GLORIA F. CECIL,

Grievant,

v. **Docket No. 97-20-366**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Gloria F. Cecil (Grievant), an employee of Respondent Kanawha County Board of Education (KCBE), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on June 25, 1997. Grievant contends KCBE improperly denied her employment as an Aide in KCBE's extended school year program at Capital High School. Following denial of her grievance at Level I, Grievant appealed to Level II where an evidentiary hearing was conducted on July 29, 1997. The grievance was denied at Level II in a decision issued by Norman T. Richardson, the Superintendent's designee, on August 6, 1997. Grievant waived Level III, as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on August 13, 1997. A Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on October 9, 1997. This matter became mature for decision at the conclusion of that hearing, as the parties made oral closing arguments, waiving written post-hearing submissions.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Kanawha County Board of Education (KCBE) during the regular school year as an Aide III at Tiskelwah Elementary School.

2. Grievant has been employed by KCBE for approximately 23 years. For the past 9 years prior

to 1997, Grievant was employed as an Aide in its summer program for special education students.

3. KCBE's established practice has been to post notices of summer positions in accordance with W. Va. Code § 18A-4-8b, and to fill those positions in accordance with W. Va. Code § 18-5-39.

4. KCBE's manual for transportation personnel provides that "[e]xisting or continuing summer assignments will be assigned to those who previously held them." G Ex A at L IV.

5. KCBE posted a number of "extended school year" summer positions for the period from June 23, 1997, to August 1, 1997, including 14 Aide positions. The first posting of these positions was scheduled to run from March 24 to April 1, 1997. However, the notices were not printed on schedule. Thus, the initial posting appeared for four days, rather than the five days required by statute. Accordingly, KCBE Director of Personnel William Milam conducted a second posting period between May 5 and May 14, 1997. See G Exs 1 & 2 at L II. 6. A copy of each of the postings described in Finding of Fact Number 4 were distributed to all KCBE schools in the normal course of business. Each school principal is responsible for posting such notices in his or her school.

7. The postings described in Finding of Fact Number 4 were also placed on a telephone "hotline" which permits employees to call in and listen to a recorded message summarizing the positions which are currently posted.

8. At Tiskelwah Elementary School, where Grievant is regularly employed, the school secretary normally affixes postings to a bulletin board in the teachers' lounge. The secretary at Tiskelwah Elementary School was on sick leave around the time these postings would have been received from KCBE's Central Office.

9. Grievant did not see a posting at her school, and began making inquiries regarding the positions on May 19, 1997. After talking with the school secretary, who could not recall seeing the posting in question, Grievant contacted KCBE's Personnel Office, and was informed that the posting had closed on May 14, 1997.

10. On May 21, 1997, Grievant applied for the posted Aide position she had held during the previous summer.

11. KCBE did not consider Grievant's application because it was not received by the deadline contained in the second posting.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each

element of her grievance by a preponderance of the evidence. ProceduralRules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Summer school employment is specifically addressed in W. Va. Code § 18-5-39. That statute provides, in pertinent part:

> Notwithstanding any other provision of the code to the contrary, the county board is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code.

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

> 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. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

KCBE contends that the position was properly posted in accordance with W. Va. Code § 18A-4-8b. Therefore, Grievant's failure to timely apply forfeits her entitlement to continued summer employment under W. Va. Code § 18-5-39. Grievant asserts that she is entitled to more definitive notice that the position she previously held was available.

W. Va. Code § 18-5-39 gives service employees who have held summer school positions during the previous summer the option of retaining that same position during thefollowing summer. Essentially, this statute gives an employee who works in a summer school position, a "right of first refusal" to that same job (if it exists) in any succeeding summer, until he or she declines to accept the position. See Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sept. 15, 1997). However, the statute does not specify how the employees are to be notified that a summer position they previously held is available. KCBE submits that posting notices in compliance with W. Va. Code § 18A-4-8b is a reasonable and efficient method for disseminating such notice.

"School personnel laws and regulations are to be construed strictly in favor of the employee." Syl.

Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Moreover, the statute must be construed as written. See Keatley v. Mercer County Bd. of Educ., 1997 W. Va. LEXIS 123, S.E.2d (1997). The statute explicitly provides for posting in accordance with W. Va. Code § 18A-4-8b when "the employee is unavailable or . . . the position is newly created." The statute similarly makes it clear that an employee such as Grievant "shall have the option of retaining the job" if the job exists "during any succeeding summer."

According to the undisputed facts in this case, Grievant was not afforded a meaningful opportunity to exercise her option to accept or decline continued summer employment in the position she previously held. KCBE was unable to establish that Grievant had anything more than constructive notice that her previously held position was available. Grievant applied for the position after the posting closed. There is no evidence that KCBE had awarded the position to another service employee before Grievant'sapplication was received. (See footnote 1) In these circumstances, Grievant was clearly not "unavailable" for the position within the plain meaning of W. Va. Code § 18-5-39. Therefore, KCBE had no authority to hire another service employee from the posting, as the condition precedent for this competitive process had not yet occurred. (See footnote 2) Thus, Grievant established that she was deprived of employment as an Aide from June 23, 1997, to August 1, 1997, contrary to W. Va. Code § 18-5-39.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18-5-39 gives service employees who have held summer school positions during the previous summer the option of retaining their position during any succeeding summer that the position exists. Established summer positions are to be filled through competitive posting in

accordance with W. Va. Code § 18A-4-8b only if theemployee who held the position during the preceding summer is "unavailable." See Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sept. 15, 1997).

3. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

4. Where Grievant's application for the summer position she held during the previous summer was submitted after the date the posting closed, but before the position was awarded to another service employee, Grievant was not "unavailable" for the position within the meaning of W. Va. Code § 18-5-39. Therefore, KCBE's decision to hire another service employee who timely applied for the position under the posting violated Grievant's entitlement to retain her previously held summer position as established by W. Va. Code § 18-5-39.

Accordingly, this Grievance is **GRANTED**. Respondent Kanawha County Board of Education is **ORDERED** to instate Grievant to the position of an Aide in its "extended school year" program at Capital High School for the summer of 1997, and to pay her back pay, with interest, and all other benefits to which she would have been entitled.

Any party may appeal this decision to the Circuit Court of Kanawha 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 thecivil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: October 31, 1997

Footnote: 1

Inasmuch as Grievant applied for the position before it was actually filled, it is not necessary to decide at this time what particular form of notice is required to permit an employee to properly exercise their summer employment option in accordance with W. Va. Code § 18-5-39.

Footnote: 2

A county board may post notice of "anticipated" vacancies, noting that the positions will be filled in accordance with W. Va. Code § 18A-4-8b, if the positions become "available" in accordance with W. Va. Code § 18-5-39.