CINDY GYORKO,

Grievant,

v. **Docket No. 99-30-188**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

DAWN TATER,

Intervenor.

DECISION

Cindy Gyorko (Grievant) alleges entitlement to a half-time computer operator position, posted in December of 1998 by the Monongalia County Board of Education (MCBOE), but never filled. The record does not indicate what proceedings occurred at level one. A level two hearing was held on April 23, 1999. In a decision dated April 28, 1999, the grievance was denied as to Grievant, but Intervenor's requested relief was granted, which will be explained below. Level three consideration was bypassed, and Grievant appealed to level four on May 10, 1999. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on June 14, 1999. Grievant was represented by counsel, John E. Roush; MCBOE was represented by counsel, Harry M. Rubenstein; and Intervenor appeared pro se. This matter became mature for consideration on July 21, 1999, upon receipt of the parties' final written submissions.

Findings of Fact

1. Grievant was employed by MCBOE as a substitute secretary from October26, 1996, until October 28, 1998, when she was placed in a regular position as a half-time clerk at University High School (UHS).

2. Intervenor has been employed by MCBOE as a substitute secretary since October 16, 1996.

3. On November 24, 1998, Intervenor filed a grievance alleging entitlement to the clerk position at UHS, which Grievant had been awarded. That grievance has not advanced beyond level one.

4. From December 12, 1998, through January 4, 1999, MCBOE posted a vacancy for a half-time computer operator position.

5. Grievant and Intervenor both applied for the computer operator position, and both have been deemed qualified by MCBOE to fill it. (See footnote 1)

6. MCBOE did not fill the computer operator position, due to its confusion regarding the respective employment statuses of Grievant and Intervenor, prompting Grievant to initiate this grievance, in which Intervenor was allowed to intervene at level two.

7. In the level two decision in this grievance, the hearing evaluator determined that Intervenor should be awarded the computer operator position, based upon MCBOE's admission that it had erred in not awarding Intervenor a half-time clerk position in the fall of 1998. MCBOE and the hearing evaluator believed granting Intervenor retroactive seniority, due to this alleged error, along with placing her in the computer operator position,would “settle” Intervenor's grievance.

8. During the posting period for the computer operator position, Grievant was the only qualified, regular employee who applied.

9. One of the three clerk positions posted in 1998 was at Cheat Lake Elementary School (Cheat Lake), and it was posted prior to the UHS posting.

10. Intervenor applied for the Cheat Lake position, as did Grievant, but Intervenor did not want to work at Cheat Lake.

11. The Cheat Lake position has, to date, not been filled by MCBOE action.

Discussion

A great deal of confusion has resulted from the level two decision in this grievance. Grievant argues that the outcome of this grievance hinges only on the respective employment statuses of herself and Intervenor when they applied for the computer operator position, rather than the “should haves” and “could haves” discussed in the level two evaluator's findings. Conversely, MCBOE and Intervenor contend that the level two decision was correct, which has brought a host of other issues into the current grievance, particularly with regard to the manner in which Respondent filled three

clerk positions in the county last summer and fall. If these positions, one of which Grievant received, had been properly filled, then Intervenor would have allegedly begun regular employment before Grievant, entitling her to the computer operator's position.

A county board of education must fill all school service personnel vacancies on the basis of seniority, evaluations of past service, and qualifications. Further, preference in filling vacancies is given in descending order to regular employees, employees on thepreferred recall list, substitute employees, and lastly to applicants with no employment status with the board of education. W. Va. Code § 18A-4-8b. Accordingly, an applicant for the computer operator position with regular employee status would be entitled to the position, if otherwise qualified, prior to the position being offered to a substitute. In addition, the same statute requires that all vacancies be filled within twenty days of posting, which MCBOE undisputedly failed to do in this case.

The West Virginia Supreme Court of Appeals has determined that intervenors in grievance proceedings have the right to make affirmative claims for relief, as well as asserting defense claims. Syl. Pt. 2, Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997). Therefore, Grievant's argument that the only relevant issues here concern the actual employment statuses of the applicants in December of 1998 must be rejected. MCBOE's admitted error in not awarding Intervenor a regular position as a half- time clerk in the fall of 1998 directly impacts upon her employment status and her rights, if any, to the position at issue here. Moreover, the grievance evaluator at level two essentially, but not formally, “consolidated” the grievances of Grievant and Intervenor, which is permitted and results in administrative efficiency. Therefore, the two grievances will be considered together here.

