LISA GRAPES,

Grievant,

v. **Docket No. 03-36-368**

PENDLETON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Lisa Grapes ("Grievant") initiated this proceeding on September 8, 2003, alleging entitlement to placement in a kindergarten aide position. The grievance was denied at level one, a level two hearing was conducted on September 30, 2003, and the grievance was again denied in a decision dated October 3, 2003. A level three hearing was held on November 18, 2003, and the grievance was denied at that hearing. Grievant appealed to level four on December 2, 2003. In lieu of a level four hearing, this matter was submitted for a decision based upon the lower level record, supplemented by fact/law proposals submitted by March 22, 2004, at which time this grievance became mature for decision. (See footnote 1)

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been regularly employed by Respondent as a half-time cook since 2002. 2. Grievant had previously been employed by Respondent as an aide and cook, but had been reduced in force from those positions, and was placed on the preferred recall list in those classifications. She was employed temporarily as an aide during the 1997- 1998 school year for 127 days (See footnote 2), and she worked as a cook during the 1996-1997, 1997- 1998, and 1998-1999 school years. Grievant had previously been employed by Respondent as a substitute cook and aide since 1995. (See footnote 3)

3. On September 18, 2002, Respondent posted an aide position created by the leave of absence of Wanda Brady. The posting stated that the employment term was “temporary _ to fill medical leave of absence.”

4. Kenna Champ, a substitute aide, applied for and was selected to fill Wanda Brady's position, pursuant to the posting. However, due to an inadvertent error by the Board of Education, Ms. Champ's selection was not formally voted upon the Board. Ms. Champ served in the position for the remainder of the 2002-2003 school year.

5. On July 28, 2003, Respondent posted a kindergarten aide position at Franklin Elementary School. Grievant, Ms. Champ, and Beth Kimble, a regularly employed cook, applied for the position during the posting period.

6. At its meeting on August 4, 2003, Respondent approved Beth Kimble for the kindergarten aide position, because she was believed to be the most senior regular employee. 7. On August 20, 2003, Wanda Brady formally requested a continuation of her medical leave of absence.

8. At its meeting on August 20, 2003, Respondent rescinded the placement of Beth Kimble in the kindergarten aide position, and approved Kenna Champ for placement in that position, due to her status as a regularly employed aide at the time of the posting. Also at that meeting, Respondent corrected its inadvertent failure to formally hire Ms. Champ for the leave of absence position, approving her placement in that position retroactive to September of 2002.

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 contends that Ms. Champ should have been considered a substitute at the time the kindergarten aide position was posted. If she had been, then Grievant contends that she would have been entitled to the position, because she would have had priority over Ms. Champ as a regular employee. Respondent counters that the selection of Ms. Champ was proper, because she was selected to fill the leave of absence position until the regular employee returned, which had not

occurred at the time the kindergarten aide position was filled. Accordingly, pursuant to the provisions of W. Va. Code §§ 18A-4-15 and 18A-4-8g, Ms. Champ was entitled to be considered as a regular employee at thattime, so she was the appropriate selection for the position, as the only applicant regularly employed in the classification at issue.

W. Va. Code § 18A-4-15(a)(2) provides that substitutes are entitled to fill vacancies caused by leaves of absence, and that, if the leave of absence is for more than 30 days, such positions must be filled pursuant to the posting and selection requirements of W. Va. Code § 18A-4-8b. There is no dispute here that Ms. Champ was placed in Ms. Brady's position in compliance with those provisions. However, the dispute arises regarding the issue of Ms. Champ's status as of July, 2003. Grievant contends that the position expired at the end of the school year, so Ms. Champ had returned to substitute status for the summer.

The issue presented here has been previously addressed by this Grievance Board. It has been held that, even if a board of education attempts to limit a leave of absence to the current school year only, it is prohibited from doing so, because W. Va. Code § 18A-4- 15 clearly requires that an employee who is placed in such a position is to remain in it until the regular employee returns. See Tennant v. Marion County Bd. of Educ., Docket No. 00- 24-381 (Mar. 8, 2001); Simpson v. Mingo County Bd. of Educ., Docket No. 96-29-431 (May 28, 1997). Accordingly, since Ms. Brady had obviously not returned to her position at the end of the 2002-2003 school year, and in fact renewed her leave of absence prior to the beginning of the 2003-2004 school year, Ms. Champ was still serving in that position when she applied for the kindergarten aide vacancy.

Both W. Va. Code §§ 18A-4-15 and 18A-4-8g provide that a substitute serving in a leave of absence vacancy is to be given regular employee status and seniority while serving in such a position. Although Respondent inadvertently failed to formally place Ms.Champ in the leave of absence position, there is no dispute that she was selected pursuant to a proper posting and bidding process. This Grievance Board has held that, if a leave of absence position has not been properly posted, the substitute placed in such a position is not entitled to the benefits of regular employment and seniority. Cisco v. Mingo County Bd. of Educ., Docket No. 00-29-087 (July 20, 2000). However, that did not happen here. Ms. Champ was competitively selected, pursuant to the requirements of W. Va. Code § 18A-4-8b, so she was entitled to regular employee status while serving in the position. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-497 (Aug. 1, 1994); See W. Va. Code §

18A-4-8g.

Although W. Va. Code § 18A-4-8b states that service personnel positions are to be filled on the basis of "seniority, qualifications, and evaluations of past service," that statute goes on to state that "[q]ualifications shall mean that the applicant holds a classification title in his category of employment . . . and must be given first opportunity for . . . filling vacancies." Moreover, and of specific pertinence here, W. Va. Code § 18A-4-8g provides that "[s]ervice personnel who are employed in a classification . . . at the time when a vacancy is posted . . . shall be given first opportunity to fill the vacancy." Accordingly, it is quite clear that, as the only applicant who was regularly employed as an aide at the time of the posting, Ms. Champ was entitled to placement in the kindergarten aide position. See Haer v. Mason County Bd. of Educ., Docket No. 99-26-292 (Nov. 30, 1999).

The following conclusions of law support the decision reached.

Conclusions of Law

___1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees 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. Kenna Champ was considered to be a regularly employed aide at the time she applied for the kindergarten aide position at issue, because she was serving in a properly posted leave of absence position. W. Va. Code §§ 18A-4-15 and 18A-4-8g.

3. As the only applicant who was regularly employed in the aide classification at the time the vacancy was posted, Kenna Champ was entitled to placement in the position over Grievant. W. Va. Code §18A-4-8g(g).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Pendleton 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: April 9, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by her sister, Angel Roy, and Respondent was represented by counsel, Kimberly Croyle.

Footnote: 2

It is unclear from the record whether this was regular or substitute employment.

Footnote: 3

Although Grievant contended that she had been employed since 1990, Respondent's records do not reflect this. Nevertheless, Grievant's employment as a substitute is not dispositive of the outcome in this case.