TAMMY BARGER

Grievant,

v v.

DOCKET NO. 98-12-212

GRANT COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Tammy Barger, filed the following grievance against Respondent, Grant County Board of Education, in a timely manner at Level I on February 18, 1997. Grievant alleges the Respondent violated W. Va. Code §§18A-4-8b & 18A-4-8g by passing over her and filling a vacant special education teacher's aide position with someone who is inferior in employment status and seniority to the Grievant. Grievant requests "instatement into the position, wages, benefits and regular employment seniority retroactive to twenty days from the posting date, and interest on all monetary sums."

After the grievance was denied at the lower levels, the matter was appealed to Level IV pursuant to W. Va. Code § 18-29-3(a) on June 25, 1998. A Level IV hearing was scheduled for August 7, 1998. The matter was continued for good cause shown until August 25, 1998. Hearing was held in the Grievance Board's Elkins, West Virginia office on that date and the grievance became mature for decision on or about September 24, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law, and any subsequent responses. (See footnote 1)

ISSUE

The issue is whether Grievant has proven by a preponderance of the evidence that Respondent violated any statute, policy, rule or regulation in filling with another applicant the special education teacher's aide position opening for which Grievant also applied.

FINDINGS OF FACT

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

1. Grievant is currently employed by Respondent as a substitute school service employee.

2. Grievant was employed by Respondent as a substitute cook on September 23, 1997, and as a substitute custodian on December 17, 1997.

3. Respondent had a service personnel position opening for a Special Education Aide at Petersburg High School arise during the 1997-98 school year.

4. The position was properly posted on November 10, 1997, and duly published in the local newspaper, with a deadline for submitting applications of November 18, 1997.

5. Grievant applied for the posted position.

6. Ms. Pat Van Meter also applied and was hired to fill the posted special education teacher's aide position on or about January 13, 1998.

7. Both Ms. Van Meter and Grievant passed the required teacher's aide competency test prior to November 18, 1997.

8. Ms. Van Meter was previously employed as a full-time aide at the South Branch Vocational Technical Center (SBVTC) from 1979 to 1981 and from 1985 to 1990. She has a total of six and one-half years experience as an aide at SBVTC. 9. Ms. Van Meter holds a bachelor's degree, plus has extensive training and experience in working with special needs children and adults.

10. Ms. Van Meter was not re-employed as an aide for the 1990-91 school year due to a lack of funding and a required reduction in force (RIF) by SBVTC. No additional aide positions have developed at SBVTC, nor apparently with the Grant County Board of Education, since that time.

11. SBVTC is a multi-county vocational center located in Grant County and serving Grant,

Hardy and Pendleton counties. Respondent is a participating county in SBVTC and also serves as its fiscal agent.

12. Grievant has never served as a regular employee of Respondent and had only been a substitute employee for a period of approximately four to six months before the filing of this grievance.

13. Grievant has never worked as a substitute aide, but did pass the aide competency test and became qualified to work as a substitute aide on November 19, 1997.

DISCUSSION

Grievant alleges that Respondent did not properly fill its opening for a special education aide pursuant to the requirements of W. Va. Code §§ 18A-4-8b and 18A-4-8g. Respondent denies it violated any statute, policy, rule or regulation in the manner in which it filled the special education aide position, and further asserts it specifically followed the requirements of W. Va. Code §§ 18A-4-8b and 18A-4-8c.

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

In order to decide this matter, a close examination of the relevant statutes is required. W. Va. Code § 18A-4-8b, "[s]eniority rights for school service personnel," provides, in relevant part:

> **A county board shall make decisions affecting promotions and the 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] of this article, on the basis of seniority, qualifications and evaluation of past service.**
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> **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 of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:**
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> **(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.

For purposes of determining seniority under this section an employee's seniority begins on the date that he or she enters into his assigned duties...

All decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section. The seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed by the countyboard within a particular job classification...

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.

Grievant alleges she should have received this aide position based on W. Va. Code § 18A-4-8b, which requires that all school service personnel vacancies must be filled on the basis of seniority, evaluation, and qualifications, and that first priority should go to applicants in the order listed in this Code section. Grievant also maintains she falls into group number four as a recent substitute employee, whereas, Ms. Van Meter was merely an applicant who held no

prior employment relationship or status with the Respondent, and is, therefore, part of the next lower priority group. Grievant argues that Ms. Van Meter's experience at SBVTC established no employment relationship with Respondent of any kind and cannot be used to give her priority over Grievant for this position.

