BRENDA SHARP, et al.,

Grievants,

v. DOCKET NO. 97-42-300

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent,

and

SHARON LYNCH,

Intervenor.

DECISION

Grievants, Brenda Sharp, Brenda Yokum, and Margaret Skidmore, filed a grievance against the Respondent, Randolph County Board of Education. They allege:

> Grievants, regularly employed [S]ecretary/[A]ccountants, contend that the Respondent filled a Secretary/Computer Operator vacancy with an applicant who was not a regular employee in violation of West Virginia Code §§18A-4-8b, 18A-4-8e, and 18A-4-8g.

As relief, Grievants seek:

> the opportunity to take the computer operator competency test after one day of in service to help prepare for the test. Further, Grievants seek instatement into the position with lost wages, benefits, and seniority retroactive to the date of the filling of the vacancy and interest on all monetary sums to be awarded to the most senior grievant to pass the competency test.

Grievants were denied relief at Levels I and II of the grievance procedure. Pursuant to W. Va. Code §18-29-4(c), Grievants waived the submission of their grievance to Level III, and the Level II decision was appealed directly to Level IV. ALevel IV evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on September 9, 1997. This case became mature for decision on October 24, 1997, with receipt of Grievant's post-hearing submission.

At Level IV, during a telephonic conference held prior to the hearing, the parties stipulated to the facts:

1. Grievants Brenda Yokum, Brenda K. Sharp, and Margaret G. Skidmore are all regular service employees of [Respondent]. [Grievant] Yokum's classification is Secretary II/Accountant II at Harman School. [Grievant] Sharp's classification is Secretary II/Accountant at Jennings Randolph Elementary School. [Grievant] Skidmore's classification is Secretary III at Third Ward Elementary School.

2. On February 2, 1989, [Respondent] posted a Computer Operator position located at the county office. Hilda McWilliams was awarded the position.

3. On August 15, 1995, the Computer Operator position was posted due to Mrs. McWilliams being on extended leave of absence. Intervenor, Susan Lynch, through the bidding process, was awarded the position.

4. On September 21, 1995, Superintendent Prichard granted a grievance filed by Mrs. McWilliams. The decision determined that Mrs. McWilliams' position was that of a multi-classified Computer Operator/Secretary III. The effective date of the reclassification was July 1, 1995.

5. Intervenor, Susan Lynch, after the Level II decision for Mrs. McWilliams, took the secretary competency test, passed the test, and receive[d] the additional classification.

6. By letter dated January 25, 1997, Mrs. McWilliams, due to health reasons, resigned her employment with [Respondent]. Respondent at a February 10, 1997, meeting accepted Mrs. McWilliams' resignation effective January 31, 1997.

7. On March 3, 1997, [Respondent] posted the Computer Operator/Secretary III position due to the resignation of Hilda McWilliams.

8. At the time of the posting, [Intervenor] was serving in the position [in question]. She had continuously worked in the position since being employed via the August 15, 1995, posting for a leave of absence.

9. Grievants Brenda Sharp and Brenda Yokum filed grievances on March 25, 1997.

> Grievant Margaret Skidmore filed a grievance on March 27, 1997. All three Grievants, by Counsel, at the Level II hearing alleged that [Intervenor] was not a regular employee at the time of the March 5, 1997, posting for the Computer Operator/Secretary III position, and that they as regular employees should have been allowed to take the Computer Operator competency test and, depending on who passed the test, the position should have been awarded to the most senior regular employee. (Emphasis added).

10. Only one of the Grievants [can] obtain [the] position [in question].

The following findings of fact were derived from the record by the undersigned.

FINDING OF FACTS

1. Intervenor and Grievants applied for the position in question.
2. Intervenor was awarded the position in question.
3. Grievants have more seniority than Intervenor.
4. Grievants have not taken the competency test for the classification(s)/position in question.

DISCUSSION

In this case, Respondent is simply trying to circumvent W. Va. Code §18A-4-15, which in pertinent part, provides:

> The county board shall employ and the county superintendent, subject to the approval of the countyboard of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
>
> (1) To fill the temporary absence of another service employee;
>
> (2) To fill the position of a regular service employee on leave of absence; Provided, That if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position: Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided herein, upon termination of the leave of absence said employee shall be returned to his or her original position; ... . [Emphasis added].

Intervenor's initial substitute employment with Respondent was controlled by W. Va. Code §18A-

4-15(2). The posting of Mrs. McWilliams' position opened on August 15, 1995, and closed on August 21, 1995. It noted that the position was “temporary” and would last only “until [the] regular employee returns from absence.” Level II, R. Ex. 1, at 2.

Mrs. McWilliams resigned her employment with a letter, dated January 25, 1997, to Respondent. Level II, R. Ex. 2. Her resignation was accepted by Respondent during a February 10, 1997 meeting, and was made effective retroactive to January 31, 1997. Level II, R. Ex. 3.

