ABIGAIL RUNYON, .

.

Grievant, .

.

v. . DOCKET NO. 93-29-481

.

MINGO COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Abigail Runyon (hereinafter Grievant) alleging a violation of W. Va. Code §18A-4-7A, in regard to her not being selected by Respondent Mingo County Board of Education (hereinafter MCBE or Respondent) for a classroom teacher's position at MCBE's Dingess Grade School for the 1993-94 school year. After the parties waived a decision at Level I, a hearing was held at Level II and a decision issued on November 12, 1993, effectively denying her grievance. Thereafter, Grievant timely appealed to Level IV, waiving a decision at Level III as authorized under W. Va. Code §18-29-4(c). Grievant further elected to waive a hearing at Level IV and have this grievance decided upon the record developed below. (See footnote 1)

Inasmuch as both Grievant and the employee ultimately awarded the contested position (Ms. Eva Stroud) were on MCBE's preferred recall list, in accordance with W. Va. Code §18A-4-7a, the outcome of this grievance hinges upon the narrow question of which candidate had the greatest seniority. (See footnote 2) In this regard, the following uncontroverted Findings of Fact have been extracted from the record.

FINDINGS OF FACT

1. Grievant was on MCBE's Preferred Recall List at the time she applied for a kindergarten teaching position for the 1993-94 employment term at Respondent's Dingess Elementary School.

Joint Stipulation of Facts at 1. [hereinafter cited as "JS at ."]

2. Ms. Susan Runyon and Ms. Eva Stroud were likewise on MCBE's Preferred Recall List and both applied for the posted position along with Grievant. MCBE initially awarded the kindergarten teaching position to Ms. Susan Runyon. JS at 1.

3. Following Grievant's initiation of this grievance, MCBE reviewed the selection at issue and discovered that both Grievant and Ms. Eva Stroud had greater seniority than the original selectee, Ms. Susan Runyon. JS at 1.

4. MCBE reviewed its records and determined that, during the previous four years, Ms. Stroud had been paid for a total of 759 days while Grievant received pay for a total of 763 days. (See footnote 3) JS at 1.

5. MCBE conducted a further review and applied W. Va. Code §18A-4-7b, (See footnote 4) determining that Ms. Stroud should be credited with an additional 7 days' seniority and Grievant an additional 3 days' seniority, for days they were on strike during the 1990 statewide teacher's strike. JS at 1. As a result of this review, Grievantand Ms. Stroud were tied with 766 days' seniority for the past four years. JS at 1.

6. MCBE scheduled a conference with Grievant and Ms. Stroud but both teachers refused to participate in a tie-breaking procedure, each asserting that she had greater seniority. JS at 1-2.

7. MCBE thereafter conducted yet another review and determined that Ms. Stroud should be credited with 1 day's additional seniority for a day in the 1991-92 employment term when "she refused to cross a picket line set up by protesting parents and for which she was not paid." JS at 2.

8. Having determined that Ms. Stroud had greater seniority than Grievant, the kindergarten teaching position was awarded to Ms. Stroud.

DISCUSSION

In an effort to invalidate MCBE's calculation of superior seniority for Ms. Stroud, Grievant has focused upon an alleged error by MCBE in crediting Ms. Stroud with regular employment status from August 30, 1989 to September 14, 1989. In order to address this argument properly, paragraph 5 from the parties' Joint Stipulation of Facts (See footnote 5) is quoted in its entirety:

> The one remaining issue is the status of Stroud from August 30, 1989 to September 14, 1989. She had been hired by Respondent as an EMI/LD teacher, assigned to Dingess, effective the beginning of the 1989-90 Employment Term, but never

> assumed that assignment. The Board followed its customary procedure by notifying Stroud of her hiring by telephone call. Respondent alleges that she refused the assignment, and Stroud alleges that she did not know of her hiring. In any event, Stroud appeared for work at Dingess the second day of the 1989-90 Employment Term and was assigned by the principal of the school to teach Second Grade. On September 14, 1989, Respondent approved Stroud's hiring as a Second Grade teacher at Dingess retroactive to the second day of the 1989-90 Employment Term. (JS at 2.)

Relying substantially upon the foregoing stipulation, Grievant argues that MCBE did not have authority to employ Ms. Stroud "retroactively" to August 30, 1989 when it took such action on September 14, 1989. Grievant's sole argument in support of this proposition consists of an inference that Ms. Stroud must have been a substitute teacher since she was not regularly employed by MCBE until September 14, 1989. While the undersigned concurs that service as a substitute teacher does not count toward regular seniority under present statutory guidelines, (See footnote 6) the record does not support a finding that Ms. Stroud was, in reality, a substitute teacher during the August-September 1989 time period at issue.

