ESTHER BLAIR,

Grievant,

v. DOCKET NO. 94-29-1083

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

KENDRA SALMONS,

Intervenor.

D E C I S I O N

Grievant, Esther Blair, filed this grievance on October 11, 1994, after a position for which she applied for allegedly was awarded to an individual with less seniority. Grievant asks to be placed in the position, with back pay and benefits, and a correction of the seniority list. Pursuant to W. Va. Code § 18-29-3(u), the individual who was awarded the position in question, Kendra Salmons, was permitted to intervene to protect her interests. Following adverse decisions at the lower levels, Grievant timely filed an appeal to Level IV and a hearing was held on April 6, 1995. The parties elected to submit post-hearing briefs, and this matter became mature for decision on or about May 2, 1995.

The underlying facts in this matter are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Esther Blair (hereinafter "Grievant") was hired by the Mingo County Board of Education (hereinafter "Respondent") on December 20, 1993, for a regular, full-time teaching position at Tug Valley High School. She worked until the end of the school year and was credited with 120 days of

regular, full-time seniority.

2. Kendra Salmons, the Intervenor herein, was employed by Respondent as a regular, part-time teacher at Kermit Grade School on November 17, 1993. Ms. Salmons' schedule varied from week to week, but at no time did she work over 17-1/2 hours per week.

3. Grievant and Ms. Salmons applied for a teaching position at Marrowbone Grade School in or around October 1994. Respondent awarded the position to Ms. Salmons because she allegedly had more seniority than Grievant. (See footnote 1)

4. Grievant filed this grievance alleging that she should have been awarded the position at Marrowbone Grade School because she has more seniority than Ms. Salmons.

Discussion

Grievant alleges that Respondent has incorrectly calculated Ms. Salmons' seniority and that if calculated correctly, Grievant would have more seniority.

Respondent and Ms. Salmons allege that Respondent correctly calculated Ms. Salmons' seniority during the time she worked as a regular, part-time employee and determined that she had more seniority than Grievant.

All parties rely on W. Va. Code § 18A-4-7b(d) which states, in pertinent part:

> (d) Any professional employee employed for a full employment term but in a part-time position shall receive seniority credit for each of day of employment prorated to the proportion of a full employment day the employee is required to work: Provided, That nothing herein allows a regular full-time employee to be credited with less than a full day of seniority credit for each day the employee is employed by the board: Provided, however, That this calculation of seniority for part-time professional personnl is prospective and does not reduce any seniority credit accumulated by any employee prior to the effective date of this section: Provided further, That for the purposes of this section a part-time employee shall be defined as an employee who is employed less than three and one-half hours per day.

However, that portion of the state states very clearly that a part-time employee is one who is employee for less than 3-1/2 hours per day. It is undisputed that Ms. Salmons worked 3-1/2 hours per day, sometimes more, but never less. Therefore, although designated as such by Respondent, Ms. Salmons is not a part-time employee for the purposes of calculating seniority under Code § 18A-4-7b.

Since she is not a part-time employee, Ms. Salmons, under Code § 18A-4-7b, should be credited

with seniority beginning on the date she commenced her duties and for each day she was professionally employed regardless of whether she received pay for that day. (See footnote 2) It appears that Respondent credited Ms. Salmons with a full days' seniority for every day she worked, plus holidays, sick days, and OS days. Therefore, even though Respondent has incorrectly designated Ms. Salmons' as a part-time employee, they have correctly calculated her seniority and she was properly placed into the subject teaching position.

Conclusions of Law

1. In order to prevail, Grievant must establish the truth of her allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. Grievant has failed to prove by a preponderance of the evidence that Respondent's calculation of Ms. Salmons' seniority was in error.

Accordingly, this grievance is **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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 26, 1995

Footnote: 1 *No evidence was presented regarding the selection process under W. Va. Code § 18A-4-7a other than the seniority issue, which is the only issue properly before the undersigned Administrative Law Judge.*

Footnote: 2 *The undersigned Administrative Law Judge is cognizant of the unfairness inherent in the language of Code § 18A-4-7b, however, is bound by the clear and unambiguous language of the statute.*