hearing was conducted on June 22, 2005, at the Grievance Board's hearing room in Charleston. Grievant appeared in person. BOE was represented by Howard E. Seufer, Jr. This grievance matured for decision at the conclusion of the hearing. As explained more fully below, this grievance must be denied for failure of Grievant to meet his burden of proving, by a preponderance of the evidence, his entitlement to relief.

DISCUSSION

Maintenance Coordinator is a service personnel position rather than a professional post. Generally speaking, the Maintenance Coordinator is charged with supervision of themaintenance department and ensuring that the schools and other facilities of the Cabell County school system are properly repaired and maintained in safe condition.

The posting for the Maintenance Coordinator position identified a number of "minimum qualifications" an applicant was required to meet. These included 1) a high school diploma or GED, 2) a valid West Virginia driver's license, 3) a Master Electrician license, 4) at least five years of experience in supervising a maintenance trade, and 5) passing the West Virginia Department of Education's competency test for the "Director or Coordinator of Services" classification. Gr.Exh.1 at IV. The posting referenced a job description that was attached to it. This two-page job description for the "Coordinator of Maintenance" position elaborates on the minimum qualifications, and it contains the statement that "Master Electrician license issued by the WV Fire Marshall [sic] preferred." Gr.Exh.1 at IV.

The successful applicant, Ryder, has such license, whereas Grievant does not. This was not, however, the dispositive factor in the selection of Ryder for the Maintenance Coordinator position. (See footnote 2) As discussed more fully below, under BOE's normal practice in cases such as this, the position was awarded to Ryder because he was the applicant with the greatest seniority within the school system.

Pursuant to West Virginia Code section 18A-4-8g(g), employees who were already in the Director or Coordinator of Services classification would have been given preference in applying for the Maintenance Coordinator position. Said statute provides that "[s]ervicepersonnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy." There were, however, no such applicants in this case. Tr.11.

Because both Grievant and Ryder were outside of that classification, they had to take and pass the applicable competency test developed by the West Virginia Department of Education. These tests are "used to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee." W. Va. Code § 18A-4-8e(h). A day of "appropriate in-service training" is provided in advance of the competency tests. W. Va. Code § 18A-4-8e(g). They are simply pass/fail tests, so competitive scores are not awarded.

Both Grievant and Ryder passed the competency test for the appropriate classification for the Maintenance Coordinator position. Pursuant to West Virginia Code section 18A-4-8e(c), "[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title." Thus, both of them were deemed to possess the appropriate qualification for the "Director or coordinator of services" classification title applicable to the Maintenance Coordinator position. (See footnote 3) *Poling v. Bd. of Educ. of Tucker County,* 215 W. Va. 231, 236, 599 S.E.2d 654, 659 (2004)(*per curiam*).

Grievant and Ryder went through an interview process, along with two other applicants who had passed the competency test. Tr.13. At the conclusion of the interview process, BOE "looked at their county seniority and the person with the most countyseniority of all of the applicants was the person who got the position." Tr.13. Sandra Rupert testified that, during the eight years she has held the position of Manager of Service Personnel, this is the practice that has been followed. Tr.16. Specifically, she responded in the affirmative to the question of whether,

> in filling other service personnel positions in the Cabell County Schools you have uniformly applied the same rule, and that is that where none of the candidates have occupied the classification of the vacancy, that you chose from among the candidates based upon their county seniority regardless of what jobs they have had?

Tr.16.

This practice comports with the provisions of West Virginia Code section 18A-4- 8b(a), which

require BOE to “make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service.” Of course, BOE could have legitimately opted to consider experience outside of the school system in selecting a Maintenance Coordinator. Where the vacancy is one that involves a highly placed supervisory position with responsibilities that have serious safety implications, the Supreme Court of Appeals of West Virginia has held that a board of education may look beyond seniority to assess the candidate's credentials. *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 606, 457 S.E.2d 537, 543 (1995)*(per curiam*)(a new employee selected as Supervisor of Transportation), *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 271, 412 S.E.2d 265, 269 (1991)(*per curiam*)(most senior applicant did not receive Supervisor of Transportation position). *See also*, *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 263, 546 S.E.2d 258, 262 (1999)(“[T]he Hancock County Board of Education did not abuse its discretion by demanding additionalqualifications beyond the passing of the competency test” in filling the position of Supervisor of Maintenance.)