Respondent argues that under the language of W. Va. Code § 18A-4-8c, Ms. Van Meter is entitled to credit for her years of service as a full-time regular aide at SBVTC, and, more importantly, since her position was discontinued due to a reduction in force necessitated by the loss of funding for her position, she is also protected by W. Va. Code§ 18A-4-8b. Therefore, she is accorded priority over a substitute employee for openings in her classification under that section's guidelines.

W.Va. Code §18A-4-8c provides, in relevant part, as follows:

> **Professional and service personnel employed by a multi-county vocational center shall establish seniority on the basis of the length of time the employee has been employed by the multi-county vocational center, except that any professional or service personnel whose employment with the multi-county vocational center was immediately preceded by employment with one of the county boards participating in the operation of the center or whose employment contract was with one of the county boards participating in the operation of the center (1) shall retain any seniority accrued during employment by said county board; (2) shall accrue seniority as a regular employee with said county board during employment with the center; (3) shall attain continuing contract status with both the county and the center if the sum of the years employed by the county and the center equals the statutory number required for continuing contract status; and (4) shall retain and continue to accrue county and center seniority in the event of reemployment by said participating county as a result of direct transfer from the center or recall from the preferred list.**
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> **Reductions in work force in the center or employment by the center or county board shall be made in accordance with the provisions of sections seven-a and eight-b [§§ 18A-4-7a and 18A-4-8b] of this article: Provided, That only years of employment within the multi-county vocational center shall be considered for purposes of reduction in force within the center.**

A review of the first sentence of this Code section indicates that when a new employee is first hired by a vocational center, that is when her seniority begins. The second phrase of that sentence indicates that when an employee has been hired by a board of education and transfers to a vocational center, she does not lose this seniority, but, rather, takes it with her to the vocational center. This transfer of seniority encourages qualified employees to apply and serve at the vocational center without the loss of seniority. The statute is, however, silent as to what happens to a RIF'd vocational centeremployee when they apply for a position with a

board of education within the multi-county area served by the vocational center. The most logical course of reasoning in that situation is to recognize the employee's prior vocational center seniority. This action would again allow for the employment of qualified individuals into posted positions within the multi- county area.

This Grievance Board most recently addressed these issues in Oliveto v. United Technical Center and Harrison County Bd. of Educ., Docket No. 96-17-210 (Sep. 5, 1997). (See footnote 2) In Oliveto, a case of first impression, the Grievance Board addressed whether Grievant should be credited with seniority at the Harrison County Board of Education for her regular employment at United Technical Center. And if so, should she be placed upon the Board's preferred recall list as a regular employee, after a reduction in force at United. The ALJ subsequently found that W. Va. Code §18A-4-8c, at (2), permits seniority acquired as a regular employee at a vocational center, to be accrued at the county board. Id.

The ALJ further stated in Oliveto that:

> The intent of the Legislature undoubtedly was to allow regular employees to go from employment with the county board to the center without losing seniority benefits. This would make it easier to fill positions with experienced people at the centers. Otherwise, qualified people within the school system would not apply for work at the centers because they would be, in effect, starting over with the accumulation of seniority.

The ALJ went on to state that the reverse was also true. He opined that the intentof the legislature was to allow employees to seek employment with either the board of education or the multi-county vocational facility, without the loss of seniority, and that W. Va. Code §18A-4-8c clearly "indicates that the Legislature intended that the center and the county are, as far as the employee is concerned, a single entity. There may be other differences caused by its multi-county nature, but it is intended that employees may freely seek and obtain employment at either without jeopardizing those benefits which are integral with seniority. This would be the case with both transfer and reemployment from the preferred recall list." Id.

The ALJ in Oliveto further found "that a reduction in force at the center ... would require the placement of the employee's name on both the Board's and United's preferred recall lists, as though they were merely two separate schools within the same system." Id. I agree.

To further support this conclusion, in a somewhat related case involving pay differentials between principals at vocational-technical centers and "regular schools," Spears v. The

Administrative Council of the James Rumsey Technical Institute, Docket No. 93-MCVTC-461 (June 1, 1994), this Grievance Board found that a multi-county vocational- technical facility is a creation of and an agent for the boards of education of the participating counties, and that the Administrative Council of such a facility serves in place of and is subject to the same laws and regulations concerning the employment and compensation of teachers, principals and service personnel as the participating county boards of education, and that Grievant was a principal employee of those boards.

