JUDY MESSER, .

.

Grievant, .

.

v. . DOCKET NO. 93-29-479

.

MINGO COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Judy Messer (Grievant) alleging a violation of W. Va. Code § 18A-4-8b, in regard to her not being selected by Respondent Mingo County Board of Education (MCBE) for a regular one-half time cook's position at Kermit Junior High School (KJHS). The Grievant initially submitted her grievance at Level I on October 12, 1993. After the grievance was denied, the Grievant appealed to Level II where a hearing was conducted on November 4, 1993. Following an adverse decision at Level II on November 12, 1993, Grievant appealed to Level III where her grievance was again denied on November 16, 1993. Grievant then submitted a timely appeal to Level IV on November 23, 1993. A hearing was held in the Board's office in Charleston, West Virginia, on February 2, 1994. Following receipt of post-hearingsubmissions from the parties, this matter became mature for decision on March 28, 1994. (See footnote 1)

BACKGROUND

Resolution of this grievance requires application of W. Va. Code § 18A-4-8b, pertinent portions of which are quoted below:

> **A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.**

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:

(1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section;

(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

*** * ***

All employees whose seniority with the county board is insufficient to allow their retention by the countyboard during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the basis of seniority.

Employees placed upon the preferred list shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to any lateral position for which the employee is qualified or to a lateral area for which an employee has certification and/or licensure.

*** * ***

> **No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.**

Under the foregoing statutory scheme, school service personnel on the preferred recall list are entitled to preference in hiring over someone who is employed as a substitute. Likewise, regular employees receive preference over other employees holding some lesser status, including preferred recall rights. See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987). MCBE contends that Mattie Fletcher, who was selected to fill the position at issue, was on its preferred recall list at the time the vacancy was posted, thus entitling her to priority over Grievant who was then a substitute. Grievant contends alternatively: (1) that Grievant's particular employment status entitled her to treatment as a regular employee under W. Va. Code § 18A-4-15(2), including preference over someone on the preferred recall list; or (2) Ms. Fletcher was improperly awarded preferred recall status by MCBE.

In order to resolve this dispute, which involves mixed questions of fact and law, it will be necessary to examine in somedetail the employment history of the personnel at issue, as well as review prior rulings by this Board which govern school service personnel employment issues. In grievances of this nature, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). For clarity, the employment status of the two individuals at issue will be discussed separately, beginning with Grievant.

Judy Messer (Grievant)

Grievant began working for MCBE during the 1977-78 school year as a substitute

Custodian I at Jenny's Creek Elementary School (JCES). Grievant was hired as a substitute Custodian and Cook at JCES at the beginning of the 1978-79 school year. Then, on November 9, 1978 Grievant became a full-time Cook at JCES. However, Grievant resigned from that position in March 1979 due to pregnancy-related illness. Thereafter, Grievant was rehired in March 1989 as a substitute Cook I in the Kermit area. Grievant continued working as a substitute Cook during the remainder of the 1988-89 school year, as well as during 1990-91 and part of 1991-92. On January 23, 1992, MCBE posted a vacancy for a substitute Cook I at KJHS. G Ex 2. The posting specified that the position was to be "filled until the status of the regular employee is determined." G Ex 2. Testimony indicated that the regular employee in question was Lillian Zeek, who was on workers compensation as the result of a work-related injury in December 1991. T at3. Consistent with W. Va. Code § 18A-4-15, MCBE moved up Freda Messer, a regular part-time employee at KJHS, to temporarily fill the full-time Cook's position held by Lillian Zeek. (See footnote 2) **MCBE posted the vacancy created when Ms. F. Messer moved up to be filled "until the status of the regular employee [Ms. Zeek] is determined." G Ex 2. Grievant successfully bid on this position and started working at KJHS on February 17, 1992.**

Grievant continued in the Cook I job at KJHS until October 7, 1993. During the time she held that position, Grievant received the same pay and benefits as a regular employee, albeit on a part-time basis. Likewise, MCBE's experience record for Grievant listed her as a "regular" employee while filling in for the regular employee at KJHS. Grievant also received "summer pay" of $110.10 from MCBE in July 1992 and 1993. See G Ex 3. Grievant testified that it was her understanding that only regular school employees receive such checks. Although Grievant was not sure why she had received this particular paycheck, Pierce Witt, President of the School Service Personnel Association for Mingo County and a regular employee of MCBE, testified that such a check represented supplemental pay for all regular employees as authorized under a local excess levy. MCBE, through the testimony of Mr. Fullen, indicated that Grievant was given regular pay and benefits as required by § 18A-4-15 and it was this entitlement which was reflected by the "regular" annotation in her experience record.