Pursuant to the cited decisions of the West Virginia Supreme Court, BOE has the discretion to consider any relevant experience an applicant may bring to the selection process. However, there is nothing that requires a school board to opt to exercise such discretion and, as Sandra Rupert testified, it has been BOE's consistent practice to look to seniority within the county where 1) the applicants are from outside of the classification in which the vacancy arose, 2) the applicants are qualified, in the sense that they have passed the competency test, and 3) the applicants have satisfactory evaluations of past performance.

As noted, Grievant and Ryder had the necessary qualifications by virtue of having passed the competency test. Both had good past evaluations. Therefore, seniority became the determining factor in Ryder's selection.

Grievant and Ryder were both regular, full-time service personnel. The following provisions of West Virginia Code section 18A-4-8g(h) control how an employee's seniority is counted, in cases such as this:

> [W]hen a school service employee makes application for a position outside of the classification category currently held, if the vacancy is not filled by an applicant within the classification category of the vacancy, the applicant shall combine all regular employment seniority acquired for the purposes of bidding on the position.

Ryder has been employed by BOE as a regular service employee since 1980, with no breaks in

service. Resp.Exh.2 at IV. By contrast, Grievant has been a regular service employee since 1999, without any breaks in service. Resp.Exh.3 at IV. In terms of applicable seniority, Ryder clearly outdistances Grievant. Grievant complains that the selection process was flawed because BOE did not give due consideration to his "resume, interview and experience outside of the school system." Statement of Grievance, Level IV. In connection with this argument, Grievant asserts that, by statute, "Cabell County Schools can and in fact are encouraged to hire the MOST qualified and MOST experienced individual, and must only submit to a more senior employee, in writing, justification for the hiring of someone less senior if they request." Statement of Grievance, Level IV (emphasis in original).

Although he does not provide a citation to the statute upon which he relies, it is clear from Grievant's foregoing characterization of the statute that he is looking at West Virginia Code section 18A-4-7a(a), which requires a board to hire professional personnel "on the basis of the applicant with the highest qualifications." This statute relates to the employment and promotion of professional employees by a board of education. Tr.17-18. It has no application to the selection of service personnel. Accordingly, it has no application to this grievance.

Grievant also complains that it was inappropriate for BOE to rely upon seniority in awarding the Maintenance Coordinator position to Ryder when seniority was not mentioned in the job posting. Grievant was shown a copy of the application he submitted for the position in question. Resp.Exh.1 at IV. It expressly states on the face of the application form that "[i]t is understood that the selection of the individual to fill the service personnel vacancy will be based on seniority, qualifications, and evaluation of past service[.]" (See footnote 4) Resp.Exh.1 at IV. Upon having this provision called to his attention, Grievant conceded "[y]ou got me on the job bidding sheet, okay, for the seniority." This is taken to be a concession on Grievant's part that there is no merit to his argument that he was not informed that seniority would be a factor in the selection of the successful applicant for the Maintenance Coordinator position.

Further, Grievant complained about having gone to the trouble of taking the pertinent in-service and the competency test, which he claimed wasted ten hours of his own time. Passing the competency test was a prerequisite for applying for the Maintenance Coordinator position. It enabled Grievant to compete with others for the job but most certainly did not guarantee that he would receive the position. Not surprisingly, Grievant has not pointed to any legal authority to support the implicit

suggestion that, by taking and passing the competency test, Grievant was entitled to receive the position in question. This is clearly not a reasonable assertion and, as such, does not merit further discussion.

After careful review of the entire record, including the Level II hearing transcript, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. On January 13, 2005, BOE posted a vacancy bulletin for a position as “Coordinator of Maintenance.” Gr.Exh.1 at IV.

2 2. None of the applicants who responded to the posting were working within the classification category in which the vacancy occurred.

