

VINA ELLIS,

Grievant,

v.

DOCKET NO. 00-23-196

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Vina Ellis, Grievant, filed this grievance on or about March 14, 2000, against her employer, the Lincoln County Board of Education ("Board"):

Violation of WV Code 18A-4-8b in filling a supplemental aide position at Pleasant View - 2 days per week. Phyllis Sanders received the position. Grievant has regular seniority which was not considered.

Relief sought: Grievant seeks the position, back pay, benefits, seniority and interest.

The grievance was waived at level one and a level two hearing was held on May 19, 2000. Charles McCann, Grievance Evaluator, denied the grievance by decision dated May 26, 2000. Grievant by-passed level three, and appealed to level four on June 5, 2000. The parties agreed this grievance could be submitted on the record developed at level two, and this matter became mature for decision on July 21, 2000, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Anita Mitter, West Virginia Education Association, and the Board was represented by James W. Gabehart, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Lincoln County Schools Vacancy Bulletin, dated February 22, 2000.

Ex. 2 -

Substitute Aides seniority list, revised March 17, 2000.

Ex. 3 -

Experience Verification record of Vina Ellis.

Ex. 4 -

Experience Verification record of Phyllis Sanders.

Testimony

Grievant testified in her own behalf. The Board presented no witnesses.

FINDINGS OF FACT

The following facts are derived from the record developed at the level two hearing.

1. Grievant is employed by the Board as a substitute aide and has been employed since 1986.
2. In February 2000, the Board posted a position for an aide at Pleasant View Elementary School. G. Ex. 1.
3. Grievant and Phyllis Sanders, also a substitute aide, applied for the position.
4. Grievant's first day of employment as a substitute aide was November 6, 1986. Ms. Sanders' first day of employment as a substitute aide was October 16, 1986, placing her ahead of Grievant on the substitute aide seniority list. G. Ex. 2.
5. Grievant received one year of regular seniority during the 1996-97 school year. G. Ex. 3. Ms. Sanders has no regular seniority. G. Ex. 4.
6. Neither Grievant nor Ms. Sanders was employed in a position which conferred upon them regular employee status at the time of the posting and hiring.
- 7.

Ms. Sanders was awarded the Pleasant View Elementary aide position.

DISCUSSION

The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996).

Grievant contends the Board erred in failing to consider her regular seniority when filling the supplemental aide position at Pleasant View Elementary. The Board asserts its reliance on substitute seniority when filling the position was appropriate, as both candidates for the position were substitutes.

W. Va. Code § 18A-4-8b sets forth the procedure to be followed in filling vacancies in service personnel positions, and states in pertinent part as follows:

A county board of education shall make decisions affecting promotion and 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, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

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, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. 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;
- (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eight- two, and who apply only for such temporary jobs or positions;
- (4) Substitute service personnel; and
- (5) New service personnel.

It is well-settled by this Grievance Board that when filling service personnel positions, the amount of regular seniority the applicants possess must be utilized to award the position, if such seniority is

present. Tomblin v. Lincoln County Bd. of Educ., Docket No. 00-22-106 (July 14, 2000); Griffith v. Boone County Bd. of Educ., Docket No. 99-03- 172 (Mar. 16, 2000); Brunty v. Lincoln County Bd. of Educ., Docket No. 99-22-069 (July 13, 1999); Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993). All of the cited cases involved substitute employees who applied for a regular position, just as in this case, and it was held and affirmed that regular seniority, if any, was to be used to determine the outcome of the selection process. Here, since Grievant had more regular seniority than Ms. Sanders, she should have been awarded the subject position in this grievance. ([See footnote 1](#))

CONCLUSIONS OF LAW

1. 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. Service personnel positions are to be filled on the basis of seniority, qualifications and evaluations of past service. W. Va. Code § 18A-4-8b.
3. When filling service personnel positions, the amount of regular seniority the applicants possess must be utilized to award the position, if such seniority is present. Tomblin v. Lincoln County Bd. of Educ., Docket No. 00-22-106 (July 14, 2000); Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (Mar. 16, 2000); Brunty v. Lincoln County Bd. of Educ., Docket No. 99-22-069 (July 13, 1999); Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).
4. Grievant has demonstrated that she had accumulated more regular seniority than the successful applicant; therefore, she has proven a violation of W. Va. Code § 18A- 4-8b and applicable case law.

Accordingly, this grievance is **GRANTED**, and the Board is hereby **ORDERED** to instate Grievant into the supplemental aide position at Pleasant View Elementary, and award her any back pay, with interest, and benefits, to which she is entitled.

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

of the Lincoln County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: September 13, 2000

[Footnote: 1](#)

Effective July 1, 2000, the Legislature amended applicable provisions of W. Va. Code § 18A-4-8a as follows:

(e) A substitute school service employee shall acquire regular employment status and seniority if the employee receives a position pursuant to subsections (2) and (5) [§ 18A-4-15(2) and (5)], section fifteen of this article: Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority, Provided, however, That upon termination of a leave of absence or a suspension, the employee shall return to the status previously held. If the employee returns to substitute status, the employee shall retain any regular employee seniority accrued, however, this seniority may not be used in the bidding process for regular positions unless the employee again attains regular employee status or has attained preferred recall status. County boards shall not be prohibited from providing any benefits or regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.