WINONA BISHOP,

Grievant,

v.

DOCKET NO. 03-55-151

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Winona Bishop, filed this grievance against her employer, the Wyoming County Board of Education ("WCBOE" or "Board"), on February 5, 2003. Her Statement of Grievance reads:

> The Grievant, a regularly employed half-time teacher's aide, alleges that the Respondent has erred in filling a full-time teachers' aide vacancy at Mull[e]ns Middle School by awarding this vacancy to Janet Alf[rey]. At the time of the filling of the vacancy, Ms. Alf[rey] was employed as a substitute teacher's aide. The Grievant alleges a violation of W. Va. Code §[§] 18A-4-8b & 18A- 4-8g.
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> Relief sought: The Grievant seeks instatement into the teacher's aide position at Mull[e]ns Middle School, retroactive wages, benefits, and seniority. The Grievant also seeks interest on all statutory sums.

The grievance was denied at Level I on February 5, 2003, by Principal Stephen M. Kirby. Grievant appealed to Level II on February 10, 2003, and the Level II decision was rendered on May 25, 2003, by Grievance Evaluator Frank B. Mann, III denying the grievance. Grievant appealed to Level IV on June 4, 2003, and a Level IV hearing was held in Beckley, West Virginia, on July 25, 2003. This matter became mature for decision on August 22, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented John Roush, Esq., from the West Virginia School Service Personnel Association, and the Board was represented by Gregory W. Bailey, Esq. of Bowles Rice McDavid Graff & Love. After a detailed review of the entire record,

the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time this grievance was filed, Grievant was employed by the Board as a half-time (.5) Aide assigned to Mullens Middle School ("MMS").

2. Grievant was first employed by the Board as a Substitute Aide effective November 3, 1986. Grievant's mother became gravely ill, and Grievant was terminated from the substitute list in March 1996, due to her need to care for her mother until her mother's death.

3. Grievant was restored to the Substitute Aide list in January 1998, without seniority.

4. Grievant began substituting as a .5 special education aide at Mullens Middle School on November 16, 1998, providing assistance to a deaf student. The position was a newly created position being filled with a substitute, because it was believed the assignment would be temporary, but the assignment continued for another three years before it was posted as a regular aide position.

5. Grievant took sign language classes, and now signs lessons to this student.

6. At some point, Grievant appealed to Assistant Superintendent James McGrady to post the position, and it was understood Grievant would get the job. For that reason, a requirement that the applicant have sign language skills was added to the posting.

7. On October 29, 2002, a position announcement was posted for a .5 regular, special education aide at Mullens Middle School, with a deadline of November 13, 2002. The posting included as a minimum requirement that the applicant "[u]nderstand sign language and ability to sign with American Sign Language."

8. This position was the same position in which Grievant had been substituting since 1998. She applied for and received the MMS position, effective November 19, 2002. Because the posting had this special requirement, Grievant was able to "leapfrog" over fourteen other substitute aides with greater seniority.

9. Five days later, on November 25, 2002, another position announcement was posted for a full-time special education aide at Huff Consolidated School, with a deadline of December 11, 2002.

10. Grievant applied for the Huff Consolidated School position on November 26, 2002, and was not selected. See Bishop v. Wyoming County Bd. of Educ., Docket No. 03- -4-042D (July 28, 2003).

11. On December 19, 2002, another position announcement was posted for a full-time special

education aide at MMS, with a deadline of January 10, 2002.

12. Grievant applied for the MMS position, and was not selected.

13. Ms. Alfrey was selected for the MMS Aide position. Ms. Alfrey's substitute seniority date is January 22, 1996.

14. The second half of the 2003 - 2004 school term began on January 17, 2003.

15. WCBOE approved Ms. Alfrey for the position on January 27, 2003, and Ms. Alfrey entered into the duties of this position at MMS on January 29, 2002.

16. Grievant was informed by Assistant Superintendent James McGrady that she was not eligible for the MMS position, because she was not permitted to transfer within the first half of the school year employment without the consent of the Board. Additionally, hehad investigated to see if there were any other employees who had sign language skills, and there was no one else. Consequently, the administration agreed she was needed at Mullens Middle School because of her sign language training.