Intervenor's substitute employment was predicated upon her filling a position in which the regularly-hired employee wastemporarily absent. Intervenor was not hired to fill a position which had been permanently vacated. In theory, Mrs. McWilliams could have returned to her position, and resumed her duties at any time. As noted above, W. Va. Code §18A-4-15(2), in pertinent part, provides: “The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position ... .” However, in this case the regular employee (Mrs. McWilliams) did not return, but resigned, which triggered Intervenor's loss of her elevated regular employee status. (See footnote 1) Her elevated regular employee status was gained and lost pursuant to W. Va. Code §18A-4-15(2). (See footnote 2)

At that point, Respondent needed to temporarily fill the vacancy created by Mrs. McWilliams' resignation. The first paragraph of W. Va. Code §18A-4-15 provides for the temporary assignment of substitute service personnel to the position, and W. Va. Code §18A-4-15(4) requires Respondent to select a permanent employee in accordance with W. Va. Code §18A-4-8b within twentydays.

Assignment of substitute service personnel to temporarily fill the position in question is accomplished by the following section of W. Va. Code §18A-4-15:

> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

As noted earlier W. Va. Code §18A-4-15(4) requires that the permanent employee be selected (to

fill the vacancy created by Mrs. McWilliams' resignation) pursuant to W. Va. Code §18A-4-8b, which in pertinent part, provides:

> 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;
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> (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.

Grievants held regular employee status and Intervenor did not. Because W. Va. Code §18A-4-8b requires that regularly employed service personnel be hired first, Respondent should not have selected Intervenor over Grievants. See Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 9, 1997).

Respondent also raised a timeliness defense. Timeliness is an affirmative defense and must be proven by a preponderance of the evidence by the party asserting the defense. See Heater v. Barbour County Bd. of Educ., Docket No. 96-01-497 (Sept. 30, 1997); Norton v. Bd. of Directors/W. Va. Northern Community College, Docket No. 96-BOD-369 (Dec. 9, 1996); Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). W. Va. Code §18-29-4(a)(1) states, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the
>
> grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Respondent asserted that the grievance was not timely filed because Mrs. McWilliams' resignation was effective January 31, 1997, Intervenor continued in the position with, as Respondent contends, regular employee status, and Grievants did not file their grievance within fifteen days of January 31, 1997. However, Respondent failed to prove, by a preponderance of the evidence,when Grievants became aware of the effective date of Mrs. McWilliams' resignation, which was not acted upon by Respondent until February 10, 1997, and made retroactive from January 31, 1997.

However, more importantly, “the event” which Grievants contest is the selection of Intervenor for the position posted March 5-11, 1997, and each Grievant filed their respective grievances in this case by March 27, 1997. Therefore, Respondent's affirmative defense fails.

In addition to the foregoing narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. Upon Respondent's acceptance of Mrs. McWilliams' resignation, a vacancy immediately existed, and Intervenor lost her status as a regular employee under W. Va. Code §18A-4-15(2). See Thomas v. Mineral County Bd. of Educ., Docket No. 95-28-524 (May 3, 1996); Hinerman v. Hancock County Bd. of Educ., Docket No. 93-15- 031 (Jan. 31, 1994).

3. Grievants proved the allegations contained in their grievance by a preponderance of the evidence.

4. W. Va. Code §18-29-4(a)(1) states, in pertinent part:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which thegrievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

5. Respondent failed to prove, by a preponderance of the evidence, when Grievants became aware of the effective date of Mrs. McWilliams' resignation.

6. “The event” which Grievants contest is the selection of Intervenor for the position posted March 5-11, 1997, and each Grievant filed their respective grievances in this case by March 27, 1997.

7. Respondent's affirmative defense fails.

Accordingly, the grievance is **GRANTED**. Respondent is **ORDERED** to give each Grievant the proper test(s) required to be selected for the position in question, and to place the appropriate Grievant, in accordance with the Code, in the position previously held by Mrs. McWilliams, and awarded to Intervenor. Respondent is also **ORDERED** to provide the Grievant instated into the position in question with all benefits provided for by law, including (but not limited to) seniority, and back pay, from the date Intervenor was awarded the position on a permanent basis.

Any party may appeal this **DECISION** to the Circuit of Kanawha County or to the Circuit Court of Randolph County and such appealmust 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.

DATED: January 9, 1998. _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

This ruling does not overrule or conflict with the Grievance Board's line of cases which provide that an employee who is competitively selected to fill a vacancy under W. Va. Code §18A-4- 15(2) is entitled to the benefits of regular status while holding such a temporary position. See Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994); Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992); Miller v. Wood County Bd. of Educ., Docket No. 59-86-298-3 (May 13, 1987). In this case, Intervenor had lost her elevated status before she applied for the position in question. Intervenor retained her elevated regular employee status only until Mrs. McWilliams' resignation was acted upon.

Footnote: 2

Intervenor fulfilled the temporary position for which see was selected and her employment with the Board ceased to exist. Intervenor's selection for a temporary position (until the return of Mrs. McWilliams) does not entitle her to another position.