THELMA HENSLEY,

Grievant,

v. DOCKET NO. 93-29-037

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

MARGARET MARCUM,

Intervenor.

D E C I S I O N

Thelma Hensley (Grievant) filed this grievance against the Mingo County Board of Education (Respondent) on the basis of an alleged violation of W. Va. Code §§ 18A-4-8b and 18A-4-15. Specifically, Grievant states, "Grievant applied for a half-time Custodian I position at Tug Valley High School. This position was awarded to a less senior employee. Grievant alleges a violation of West Virginia Code §18A-4-15 and §18A-4-8b and requests instatement, back wages, benefits and seniority." (See footnote 1) Margaret Marcum(Intervenor) was the employee selected for the position. Mrs. Marcum appeared at the Level IV hearing and is deemed to have properly intervened pursuant to W. Va. Code § 18-29-3(u). A timely grievance was filed at Level I and appealed to Level II, where the grievance was denied. Respondent waived participation at Level III, and hearing was held at Level IV on June 3, 1994. Briefs were filed on or about June 17, 1994.

The facts of this case are undisputed. Grievant has been employed as a "Substitute Custodian I" for Respondent since September 14, 1989. Intervenor has been employed for Respondent as a "Substitute Custodian I" since May 5, 1988. On November 26, 1991, Grievant was called to substitute at Tug Valley High School for a regularly-employed custodian, Jackie Baisden, who was off work due to illness. Mr. Baisden's position was subsequently posted as temporarily vacant on

January 23, 1992. This position was advertised as available "until the status of the regular employee is determined." Grievant applied for and was assigned the position on February 13, 1992 and continued in that position until June 10, 1993. Grievant received all regular employee benefits while employed in this position.

Respondent posted a position for a half-time custodial vacancy at Tug Valley High School on November 19, 1992. Grievant, who was still working in Mr. Baisden's position, and Intervenor bothapplied for the position. The vacancy was awarded to Intervenor on December 4, 1992.

The issues presented are the determination of Grievant's employment status and the type of seniority she accrued during the time she worked at Tug Valley High School from February 13, 1992 to June 10, 1993, and whether Respondent violated W. Va. Code §§ 18A-4-8b and 18A-4-15 by considering Intervenor prior to Grievant for the half-time custodial vacancy at Tug Valley High School.

Grievant contends that, because Mr. Baisden was absent from his position for more than thirty days when Respondent posted his position, he was on a "leave of absence" for purposes of the employment of substitute personnel under W. Va. Code § 18A-4-15(2). That Code section provides that when a board of education fills a position of a regular service employee on a leave of absence pursuant to the selection procedures of W. Va. Code § 18A-4-8b, that employee is a regular employee for the time he or she serves in the position. Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992). Grievant submits that she acquired regular employee status while serving in Mr. Baisden's position, and should have been considered first for the half-time custodial vacancy at Tug Valley.

W. Va. Code § 18A-4-8b requires applications for vacancies to 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.

If, as she claims, Grievant had regular employee status while working in Mr. Baisden's position, then according to the above priority list, she should have been considered for the Tug Valley vacancy before Mrs. Marcum, a substitute service personnel.

Respondent argues that Mr. Baisden was not on a leave of absence and that W. Va. Code § 18A-4-15 does not apply to the instant case. Respondent relies on W. Va. Code § 18A-4-8g (1993), which provides

> A substitute school service employee may acquire regular employment status and seniority if said employee receives a position pursuant to section fifteen [§ 18A-4-15(2) and (5)], subsections (2) and (5) article four of this chapter. County boards of education shall not be prohibited from providing any benefits of regular employment for substitute employees, but such benefits shall not include regular employee status and seniority.

Respondent argues that since Mr. Baisden never formally requested a leave of absence that his time off work must be considered a temporary absence under W. Va. Code § 18A-4-15(1), rather than a leave of absence under W. Va. Code § 18A-4-15(2), and as a result, Grievant is not eligible to receive regular employee status and seniority. In support of its argument, Respondent offered into evidence an October 25, 1991 letter from the West Virginia School Service Personnel Association which in essence stated that if an employee has requested a leave of absence, his orher position is to be filled according to § 18A-4-15(2); otherwise, the absence is considered temporary under § 18A-4-15(1).

While it is easy to see why the Respondent takes the position it does based upon this letter, the

opinion offered therein is in direct conflict with prior decisions of this Board. The "leave of absence" issue was directly addressed and decided in Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987), wherein it was held that, after an employee has been off work for twenty days, further absence will be considered a leave of absence for the purpose of substitute hiring under § 18A-4-15(2) even though a formal request for a leave of absence has not been filed by the absent employee. See also, Ferrell v. Snell/Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd., Circuit Court of Kanawha County, 93-AA-217, (Feb. 15, 1994); Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991), citing, Stutler, supra. (See footnote 2)

Moreover, under W. Va. Code § 18A-4-15(2), an employee who is selected to fill the position of a regular employee on a leave of absence pursuant to the provisions of W. Va. Code § 18A-4-8b is considered a regular employee for the duration of that job assignment, and begins earning regular employee seniority. Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992).

Therefore, Grievant had regular employee status and seniority while working in Mr. Baisden's position at the time Respondentposted the subject vacancy and, pursuant to W. Va. Code § 18A-4-8b, should have been awarded the position over Intervenor, who had substitute status.

In addition to the above findings of fact, the following conclusions of law are made.

Conclusions of Law

1. Mr. Baisden, a regular service employee, was absent for a period greater than twenty days, and that absence is considered a "leave of absence" for the employment of substitute personnel under W. Va. Code § 18A-4-15(2). Ferrell v. Snell/Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd., Circuit Court of Kanawha County, 93-AA-217, (Feb. 15, 1994); Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991), citing, Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987).

2. Grievant was assigned to Mr. Baisden's position while he was on a leave of absence, therefore, she was a regular employee for the time she served in the position. Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992).

Accordingly, this grievance is **GRANTED** and the Mingo County Board of Education is **ORDERED** to credit Grievant with regular employee status and seniority as a custodian for the period February

13, 1992 through September 17, 1993, and to compensate Grievant with retroactive back-pay and benefits for the period August 27, 1993 through September 17, 1993.

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.

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MARY JO ALLEN

Administrative Law Judge

Dated: July 6, 1994

Footnote: 1 *Grievant was hired as a full-time custodian at Marrowbone Grade School on September 17, 1993, and waives instatement into the half-time custodial position at Tug Valley High School. Grievant seeks amendment of Respondent's seniority records to reflect that she accrued regular employment status and seniority as a custodian from February 13, 1992 to September 17, 1993 and retroactive wagesand benefits for the period from August 27, 1993 to September 17, 1993.*

Footnote: 2 *Respondent's reliance on Meade v. Mingo County Bd. of Educ., 356 S.E.2d 479 (W. Va. 1987) is also misplaced.*