3 3. The minimum qualifications set forth in the job posting included “[s]uccessful completion of the WV Department of Education Competency Test for the classification of Director or Coordinator of Services.” Gr.Exh.1 at IV. This is a pass/fail test that was successfully completed by both Ryder and Grievant.

4 4. Among the qualifications for the position, the posting also stated “Master Electrician license issued by the WV Fire Marshall [sic] preferred.” Gr.Exh.1 at IV.

5 5. Ryder, the successful applicant, has a master electrician license, whereas Grievant does not.

6 6. During the eight years Sandra Rupert has served as BOE's Manager of Service Personnel, BOE has consistently relied upon seniority as the determinative factor in filling service positions where none of the applicants are currently in the classification in which the vacancy occurred.

7 7. None of the applicants for the Maintenance Coordinator position were already within the Director or Coordinator of Services classification, which is where the Maintenance Coordinator vacancy fell.

8 8. Ryder has been continuously employed as a regular employee by BOE since 1980. Resp.Exh.2 at IV.

9 9. Grievant has been continuously employed as a regular employee by BOE since 1999. Resp.Exh.3 at IV.

10 10. As compared to Grievant, Ryder has greater seniority as a BOE employee.

11 11. The form submitted by Grievant in applying for the Maintenance Coordinator position expressly states that "[i]t is understood that the selection of the individual to fill the service personnel vacancy will be based on **seniority**, qualifications and evaluation of past service[.]" Resp.Exh.1 at IV (emphasis added).

12 12. Grievant voluntarily opted to participate in the in-service and take the competency exam so that he could apply for the Maintenance Coordinator position.

BURDEN OF PROOF AND DISPOSITION

This is not a disciplinary matter. Therefore, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *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).

"The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001). It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351, S.E. 2d 58 (1986). To prevail on this non-selection grievance, Grievant would have to establish, by a preponderance, that BOE's selection of Ryder was an unreasonable exercise of discretion, was not in the best interests of the schools, or was arbitrary and capricious. This he has failed to do. Ryder's selection was consistent with the applicable statutes and was in conformity with BOE's long-standing practice in like cases. This grievance must be denied.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

CONCLUSIONS OF LAW

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (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).

2 2. Grievant must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351, S.E.2d 58 (1986).

4 4. Pursuant to the provisions of West Virginia Code section 18A-4-8b(a), a board of education is required to “make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service.”

5 5. Pursuant to West Virginia Code section 18A-4-8e, “[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title.” Both Ryder and Grievant met this qualification.

6 6. BOE's actions in selecting Ryder were consistent with its long-standing practice of filling service personnel positions, where there are no applicants from within the classification where the vacancy exists, based on seniority.

7 7. West Virginia Code section 18A-4-8g(h) controls how the seniority was counted with respect to the applicants for the Maintenance Coordinator position. Application of that statute to this case results in over 24 years of seniority attributable to Ryder, as compared to a little less than 6 years for Grievant.

8 8. Awarding the position of Maintenance Coordinator to Ryder was consistent with the provisions of West Virginia Code section 18A-4-8b(a) and with BOE's prior practice in cases such as this, where none of the applicants were already in the classification in which the vacancy occurred.

9 9. Grievant failed to prove by a preponderance of the evidence that BOE acted in an arbitrary and capricious manner or violated any applicable law, rule or policy in connection with

posting and awarding the Maintenance Coordinator position at issue in this grievance.

Based upon the foregoing, this grievance is **DENIED.**

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

Dated: June 30, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

All of the lower level record is incorporated into the Level IV record. References to pages in the Level II transcript shall appear as "Tr. ___."

Footnote: 2

Despite the fact that the electrician license appeared in the job posting under minimum qualifications, with no mention that it was preferred rather than required, both parties treated it as a preferred qualification. This is how it is listed on the job description.

Footnote: 3

W. Va. Code § 18A-4-8(i)(34).

Footnote: 4

These three criteria are drawn directly from the pertinent provisions of West Virginia Code section 18A-4-8b(a), which addresses filling vacancies in service personnel positions.