DELAINE SIMMONS,

Grievant,

v. **Docket No. 00-42-306**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent,

and

VICKIE DEWITT,

Intervenor.

DECISION

This grievance was initiated by Delaine Simmons ("Grievant") on July 13, 2000, alleging entitlement to two Secretary II/Accountant II positions which were posted during the summer of 2000. Following a level two hearing held on September 12, 2000, the grievance was granted at that level. Level three consideration was bypassed, and Intervenor Vickie Dewitt appealed to level four on September 20, 2000, challenging the granting of Grievant's requested relief at level two. A level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on November 29, 2000. Grievant was represented by Mary Linn, representative for the West Virginia Education Association; Intervenor was represented by counsel, John E. Roush; and Respondent was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 10, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. On March 28, 2000, Respondent Randolph County Board of Education ("RCBOE") posted a vacancy for a Secretary III position at the central office. The position was created by a medical leave

of absence taken by the regular employee, and the posting stated that the successful applicant would serve in the position until the return of the regular employee.

2. Grievant was the successful applicant for the leave of absence ("LOA") position, and she began employment in that position on April 5, 2000.

3. Prior to being awarded the LOA position, Grievant was employed as a substitute secretary by RCBOE, with a seniority date of December 1, 1999.

4. Intervenor did not apply for the LOA position. At the time of that posting, she was also employed as a substitute secretary, with a seniority date of November 30, 1999.

5. On June 21, 2000, RCBOE posted a vacancy for a half-time Secretary II/Accountant II at Pickens School ("Pickens position"). This was a 205-day position.

6. During the posting period for the Pickens position, Grievant was still serving in the LOA position. The regular employee returned to the position on July 11, 2000, and Grievant was returned to substitute status at that time.

7. Both Grievant and Intervenor applied for the Pickens position. Intervenor was selected because of her greater substitute seniority. Grievant's seniority and regular employee status, while serving in the LOA position, were not considered.

8. Intervenor was hired for the Pickens position effective June 29, 2000. Her contract stated that she would serve in the position for the school year commencing July 1, 2000, and the period of employment was 205 half days. 9. On July 24, 2000, the principal of Pickens School requested that Intervenor come to work, so that she could learn how to close out the year's records. The employee who had vacated the position came to the school that day to close the books and to train Intervenor.

10. Intervenor marked her time sheet to reflect that she worked six hours on July 24, 2000, at Pickens. This will be counted as one of her 205 days of employment for the 2000-2001 school year. (See footnote 1)

11. On August 9, 2000, RCBOE posted a vacancy for a Secretary II/Accountant II at Valley Head Elementary School ("Valley Head position"), with a 205-day employment term.

12. Both Grievant and Intervenor applied for the Valley Head position. It was awarded to Intervenor, based on her regular employee status.

13. Intervenor began serving in the Valley Head position on August 21, 2000.

14. The Pickens position was reposted and awarded to Grievant on August 28, 2000.

15. At level two, the grievance evaluator determined that Grievant should have originally been awarded the Pickens position, because she was considered to have regular employee status at the time it was posted and filled in June, 2000. Consequently, Grievant was placed in the Valley Head position, because she would also have attained regular employee status when it was posted, and Intervenor would have been a substitute. Pursuant to this decision, Intervenor was returned to the Pickens position on September 20, 2000.

Discussion

As this grievance does not involve a disciplinary matter, Intervenor has the burden of proving her claims 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. The West Virginia Supreme Court has held that Intervenors in grievance proceedings may make affirmative claims for relief. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

The parties agree that Grievant was, as determined at level two, entitled to placement in the Pickens position in June of 2000. As set forth in W. Va. Code § 18A-4- 8b, service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with regularly employed personnel having hiring preference over substitutes. Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County Jan. 21, 1997). See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987), aff'd, Civil Action No. 87-C-275 (Cir. Ct. of Nicholas County Aug. 29, 1989). At the time of the original posting of the Pickens position, Grievant was employed in a long-term substitute position, pursuant to the provisions of W. Va. Code § 18A-4-15(2), which states that a substitute who servesin a leave of absence position extending beyond thirty days is to be given regular employee status. In turn, W. Va. Code § 18A-4-8g provides as follows regarding the status of substitutes who serve in such positions: (See footnote 2)

> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5),

> section fifteen [§ 18A-4-15(2) and (5)] 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. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

Accordingly, there is no dispute in this grievance that, due to her regular employee status at the time the Pickens position was posted and filled, Grievant should have been selected over Intervenor, a substitute. The remaining issue in this case is whether or not, by virtue of being entitled to the Pickens position, Grievant should also have been placed in the Valley Head position. In this regard, Intervenor contends that Grievant would not yet have actually begun her employment in the Pickens position when Valley Head was posted, so she and Grievant both had substitute status. As the substitute with greater seniority, Intervenor believes she should still have been selected for the Valley Head position.

