ELAINE KORZUN,

Grievant,

v. **Docket No. 01-30-538**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

CINDY WATSON,

Intervenor.

D E C I S I O N

Grievant, Elaine Korzun, employed by the Monongalia County Board of Education (MCBE) as a Secretary, filed a level one grievance on August 2, 2001, in which she alleged violations of W. Va. Code §§ 18A-4-8b, 18A-2-7,and 18A-4-8g, when positions were filled with applicants with less seniority and inferior employment status. (See footnote 1) Grievant seeks instatement into the position, and compensation for "any and all expenses" incurred due to her continued assignment at Waitman Barbe Elementary School. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, and advanced the matter to level four on October 16, 2001.

A level four hearing was scheduled for December 12, 2001; however, Grievant, represented by John E. Roush, Esq., of WVSSPA, and Respondent, represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney, PLLC, agreed to submit the matter for decision,to be supplemented with proposed findings of fact and conclusions of law. (See footnote 2) The matter then became mature for decision on January 15, 2002.

The following essential facts derived from the record are undisputed.

Findings of Fact

1. Grievant has been employed by MCBE since August 13, 1991, and has held the classification of Secretary throughout her employment.

2. Intervenor Cindy Watson is employed as a Secretary II, and has a seniority date of November 15, 2000.

3. As the result of a reduction in force, Intervenor Watson's employment was terminated, and she was placed on the preferred recall list in Spring 2001.

4. On June 28, 2001, MCBE posted a vacancy for the position of Secretary II at University High School (UHS).

5. Grievant applied for the position at UHS; however, it was awarded to Intervenor based on her preferred recall status.

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 asserts that she is entitled to the position at UHS under the provisions of W. Va. Code § 18A-4-8b(a), which requires that all school service personnel vacancies and promotions be filled on the basis of seniority, evaluation, and qualification. Since both Grievant and Intervenor are qualified by holding the classification title, and both have satisfactory evaluations, Grievant concludes that her advanced seniority would direct her placement into the position.

Grievant further supports her claim by citing the order in which applicants shall be considered for a position, stated in W. Va. Code § 18A-4-8b(b):

(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.

Grievant next cites W. Va. Code §18A-4-8g(g), which addresses seniority for service personnel, “service personnel who are employed in a classification category of employment at the time when a

vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy." Finally, Grievant cites numerous Grievance Board decisions upholding her position.

MCBE argues that the UHS position was awarded to Intervenor in compliance with W. Va. Code § 18A-4-8b(q), which provides that "[n]o position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferredrecall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment." Acknowledging the Grievance Board decisions addressing this issue, MCBE submits that the holdings in those cases are contrary to the express and unambiguous language of W. Va. Code § 18A-4-8b(q).

Previously, the Grievance Board has determined that under the foregoing language, regular school service personnel employees receive preference in filling vacant positions over employees holding some lesser status, including preferred recall rights. 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).

When Grievant and Intervenor applied for the position at issue, Grievant held a regular Secretary position while Intervenor was a Secretary on MCBE's preferred recall list. In these circumstances, the plain language of the statutes governing employment of school service personnel required MCBE to select Grievant ahead of Intervenor, because Grievant was in a category of employment entitling her to a hiring preference over employees on preferred recall. Porter, supra; Hlebiczki, supra; Messer, supra. Accord/Meadows v. Logan County Bd. of Educ., Docket No. 98-23-112 (June 16, 1998); Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996).

Respondent has improperly applied W. Va. Code § 18A-4-8b(q), in this instance. While the provision clearly states that former employees with preferred recall status mustbe given the opportunity to accept a vacancy prior to the employment of new or temporary personnel, it must be read in context with the entire section on reductions in force, and other sections governing the employment of service personnel. Because boards of education must hire service personnel based on seniority, qualifications and evaluations, and hire regular employees before those with preferred

recall status, Section 18A-4-8b(q) by necessity must be interpreted to mean that there is no vacancy until all internal transfers, if any, are completed. Therefore, Grievant is entitled to the UHS position, and her former assignment could be offered to Intervenor, if no other regular employee bids on it.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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. Pursuant to W. Va. Code § 18A-4-8b, a county board of education shall make decisions to fill service personnel positions on the basis of seniority, qualifications, and evaluation of past service. Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987). 3. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with regularly employed service personnel receiving preference over service personnel who have been awarded preferred recall status as a result of their employment being discontinued. Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). See Dorsey, supra.

4. W. Va. Code § 18A-4-8b(q),provides that “[n]o 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.”

5. W. Va. Code § 18A-4-8b(q) must be read in context of the remainder of that statutory section, and other, which address the employment rights of service personnel, to mean that employees holding preferred recall status must be offered position vacancies after all internal transfers are completed, allowing regular employees first opportunity to receive an assignment.

6. Grievant established by a preponderance of the evidence that Respondent Monongalia County Board of Education violated W. Va. Code §§ 18A-4-8b and 18A-4-8g, when it failed to select her for a posted vacancy for a Secretary at University High School.

Accordingly, the grievance is **GRANTED**, and MCBE Ordered to place Grievant in the Secretary position at UHS. Absent any evidence relating to expenses incurred by Grievant during her continued employment at Waitman Barbe, no further relief is appropriate. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: January 31, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Initially, it appeared that Grievant was including a position at Morgantown High School; however, at level two it was established that she had not applied for that position, and was not interested in it. Therefore, no further consideration need be given that matter.

Footnote: 2

Intervenor, appearing pro se, stated no objection to the proposal.