BRENDA PERRY,

Grievant,

v. **DOCKET NO. 99-50-014**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Brenda Perry initiated two grievances against the Wayne County Board of Education ("WBOE"), on or about June 23, 1998, and August 26, 1998. She challenged her non-selection for a cook position in one grievance. In the other she initially argued she could not be reduced in force from a long-term temporary aide position, but withdrew this argument at Level II, arguing instead that she should have been placed in one of two aide vacancies when she was reduced in force, alleging violations of W. Va. Code §§ 18A-4-8b and 18A-4-15. (See footnote 1) As relief, Grievant sought placement in one of two positions. The two grievances were consolidated at Level II. (See footnote 2)

The record developed at Level II was not entirely clear on several points, and the undersigned makes the following findings of fact based upon a preponderance of the evidence presented at Level II.

Findings of Fact

1. During the 1997-98 school year, Grievant was employed by WBOE in a regular cook position, and she then bid into a long-term temporary position as kindergarten aide at Kellogg Elementary. She had been employed by WBOE for five years as a cook.

2. During the 1997-98 school year, Grievant received notice that her position as a long-term temporary aide at Kellogg Elementary was being reduced in force at the end of the school year and would be placed on the preferred recall list. Grievant was the least senior employee in the aide classification, with about six months of seniority in that classification as of the end of the 1997-98 school year. Three other aides were also reduced in force.

3. While she was on preferred recall, Grievant received copies of all the service personnel position postings.

4. Grievant was returned to the East Lynn Elementary cook position she had held prior to her placement into the long-term temporary aide position. (See footnote 3) 5. WBOE posted a kindergarten aide position at Ceredo Elementary on January 27, 1998. Grievant did not apply for the position. It was filled in June 1998, by one of the applicants, Juanita McNeeley, a custodian, after she took the competency test for aides and passed it.

6. The testing and training person for WBOE, Mary Ball, was not available throughout much of the spring of 1998, to train and test aides and secretaries, due to the illness and death of her husband. When she returned to work, those who needed to be tested received in-service training and testing.

7. In January 1998, WBOE posted a long-term temporary special education aide position at Kenova Elementary. Grievant did not apply for the position. It was filled June 22, 1998, by Linda Williamson. On July 6, 1998, this action was rescinded, and the position was re-posted on August 14, 1998. Grievant did not bid on the position when it was re-posted, and it was awarded to one of the applicants. The date it was awarded was not made a part of the record.

8. Grievant did not bid on all posted aide positions because she was not physically able to lift students, such as would be required with some of the special education students.

9. On July 24, 1998, WBOE posted a cook position at Wayne High School, and a long-term temporary kindergarten aide position at Crum Elementary. Grievant bid on both positions, and she noted the aide position was her first choice. 10. Grievant was the successful applicant for the temporary kindergarten aide position at Crum Elementary, and was so notified. At the same WBOE meeting where Grievant's employment in this position was approved, another employee's resignation was accepted, which eventually resulted in the regular employee returning to the kindergarten aide position at Crum Elementary so that Grievant never served in this position. The date this occurred was not made a part of the record.

11. The cook position at Wayne High School was filled by a less senior applicant. The date this occurred was not made a part of the record.

Discussion

The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant makes two arguments. First, she argues she should have been placed in either the Kenova Elementary or the Ceredo Elementary Aide position, because both were vacant at the time she was reduced in force. Second, and in the alternative, she argues she should have been placed in the cook position at Wayne High School as the most senior applicant.

With regard to the Kenova Elementary temporary aide position, Respondent argued Grievant's argument was moot because the posting was rescinded and was thereafter filled as a permanent position. The record does not reflect that the posting was rescinded and this position was ever filled as a permanent position, and Respondent's argument is disregarded.

It is clear that Grievant did not want the special education aide position at Kenova Elementary. If she had, she could have bid upon it. She did not bid on it because she didnot think she could perform the duties of the position. Grievant waived her right to claim she should have been placed in this position when she made the conscious decision not to apply for it. Why Grievant insisted on asserting a right to this position is a mystery. In fact, when she stated the relief she requested at Level II, placement in this position was not one of her desired options.

