KENNA HEDRICK CHAMP,

Grievant,

v. **DOCKET NO. 01-36-419R**

PENDLETON COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

In a grievance filed February 23, 2001, Grievants Kenna Hedrick Champ, Daisy M. Hedrick and Lisa Grapes alleged a violation of W. Va. Code § 18A-4-8b, and stated "Person [who] received the job was not legal in the system do [sic] to the job not being posted at the time she was placed as a service personnel - therefore the person on list who should have received the job was not given this position therefore I did not get the temporary job for which I applied."

After being denied at level one, Grievants appealed to level two and a level two hearing was held on May 22, 2001, at which time only Grievants Champ and Grapes appeared, with Ms. Champ represented by West Virginia School Service Personnel Association Attorney John E. Roush, Esq. and Ms. Hedrick, (See footnote 1) and Ms. Grapes appearing *pro se.* Respondent was represented by its counsel, Kimberly S. Croyle, Esq. of Bowles Rice McDavid Graff & Love, PLLC. Following a denial at level two, level three was waived and Grievants appealed to level four, agreeing to submit the matter for decision based on the lower-level record. The grievance was denied by the undersigned Administrative Law Judge in a decision dated November 7, 2001, on the basis that it was untimely filed and without consideration of the merits of the Grievants' claim. (See footnote 2)

Grievant Champ appealed the level four decision to the Circuit Court of Kanawha County, and on March 17, 2003, the Court reversed the level four decision and remanded the matter to level four for a hearing on the merits. A level four hearing on the merits was held June 5, 2003. The parties agreed to submit their proposed findings of fact and conclusions of law by June 7, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant Kenna Hedrick Champ is employed by Respondent Pendleton County Board of Education as a substitute kindergarten Aide at Brandywine School, and has worked as an Aide for two years. She was first employed by Respondent as a regular Aide in October, 1998, and is currently on the preferred recall list for the Aide classification.

2. Lisa Grapes also works as a substitute Aide in Pendleton County and is on the regular-employee preferred recall list. Ms. Grapes has more seniority than Grievant Champ. [Tr. p. 32]

3. On February 7, 2001 Respondent posted a position for a special education Aide at Pendleton County High School. [Gr. Exh. No. 1]

4. Both Grievant and Ms. Grapes were qualified for the position and applied. 5. The position was awarded to Anita Warner, another applicant who had more seniority than either Ms. Champ or Ms. Grapes.

6. Ms. Warner was first employed in 1989 by Respondent as an independent contractor pursuant to a posting, to provide the same services as a regularly employed Aide.

7. In 1997, Respondent determined that it was improperly paying Ms. Warner as a contractor and should be paying her as a regular employee, with all the benefits of a regular employee.

8. At a regular public meeting of the Pendleton County Board of Education in September, 1997, Respondent hired Ms. Warner as a regular employee on a probationary contract, without changing her duties or job location. Ms. Warner began accruing regular Aide seniority at that time.

9. Respondent posts the county-wide service personnel seniority list twice per year at all locations where personnel are employed. Ms. Warner appeared on this list with credit for eight years' service as a contracted Aide and with seniority as a supervisory Aide from September 8, 1997. Both Grievants had actual knowledge of the seniority attributed to Ms. Warner on these lists and were able to compare that to their own seniority, although they were not aware of the significance of the listings.

10. Grievant Champ did not become aware that Ms. Warner's employment status had changed until about the time the 2001 job was posted, although she knew Ms. Warner had originally been hired as a contract employee. [Tr. p. 19]

11. Grievant Grapes also knew Ms. Warner had originally been hired as a contract employee [Tr. p. 64] but was unaware that she had become a regular employee until after the 2001 job was posted

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6; 156 W. Va. C. S. R. 1 § 4.21. Grievant argues that Respondent erred in hiring Anita Warner, because Respondent initially hired her not as a regular employee, but as a contract aide. Grievant argues the seniority Ms. Warner accrued as a contract Aide should not have been used in selecting her for the position in question. Respondent's position is that it could not deny Ms. Grapes seniority because of the Grievance Board's ruling in Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997), and that, even if Ms. Warner's seniority were less than Grievants, Ms. Grape had more seniority than Grievant and so Grievant would still not be entitled to the position.

Respondent's argument cuts quickly to the crux of the matter: Even if Grievant proved Respondent's actions were entirely improper, Grievant would have suffered no harm as she would not have been entitled to the position she seeks, by virtue of her subordinate seniority to Ms. Grapes. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n, Docket No. 95- PSC-501 (Jan. 31, 1996); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998).

Grievant's counsel argues that "The grievance board on occasion in the past has denied deserving grievants relief on this specious ground. . ." Grievant admits that the job should go to the next person in line with the most seniority, but contends that Grievant is that person by virtue of Ms. Grapes having abandoned this grievance. His analogy compares this situation to one in which a successful applicant declines to accept aposition, and so instead of reposting it, the job is simply offered to the next most qualified applicant. However, this argument ignores the ideal that a person must have been harmed to have standing to pursue a grievance, and Grievant's reckoning, as applied to this grievance, would allow a grievant without standing to file a grievance on the off chance that she would acquire standing sometime in the future. Grievant has not been harmed by Ms. Warner's

hiring, because even if it were found that Ms. Warner should not have been hired, Grievant would not be the person who should have been hired in her stead.

