SANDRA KENNEDY

v. **Docket No. 94-55-035**

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Sandra Kennedy, was employed by the McDowell County Board of Education (Board) as a teacher's aide until her termination in a reduction-in-force (RIF) conducted in Spring 1993. She filed a grievance at Level I October 19, 1993, (See footnote 1) alleging

> At the end of the 1990-91 school term, I was terminated from my position with the Bd. of Ed. Louis Scott Lane was not terminated. We both had the same starting date and seniority status. We had never been in a tie breaking selection before.

The grievance was denied at the lower levels (See footnote 2) and appeal to Level IV was made February 1, 1994. A hearing was held April 6, 1994 andthe parties declined to submit proposed findings of fact and conclusions of law.

FACTS

___There is no dispute over the facts of the case. The record developed at Levels II and IV supports the following findings.

1. The grievant and Louis Lane were first hired as aides on August 26, 1986.

2. Both the grievant and Mr. Lane lost their jobs in a reduction-in-force (RIF) in the spring of 1990 and were placed on preferred recall status. The two employees were then tied in seniority. (See footnote 3)

3. On or about May 22, 1990, the Board posted sixteen positions including an aide vacancy at Gary Elementary School (GES) for the 1990-91 school year. The grievant and Mr. Lane made applications for several of the jobs, including the GES position. (See footnote 4) Mr. Lane was appointed to the position by the Board on June 6, 1990, and entered upon his duties at GES on August 27, 1990.

4. On August 27, 1990, the Board posted an aide position at the McDowell County Vocational

Center (MCVC) and the grievant and two other aides made applications. By letter dated September 5, 1990, Jerry Roncella, the Board's Personnel Director, advised the grievant that she and the other two applicants were tied inseniority and that she should report to the Board office on September 10, 1990, to "devise a means of breaking this tie."

5. The grievant participated in a random drawing used to break the tie but apparently did not achieve the highest ranking. She was not awarded the MCVC position.

6. On September 18, 1990, the Board awarded the grievant another aide position at GES effective September 24, 1990. Since Mr. Lane had entered into his duties at GES prior to that date, the Board's subsequent entries in its seniority records did not reflect that he and the grievant were tied in seniority.

7. The grievant and Mr. Lane lost their positions at GES in a Spring 1993 reduction-in-force and were placed on preferred recall status.

8. Per directions from Ms. Roncella, the grievant reported to the Board's central office on September 28, 1993, to establish another random drawing process. (See footnote 5) Upon her arrival, she observed that Mr. Lane was not present. Believing that Mr. Lane and herself had identical seniority at that time, the grievant inquired of Ms. Roncella and others in the central office as to the reason for his absence but did not receive a response. The grievant participated in the selection of the method by which the random drawing would be conducted.

9. On the evening of September 28, 1993, the grievant obtained a copy of the Board's seniority rosters for aides from the president of the McDowell County School Service Personnel Association. Upon review of the rosters, she learned that Mr. Lane was listed as having worked for the Board for approximately one month more than she.

10. On October 13, 1993, the grievant reported to the Board's central office to take part in the random drawing. Prior to her participation, she advised Ms. Roncella in writing that she had concerns over Mr. Lane's seniority and that she felt he should be included in the drawing. In the October 13, 1993 letter, she indicated that her participation in the drawing was under protest. The grievant did not achieve the highest ranking in the drawing and was not awarded the position.

11. Per W.Va. Code §18-29-4(a)(1), the grievant participated in an informal conference with Ms. Roncella on October 19, 1993. During that conference, the grievant was advised that Mr. Lane's earlier 1990 rehire date was the reason for his greater seniority. As previously noted, the grievance

was filed the same date.

12. Subsequent to the filing of the grievance, the grievant was rehired in an aide position. (See footnote 6) As of April 16, 1994, the date of the Level IV hearing, Mr. Lane had not been rehired and thus, the grievant had surpassed him in accrued seniority.

