DEBRA DAVIS,

Grievant,

v. **Docket No. 94-29-1082**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

PAULA T. HURLEY and TAUNIA HALE,

Intervenors.

D E C I S I O N

Grievant, Debra Davis, alleges the school secretary positions (See footnote 1) she applied for were filled by less senior applicants, thus the Mingo County Board of Education ("MCBOE") violated W. Va. Code §18A-4-8b. Her requested relief is to be placed in one of the positions with all benefits and back pay. The Intervenors are the current employees in the positions at issue. This grievance was denied at Levels I and II and waived at Level III. A Level IV hearing was held on March 8, 1995, and the case became mature for decision on April 24, 1995, after the submission of proposed findings of fact and conclusions of law.

The facts of this case, although somewhat confusing, are not in dispute.

Findings of Fact

1. On August 12, 1994, the position of school secretary at Thacker Grade School ("TGS") was posted, for the 1994-95 school term only. Grievant and both Intervenors applied and were the top applicants for the position.

2. Intervenor Hurley withdrew her name from the selection process and told Superintendent Everett Conn she wanted to stay home this year and be with her children.

3. At this same time, Superintendent Conn and Assistant Superintendent John Fullen knew

there would also be another school secretary position, for one year only, at Red Jacket Elementary ("RJE") (See footnote 2) .

4. In July, 1994, MCBOE had given Superintendent Conn the authority to place employees into positions prior to final Board action.

5. Superintendent Conn and Assistant Superintendent Fullen also knew Grievant and the Intervenors were the substitute employees with the most seniority.

6. In late August or early September, Superintendent Conn and Assistant Superintendent Fullen decided Grievant was the most senior of the three individuals, based upon her first day worked as a substitute, and Superintendent Conn asked her whether she wantedthe RJE or the TGS position for the school year. Grievant selected the RJE position because of traffic and construction considerations. Superintendent Conn then called Intervenor Hale and told her she would fill the TGS position.

7. Later the same day, after accepting the RJE position, Grievant called Superintendent Conn and stated she wanted the TGS position. Superintendent Conn told her that position was already filled.

8. On September 19, 1994, MCBOE posted the RJE position for the 1994-95 school year only. Grievant and both Intervenors applied.

9. Grievant's and Intervenors' past evaluations are satisfactory.

10. After lengthy discussions and consultation with an attorney, Superintendent Conn and Assistant Superintendent Fullen decided they had incorrectly filled the RJE position based on the first day worked as a substitute. They selected Intervenor Hurley to fill the RJE position based on the amount of time worked as a regular employee. They also concluded the placement of Intervenor Hale was correct based on this same reasoning.

11. Grievant's first day worked as a substitute was May 16, 1989. She has worked a total of eleven days as a substitute. On November 15, 1993, Grievant was hired from the substitute list to fill a position at Williamson Elementary for the remainder of the1993-94 school year. (See footnote 3) MCBOE considered this time of seven months and four days as regular time, and at the April 19, 1994, MCBOE meeting, Grievant was placed on the preferred recall list.

12. Intervenor Hurley's first day worked as a substitute was May 23, 1989. She received a posted position at Nolan Elementary ("NE") for the 1991-92 school year. This position was as a

"[s]ubstitute - until the status of the regular employee is determined." Int. Exh. 2. Intervenor Hurley was considered a regular employee for all the time she worked at NE, which was a total of five months and twenty-five days. On February 21, 1994, Intervenor Hurley received a posted position at TGS as a long-term substitute for the remainder of the school, four months. MCBOE considered Intervenor Hurley as a regular employee, and at the April 19, 1994, MCBOE meeting placed her on the preferred recall list. Intervenor Hurley's total amount of regular time is approximately nine months and twenty-five days.

13. Intervenor Hale's first day worked a substitute was October 2, 1989. She worked eight months, six days during the 1989-90 school year, and nine months, four days during the 1990-91 school year at Hardy Union Elementary. This position was posted. Both these years were considered as regular employment, thus Intervenor Hale has seventeen months and ten days of regular time. Since the 1990-91 school year, Intervenor Hale has worked numerousdays as a substitute, but has received no more posted, long-term positions leading to regular employment seniority.

14. Assistant Superintendent Fullen stated Intervenor Hale should have been placed on the preferred recall list pursuant to Board's Policy 807.01A (See footnote 4), but was inadvertently left off, and that when he and Superintendent Conn decided who to recommend to MCBOE for the RJE and TGS positions in October, 1994, they corrected this oversight and considered all candidates as having preferred recall status.

15. On October 6, 1994, MCBOE followed Superintendent Conn's recommendations and selected Intervenor Hale for the TGS position and Intervenor Hurley for the RJE position. Grievant had worked in the RJE position for approximately twenty-seven days at this time.

16. Both the TGS and RJE positions were regular employee positions.

Issue

The issue before this Grievance Board is which of these three individuals, with varying amounts of regular employment seniority and different beginning substitute seniority dates, should have been selected for these two positions. Obviously, the position at TGS only concerns a comparison between Grievant and Intervenor Hale, and the position at RJE only concerns a comparison between Grievant and Intervenor Hurley, as Intervenor Hurley withdrew from the TGS selection and Intervenor Hale did not grieve her non-selection for the RJE position.

