MELINDA McCOY, .

.

Grievant, .

.

v. . DOCKET NO. 93-50-475

.

WAYNE COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Melinda McCoy (hereinafter Grievant) alleging a violation of W. Va. Code §§18-5-39 and 18A-4-8, in regard to her not being selected by Respondent Wayne County Board of Education (hereinafter WCBE) for a teacher's aide position in the special education extended school year program during the summer of 1993. This grievance was initiated on June 14, 1993. The grievance was denied through Level III, following a hearing at Level II on August 17, 1993. Grievant elected to appeal to Level IV, allowing the grievance to be decided upon the basis of the record below. (See footnote 1)

None of the pertinent facts are in dispute. Therefore, the following Findings of Fact have been developed from the record.

FINDINGS OF FACT

1. Grievant is presently employed as an Aide IV by WCBE, having been first employed as a special education aide on October 23, 1978.

2. Grievant was employed as a summer aide in the extended year special education program in 1989, 1990, and 1992.

3. Grievant applied for a duly posted aide position with WCBE's summer school extended year special education program at Lavalette Elementary School for 1993.

4. Judy Caldwell was the successful applicant for the summer aide position.

5. Ms. Caldwell has been employed by WCBE as a school aide since October 18, 1977.

6. Ms. Caldwell was employed as a summer aide in the extended year special education program in 1987, 1989 and 1992.

7. Ms. Caldwell's total seniority is greater than Grievant's.

DISCUSSION

The instant grievance involves application of W. Va. Code §18-5-39 (1993), which provides in pertinent part:

> An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer. If such employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code.

This Board has previously noted that §18-5-39 is a narrowly drafted exception to the more general provision in §18A-4-8b requiring competitive posting for school service personnel positions. Francis v. Logan County Bd. of Educ., Docket No. 93-23-346 (Dec. 29,1993). In the case at issue, both Grievant and the successful applicant had worked during the "immediate previous summer," the summer of 1992. For some reason not reflected in the record below, Grievant and the successful applicant, Ms. Caldwell, were required to compete for a single position. Given these facts, the narrow preference created by §18-5-39 provides no advantage to either Grievant or Ms. Caldwell. See Francis, supra.

WCBE accordingly referred to W. Va. Code §18A-4-8b (1993) which provides, in pertinent part, as follows:

> A county board of education shall make decisions affecting promotion and 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], article four of this chapter, (See footnote 2) on the basis of seniority, qualifications and evaluation of past service.

> 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, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies....

....

For purposes of determining seniority under this section an employee's seniority begins on the date that he enters into his assigned duties.

....

All decisions by county boards of education concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided.

....

If two or more employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the county board.

....

Grievant contends that since she and Ms. Caldwell were tied for the 1993 summer position under W. Va. Code §18-5-39, based upon each having worked the previous summer (1992), WCBE should have employed a random selection system to determine priority between them in accordance with W. Va. Code §18A-4-8b. WCBE agrees that once the narrow exception granted by W. Va. Code §18-5-39 becomes factually inapplicable, the school board is obligated to fill the position in accordance with W. Va. Code §18A-4-8b. However, WCBE argues that the controlling clause in §18A-4-8b is the one which provides that "seniority begins on the date that [the employee] enters into his assigned duties." Because Ms. Caldwell started working as an aide for WCBE on October 18, 1977, whereas Grievant's employment commenced on October 23, 1978, WCBE was obligated by §18A-4- 8b to

award the position to Ms. Caldwell, given that both applicants had appropriate qualifications and satisfactory past service. (See footnote 3)

The undersigned concurs with WCBE's interpretation of the statute. It is questionable whether the random selection clause in §18A-4-8b applies to any employmentaction other than a reduction in force. (See footnote 4) In any event, it is not necessary to reach that issue here since it is apparent that under the general definition of seniority set forth in §18A-4-8b, the applicants have not accumulated "identical seniority." Ms. Caldwell's accumulated regular seniority was superior to that of the Grievant. Therefore, given that each applicant was qualified and had records of satisfactory past performance, §18A-4-8b required WCBE's selection of Ms. Caldwell for the summer aide position. Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331 (W. Va. 1993); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989); King v. Ritchie County Bd. of Educ., Docket No. 43-87-308-3 (Oct. 31, 1988).

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

CONCLUSIONS OF LAW

1. Inasmuch as Grievant and the successful applicant had both worked as summer aides in the special education program operated by WCBE during the immediate previous summer, neither was entitled to any advantage over the other in competing for a summer 1993 aide position under the provisions of W. Va. Code §18-5-39. See Francis v. Logan County Bd. of Educ., Docket No. 93-23-346 (Dec. 29, 1993).

2. Consistent with W. Va. Code §18A-4-8b, the contested position was awarded to the applicant with the greatest seniority, based upon the dates when the respective applicants entered into their assigned duties. Harrison County Bd. of Educ. v. Coffman, 430S.E.2d 331 (W. Va. 1993); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989); King v. Ritchie County Bd. of Educ., Docket No. 43-8-308-3 (Oct. 31, 1988).

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 Wayne 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 not

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: March 1, 1994

Footnote: 1

Upon receipt of written submissions from both parties, this matter became mature for decision on December 21, 1993.

Footnote: 2

Aides I-IV are included in the classifications of service personnel listed in W. Va. Code §18A-4-8 (1993).

Footnote: 3

WCBE also considered the applicant's "seniority" as summer aides back to 1987. This consideration resulted in another "tie" since both had worked for three summers. This decision does not address whether this process is sanctioned by W. Va. Code §§18-5-39 and 18A-4-8b since the result would not be affected thereby.

Footnote: 4

To a certain extent, the definition of "seniority" in §18A-4-8b was modified by W. Va. Code §18A-4-8g (1993). However, nothing therein affects the determination that Ms. Caldwell's total seniority is greater than Grievant's.