

GLORIA STEWART

v. Docket No. 95-55-381

WYOMING COUNTY BOARD OF EDUCATION

DECISION

The grievant, Gloria Stewart, is employed by the Wyoming County Board of Education (Board) as a one-half time Cook. Her complaint, filed at Level I June 2, 1995, is that the Board violated W.Va. Code §18A-4-8b by failing to post a special education Aide position at Oceana High School (OHS) during the 1994-95 school year. Her supervisor was without authority to grant relief, and the grievance was denied at Level II following a hearing held August 3, 1995. The Board, at Level III, declined to address the matter and appeal to Level IV was made August 28, 1995. On or about March 25, 1996, the parties agreed to submit the case for decision on the record developed at Level II. [\(See footnote 1\)](#) Proposed findings of fact and conclusions of law were received by April 26, 1996. There is no dispute that from early September 1994 to the end of the 1994-95 school year, the Board, without announcing a position vacancy, assigned Freda Blankenship, a substitute Aide, to OHS to work with two physically impaired students, one or both of which may have required the use of a wheelchair. It appears that the need for the assignment arose shortly before the start of the school year or was otherwise unexpected, and that, initially, it was to last only a few weeks.

The grievant served as an Aide during the 1993-94 school year but lost that position in a Spring 1994 reduction-in-force. She sustained an on-the-job back injury on March 23, 1994, and worked only four to five weeks of the remainder of the 1993-94 school year. The grievant apparently bid upon and received her present Cook position during the summer months. It is undisputed, however, that the injury did not permit her to work the entire 1994-95 year. The grievant concedes that she could not have performed any tasks associated with the OHS assignment which entailed lifting more than ten to fifteen pounds.

The grievant learned of Ms. Blankenship's assignment in early September 1994. At least twice in

late September or early October, she indicated to Superintendent of Schools Frank Blackwell that the assignment should be posted, and was advised each time that it would end shortly. The grievant did not consult the Superintendent further, and did not again inquire whether Ms. Blankenship continued to work at OHS until early March 1995. As noted, she did not file at Level I until June 2, 1995. It seems the parties agree that, at some point, the OHS assignment became a "position" and should have been posted. W.Va. Code §18A-4-8b, in pertinent part, provides,

Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job.

The grievant maintains that had the position been properly posted, she would most likely have obtained it through competitive bidding. She concedes that more senior Aides and even more senior employees in other classifications might have outbid her, and asserts, apparently in the alternative, that it is probable that she would have eventually obtained an Aide slot as a transfer or transfers of those employees caused other vacancies. As relief, the grievant asks that she be credited with seniority as an Aide for the 1994-95 school year.

The Board primarily contends that the grievant's injury rendered her ineligible for the post and that she failed to demonstrate that she would have been the successful bidder, in any event. The Board also avers that the complaint is untimely per W.Va. Code §18-29-4(a)(1).

The grievant's legal position is flawed in several respects, but since resolution of the issue of the grievant's eligibility for the position is dispositive of the case, other issues, including the Board's timeliness assertion, need not be addressed. Therecord establishes that the OHS job entailed lifting, on a regular basis, weights of more than fifteen pounds. The grievant's own testimony confirms that she could not have performed those duties during the time for which she claims seniority. The grievant does not cite and the undersigned is unaware of any statute, policy, regulation, or rule of law whereby a school service employee, on leave of absence due to an on-the-job injury, must be appointed to a position when the injury renders him or her incapable of performing the duties thereof.

Accordingly, the grievance is **DENIED**.

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

Wyoming 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.

JERRY A. WRIGHT
ADMINISTRATIVE LAW JUDGE

Dated: May 30, 1996

[Footnote: 1](#) *At least four hearings were scheduled and continued, primarily at the request of grievant's counsel.*