THOMAS LOSS,

Grievant,

v. **DOCKET NO. 97-24-413**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Thomas Loss, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1, et seq., challenging his non-selection for a custodian position by Respondent Marion County Board of Education ("Board"). As relief, Grievant seeks instatement to the position, along with associated seniority credit, retroactive to August 19, 1997, the date the position was filled.

Grievant's immediate supervisor was unable to provide relief, and a level two decision dated September 11, 1997, denied the grievance. (See footnote 1) Level three consideration was waived, pursuant to W. Va. Code §18-29-4(c). Grievant appealed to level four on September 19, 1997, where a hearing was conducted in the Grievance Board's Morgantown, West Virginia, office on November 6, 1997. This matter became mature for decision upon receipt of proposed findings of fact and conclusions of law on November 14, 1997.

The material facts are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievant is regularly employed by the Board as a truck driver/general maintenance employee, and has been so employed since August 17, 1988. 2. Grievant was previously employed by the Board in the custodian classification from 1983 through 1988.

3. On August 1, 1997, the Board posted a job vacancy for a custodian at Pleasant Valley Elementary, for which Grievant applied.

4. Grievant was the only regularly employed individual who applied for the custodian position.

In addition to Grievant, several substitute custodians employed by the Board applied.

5. The Board selected Everett Martin, a substitute custodian, to fill the vacancy. Mr. Martin had been employed as a substitute custodian since December 1, 1995.

6. Grievant has received only satisfactory performance evaluations while employed by Respondent.

Discussion

In a non-disciplinary proceeding, Grievant bears the burden of proving all of the elements of his claim by a preponderance of the evidence. W. Va. Code §18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997). Grievant argues that, pursuant to the provisions of W. Va. Code §18A-4-8b, he was entitled to placement in the custodian position, because he was the only regular employee who applied. The applicable Code provision states, in pertinent part, as follows:

> 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, 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 beconsidered 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;
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> (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.

As Grievant has stated, the statute clearly sets forth a specific order in which applicants are to be considered, giving hiring preference to “regularly employed service personnel” before substitutes. A very similar issue was resolved in favor of the grievant in this Grievance Board's recent decision in Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997). In that case, the board of education hired an individual from the preferred recall list rather than the grievant, who was regularly employed, but in a different classification. However, the grievant had met all requirements to hold the necessary classification, so she was deemed to be qualified and, as a regularly employed service personnel, she was entitled to the position before it was offered to an employee on preferred recall.

The same reasoning applies here. As set forth in Hlebiczki, supra, “this Grievance Board's decisions are quite clear in holding that Code § 18A-4-8b gives hiring preference to school service personnel holding regular employment status over those who have been placed on preferred recall. Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Messer v. Mingo County Bd.of Educ., Docket No. 93-29-479 (Aug. 1, 1994).” Similarly, regularly employed service personnel are also listed before substitutes under the hiring preference set forth in W. Va Code §18A-4-8b.

Respondent has argued that Grievant was not entitled to the position because he did not hold the appropriate classification of custodian. However, W. Va. Code §18A-4-8e provides that “once an employee holds or has held a classification title in a category of employment, that employee shall be deemed as qualified for said classification title even though that employee no longer holds that classification.” Grievant was previously classified as a custodian, so he was qualified for placement into the position at Pleasant Valley Elementary. See Martin/Holcomb, supra.

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

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of

Educ., Docket No. 96-23-164 (Apr. 30, 1997).

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 personnel receiving preference over other employees, including substitutes and employees on preferred recall. See Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

3. In each category of preference set forth in W. Va. Code § 18A-4-8b, the criteria of seniority, qualifications, and evaluation of past service are applied to employees in that category todetermine the appropriate candidate for a position. Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); See Cramer/Castle v. Preston County Bd. of Educ., Docket No. 95-39-400 (Mar. 27, 1996).

4. Grievant had previously held the classification of custodian and was a regularly employed individual, so he was entitled to the position at Pleasant Valley Elementary.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to place grievant in the custodian position at Pleasant Valley Elementary, with all associated back pay, benefits and seniority, effective August 19, 1997.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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.

DATE: January 30, 1998 _____ **V.**

DENISE MANNING

Administrative Law Judge

Footnote: 1

A level two hearing was conducted, but, due to technical difficulties, a transcript of that hearing could not be provided.