There is no dispute among the parties that, at the time the clerk positions were posted in the fall of 1998, Intervenor had more seniority as a substitute than Grievant. Accordingly, pursuant to the provisions of W. Va. Code § 18A-4-8b, she should have received one of the positions before they were offered to Grievant. However, the undersigned does not agree with the level two evaluator's conclusion that Intervenorshould have been placed in the Cheat Lake position, and his award of a seniority date to Intervenor based upon when the position “could” have been filled. In actuality, the Cheat Lake position has not been filled to date, and Intervenor has stated several times that she did not really want the Cheat Lake position. This is also obvious from the fact that Intervenor's grievance concerned her non-selection for the UHS position, not Cheat Lake. Moreover, W. Va. Code § 18A-4-

8g provides that seniority begins to accumulate when an employee “enters upon [her] . . . duties.” Since no employee ever began employment as a regular employee in the Cheat Lake position, Intervenor is not entitled to a fictional seniority date for the Cheat Lake Position.

Nevertheless, Intervenor has proven by a preponderance of the evidence that she was entitled to placement in the UHS position over Grievant. MCBOE has argued that Intervenor would be entitled to regular seniority status, if she had been properly placed in the UHS position, based upon the earliest possible date after the posting closed when the Board could have taken action. Again, this would be contrary to the provisions of W. Va. Code § 18A-4-8g, because the successful candidate for the position--Grievant--did not actually “enter upon her duties” as a regular employee until October 28, 1998. Therefore, October 28, 1998, is the appropriate seniority date to be granted to Intervenor.

The evidence establishes that Intervenor should have been employed as a regular employee beginning on October 28, 1998. However, this leaves the issue of who should have been placed in the computer operator position unresolved. The Grievance Board has previously held that a board of education is not required to strip an employee of seniority earned while serving in a position which was awarded to her in error. Gibson v. WyomingCounty Bd. of Educ., Docket No. 97-55-331 (Feb. 9, 1998); Hall v. Mingo County Bd. of Educ., Docket No. 97-29-364 (Jan. 29, 1998). It would be unfair to deprive Grievant of the seniority she has earned as a regular employee while serving in the UHS position, especially since she will probably continue serving in that position. Therefore, both Grievant and Intervenor hold a regular employee seniority date of October 28, 1998, the date Grievant began her duties, and the date upon which Intervenor should have begun her duties, but for MCBOE's error.

Grievant has proposed that, if both parties are deemed to have the same seniority date, a random selection be used to determine which one should be placed in the computer operator position. As equally qualified candidates with identical seniority, it would appear that both are entitled to placement in the computer operator position. However, the evidence has established that Intervenor was legally entitled to placement in the UHS clerk position, and, if this had been accomplished in October of 1998, there would be no question that, as a regular employee, she would be entitled to the computer operator position over Grievant, who would have continued to be a substitute. Therefore, the undersigned finds that, although Grievant and Intervenor will both retain a regular seniority date of October 28, 1998, Intervenor should be placed before Grievant in consideration for filling vacancies and reductions in force, within the clerk classification, pursuant to the random selection

process discussed in W. Va. Code § 18A-4-8g. Therefore, as the "more senior" applicant for the computer operator position, Intervenor is entitled to placement in that position. Because Intervenor is entitled to placement in the computer operator position, Grievant may continue serving as a half-time clerk at UHS. In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. A county board of education must fill all school service personnel vacancies on the basis of seniority, evaluations of past service, and qualifications. Further, preference in filling vacancies is given in descending order to regular employees, employees on the preferred recall list, substitute employees, and lastly to applicants with no employment status with the board of education. W. Va. Code § 18A-4-8b.

2. Intervenors in grievance proceedings have the right to make affirmative claims for relief. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

3. W. Va. Code § 18A-4-8g provides that regular seniority begins to accumulate when an employee enters upon her duties as a regular employee.

4. Because she had more substitute seniority than Grievant, and was otherwise equally qualified for the position, Intervenor was entitled to placement in a position as a half-time clerk at University High School, beginning on October 28, 1998.

5. A board of education is not required to strip an employee of seniority earned while serving in a position which was awarded to her in error. Gibson v. Wyoming County Bd. of Educ., Docket No. 97-55-331 (Feb. 9, 1998); Hall v. Mingo County Bd. of Educ., Docket No. 97-29-364 (Jan. 29, 1998).

6. Grievant should not be stripped of the regular seniority she has earned while serving as a half-time clerk at University High School since October 28, 1998. 7. Grievant and Intervenor should both have a regular seniority date of October 28, 1998, but Intervenor will be placed before Grievant in seniority in the clerk classification for purposes of filling vacancies and reductions in force. See W. Va. Code § 18A-4-8g.

8. Intervenor is entitled to placement in the computer operator position, due to her superior seniority status as a regular employee, effective twenty days after the position was posted..

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**, as set forth in this

Decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia 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. However, the appealing party is required by W. Va. Code § 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.

Date: August 11, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The parties have stipulated that Grievant and Intervenor's qualifications for the computer operator position are not at issue, and that one or the other is entitled to the position, depending on the determinations regarding their respective seniority and employment status.