DONNA SCHAFFER,

Grievant,

v. **Docket No. 01-39-019**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Donna Schaffer, employed by the Preston County Board of Education (PCBOE) as a substitute in the Aide, Custodian, and Cook classifications, filed a level one grievance on November 1, 2000, in which she alleged violations of W. Va. Code §§ 18A-4- 8b and 18A-4-8g when she was not placed on the preferred recall list after being released for lack of need, and when two other substitutes who did not hold preferred recall status were placed into regular positions. For relief, Grievant requested instatement to either of the two positions, and her choice of the two if she was entitled to priority for both positions, back pay, interest, and benefits, effective October 9, 2000.

After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, and appealed to level four on January 24, 2001. An evidentiary hearing was conducted in the Grievance Board's Westover office on March 8, 2001, at which time Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and PCBOE was represented by Gregory W. Bailey, Esq. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by both parties on or before April 9, 2001.

The following findings of fact are undisputed.

Findings of Fact

1. Grievant was employed by PCBOE on or about August 26, 1999, under a probationary contract as a full-time aide assigned to Kingwood Elementary School.

2. In May 2000, Grievant was notified by PCBOE that she was not on the list of probationary employees to be rehired for the 2000-2001 school year, due to lack of need. Grievant's employment as a regular employee subsequently ended on June 30, 2000.

3. Grievant continued to be employed by PCBOE for the 2000-2001 school year as a substitute Aide, Cook, and Custodian.

4. A multi-classified position of Cook/Custodian was posted in Fall 2000. William Strawser, a substitute with greater substitute seniority than Grievant in the multi- classification of Cook/Custodian was awarded the position.

5. A position of Custodian was also posted by PCBOE in Fall 2000. Substitute employee Paul Peaslee was awarded the position based upon his greater substitute seniority in the Custodian classification.

6. Neither Mr. Strawser nor Mr. Peaslee held regular seniority in any classification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. Grievant argues that she was entitled to be placed on the preferred recall list when her employment was terminated in May 2000, giving her priority over both the successful applicants for the positions in question. In the nature of an alternative argument, Grievant notes that prior to July 1, 2000, the amount regular seniority held would have determined which substitute applicant would receive a position. Effective July 1, 2000, W. Va. Code § 18A-4-8g was amended to state that regular seniority earned as a result of filling a posted long term vacancy created by a leave of absence or suspension may not be used to for any purpose until the applicant returns to regular status. Grievant asserts that her regular seniority was not earned as the result of either of those circumstances, therefore, its use to secure a position is not prohibited by the amended statute. PCBOE argues that there is no statutory provision for the placement of probationary employees on the preferred recall list, and that Code §18A-4-8g, as amended, is not limited to substitute service employees who acquire regular employee status by filling a vacancy created by a leave of absence or suspension.

The Grievance Board has recently held in two related cases that a probationary service employee is entitled to be placed on the preferred recall list when her employment is terminated due to lack of need. Knotts v. Preston County Bd. of Educ., Docket No. 00- 39-387 (Apr. 9, 2001); Dakon v. Preston County Bd. of Educ., Docket No. 00-39-390 (Mar. 27, 2001). These decisions were based on the W. Va. Code § 18A-4-8b provision that:

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.

Because this provision applies to all employees, Grievant was entitled to placement on the preferred recall list when her employment was terminated in May 2000.

Having determined that Grievant was entitled to preferred recall status, it must next be determined whether she was entitled to either of the positions at Preston High School posted by PCBOE in September 2000. W. Va. Code § 18A-4-8b provides that service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with employees on the preferred recall list 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 prior to a substitute employee.

It was previously determined in Dakon, supra, that Ms. Dakon should have been selected to fill the Cook/Custodian position at Preston High School. In Knotts, supra, it was held that Ms. Knotts was entitled to the Custodian position at Preston High School; however, the Administrative Law Judge noted that while “there was some discussion at level two of there being another regular employee who had more seniority than [Ms. Knotts] 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.” Grievant Schaffer did apply for the position, and having approximately one month more seniority, was entitled to the Custodian position prior to Ms. Knotts.

Consistent with the foregoing findings of fact and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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.

2. W. Va. Code §18A-4-8b provides that:

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.

3. W. Va. Code § 18A-4-8b provides that service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with employees on the preferred recall list 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).

4. Grievant has proven by a preponderance of the evidence that PCBOE acted in violation of W. Va. Code §18A-4-8b when it failed to place her on the preferred recall list after terminating her employment as the result of a reduction in force. 5. Grievant has proven by a preponderance of the evidence that had she been given preferred recall status, she would have been awarded the position of Custodian at Preston High School in October 2000.

Accordingly, the grievance is **GRANTED** and PCBOE is Ordered to instate Grievant to the position of Custodian, effective October 2000, with all back pay and benefits to which she would be entitled. Notwithstanding the holding in Knotts, supra, which was based on the information made available to the ALJ at that time, the evidence in this matter establishes that Ms. Knotts is not entitled to the position.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston County. Any 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 24, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE