MAIDA KNOTTS,

Grievant,

v. **Docket No. 00-39-387**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Maida Knotts ("Grievant") initiated this proceeding on October 30, 2000, alleging she should have been placed on preferred recall after her reduction in force at the end of the 1999-2000 school year. Grievant seeks preferred recall status and placement in any position to which that status would entitle her. The grievance was denied at level one on November 1, 2000, and a level two hearing was held on November 14, 2000. Relief was denied in a level two decision dated December 5, 2000. Level three consideration was bypassed, and Grievant appealed to level four on December 12, 2000. A hearing was held in the Grievance Board's office in Morgantown, West Virginia, on February 26, 2001. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 27, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed by Respondent Preston County Board of Education ("PCBOE") as a substitute Cook and Custodian from December of 1995 until September of 1999.

2. On September 27, 1999, Grievant began serving as a regular Supervisory Aide II (Special Ed) at Valley Elementary School, pursuant to a probationary contract.

3. At the conclusion of the1999-2000 school year, Grievant was notified by PCBOE that she would not be rehired for the 2000-2001 school year, due to lack of need.

4. After she was reduced in forced in May of 2000, Grievant was returned to substitute status,

and she was not placed on preferred recall.

5. In the fall of 2000, Grievant applied for a cook/custodian vacancy and a custodian vacancy at Preston High School. Both positions were awarded to substitutes with greater substitute seniority than Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

The exact issue presented here was just recently decided by this Grievance Board in Dakon v. Preston County Bd. of Educ., Docket No. 00-39-390 (March 27, 2001). As in the instant case, the grievant held regular employee status during the 1999-2000 school year under a probationary contract, and was reduced in force at the end of the year and returned to her previously held substitute status. Respondent also argued in that case, asit has here, that non-tenured employees have no right to preferred recall status when they are reduced in force. In rejecting this argument, the administrative law judge in Dakon, supra, determined that W. Va. Code § 18A-4-8b (See footnote 1)

> does not differentiate between professional and service employees or tenured and nontenured employees. It simply states that 'all' employees whose employment is terminated as the result of a reduction in force shall be placed on the preferred recall list. . . . While nontenured employees have no right to continued employment, this provision clearly recognizes that when individuals lose their employment through no fault of their own, they should be given first opportunity to fill vacancies as they occur.

(Emphasis in original.) In accordance with this decision, Grievant was entitled to placement on the preferred recall list when she was reduced in force in May of 2000.

The next issue to be resolved is what, if any, position Grievant should have been awarded when she applied for the two vacancies at Preston High School in the fall of 2000. It was determined in Dakon, supra, that Ms. Dakon should have been selected to fill the Cook/Custodian position at Preston High School. (See footnote 2)

As set forth in W. Va. Code § 18A-4-8b, service personnel vacancies are to be filled on the basis

of seniority, qualifications and evaluations of past service, with employees on preferred recall having hiring preference over substitutes. See Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ.,Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County Jan. 21, 1997). Accordingly, Grievant should have received a position over a substitute, and comparison of her substitute seniority to that of another substitute would be inappropriate. “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 to be applied to employees in that category to determine the appropriate candidate for a position.” Conclusion of Law #3, Hlebiczki, supra.

Therefore, in accordance with the foregoing discussion, Grievant should have been hired for the Custodian position at Preston High School, which was awarded to a substitute, in violation of the W. Va. Code § 18A-4-8b hiring preference. Although there was some discussion at level two of there being another regular employee who had more seniority than Grievant who may have been eligible for this position, there is no evidence regarding that employee's qualifications or whether or not she even applied for the position. Under these circumstances, Grievant is entitled to placement in the Custodian position, there being no evidence that any other qualified, regular employee applied for the position. Grievant is also entitled to retroactive back pay and benefits to the date the Custodian position at Preston High School was filled, which should be offset by any pay and benefits she received for working as a substitute during this time period.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-4-8b provides that “all employees” who are reduced in force for lack of need shall be placed in preferred recall, regardless of whether they are tenured or probationary

employees. See Dakon v. Preston County Bd. of Educ., Docket No. 00-39-390 (March 27, 2001).

3. Grievant has proven by a preponderance of the evidence that she should have been placed on the preferred recall list when she was reduced in force at the conclusion of the 1999-2000 school year.

4. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with employees on preferred recall having hiring preference over substitutes. W. Va. Code § 18A-4-8b. See Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County Jan. 21, 1997).

5. As a regular employee on preferred recall, Grievant was entitled to placement in the Custodian position at Preston High School in October of 2000.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to instate Grievant to the Custodian position at Preston High School, with back pay, benefits and seniority.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Preston 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: April 9, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This statute states, in pertinent part:

> *All employees whose seniority with the county board is insufficient to allow their retention by the county board 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.*

Footnote: 2

Ms. Dakon passed away in early March, 2001, and her estate was awarded back pay and the value of all benefits between October, 2000, and February, 2001.