

**DEBORAH HARRISON, .**

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**Grievant, .**

•

**v. . Docket No. 95-23-459**

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**LOGAN COUNTY BOARD OF EDUCATION, .**

•

**Respondent. .**

## **DECISION**

This is a grievance by Deborah Harrison (Grievant) alleging that Respondent Logan County Board of Education (LCBE) violated W. Va. Code §§ 18A-4-8b and 18A-4-8g when she was not selected for one or more posted teacher aide vacancies. This grievance was advanced to Level IV on October 18, 1995. A hearing was held in this Board's office in Charleston, West Virginia, on February 14, 1996. This matter became mature for decision on April 9, 1996, upon timely receipt of Grievant's post-hearing submission.

The pertinent facts in this matter are essentially undisputed and the parties are generally in agreement that resolution of this grievance involves a question of law. Accordingly, the following Findings of Fact have been derived from the record, including hearings at Levels II and IV.

## **FINDINGS OF FACT**

1. Grievant, Bernice Chambers, and Carolyn Ramey were employed by LCBE as regular school service employees in the classification of aide during the 1994-95 school year.
2. Prior to the end of the 1994-95 school year, Grievant, Ms. Chambers, and Ms. Ramey were properly notified and placed on the preferred recall list, due to a reduction in force by LCBE.
3. Ms. Chambers and Ms. Ramey have less seniority as aides than Grievant.
4. Prior to August 22, 1995, the beginning of the 1995-96 school year, Ms. Chambers and Ms.

Ramey bid upon and were selected to hold regular positions during the 1995-96 school year. Ms. Ramey was hired as a cook at Whitman Grade School from Posting No. 417, dated August 4-11, 1995. Ms. Chambers was hired as a custodian at Man Junior High School from Posting No. 409, dated June 9-15, 1995. See J Ex 1 at L II.

5. LCBE listed a vacancy for a special education aide at Man High School in Posting No. 418 dated August 15-21, 1995.

6. Grievant and Ms. Chambers applied for the aide position described in Finding of Fact Number 5. LCBE selected Ms. Chambers for transfer to the aide position based upon a determination that she was entitled to priority under W. Va. Code § 18A-4-8b as a regular employee.

7. LCBE further issued Posting No. 419 dated Aug. 18-24, 1995, listing a vacancy for an aide at Man Junior High School. 8. Grievant and Ms. Ramey applied for the aide position described in Finding of Fact Number 7. Ms. Ramey was transferred to this position, effective August 24, 1995.

9. Grievant did not apply for any vacant school service positions other than aide.

10. Ms. Chambers and Ms. Ramey are properly qualified to hold the cook and custodian positions for which they were selected by LCBE.

11. Grievant was recalled from the preferred recall list on September 18, 1995, as an aide at Sharples Elementary/Middle School.

12. On September 18, 1995, Eunice Runyon, employed as a half- time cook at Sharples Elementary/Middle School, was transferred to a posted vacancy as a Chapter I aide at Verdunville Elementary School.

13. Grievant also applied for the Verdunville position and has greater seniority as an aide than Ms. Runyon.

14. Grievant, Ms. Ramey, Ms. Chambers, and Ms. Runyon all hold the service personnel classification of aide and have received satisfactory evaluations.

15. As of August 21, 1995, LCBE had approved employment of Ms. Chambers as a custodian and Ms. Ramey as a cook, but they did not enter upon their duties until August 22, 1995.

### **DISCUSSION**

In a grievance of this nature, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29- 481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

Resolution of this grievance requires application of W. Va. Code § 18A-4-8b, pertinent portions of which are quoted below:

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, 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. Applicants shall 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.

\* \* \*

All employees whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the basis of seniority.

Employees placed upon the preferred list shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to any lateral position for which the employee is qualified or to a lateral area for which an employee has certification and/or licensure.

\* \* \*

No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

Also germane to resolution of this grievance is W. Va. Code § 18A-4-8g, which provides, in pertinent part:

The seniority for service personnel shall be determined in the following manner:

Seniority accumulation for a regular school service employee shall begin on the date such employee enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5], article two of this chapter and shall continue until the employee's employment as a regular employee is severed. . . .

Under the foregoing statutes, school service personnel holding regular employment status are entitled to preference in hiring over other employees holding some lesser status, including preferred recall rights. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987). LCBE contends that Ms. Ramey and Ms. Chambers were "regularly employed service personnel" within the meaning of W. Va. Code § 18A-4-8b at the time they were selected for the aide positions at issue. Thus, they were statutorily entitled to preference over Grievant.

Grievant argues that Ms. Chambers and Ms. Ramey would not regain regular status until they entered upon their duties. Thus, while waiting to assume the positions for which they had been selected, they retained preferred recall status. As Grievant also had preferred recall status and greater seniority as an aide, LCBE should have selected her for at least one of the vacant aide positions.

The posting for the aide position at Man Junior High School for which Grievant and Carolyn Ramey applied did not close until August 24, 1995. As of that date, Ms. Ramey had been performing her duties as a regular cook for two days. Accordingly, the undersigned finds that Ms. Ramey was then a regularly employed service employee as intended by W. Va. Code § 18A-4-8b, and LCBE properly selected her for the aide position over Grievant, who then held only preferred recall status.

See Messer, supra.

The dispositive issue in this grievance arises over LCBE's selection of Ms. Chambers over Grievant for the vacant special education aide position at Man High School. As of the date that posting closed, August 21, 1995, Ms. Chambers had not yet entered upon the duties of her position as a regular custodian. [\(See footnote 1\)](#) Grievant noted at Level II that an opinion of the State Superintendent of Schools supports her position. This opinion, issued by State Superintendent Henry Marockie on August 22, 1994, states:

[T]he phrase "regularly employed service personnel" means "regularly employed at the time the applicants are considered." Employee "A" has been hired and will be regularly employed when the school term commences, but is not yet regularly employed . . . . (emphasis in original.)