Lillian Zeek retired during the Summer of 1993 and her Cook III position was posted on August 5, 1993. G Ex 4. This position was awarded to Freda Messer. Thereupon, MCBE posted

Freda Messer's former position on September 14, 1993 as a regular part-time vacancy for a Cook I at KJHS. G Ex 1. (This was the position which Grievant had been filling in accordance with the January 1992 posting "until the status of the regular employee is determined.") See G Ex 2. Grievant bid upon this vacancy but the position was awarded to Mattie Fletcher.

Mattie Fletcher (Selectee)

Ms. Fletcher was first employed by MCBE as a substitute Cook I for the Chattaroy Area commencing on March 13, 1986. G Ex 10; Bd Ex 2 at Level II. Ms. Fletcher retained her substitute Cook I position through the 1991-92 school year. Bd Ex 2 at Level II. On February 16, 1993 Ms. Fletcher was hired for a part-time Cook I position at Delbarton. Bd Ex 2 at Level II. That position was posted to "be filled from February 8, 1993, to April 30, 1993." G Ex 5. Mr. Johnny Fullen, MCBE's Assistant Superintendent and Personnel Director, testified that this vacancy occurred because the regular employee had requested a medical leave. While at Delbarton, Ms. Fletcher competitively transferred to a part-timeCook I position at Williamson High School (WHS). The WHS position was posted as being "for the remainder of the 1992-93 school term only." G Ex 6 (emphasis in original). As a result of a reduction in force that transpired following consolidation of three schools, a part-time Cook I position was eliminated. According to Mr. Fullen, MCBE placed Ms. Fletcher on its preferred recall list as she was the most junior Cook I.

DISCUSSION

Under the foregoing facts, this grievance can be resolved by determining Grievant's status at the time she competed for the part-time vacancy at issue. This Board previously addressed a similar question in Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd, No. 93-AA-217 (Kanawha County Cir. Ct. Feb. 15, 1994). In Ferrell, which also happened to involve a part-time Cook I position, it was determined that MCBE properly applied W. Va. Code § 18A-4-15(2) in granting regular employee status to an employee who had been selected to fill the position of another employee on leave of absence. The pertinent portions of § 18A-4-15 provide as follows:

> **The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:**

*** * ***

> **(2) To fill the position of a regular service employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position.**

Here, MCBE followed § 18A-4-8b in competitively selecting Grievant to fill a substitute part-time Cook I position "until the status of the regular employee is determined." G Ex 2. The record indicates that this action was taken because Ms. F. Messer was absent from that position for more than 30 days while filling in for Ms. Zeek. In Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992), this Board held that a service employee who is selected to fill such a position "is a regular employee for the time he or she serves in the position." Bushko, supra, at 4. Previously, this Board recognized that § 18A-4-15 requires that substitute service employees who fill the position of an absent regular employee must be given regular employee status "when the tenure of employment extends beyond twenty days." Miller v. Wood County Bd. of Educ., Docket No. 54-86-298-3 (May 13, 1987). Likewise, in Stutler v. Wood County Board of Education, Docket No. 54-86-333-3 (Aug. 20, 1987), this Board determined that it was the intent of § 18A-4-15 "to provide full-time benefits to substitute personnel who remain at a specific job site and work in an ongoing capacity for an extended period of time."

Consistent with Bushko, Miller and Stutler, Ferrell held that MCBE properly considered the seniority acquired by a substitute school service employee under § 18A-4-15(2) when filling a regular vacancy under § 18A-4-8b. This grievance requires a furtherdetermination whether the provisions of W. Va. Code § 18A-4-15(2), conferring "regular employee status" on certain substitute service personnel, constructively elevates such employees to the status of "regularly employed service personnel" within the meaning of W. Va. Code § 18A-4-8b, thereby entitling such person to a higher priority in competing for posted school service

personnel positions.

Although the rights conferred by § 18A-4-15(2) are of limited duration ("only until the regular employee is returned to such position"), the scope of the term "regular employee status" is not restricted. Clearly "regular employee status" requires the school board to extend the same pay, benefits and seniority to the substitute employees in such positions. In addition to this Board's rulings to that effect in Bushko and Ferrell, the legislature reinforced that conclusion on April 8, 1993 when a provision was included in W. Va. Code §18A-4-8g stating: "A substitute school service employee may acquire regular employment status and seniority if said employee receives a position pursuant to section fifteen [§ 18A-4-15(2) and (5)], subsections (2) and (5) article four of this chapter." While extending the hiring preference conferred by §18A-4-8b on these employees is a significant benefit, the legislature stipulated that school boards must follow the same competitive procedures of §18A-4-8b in filling such positions as they would follow in filling a permanent vacancy. MCBE followed those procedures in January 1992 when it selected Grievant to fill the vacancy created by Ms. F. Messer's temporary advancement to replace Ms. Zeek. Moreover, Grievant was still employed in thiscapacity over one year later when the vacancy at issue was posted in September 1993. Thus, in the circumstances present here, § 18A-4-15(2) requires MCBE to treat Grievant as holding regular employee status and § 18A-4-8b gives her preference over Ms. Fletcher for the permanent vacancy at issue here. See Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331, 189 W. Va. 273 (1993). (See footnote 3) **Given that Grievant is entitled to preference under § 18A-4-8b over another school service employee on preferred recall status, it is not necessary to address Grievant's alternative contention that MCBE improperly awarded preferred recall status to Ms. Fletcher.**

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was initially employed by the Respondent Mingo County Board of Education (MCBE) as a substitute Custodian I during the 1977-78 school year. Thereafter, Grievant was hired by MCBE as a substitute Custodian and Cook for the 1978-79 school year.