17. Ms. Alfrey was permitted to transfer two months after she accepted the MMS position because she did not possess any special skills that would prevent another employee from stepping into her old position.

Issues and Arguments

Grievant asserts she should have been selected for the position because she was a regularly employed aide, and the successful applicant was a substitute. Respondent asserted W. Va. Code § 18A-5-8(d) allowed Respondent to keep Grievant in her MMS position until she has served one-half of her term of employment, and it followed the applicable statute when it decided not to allow Grievant to transfer within the first one-half term.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. "The preponderance standard generally requires proof

that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va.Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

W. Va. Code § 18A-4-8b controls hiring of school service personnel, and includes the following provisions pertinent to this grievance:

> (a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.
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> (b) 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 be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (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.

It is acknowledged in the statute, however, that the most senior, qualified individual may not

always be awarded a position. Specifically, the statute provides that, "[i]f requested by the employee, the board must show valid cause why an employee with themost seniority is not promoted or employed in the position for which he or she applies." Id.

There is no dispute that Grievant was a regular employee and Ms. Alfrey was a substitute. Nevertheless, the Board denied Grievant the MMS Aide position, relying upon the language found in W. Va. Code § 18A-5-8(d):

> An aide may transfer to another position of employment one time only during any one half of a school term, unless otherwise mutually agreed upon by the aide and the county superintendent, or the superintendent's designee, subject to board approval: Provided, That during the first year of employment as an aide, an aide may not transfer to another position of employment during the first one-half school term of employment, unless mutually agreed upon by the aide and county superintendent, subject to board approval.

(Emphasis added).

Grievant was in her first year of regular employment as an Aide, and thus was limited in movement by the above-cited Code provision. Mr. McGrady was upset when Grievant applied for the two positions after such a short period of time as a regular employee, especially since he had tailored the .5 MMS posting to ensure Grievant would receive the position. However, the primary reason Grievant was not awarded the full-time MMS position was because there was no one else who could fill her position at Mullens caring for the hearing impaired student. Mr. McGrady believed Grievant's transfer was subject to approval by the superintendent and the Board, and it was determined she was needed in the .5 MMS position. Ms. Alfrey was not restricted from transferring because her position did not require any specialized training or skills, and it could be performed by any otherwise qualified person.

The issue here is the interpretation of W. Va. Code § 18A-4-5(d). Grievant asserts the phrase "the first one-half school term of employment" means the first semester of the2002 - 2003 school year, and since this position was filled after the start of the second semester, there should be no impediment to her being placed in the position. Respondent maintains this phrase means half of her term of employment, and since Grievant did not start her regular position until November 19, 2003, the Board could still use its discretion to deny Grievant the position based on the needs of the student.

This is a case where the guidance of Syllabus Point 1 of Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1992) is helpful. Morgan stands for the proposition that "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee." Given that direction, the undersigned Administrative Law Judge finds the meaning of the above-cited phrase for a 200 day service personnel employees, is the first semester, and WCBOE was incorrect in preventing Grievant from receiving the MMS full time position.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. W. Va. Code § 18A-4-8b controls hiring of school service personnel, and includes the following provisions pertinent to this grievance:

> (a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.
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> (b) 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 be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section;

(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.

3. W. Va. Code § 18A-5-8(d) provides:

An aide may transfer to another position of employment one time only during any one half of a school term, unless otherwise mutually agreed upon by the aide and the county superintendent, or the superintendent's designee, subject to board approval: Provided, That during the first year of employment as an aide, an aide may not transfer to another position of employment during the first one-half school term of employment, unless mutually agreed upon by the aide and county superintendent, subject to board approval.

4. "School personnel regulations and laws are to be strictly construed in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1992). 5. Grievant was in her first year of regular employment as an Aide, but would have completed her first semester by the time the position was filled. Accordingly, WCBOE was incorrect in its interpretation of the statute, and Grievant should have received the position.

Accordingly, this grievance is **GRANTED**.

WCBOE is directed to place Grievant in the full-time MMS position with all attendant rights and privileges, including retroactive wages, benefits, seniority, and interest on all statutory sums.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming County. Any such appeal must be filed within thirty (30) days ofreceipt 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.

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Janis I. Reynolds

Administrative Law Judge

Dated: September 29, 2003