JAY S. O'BRIEN,

Grievant,

v. DOCKET NO. 95-50-316

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jay O'Brien, filed this grievance on June 27, 1995:

> Violation of WV Code 18A-4-8b, 18A-4-8g, 18A-4-15 in regard to grievant and another employee not having their seniority determined by a random selection system. The grievant bid on posted positions that were awarded to the other employee. This grievance has been on-going at the informal level, but settlements were unsuccessful. The grievant seeks relief by having a random selection system occur and credit for loss of any regular seniority status.

Following adverse decisions at the lower levels, Grievant appealed to level four on July 18, 1995. The parties agreed to submit the case on the record developed below, consisting of the transcript, exhibits and decision of a level two hearing conducted on July 5, 1995. This case became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on August 9, 1995.

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

Findings of Fact

1. Grievant was employed as a substitute custodian by Respondent Wayne County Board of Education on February 19, 1990.

2. Judy James was employed as a substitute custodian by Respondent on February 19, 1990.

3. Ms. James was called to work on the morning shift on that day. Grievant was called to work on the evening shift on that day.

4. Both applied for a regular posted position and Ms. James was awarded the position as being more senior.

5. Grievant requested a random selection take place with Ms. James to determine who had greater seniority, and Ms. James refused to participate in the selection. Respondent did not hold a random selection drawing.

W. Va. Code § 18A-4-8b states, in pertinent part:

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

W. Va. Code § 18A-4-8g states, in pertinent part:

> . . . Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen [§ 18A-4-15], article four of this chapter,
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> . . .
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> 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.
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> A board of education shall conduct such random selection within 30 days upon said employees establishing an identical seniority date. All employees with an identical seniority date within the same class title or classification category shall participate in the random selection. As long as the affected employees hold identical seniority within the same classificationcategory, the initial random selection conducted by the board of education shall be permanent for the duration of the employment within the same classification category of said employees by the board of education. This random selection priority shall apply to the filling of vacancies and to the reduction in force of school service personnel.

Grievant relies on the above statutes to support his contention that he and Ms. James have identical seniority, and that a random selection should take place to determine, for purposes of filling vacancies and reduction in force, who has the greater seniority.

Respondent contends Ms. James has greater seniority because she was called first on February 19, 1990, to work the morning shift, and Grievant did not begin to work until the evening shift. Respondent's interpretation is not supported by the clear wording of the statutes that an employee's seniority begins on the date he enters into his assigned duties, not the date and time.

Based upon the findings of fact and the applicable statutes, the undersigned finds Grievant must prevail as more fully set forth in the following conclusions of law.

Conclusions of Law

1. For purposes of determining seniority under this section an employee's seniority begins on the date that he enters into his assigned duties. W. Va. Code § 18A-4-8b.

2. Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute. W. Va. Code § 18A-4-8g.

3. 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. A board of education shall conduct such random selection within 30 days upon said employees establishing an identical seniority date. W. Va. Code § 18A-4-8g.

4. Grievant has proven by a preponderance of the evidence that he and Ms. James both entered upon the duties of their jobs on February 19, 1990 and thus, at that time, held identical seniority as defined by W. Va. Code §§ 18A-4-8b and 18A-4-8g.

5. Grievant has proven by a preponderance of the evidence that he requested a random selection drawing and Respondent failed to conduct such a drawing in violation of W. Va. Code § 18A-4-8g.

Accordingly, this grievance is **GRANTED**. The Wayne County Board of Education is hereby **ORDERED** to immediately conduct a random selection with respect to Grievant and Ms. James pursuant to W. Va. Code § 18A-4-8g. Should Grievant prevail in the drawing, he shall be credited with any regular seniority status he lost to Ms. James in the past. Should Grievant lose the drawing, he shall not be credited with any regular seniority status. Ms. James' accrual of regular seniority status shall remain the same no matter what the outcome of the drawing.

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 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: August 29, 1995