The factual situation discussed in the above-quoted opinion involved two substitute bus operators, one of whom had been hired in July to fill a regular position at the beginning of the upcoming school term. The undersigned does not find any meaningful distinction between a substitute service employee selected for a regular position and a service employee on preferred recall status selected for a regular position, for purposes of deciding this specific issue.

W. Va. Code § 18-3-6 authorizes formal opinions by the Superintendent of Schools in the following terms: "At the request in writing of any citizen, teacher, school official, county or state officer, the state superintendent of schools shall give his interpretation of the meaning of any part of the school law or of the rules of the state board of education." Under the West Virginia Supreme Court of Appeals' well-settled doctrine regarding interpretation of statutes by bodies charged with their administration, a State Superintendent's opinion is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E. 2d 775 (1992); Smith v. Bd. of Educ., 341 S.E.2d 685, 689-690 (W. Va. 1985); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994). See Chafin v. Boone County Bd. of Educ., Docket No. 93-03-034 (July 7, 1993); Skeens v. Lincoln County Bd. of Educ., Docket No. 89-22-496 (Oct. 24, 1989).

The State Superintendent's opinion acknowledges that this is a "close question." However, if LCBE had posted either of the aide vacancies, prior to posting the cook and custodian positions into which Ms. Chambers and Ms. Ramey successfully bid, Grievant would then have been selected for either position by virtue of her superior seniority. There is no evidence to suggest that LCBE did anything beyond simply posting and filling these service personnel positions in the same

chronological order as it became aware of these vacancies. Nonetheless, the result LCBE seeks to enforce eliminates seniority as the determinative factor among similarly qualified applicants for a vacant service personnel position. When W. Va. Code §§ 18A-4-8b and 18A-4-8g are read in pari materia, "the legislature's intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 275, 430 S.E.2d 331 (1993). See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

In view of the foregoing, the undersigned is unable to conclude that the opinion of the State Superintendent of Schools relied upon by Grievant is either clearly wrong, or inapplicable to the facts present in this grievance. Accordingly, it is determined that Ms. Chambers had not yet attained regular employment status, as intended by W. Va. Code § 18A-4-8b, as of the time she was selected over Grievant to fill the special education aide position at issue. Consequently, Grievant has established that she should have been instated to that position, effective August 22, 1995, and is entitled to backpay from that date to September 18, 1995, the date she was recalled by LCBE to another aide position. The parties stipulated at Level II that if Grievant had been hired for one of the two vacant aide positions in August 1995, due to her seniority, she would have had priority for the aide vacancy at Verdunville Elementary School held by Eunice Runyon. [\(See footnote 2\)](#) Accordingly, LCBE will be required to instate Grievant to the Verdunville position. See McMillen v. Bd. of Trustees, W. Va. Univ., Docket No. 92-BOT-341 (Nov. 12, 1993).

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

### **CONCLUSIONS OF LAW**

1. In a grievance of this nature, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and

capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). 3. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with regularly employed service personnel receiving preference over service personnel who have been awarded preferred recall status as a result of their employment being discontinued. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987).

4. An opinion of the State Superintendent of Schools interpreting a provision of the laws applicable to the West Virginia schools is entitled to great weight unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 424 S.E.2d 775, 188 W. Va. 430 (1992); Smith v. Bd. of Educ., 341 S.E.2d 685 (W. Va. 1985); Jerden v. Lewis County Bd. of Educ., Docket No. 93- 21-349 (Aug. 19, 1994). See Security Nat'l Bank v. First W. Va. Bancorp, 277 S.E.2d 613 (W. Va. 1981).

5. The August 22, 1994 opinion by the State Superintendent of Schools that a school service employee hired for a regular position but who has not yet entered into his duties has not yet attained the status of "regularly employed service personnel" under W. Va. Code § 18A-4-8b, for purposes of obtaining priority in hiring over another school service employee in a lower employment category, is not clearly erroneous. See Lincoln County, *supra*.

6. The legislature's intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of service personnel positions under W. Va. Code § 18A-4-8bis clear. Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 275, 430 S.E.2d 331 (1993). See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. A school service employee on preferred recall status who has been selected and approved by a county board of education for recall to employment in a regular school service personnel position, but who has not yet entered upon the duties of the regular position within the meaning of W. Va. Code § 18A-4-8g, is not entitled to preference in hiring under the provisions of W. Va. Code § 18A-4-8b, over another school service employee on the preferred recall list with greater seniority in the classification of employment being filled.

8. Under the particular facts and circumstances present here, Grievant has established that she is entitled to instatement as an aide, effective August 22, 1995, with a further entitlement to instatement as a Chapter I aide at LCBE's Verdunville Elementary School. See W. Va. Code §§ 18A-4-8g & 18-29-5(b); McMillen v. Bd. of Trustees, W. Va. Univ., Docket No. 92-BOT-341 (Nov. 12, 1993).

Accordingly, this Grievance is **GRANTED** and LCBE is hereby **ORDERED** to instate Grievant as an aide at Verdunville Elementary School, and to award her back pay and benefits, as if she had been employed commencing on August 22, 1995, and to make appropriate adjustments to her seniority based thereon.

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

**LEWIS G. BREWER**

**Administrative Law Judge**

**Dated: May 31, 1996**

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[Footnote: 1](#)

*Ms. Chambers reported for duty on August 22, 1995. As that was an inservice day, her transfer to the special education aide position became effective that day. Thus, she never actually worked as a custodian.*

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[Footnote: 2](#)

W. Va. Code § 18A-4-8g provides: "Service personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill such vacancy."