Grievant has the burden of establishing Ms. Stroud's status as a substitute teacher by a preponderance of the evidence. See Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). The stipulated Level II record in this matter contains "Membership Enrollment" forms for the State of West VirginiaTeachers Retirement System (See footnote 7) for both Grievant and Ms. Stroud. Grievant's form is dated September 1, 1989 and Ms. Stroud's is dated August 31, 1989. The two forms, except for personal information such as social security number, date of birth, etc., are virtually identical. Both Grievant and Ms. Stroud answered question 10, "Circle the number of months you serve in a school year" with "10." Ms. Stroud indicated in response to question number 7, "On what date did you begin your current employment?" that she began on "August 30, 1989." Grievant answered the same question with "August 31, 1989." A 1989-90 "School Calendar" included in the record indicates that August 29, 1989 was the first day of school. Thus, MCBE appears to have treated Ms. Stroud as a regular employee before September 14, 1989, in substantially the same manner as it treated Grievant.

It is further noted that W. Va. Code §18A-2-3 provides for employment of substitute teachers as follows:

> The county superintendent, subject to approval of the county board, shall have

> authority to employ and assign substitute teachers to any of the following duties: (a) To fill the temporary absence of any teacher or an unexpired school term made vacant by resignation, death, suspension or dismissal; (b) to fill a teaching position of a regular teacher on leave of absence, and (c) to perform the instructional services of any teacher who isauthorized by law to be absent from class without loss of pay, providing such absence is approved by the board of education in accordance with the law. Such substitute shall be a duly certified teacher.

Given that no evidence was presented to suggest that any of the situations contemplated by §18A-2-3 existed in regard to the position being filled by Ms. Stroud on August 30, 1989, Grievant's suggestion that Ms. Stroud was employed as a "substitute" is not supported by the record.

Thus, notwithstanding the confusion as to Ms. Stroud's status on August 29, 1989, the Joint Stipulation of Facts, and all other evidence of record, indicates that MCBE treated Ms. Stroud as a de facto regular teacher as of the time she reported to work on August 30, 1989, and the Respondent's action of September 14, 1989, merely added form to substance. (See footnote 8)

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant is required to prove the allegations of his or her complaint by a preponderance of the evidence. Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). 2. Grievant failed to demonstrate by a preponderance of the evidence that MCBE violated W. Va. Code §§18A-4-7a or 18A-2-1 bycrediting Ms. Stroud with regular seniority as a classroom teacher from August 30 to September 14, 1989.

Accordingly, this Grievance is hereby **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: April 4, 1994

Footnote: 1The parties further agreed to a "Joint Stipulation of Facts" to supplement the Level II record. This case became mature fordecision on December 28, 1993, upon expiration of the time period established for making written submissions.

Footnote: 2W. Va. Code §18A-4-7a provides:

> *All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in force shall be placed upon a preferred recall list. As to any professional position opening in the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position. (emphasis added)*

W. Va. Code §18A-2-2, ¶3 concomitantly recognizes that individuals placed on a preferred recall list nonetheless retain their continuing contract status. Accordingly, this Board has previously acknowledged sub silentio that individuals on the preferred recall list have standing as "employees" eligible to grieve under W. Va. Code §18-29-2(c). See, e.g., Six v. Ritchie County Bd. of Educ., Docket No. 43-86-283-3 (Feb. 3, 1987).

Footnote: 3In accordance with W. Va. Code §18A-4-7a, both Grievant and Stroud had at least 133 days of employment during each of the four years in question. JS at 1.

Footnote: 4That statute provides guidance to supplement the seniority provisions of W. Va. Code §18A-4-7a and directs that: "An employee shall receive seniority credit for each day the employee is professionally employed regardless of whether the employee receives pay for that day ...." W. Va. Code §18A-4-7b(b) (1993). While the undersigned finds that he is bound by the parties' stipulation as "the law of the case" (See Moran v. Leccony Smokeless Coal Co., 124 W. Va. 54, 62, 18 S.E.2d 808, 813 (1942).), this should not be interpreted as sanctioning the parties' interpretation of 18A-4-7b as a precedent.

Footnote: 5Although styled a "Joint Stipulation of Facts" this document, to a certain extent, comprises a stipulation of issues, as it is apparent from reading paragraph 5 that the parties have "agreed to disagree" as to certain particulars.

Footnote: 6See Landers v. Kanawha County Bd. of Educ., Docket Nos. 92-20-170/102 (Nov. 4, 1992); Hoffman v. Kanawha County Bd. of Educ., Docket No. 91-20-278 (Jan. 31, 1992).

Footnote: 7These forms are considered relevant to the question of Ms. Stroud's status in that W. Va. Code §18-7B-2(5)(k) (1993) defines "member" or "employee" for purposes of the Teachers' Defined Contribution Retirement System to include all classroom teachers "if regularly employed for full time service." The statute further defines regularly employed for full-time service as "employment in a regular position or job throughout the employment term regardless of the number of hours worked." W. Va. Code §18-7B-2(6) (1993). Thus, it does not appear that a substitute teacher would normally be authorized to participate in the teachers' retirement system.

Footnote: 8Cf. Cooke/Lawson v. Logan County Bd. of Educ., Docket Nos. 92-23-031/032 (Oct. 9, 1992), wherein this Board found that although the school board did not meet and approve school service personnel positions for a summer session until a week after the program began, such delay did not make such positions "newly created" within the meaning of W. Va. Code §18A-5-39.