Discussion

Although Grievant only alleged a violation of W. Va. Code §18A-4-8b, multiple code sections dealing with selection and seniority will be examined to resolve this grievance. First, W. Va. Code §18A-4-8b states that regular positions are to be filled on the basis of seniority, qualifications and evaluations of past service. Both the TGS and RJE positions were regular positions. Applicants for positions 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.

Id.

Superintendent Conn and Assistant Superintendent Fullen considered all three applicants to be on the preferred recall list, thus this section indicates all three would be viewed equally, as regular employees with preferred recall status. If Grievant and Intervenors are all viewed as being on the preferred recall list, then the filling of the positions would be based on regular seniority, because all three are qualified for the position and their past evaluations are satisfactory. Thus, the positions are correctly filled because both Intervenors have more regular seniority than Grievant.

Grievant appears to question the decision to fill the positions from the preferred recall list and argues the selection should have been based, not on regular seniority, but on the substitute seniority date. This argument, if valid, would require a review of W. Va. Code §18A-4-8g to see if Grievant's and Intervenors' placement on the preferred recall list, and the granting of regular seniority, represents a Code violation.

W. Va. Code §18A-4-8g states in pertinent part:

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. County boards of education shall not be prohibited from providing any

benefits of regular employment for substitute employees, but such benefits shall not include regular employee status and seniority.

Thus, a substitute may acquire regular employment status and seniority if the requirements of W. Va. Code §§18A-4-15(2) or (5) are followed.

W. Va. Code §18A-4-15 states in pertinent part:

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;

. . .

(5) To fill the vacancy created by a regular employees' suspension:

This Grievance Board has clarified what constitutes a leave of absence. After a regular service employee has been absent for twenty days, any further absence will be considered a leave of absence for the purpose of substitute employment under W. Va. Code §18A-4-15(2). Ditty v. Brooke County Bd. of Educ., Docket No. 91-03-250 (Oct. 31, 1991). Additionally, "[w]hen 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'." Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1,

1994) (citing Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993)).

All the positions at issue were posted and competitively bid upon, resulting in Grievant having seven months, four days regular seniority, Intervenor Hurley having nine months, twenty-five days regular seniority, and Intervenor Hale having seventeen months, ten days regular seniority. Given that Grievant and Intervenors were considered to be on the preferred recall list, W. Va. Code §18A-4-8b indicates individuals shall be hired based on seniority, qualifications, and evaluations. Grievant and Intervenors were qualified for the position and their evaluations were satisfactory; consequently, the deciding factor in filling these two regular positions from the preferred recall list is regular seniority, not substitute seniority. See Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331 (W. Va. 1993).

In comparing Grievant to Intervenor Hurley on the RJE posting, Intervenor Hurley has more regular seniority, and thus was correctly placed in the position. In comparing Grievant to Intervenor Hale on the TGS position, Intervenor Hale has more regular seniority, thus was correctly placed in this position.

The remainder of the discussion will be presented as formal conclusions of law.

Conclusions of Law

1. In a selection grievance the Grievant has the burden of proving her complaint by a preponderance of the evidence. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

2. W. Va. Code §18A-4-8b requires county boards of education to consider seniority, qualifications and evaluations when filling positions from the preferred recall list.

3. The positions at issue were regular positions, thus MCBOE's consideration of accrued, regular seniority was appropriate.

4. 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 individuals holding preferred recall status having priority over "substitute service personnel." See Messer, supra.

5. "When an individual is competitively selected under W. Va. Code §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[s]. 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); Buchko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992)." See W. Va. Code §18A-4-8g.

6. W. Va. Code §18A-4-8g does not prevent county boards of education from granting preferred recall status to substitute service personnel who achieve regular employment status pursuant to W. Va. Code §18A-4-15(2) and (5). Accord Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994).

7. Under the circumstances presented here, Respondent correctly filled the two positions at issue utilizing the preferredrecall list and the amount of regular seniority of each applicant. See W. Va. Code §18A-4-15(2); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).

Accordingly, this grievance is **DENIED**.

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 29, 1995

Footnote: 1Grievant initially grieved only the position at Red Jacket Elementary. She later amended her grievance to include the position at Thacker Grade School.

Footnote: 2Both TGS and RJE were scheduled for closure and consolidation the following year.

Footnote: 3There was no direct testimony that this position was posted, but it was MCBOE's policy to post all positions.

Footnote: 4This policy states:

It shall be the policy of the Board of Education of the County of Mingo to post and fill all service personnel vacancies that exist for more than thirty (30) consecutive working days taken from the payroll records submitted and signed by the school principal.

The positions will be advertised for a long term substitute until the status of the regular employee is determined, or until the end of the current school term which ever occurs first.

Apparently, MCBOE believed this policy required placing employees on the preferred recall list after they were selected pursuant to this policy.