Notwithstanding the fact that Grievant could not prevail even if her initial allegation were proven, Ms. Warner was the correct applicant to hire for the job. Grievant argues that Ms. Warner's seniority is inferior to Grievants, because Ms. Warner was originally hired as a "contract" rather than a "regular" employee, whose status was converted to regular employee status without posting her current job and filling it. This change was likely in response to the West Virginia Supreme Court of Appeals holding that the contractual scheme of employment for school personnel does not allow for the hiring of hourly-paid employees to perform the full-time, regular duties of school service personnel positions. *(See footnote 3)* Grievant argues Ms. Warner's status never legally converted to regular employee status, and she therefore is still an independent contractor, over whom Grievant, a regular employee on the preferred recall list, has priority.

Grievant cites Rose v. Nicholas county Board of Education, Docket No. 93-34-063 as standing for the proposition that "[a]n employee obtains a property interest in employment with the board of education by operation of statute and not on the basis of unauthorized action by a public officer." However, the West Virginia Supreme Court ofAppeals has effectively overruled that holding and definitively answered the question of whether she may earn regular employee seniority in that position.

> [E]mployees who are later determined to have been improperly placed in positions through board of education error may keep seniority and other benefits earned while serving in such positions. *See* Gibson v. Wyoming County Bd. of Educ., Docket No. 97-55-331 (Feb. 9, 1998). However, the West Virginia Supreme Court of Appeals has just recently issued an opinion which decisively determines the legal standard on this issue. Noting that seniority arises only from statutory mandate or from an employment contract, the Court held that "school service personnel must be awarded seniority earned for time served under a contract for a position later determined to have been incorrectly awarded to such employee." After reviewing several statutes which provide that seniority is to be retained by school service employees under various circumstances, the Court reasoned that "because of its significance, 'earned' seniority cannot be removed from an employee in an arbitrary manner," specifically the situation in which the employee was placed in a position erroneously.

Pennington v. Randolph County Bd. of Educ., Docket No. 00-42-232 (Dec. 20, 2000), citing Hall v. Bd. of Educ. of the County of Mingo, 208 W. Va. 534, 541 S. E. 2d 624 (2000).

"Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in [W. Va. Code § 18A-2-

5], and continues until the employee's employment as a regular employee is severed by the county board." W. Va. Code § 18A-4-8g(a); Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997). Ms. Warner was, in fact, hired to fill a posted position, but was not given the contract to which she was entitled when that happened. Respondent corrected its mistake by giving her a regular employment contract. She entered regular employment duties pursuant to a contract before Ms. Champ or Ms. Grapes, and was regularly employed when the job in question was posted, so she was the proper applicant to hire for the job. Grievant's argument that Ms. Warner was not a regular employee at the time of the posting is therefore directly contradicted by the evidence. Grievant contends that her original hire as a contract employee governs her current status, and argues she must be a contract employee now despite the fact she is working under a regular contract of employment. She cites a holding in Hall v. Mingo County Board of Education, Docket No. 94-29-1110 (Sep. 29, 1995) that "[i]ndependent contractors have no status or preference in filling posted service personnel positions," but no such holding is in that decision. In any event, Ms. Warner is employed under a regular contract of employment and the West Virginia Supreme Court's Hall ruling entitles Ms. Warner to the seniority she has been credited despite any irregularities in her hiring.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 party bearing the burden has not met its burden. Id.

2. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n, Docket No. 95-PSC-501 (Jan. 31,1996); Smith v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998).

3. Grievant has suffered no real injury because, even if she were to prevail on the merits of her claims, she would not be entitled to the position in question since she has less seniority than another

qualified applicant.

4.

> [E]mployees who are later determined to have been improperly placed in positions through board of education error may keep seniority and other benefits earned while serving in such positions. *See* Gibson v. Wyoming County Bd. of Educ., Docket No. 97-55-331 (Feb. 9, 1998). However, the West Virginia Supreme Court of Appeals has just recently issued an opinion which decisively determines the legal standard on this issue. Noting that seniority arises only from statutory mandate or from an employment contract, the Court held that "school service personnel must be awarded seniority earned for time served under a contract for a position later determined to have been incorrectly awarded to such employee." After reviewing several statutes which provide that seniority is to be retained by school service employees under various circumstances, the Court reasoned that "because of its significance, 'earned' seniority cannot be removed from an employee in an arbitrary manner," specifically the situation in which the employee was placed in a position erroneously.

Pennington v. Randolph County Bd. of Educ., Docket No. 00-42-232 (Dec. 20, 2000), citing Hall v. Bd. of Educ. of the County of Mingo, 208 W. Va. 534, 541 S. E. 2d 624 (2000).

5. "Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in [W. Va. Code § 18A-2-5], and continues until the employee's employment as a regular employee is severed by the county board." W. Va. Code § 18A-4-8g(a); Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997).

6. Ms. Warner was regularly employed by Respondent and had more seniority than Grievant, and was the proper employee to place in the position in question.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Pendleton 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 14, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Although Daisy Hedrick is listed as a grievant on the level one grievance form, she did not appear as a grievant at level two.

Footnote: 2

See, Hedrick and Grapes v. Pendleton County Bd. of Educ., Docket No. 01-36-419 (Nov. 7, 2001).

Footnote: 3

See State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W.Va. 176, 475 S.E.2d 176 (1996).