The issue to be resolved in this grievance is whether or not the employee selectedfor the Pickens position attained regular employee status by working one day on July 24, 2000. Intervenor argues that this Grievance Board's rulings in Harrison v. Logan County Board of Education, Docket No. 95-23-459 (May 31, 1996) and Henry v. Mason County Board of Education, Docket No. 91-26-195 (Sept. 4, 1991) support her contention that employment in the Pickens position would not have begun until school started on August 23, 2000. W. Va. Code § 18A-4-8g states that "[s]eniority accumulation for a regular school service employee shall begin on the date such employee enters upon regular employment duties pursuant to a contract as provided in [18A-2-5]." Intervenor is correct in her contention that Harrison, supra, stands for the proposition that, although selected for a position and having signed a contract of employment, an employee does not actually attain regular employee status until he or she actually begins working in the position.

However, Respondent and Grievant contend that, if she had been placed in the Pickens position, Grievant (like Intervenor) would have actually attained regular employee status when she "entered upon her duties" on July 24, 2000. In Henry, supra, the grievant had reported to work five days prior to the beginning of the school, at the request of the principal. She had not yet been entered upon the payroll and later received compensatory time off for working on that day. In determining that the grievant was not entitled to have her regular employment status begin on that day, the administrative law judge noted that the school board, who had officially hired her, had hired her "commencing on

August 28, 1989" (she had reported to work on August 23). Therefore, it was determined that an employee cannot be considered to have “entered upon her assigned duties” prior to the effective date of her contract with the board of education.

Henry, supra, is distinguishable from the instant case in several respects. Theemployment contract for the Pickens position clearly stated that the employment term was 205 half days, commencing July 1, 2000. Although not clearly stated in the Henry opinion, it appears that the grievant's contract of employment stated that her employment was to begin on a particular date, and she attempted to obtain credit for beginning work prior to that date. In the instant case, the Pickens contract makes no mention of the position not beginning until the start of the school year and, in fact, states that employment is to begin as of July 1, 2000. Moreover, the Pickens position was for 205 days, exceeding the normal 200-day school year (See footnote 3), and, as explained by RCBOE Superintendent Glen Karlin, principals often utilize such employees--particularly secretaries--as needed during the summer months. This is not a situation in which, as Intervenor argues, an employee and her principal can manipulate her seniority date by having her come to work early. Because the contract stated that employment was to begin on July 1, 2000, and Intervenor's employment was effective June 29, 2000, there has been no such manipulation, and regular employee status and seniority should have begun when the employee began her assigned duties on July 24, 2000.

As a regular employee at the time the Valley Head position was filled, Grievant would have been entitled to the position over Intervenor, who would have been a substitute at that time, per the hiring preference set forth in W. Va. Code § 18A-4-8b. Accordingly, the undersigned finds that Grievant was the proper selection for both the original Pickens position and the Valley Head position, and Intervenor's requested relief must be denied. Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary grievances, an employee must prove the 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. Intervenors in grievance proceedings may make affirmative claims for relief. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

3. A substitute who serves in a leave of absence position extending beyond thirty days is to be given regular employee status and seniority. W. Va. Code §§ 18A-4-8g and 18A-4-15(2).

4. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with regularly employed personnel having hiring preference over substitutes. W. Va. Code § 18A-4-8b. See Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County, Jan. 21, 1997).

5. Grievant should have been selected over Intervenor for the Pickens School position, effective June 29, 2000.

6. Although selected for a position and having signed a contract of employment, a service employee employee does not actually attain regular employee status until he or she actually begins working in the position. Harrison v. Logan County Bd. of Educ., DocketNo. 95-23-459 (May 31, 1996); See W. Va. Code § 18A-4-8g.

7. Grievant would have been a regular employee at the time the Valley Head position was filled, and would have been entitled to the position over Intervenor, per the hiring preference set forth in W. Va. Code § 18A-4-8b.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Randolph 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. 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: January 26, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Intervenor has not yet been paid for working on this particular day. However, the superintendent and personnel coordinator testified at level four that, for employees who work beyond the normal school year of 200 days, their total work days are counted at the conclusion of the year, and they are compensated accordingly.

Footnote: 2

This Code section was amended, effective July 1, 2000, to state that, once having returned to substitute status, an employee may not use the regular seniority earned while serving in a leave of absence position in the bidding process for new positions, until the employee once again attains regular status. However, the amendment has no effect upon the circumstances which existed in the instant case in June of 2000. The amendment had not yet taken effect, and it is undisputed that Grievant was currently serving in the LOA position--thus enjoying regular employee status--at the time Pickens was filled.

Footnote: 3

The secretarial position at issue in Henry, supra, was for 200 days.