ARGUMENT

The grievant asserts that since she and Mr. Lane were tied in seniority at the time they applied for the GES position to which he was appointed in June 1990, the Board should have conducted a random drawing at that time. Alternatively, she argues that she was more qualified than Mr. Lane and should have been awarded the job on that basis. The grievant maintains she did not learn of the facts giving rise to the grievance, i.e., Mr. Lane's appointment to the GES position, until October 19, 1993, and, thus, the grievance was timely per the provisions of W.Va. Code §18-29-4(a)(1). As relief, the grievant requests that she be compensated for the time Mr. Lane occupied the position prior to her appointment in September 1990 to a GES aide position and that her seniority be recalculated to reflect that additional time.

The Board primarily asserts that the grievant is attempting to protest her nonselection for the post awarded to Mr. Lane in June 1990 and that she is clearly beyond the timelines provided in §18-29-4. Alternatively, the Board asserts that the position was filled in accordance with W.Va. Code §18A-5-8, which controlled the appointment of aides at the time the position was filled.

CONCLUSIONS

After a careful review of the parties' positions, the applicable statutes and the foregoing findings of fact, the undersigned makes the following conclusions of law.

1. An employee of a county board of education may file a grievance within fifteen days following the occurrence of the eventupon which the grievance is based, or within fifteen days of the date on which the event became known to the employee. W.Va. Code §18-29-4(a)(1).

2. The event upon which the present grievance is based is the appointment of Mr. Lane to the position of aide at GES in June 1990. A preponderance of the evidence establishes that, while reasonable inquiry on her part would have revealed to the grievant as early as September 1990 that Mr. Lane was awarded the position upon which she bid, she did not actually learn of that appointment until October 19, 1993. (See footnote 7) Thus, the filing was in accordance with the timelines of Code §18-29-4(a)(1).

3. At the time the position in issue was filled, the selection process was controlled by W.Va. Code §18A-5-8 which mandated that aides be employed "on the basis of (1) qualifications, including but not limited to, education, training and experience, and (2) seniority." The statute did not mandate that applicants for such positions who were tied in seniority participate in a random drawing.

4. A grievant must prove the allegations contained in his or her grievance by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 93-06-416 (Feb. 28, 1994). The grievant failed to establish that she was more qualified for the position in issue than Mr. Lane or otherwise demonstrate that the Board violated Code §18A-5-8 in the appointment of Mr. Lane to the position.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of McDowell 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.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: August 31, 1994

Footnote: 1The grievant was on a preferred recall list per W.Va. Code §18A-4-8b when the grievance was filed. The Grievance Board has held that an employee on such status has standing to file a grievance. See, e.g., Woodson V. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993).

Footnote: 2A hearing was held at Level II on December 6, 1993. The transcript of that hearing and documents admitted are part of the record herein.

Footnote: 3Each had been transferred during the interim but had worked identical employment terms each year.

Footnote: 4Mr. Lane advised the Board's Personnel office that the GES position was his first preference while the grievant indicated that it was her fifth choice among all the positions.

Footnote: 5It is not clear from the record whether the grievant had applied for another position or whether the Board was merely attempting to establish the order by which she and other aides on the preferred recall list would be recalled in the event a position did become open. In any event, the reason for the drawing is of no significance to the inquiry.

Footnote: 6The record does not reflect the date she was rehired or the position she filled.

Footnote: 7The grievant was very credible in her assertion that while she knew Mr. Lane was working at GES, she did not realize that he had obtained his position there via the May 22, 1990 postings. It appears, however, that regardless of whether an employee files a grievance within fifteen days of his or her actual discovery of the facts giving rise to the complaint, that it may still be untimely if it is demonstrated that the employee was aware of sufficient facts which would have caused a reasonable person to make inquiry. See, Brown v. Public Employment Relations Bd., 345 N.W.2d 88 (Iowa 1984). Because the grievant fails on the merits of the case, the undersigned has elected not to address the timeliness issue more extensively herein.