TAMMY KIRK,

Grievant,

v.

DOCKET NO. 97-29-069

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

SHERRILYN CISCO,

Intervenor.

D E C I S I O N

Grievant, Tammy Kirk, filed this grievance on or about December 12, 1996:

> Grievant, a cook on preferred recall, applied for a posted half-time Cook I vacancy at Burch High School. The Respondent awarded this position to Sherrilynn Cisco, a less senior cook on preferred recall. Grievant alleges a violation of West Virginia Code §18A-4-8b and §18A-4-8g and seeks instatement into this position and wages, interest and benefits retroactive to December 5, 1996.

A level two hearing was held on January 16, 1997, at which time Sherrilyn Cisco was granted intervenor status pursuant to W. Va. Code § 18-29-4(u). A level two decision denying the grievance was rendered by John Fullen, the Superintendent's designee onJanuary 27, 1997. The Board waived participation at level three pursuant to W. Va. Code § 18-29-4(c), and Grievant appealed to level four on February 4, 1997. Hearing was held on April 11, 1997, and this case became mature for decision on May 9, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

SUMMARY OF THE EVIDENCE

Grievant's Exhibits

LII Ex. 1 -

West Virginia State Department of Health Food Worker's Permit issued to Tammy Kirk, expiration date December 1997.

LIV Ex. 1 -

Mingo County Schools Experience Record for Tammy Kirk

LIV Ex. 2 -

Mingo County Board of Education Service Personnel Positions, dated November 8, 1996

Board's Exhibits

LII Ex. 1 -

Mingo County Schools Preferred Recall and Substitutes Cook List 1996- 1997

LII Ex. 2 -

Mingo County Board of Education Board Minutes, December 5, 1996

Testimony

Grievant testified in her own behalf and presented the testimony of Christine Whitt. The Board presented the testimony of Pamelia Varney and Sherrilyn Cisco.

ISSUE

The issue is whether the Board violated the preferred recall provisions of W. Va. Code § 18A-4-8b, or was arbitrary and capricious, in not recallling Grievant for a one-half time Cook I position, because she not possess a valid West Virginia State Department of Health Food Handler's Card.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed by the Board in the Cook classification category of employment.

2. Grievant's seniority date with the Board in the Cook classification is August 29, 1989.

3. On November 8, 1996, the Board posted a one-half time Cook I position for Burch High School, as follows:

(1) Cook I

(Regular Part-Time 17 ½ hrs per week)

(Position will be filled for the 1996-97 school term only.)

(Position will remain if the lunch count justifies.)

LIV G. Ex. 2.

4. At the time of the subject posting, Grievant was on the Cook preferred recall list.

5. The closing date for this posting was November 15, 1996.

6. Grievant was the most senior applicant for the position and had satisfactory evaluations.

7. Grievant had let her West Virginia State Board of Health Food Handler's Permit expire in August 1996.

8. On December 5, 1996, the Board filled the position with Intervenor, effective December 6, 1996.

9. Grievant was not selected for the position because she did not hold a valid West Virginia Department of Health Food Handler's Card. 10. Intervenor possessed a valid Food Handler's Card at the time of her selection.

11. Grievant was aware she was required to have a valid Food Handler's Card in order to work in food service.

12. Grievant first received a Food Handler's Card when she was hired by the Board as a cook in 1985. Tr., p. 8.

13. At the beginning of every school year, the Board sponsors an inservice class for all cooks to renew their Food Handler's Cards through the Mingo County Health Department. The class is advertised in the Williamson Daily News. Tr., p. 17.

14. In order to get a Food Handler's Card in Mingo County, an applicant must pass a tuberculin (TB) skin test, and a written test.

15. After discovering her Food Handler's Card had expired, it took Grievant approximately seven (7) days to pass the required tests and receive a new card.

DISCUSSION

Grievant alleges the Board violated the preferred recall provisions of W. Va. Code §§ 18A-4-8b and 18A-4-8g when it selected Intervenor, who had less seniority, for the posted position. Grievant also alleges that the Board violated the posting provisions of Code § 18A-4-8b, because it did not specify in the posting that a valid Food Handler's Card was required for the position.

The Board contends that Grievant was not qualified on December 5, 1996, for the Cook I position because her Food Handler's Card had expired. The Board further argues that it was common knowledge that all food service workers had to have a valid FoodHandler's Card in order to work for the Board, Grievant had always had one, and thus, Grievant had ample notice that she needed to have a Food Handler's Card.

It is clear from the testimony of all the witnesses, including Grievant, that it is common knowledge that food workers in the Mingo County School system must possess a Food Handler's Card, and if they do not, they are not eligible to be called for work from the preferred recall or substitute lists. Tr., pp. 8, 9, 13, 15, 19. Thus, Grievant's argument that she did not have notice because it was not included on the posting must fail. Grievant did not even attempt to testify that she did not know she needed a Food Handler's Card to work as a Cook for the Board. What she did not know was that her card had expired.

W. Va. Code § 16-3-4a, governing compulsory testing for tuberculosis of school children and school personnel, states in pertinent part:

> All school personnel shall have an approved tuberculin skin test at time of employment and once every two years or more frequently if medically indicated. . . School personnel who have not had the required examination will be suspended from employment until reports of examination are confirmed. (Emphasis added).

Thus, school employees who have not had a TB test simply are not permitted to work in the schools. The West Virginia State Department of Health has promulgated rules and regulations giving county boards of health the discretion to examine and train food service workers. Title 64, Legislative Rules, Division of Health, Series 7, Section 25.1 provides:

> 25.1 - Food service management training or food service worker's training may be provided by the county health departments at the discretion of the county health officer.

In this case, it is undisputed that the Mingo County Health Department provided the training class and the TB test for the Mingo County School food service workers. Theywere provided a Food Handler's Card if they passed the tests, with the expiration date indicated on the card. Grievant had such a card, and it expired in August 1996.

Not only was the Board not required to hire Grievant for the Cook I position at Burch High School, but it would have been in violation of State Department of Health statutes and regulations. Certainly, if the Board chose to do so, it could have hired Grievant for the position and given her an opportunity to get her card renewed before she was allowed to enter upon her duties. However, there is no statute, rule or law which prohibited the Board from not hiring Grievant when she did not possess the necessary Food Handler's Card, and it's decision not to hire her was not abuse of discretion.

CONCLUSION OF LAW

1. It is incumbent upon Grievant to prove her case by a preponderance of the evidence. W. Va. Code § 18-29-6; Maynard v. Mingo County Bd. of Educ., Docket No. 96- 29-012 (June 28, 1996).

2. W. Va. Code § 16-3-4a, governing compulsory testing for tuberculosis of school children and school personnel, states in pertinent part:

> All school personnel shall have an approved tuberculin skin test at time of employment and once every two years or more frequently if medically indicated. . . School personnel who have not had the required examination will be suspended from employment until reports of examination are confirmed. (Emphasis added).

3. Grievant has failed to prove by a preponderance of the evidence that the Board violated W. Va. Code § 18A-4-8, or any other rules or policies when it did not hire her for the Cook I position at Burch High School, after learning her West Virginia State Board of Health Food Handler's Card, which includes confirmation of a TB test as required by statute, had expired.

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: July 17, 1997