SHARON ACORD,

Grievant,

v. **Docket No. 06-10-146**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Sharon Acord ("Grievant") initiated this proceeding at level two (per agreement with Respondent) on February 2, 2006, alleging she should have been selected for an aide position. She seeks placement in the position, with back pay and benefits. After a somewhat confusing procedural history, this matter came to level four by agreement of the parties on May 4, 2006. (See footnote 1) At level four, the parties agreed to submit this matter for a decision based upon agreed stipulations of fact, accompanied by fact/law proposals, which were received by the undersigned on June 5, 2006. Grievant was represented by Ben Barkey of the West Virginia Education Association, and Respondent was represented by counsel, Erwin L. Conrad.

Findings of Fact

The following stipulations of fact were submitted by the parties:

1. Sharon Acord, Grievant, was a full time teacher's aide for the 2004-2005 school year. She was notified of reduction in force in the spring of 2005. She beganworking as a substitute aide in the fall of 2005. At this time, the grievant is currently employed as a [substitute] and retained rights afforded any RIF'd service employee.

2. In the fall of 2005 Fayette County Board of Education posted an [sic] teacher's aide position for which [Grievant] made application. A regularly employed service personnel in a different classification, a cook, also made application for the aides' [sic] position. The cook also took and passed the aide's test for classification.

3. Fayette County Board of Education approved the hiring of the currently employed cook over the RIF'd aide for the posted teacher's aide position.

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 (2004); *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 issue presented here is whether or not Grievant, an employee on preferred recall in the relevant job classification, should have been selected over a regular employee, who although serving as a cook at the time of selection, had qualified for the aide classification by successfully taking the competency test. This exact issue was addressed in the case of *Hlebiczki v. Ohio County Board of Education*, Docket No. 97-35-037 (Sept. 30, 1997), which has been reaffirmed several times by this Grievance Board. *See Holbert v. Wood County Bd. of Educ.*, Docket No. 01-54-427 (Nov. 30, 2001); *Porter v. Lincoln County Bd. of Educ.*, Docket No. 00-22-010 (May 30, 2000); *Nutter v. Harrison County Bd.of Educ.*, Docket No. 98-17-516 (June 25, 1999); *Loss v. Marion County Bd. of Educ.*, Docket No. 97-24-413 (Jan. 30, 1998). As in the instant case, the outcome of *Hlebiczki* and its progeny hinged upon one's interpretation of the following portion of W. Va. Code § 18A-4-8b:

> (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.

(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:

(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.

This Grievance Board has determined that, in a situation such as the one presented here, a qualified regular employee is entitled to hiring preference over an employee on preferred recall. As stated in *Hlebiczki*:

> Although [W. Va. Code § 18A-4-8b] clearly states that vacancies are to be filled based upon the three criteria of seniority, qualifications, andevaluations, it also states quite unambiguously that applicants are to be considered in a specific order. Therefore, applicants who are on the preferred recall list are not even considered until all regularly employed applicants have been fully considered and the three criteria applied to them. In the instant case, Grievant is unquestionably a regularly employed individual . . . . As to the third criterion, qualifications, Grievant has met all requirements to be qualified as a bus operator. It is irrelevant that she has not actually worked in that classification, and does not technically "hold" that classification title, because she has undisputedly met the requirements. However, if another regularly employed individual who already held the title of bus operator had applied for this position, pursuant to the first two sentences of the second paragraph of W. Va. Code § 18A-4-8b, that person would have been given first opportunity over Grievant. In this case, the successful applicant was on preferred recall status, and, therefore, not entitled to hiring preference over Grievant just because she "held" the classification title of bus operator.

This reasoning clearly and unequivocally applies to the instant case. "This Grievance Board's decisions are quite clear in holding that . . . § 18A-4-8b gives hiring preference to school service personnel holding regular employment status over those who have been placed on preferred recall. *Harrison v. Logan County Bd. of Educ.*, Docket No. 95-23-459 (May 31, 1996); *Martin/Holcomb v. Mason County Bd. of Educ.*, Docket No. 94- 26-261 (Oct. 19, 1994); *Messer v. Mingo County Bd. of Educ.*, Docket No. 93-29-479 (Aug. 1, 1994)." *Hlebiczki*, *supra*. As a regular employee who had met the requirements of the aide classification, the successful applicant was entitled to this position over

Grievant, an employee on preferred recall.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary case, 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 (2004); *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. First preference in filling vacancies must be given to regular school service personnel, followed in descending preference by applicants from the preferred recall list, substitute employees and lastly to applicants with no previous employment status with the board of education. W. Va. Code § 18A-4-8b; *Hlebiczki v. Ohio County Bd. of Educ.*, Docket No. 97-35-037 (Sep. 30, 1997); *Nutter v. Harrison Co. Bd. of Educ*., Docket No. 98- 17-516 (June 25, 1999); *Holbert v. Wood County Bd. of Educ.*, Docket No. 01-54-427 (Nov. 30, 2001).

3. As an employee on preferred recall, Grievant was not entitled to placement in the position at issue over a qualified regular employee.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Fayette 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: June 30, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

After the initial grievance filing, the parties stipulated to the agreed facts, and a level two decision, granting the grievance, was issued on March 7, 2006. Respondent appealed this decision to level four, and the grievance was apparently remanded to level three at the request of Grievant. For unexplained reasons, the parties once again agreed to waive the matter to level four, where it arrived on May 4, 2006.