2. MCBE hired Grievant as a full-time Cook on November 9, 1978. Grievant resigned from that position in March 1979 due to a pregnancy-related illness.

3. In March 1989, MCBE rehired Grievant as a substitute Cook I in the Kermit area. Grievant remained in that position into the 1991-92 school year.

4. After Lillian Zeek went on workers compensation for an extended period of time, MCBE moved up Freda Messer, a regular part-time Cook I at Kermit Junior High School (KJHS), to temporarily fill Ms. Zeek's full-time Cook III position.

5. Thereafter, on January 23, 1992, MCBE posted the vacancy created in Ms. F. Messer's part-time Cook I position at KJHS to be filled "until the status of the regular employee is determined."

6. Grievant successfully bid on this position and began working on February 17, 1992.

7. While occupying this part-time position, Grievant received regular pay and benefits.

8. Ms. Zeek retired during the Summer of 1993 and her Cook III position was posted on August 5, 1993. MCBE awarded this position to Ms. F. Messer.

9. MCBE posted Ms. F. Messer's former part-time Cook I position at KJHS on September 14, 1993.

10. At the time this vacancy was posted, Grievant was still working in the position and continued working until October 7, 1993, after the position was competitively filled.

11. Mattie Fletcher was first employed by MCBE as a substitute Cook I on March 13, 1986.

12. While subsequently employed in a part-time Cook I position of limited duration (resulting from a regular employee'smedical leave) at Delbarton Elementary School, Ms. Fletcher competitively transferred to a part-time Cook I position at Williamson High School. That position was posted "for the remainder of the 1992-93 school term."

13. When MCBE eliminated a Cook I position at the end of the 1992-93 school year, Ms. Fletcher was extended preferred recall status based upon a determination that she was the least senior Cook I.

14. Grievant bid upon the KJHS part-time Cook I vacancy but MCBE awarded the position to Ms. Fletcher.

CONCLUSIONS OF LAW

1. In a grievance of this nature, alleging improper selection, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with "regularly employed service personnel" receiving preference over "service personnel whose employment has been discontinued in accordance with this section" (and awarded preferred recall status). See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987).

3. When an individual is competitively selected under § 18A-4-8b procedures to fill the position of a school service employee on leave of absence, W. Va. Code § 18A-4-15(2) requires the school board to give "regular employee status" to such individual. Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug 4, 1993), aff'd, No. 93-AA-217 (Kanawha County Cir. Ct. Feb. 15, 1994); Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992). See W. Va. Code § 18A-4-8g.

4. A school service employee selected to fill a position under §18A-4-15(2) "is a regular employee for the time he or she serves in the position. Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992).

5. Under the circumstances present here, Grievant was entitled to preference under § 18A-4-8b as a regular employee over another service personnel employee in the same classification on MCBE's preferred recall list. See W. Va. Code § 18A-4-15(2); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993); Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992). See also Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331, 189 W. Va. 273 (1993).

Accordingly, this Grievance is hereby GRANTED and MCBE is ORDERED to instate Grievant as a part-time Cook I at Kermit Junior High School and to award her back pay and benefits, as if she had been employed as a part-time Cook I commencing on October 8,

1993,and to make appropriate adjustments to her seniority based thereon. (See footnote 4)

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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: August 1, 1994

Footnote: 1MCBE included two documents as attachments to its post-hearing brief. Grievant objected to the documents as they were not introduced at the Level IV hearing. Since Respondent did not request approval to supplement the record with additional evidence subsequent to the conclusion of the Level IV hearing, Grievant's objection is sustained and these documents will not be considered in rendering this decision. See W. Va. Code § 18-29-6 (1993).

Footnote: 2The pertinent portion of W. Va. Code § 18A-4-15 provides:

> *[I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.*

Footnote: 3MCBE's claims that its actions were not arbitrary or capricious under the standards set forth in Dillon v. Board of Education, 351 S.E.2d 58 (W. Va. 1986), must be rejected when there is an explicit failure to comply with a statutory mandate governing the employment of school service personnel. See Harrison County, supra.

Footnote: 4It is noted that Grievant was on workers compensation due to a work-related injury for some period of time after October 1993. The effect of that compensation on Grievant's back pay award is beyond the scope of this decision. Moreover, the issue of whether or not Grievant was able to work after October 7, 1994 was not properly raised by Respondent. See F.N. 1, supra.