Respondent argued that the only regular employee who bid on the temporary aide position at Ceredo was not qualified to hold an aide position, but was entitled to take the aide competency test, which could not be administered until Ms. Ball returned to work.

School service personnel positions must be posted for at least five working days, and must be filled within twenty working days of the posting. W. Va. Code §18A-4-8b. An employee who does not meet the qualifications of the posting at the time it had to be filled, could not, in accordance with W. Va. Code §18A-4-8b, be chosen for the posted position. See, Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994). WBOE could not hold the position for Ms. McNeeley until she passed the aide competency test. The Ceredo Elementary position was a vacancy at the time Grievant was reduced in force.

W. Va. Code § 18A-4-8b provides with regard to a reduction in force:

> Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy:

> **Provided,** That if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification. However, Grievant was not the only employee reduced in force as an aide. Three other employees with more seniority than Grievant were likewise reduced in force as aides. Grievant did not prove that she was entitled to be placed in this position ahead of these other aides. Accordingly, she is entitled to no relief.

With regard to the cook position at Wayne High School, WBOE argues it placed Grievant in her first choice, the temporary aide position at Crum Elementary, as was its policy; and that it was through a serious of unforeseen events that she never served in that position. (See footnote 4) Respondent did not explain why it failed to recognize that Grievant would never be able to serve in the position, and why it did not rescind the posting when it accepted the resignation of the other employee; however, it is not entirely clear from the record and the parties' arguments that it was obvious that this resignation would result in Grievant not receiving the position. The undersigned has no idea when the cook position was filled. Based upon the evidence presented, the undersigned cannot conclude that WBOE had an obligation to place Grievant in the cook position rather than, or in addition to, her first choice, that it violated any statute, rule or regulation, or that it acted in an arbitrary and capricious manner.

This discussion is supplemented by the following conclusions of law, which support the denial of this grievance.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. Grievant proved there was an aide vacancy at the time she was reduced in force as an aide, but she did not prove she should have been placed in that position.

3. Grievant waived any claim of right to the aide position at Kenova Elementary when she chose not to apply for it when it was posted because she did not think she was physically able to perform the duties of the position.

4. The Wayne County Board of Education did not violate any statute, rule or regulation when it placed Grievant in her first choice of vacancies, rather than her second choice, even though she never actually served in that position, nor did it act in an arbitrary and capricious manner given the

facts established.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 4, 1999

Footnote: 1

This Code Section deals with the employment of substitute service personnel. As such, it has no applicability to this grievance, and it appears any claim of a violation of this statute was dropped at Level II.

Footnote: 2

The parties agreed to waive Level I. A Level II hearing was held on September 22, 1998. A Level II decision denying the grievance was issued on January 6, 1999. Level III was bypassed by Grievant, and she appealed to Level IV of the grievance procedure on January 11, 1999. The parties agreed that a decision could be rendered on the Level IIrecord, and this matter became mature for decision upon receipt of the last of the parties' written arguments on February 16, 1999. Grievant was represented by Susan Hubbard, and Respondent was represented by David Lycan, Esquire.

Footnote: 3

Grievant did not clearly explain this, but she did not indicate she had been reduced in force from her cook position, and testified as follows on cross-examination: Question by James Ross, Director of Personnel: "Had you been placed in a regular position before the last bids came up?" Answer by Grievant: "No. Just the job that I went back to thatwas mine." It is unclear why Grievant was considered to be on preferred recall when she had been returned to her old position.

Footnote: 4

Grievant did not argue she should have been placed in both positions, although it would certainly seem possible. Although she obviously could not serve in both positions at the same time, she could have been awarded the cook position, as it was a permanent position, and then moved into the long-term temporary aide position also, and her cook position would

have then been posted as a long-term temporary position. However, since Grievant did not argue this, and indicated in her application a preference for the temporary position, this possibility will not be addressed.