NANCY DAKON,

Grievant,

v. **Docket No. 00-39-390**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Nancy Dakon, was employed by the Preston County Board of Education (PCBOE or Respondent) as a Cook/Custodian at Kingwood Elementary School when she filed a level one grievance on October 18, 2000, in which she alleged violations of W. Va. Code §§18A-4-8b and 18A-4-8g when a less senior substitute employee was hired to fill a similar position at Preston High School. Grievant requested back pay, interest, seniority, and all other benefits she would have earned between the effective date of the position in question, October 9, 2000, and the date she was regularly employed, February 15, 2001. The level one grievance evaluator lacked authority to grant the requested relief. The grievance was denied at level two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). Appeal was made to level four on December 12, 2000, and an evidentiary hearing conducted on February 20, 2001. Grievant was represented by John E. Roush, Esq., of WVSSPA, while PCBOE was represented by Gregory W. Bailey, Esq. The matter became mature for decision upon submission by both parties of proposed findings of fact and conclusions of law on March 1, 2001. (See footnote 1) The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant was first employed by PCBOE as a substitute in the Cook, Custodian, and Aide classifications during the 1993-94 school year. Grievant acquired a seniority date as a Custodian on March 25, 1994, and as a Cook on April 13, 1994. Grievant first worked in a multiclassified Cook/Custodian position on May 2, 1994.

2. Grievant was assigned to substitute for an employee on suspension, and earned thirty-eight and one-half days of regular seniority in October 1998.

3. During the 1999-2000 school year Grievant was regularly employed by PCBOE as an Aide.

At the end of the school year Grievant was not rehired due to a reduction in force. Grievant was not placed on a preferred recall list, and her status reverted to substitute employee at the beginning of the 2000-2001 school year.

4. By posting dated September 27, 2000, PCBOE advertised a vacancy for a multiclassified position of Cook/Custodian at Preston High School.

5. The position at Preston High School was awarded to William Strawser, who held a seniority date as a Cook/Custodian of March 27, 1994.

___6. Grievant was re-employed by PCBOE as a regular, full-time Cook Custodian at Kingwood Elementary School effective February 15, 2001.

7. There were eighty-eight work days during the period October 9, 2000 to February 15, 2001. Grievant worked forty and one-half of those days, all in a classification which paid less than Cook/Custodian.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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.

Grievant sets forth three arguments. First, that she was entitled to be placed on the preferred recall list when her employment was not renewed due to a reduction in force. Second, prior to July 1, 2000, a service personnel position would be filled on the basis of regular seniority, if any applicant had acquired such. Because she had accrued regular seniority and Mr. Strawser had not, Grievant claims she was entitled to the position. Third, when two applicants apply for a position and neither holds the classification title of the position, priority must be given to the applicant with the most overall seniority, in this case, Grievant.

PCBOE asserts that nontenured employees are not entitled to be placed on the preferred recall list, that regular seniority was not considered due to an amendment of W. Va. Code §18A-4-8g, and that seniority within the multiclassified area is determinative when filling multiclassified positions.

Preferred recall

Grievant argues that W. Va. Code §18A-4-8b confers preferred recall status on all service

personnel released from their employment for lack of need, and clearly provides that employees on the preferred recall list have priority in filling vacancies over employeeswith substitute status. PCBOE cites Baker v. Hancock County Board of Education, ___ W. Va. ___, 534 S.E.2d 378 (2000), and Stansbury v. Morgan County Board of Education, Docket No. 97-32-577 (July 24, 1998), in support of its claim that probationary employees are accorded treatment different than regular, full-time employees, including a lack of entitlement to preferred recall status.

In general, Respondent is correct that nontenured education employees are treated differently from tenured employees. Nontenured employees have few rights or benefits. An employer may determine not to renew the employment of a nontenured employee for virtually any reason, or even no reason. For example, in Baker, supra, a nontenured professional employee was not rehired as an administrator. In that case, the decision was for cause. In Stansbury, supra, a substitute bus operator who had held a long-term assignment did not have his assignment renewed when the regular bus operator assigned to the position resigned at the end of the year. The facts of that case are unique in that the Morgan County Board of Education had given Mr. Stansbury a probationary contract of employment while he held the long-term substitute position. However, it is clear that while Mr. Stansbury earned regular seniority in that assignment, he retained his status as a substitute employee, as evidenced by the fact that when the regular employee resigned the position was posted and filled. Although the Superintendent stated that the non- renewal was for lack of need, the facts establish that the assignment had simply concluded, and Mr. Stansbury retained his substitute status. There was no reduction in force or termination of employment in that situation.

Having noted the general rule, the Legislature has carved out an exception, giving nontenured employees who lose their employment due to a reduction in force the benefitof being placed on the preferred recall list. W. Va. Code §18A-4-8b states in pertinent part:

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 (emphasis added).

This language does not differentiate between professional and service employees or tenured and nontenured employees. It simply states that “all” employees whose employment is terminated as the result of a reduction in force shall be placed on the preferred recall list. Statutory language which is clear an unambiguous must be applied and not interpreted. State v. Elder, 152 W. Va. 571, 165

S.E.2d 108 (1968); Peyton v. City Council of Lewisburg, 182 W. Va. 297, 387 S.E.2d 532 (1989); Mallamo v. Town of Rivesville, 197 W. Va. 616, 477 S.E.2d 525 (1996). While nontenured employees have no right to continued employment, this provision clearly recognizes that when individuals lose their employment through no fault of their own, they should be given first opportunity to fill vacancies as they occur. This approach is of no detriment to the employer as the employees are terminated, but provides both the employer and the employee the benefit of re-employing individuals who have established good work records.

Had Grievant been properly placed on the preferred recall list, she would have been given the opportunity for the position at Preston High School prior to Mr. Strawser, who had not been affected by a reduction in force. Therefore, Grievant is entitled to back pay, less appropriate set off, with interest. Under the special circumstances of this case,Grievant is also entitled to the monetary value of any benefits, such as annual leave, she would have accrued between October and February. (See footnote 2)

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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 §18A-4-8b provides that:

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.

3. Statutory language which is clear and unambiguous must be applied and not interpreted. State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968); Peyton v. City Council of Lewisburg, 182 W. Va. 297, 387 S.E.2d 532 (1989); Mallamo v. Town of Rivesville, 197 W. Va. 616, 477 S.E.2d 525 (1996). 4. Grievant has proven by a preponderance of the evidence that PCBOE acted in

violation of W. Va. Code §18A-4-8b when it failed to place her on the preferred recall list after terminating her employment as the result of a reduction in force.

5. Grievant has proven by a preponderance of the evidence that had she been given preferred recall status, she would have been awarded the position of Cook/Custodian at Preston High School in October 2000.

Accordingly, the grievance is **GRANTED** and PCBOE is Ordered to compensate Grievant's estate for back pay, interest, and the monetary value for benefits which would have been accrued, if any, during the period of October 2000 and February 2001.

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

Date: March 27, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant passed away on March 11, 2001; subsequently, her representative requested that a decision be issued for the estate.

Footnote: 2

Due to the outcome of this issue, it is unnecessary to address the remaining arguments.