The ALJ in Spears opined that to accept the Administrative Council's arguments inthe matter, that the grievant was not a principal employee of the Board of Education and hence not entitled to the same pay as principals of "regular" schools, "would be tantamount to agreeing that administrative councils, comprised of members from participating county boards of education, have no accountability with respect to laws governing the administration of public high schools or secondary vocational schools in West Virginia. Council, in effect, argues that administrative councils of multi-county vocational schools possess more discretionary powers than the representative county boards of education which form the council. Administrative councils of multi-county vocational and/or technical schools do not have such powers; . . . these councils are... creatures of. . .the State Board of. . .Education." Id.

More importantly, The Establishment Procedures and Operating Policies for Multi-County Vocational Technical Centers §2500.2e(2) states:

> **The administrative council must afford its employees the same benefits (sick leave, vacation, insurance, retirement, tenure, etc.) as those to which the employees of the fiscal agent county of that center are entitled. (Emphasis added).**

Respondent was the fiscal agent for the SBVTC. Ms. Van Meter's paychecks and time sheets were administered by Respondent when she was employed at the SBVTC. Based on the evidence submitted, this was apparently the first position within Ms. Van Meter's classification to be posted with either Respondent or at SBVTC since her termination of employment due to a RIF in 1990. Based on the above, it is clear she should be treated the same as any regular employee on the Preferred Recall List of the Grant County Board of

Education. Therefore, it is the opinion of the undersigned ALJ that herplace on the preferred recall list at SBVTC, including her six-plus years of seniority as an Aide at SBVTC, should also apply to the position at Petersburg High School. **(See footnote 3)**

Grievant has failed to prove by a preponderance of the evidence that the selection of Ms. Van Meter, instead of Grievant, for the position of Special Education Aide at Petersburg High School was violative of any statute, rule, regulation or policy.

In addition to the above Findings of Fact and Discussion, it is appropriate to make the following Conclusions of Law.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case 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. Under the language of W. Va. Code § 18A-4-8c, Ms. Van Meter is entitled to credit for her years of service, as a full-time aide at SBVTC, for the purpose of filling thisposition. Further, since her position was discontinued due to a reduction in force necessitated by the loss of funding for her position, she is also protected by W. Va. Code § 18A-4-8b and is accorded priority for openings in her classification, under that Code section's guidelines, with Respondent. See Oliveto v. United Technical Center and Harrison County Bd. of Educ., Docket No. 96-17-210 (Sep. 5, 1997).

3. A multi-county vocational-technical facility is a creation of and an agent for the boards of education of the participating counties and the Administrative Council of such a facility, as the agent, serves in place of and is subject to the same laws and regulations concerning the employment and compensation of teachers, principals and service personnel as the participating county boards of education. Spears v. The Admin. Council of the James Rumsey Technical Inst., Docket No. 93-MCVTC-461 (June 1, 1994).

4. Employees of a multi-county vocational-technical facility should be treated the same and must be afforded the same benefits (sick leave, vacation, retirement, insurance, tenure, etc.) as principal employees of the participating county board of education which serves as

the center's fiscal agent. Spears, supra. Establishment Procedures and Operating Policies for Multi-County Vocational Technical Centers §2500.2e(2).

5. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, as long as this discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

6. W. Va. Code § 18A-4-8c does not preclude a board of education fromrecognizing RIF'd employees' prior vocational center seniority when they apply for a position with a board of education within the multi-county area served by the vocational center.

7. Grievant failed to prove Respondent violated any statute, rule, regulation or policy with regard to the selection of Ms. Van Meter, instead of Grievant, for the position of Special Education Aide at Petersburg High School

Accordingly, this grievance is DENIED.

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

Dated: March 17, 1999

R. K. MILLER

Administrative Law Judge

Footnote: 1 ***Grievant was represented by legal counsel, John Roush. Respondent was represented by its legal counsel, Dennis DiBenedetto.***

Footnote: 2 ***Oliveto does differ slightly from the matter at hand, in that, the grievant in Oliveto worked for the county board of education, albeit as a substitute employee, before being hired at the vocational center.***

Footnote: 3 ***Although the undersigned ALJ believes it is not necessary to go any further than an analysis of W. Va. Code § 18 A-4-8c to decide this issue, it is not clear that Grievant would prevail even if W. Va. Code § 18A-4-8c did not apply. While Grievant maintains that W. Va. Code § 18A-8b and her months of seniority as a substitute service employee should control, seniority is not necessarily the sole factor in this decision. A board of education making a hiring decision under W. Va. Code § 18A-4-8b should use its best professional judgment to select the applicant best suited to the needs of the students based on qualifications, seniority and evaluations of the applicants' past service. See Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Webster County Bd. of Educ. v. Johns, 191 W. Va. 664, 447 S.E.2d 599 (1994).***