ADA EAGLE

v. Docket No. 94-24-226

MARION COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Ada Eagle is employed as a substitute cook by Respondent Marion County Board of Education (MCBE). She alleges she was illegally terminated from a long-term substitute assign ment during the second semester of the 1993-94 school year and brings this action to recover the salary and benefits she would have earned had she been retained until the end of the term. In addition, Grievant alleges she had been harassed, retaliated against and targeted for dismissal by the supervisory cook and seeks relief on that issue. The parties ultimately agreed to a record decision at level four.1

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1On August 8, 1994, the transcript/exhibits of the level two hearing, conducted April 28 and May 6, 1994, was submitted, and MCBE agreed to stand on its level two decision and Grievant, upon her level two fact/law proposals of record. The case became mature on August 19, 1994 upon the execution of an Order memorializing an agreement to limit the evidence to that which was presented at level two.

I

In the past, Watson Elementary School (WES) employed three full-time cooks, one of whom was the supervisory cook, and a half-time cook.2 Apparently, either prior to or during the first semester of the 1993-94 school year, a full-time cook took an extended sick leave, and the regularly-employed half-time

cook "stepped up" to the temporarily vacated full-time slot. Thereafter, a temporary half-time cook's position for the first semester was posted and filled. The employee who received the temporary job testified that she did not return to WES after the semester ended because she bid upon and received another job at a school just across the street from her home.3 Grievant, a substitute cook for six years and presumably holding a substi tute's continuing contract, became the next temporary half-time cook at WES.

Grievant testified about how she came to be placed at WES and about other matters during her tenure there. She stated that the assistant superintendent's secretary called her in

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2This case was initially advanced to level four on or about June 8, 1994. On June 27, WES's head cook, Grievant's immediate supervisor at WES, sought intervenor status. As the result of agreements reached during a telephone conference on July 20, 1993 among the undersigned and the attornies representing Grievant, MCBE and the supervisor, the request to intervene was dropped. The supervisor's counsel essentially agreed that her interests would be sufficiently protected if she was not identified by name in this decision.

3The record is silent as to whether this cook was a regular employee or a substitute employee. There was testimony from the supervisor that the worker who received this assignment at WES had been "under contract" until the end of first semester. T.75.

January 1994 and told her she would be assigned to WES as a half-time cook until the end of the school year. According to

Grievant, everything was fine at work until approximately the end of February 1994 when her supervisor asked her for her phone number in case she (the supervisor) had to call Grievant to "step up" to a full days' work in the event a full-time cook reported off. Grievant replied that she was not interested in any full-time work.

Grievant related that this exchange prompted some further discussion the next day over the question of whether Grievant even had a right to step up. Grievant said the supervisor told her that a sub could not step up, anyway. Grievant, in turn, sought an answer to the question from the cooks' union represen tative, even though she admittedly did not want occasional full-time work. Grievant noted that the incident marked the decline of the "team" effort among WES's cooks and that the cooks did not really "get along" that well afterward. See T.10-12.

In early March 1994 the regularly-employed half-time cook who had stepped up to full-time status was notified that her half-time position was targeted for a reduction-in-force (RIF) for the 1994-95 school year. Grievant testified that the supervisor was upset about losing the half-time position when she learned of this on March 7, 1994. Grievant said that, the next day, while all of the cooks were joking around, the super visor turned around and called her and another cook "assholes." Grievant said the remark was made while the cooks were on the serving line when children were present. T.13-14.

Grievant claimed she told the supervisor that the asshole name-calling was carrying the joking too far, but the supervisor responded that she would deny she said it should Grievant report her. T.13-14. Grievant said that when the cooks departed later

that day, the supervisor called out to them that she would see "you sluts" tomorrow. Grievant said she felt the remark was directed to her, so she again informed the supervisor that the name-calling had gone "too far" and asked the supervisor not to call her names again. T.14-15.

Grievant said that, on the next working day, March 10, she decided to hide a tape recorder in her pocket and approach the supervisor to say she was "sorry" about the incident on March 7. Grievant explained that her reason for taping this conversation between them had been to "verify" the content of their March 7 exchange when the supervisor stated she would deny any charges about the asshole name calling.4 When asked by her counsel if the supervisor "made any threats," on March 10, Grievant re plied,

Yes, she said she could take the half time job away from me, come on, let's go to the office, she said,

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4Grievant stated she possessed a written version of the "full conversation" which she tape recorded on May 10, 1994; however, the parties apparently listened to the tape while off the record, see T.17. Although the level two transcript indicates at T.29 that the tape recording was marked and entered into the record without protest on the part of MCBE's counsel, the tape was not transmitted to the undersigned nor was any transcription of the tape introduced into the record or sent to the undersigned.

and you can just go home and I told her I was warning her first [because] . . . I didn't want to carry it any further than the kitchen.

T.20-21.

According to Grievant, after the March 10 encounter, but before March 16, 1994, she had a "conversation" with the super visor about her "time," that is, her work hours. Grievant did not fully explain what happened during that encounter. Instead, Grievant next related that she met with the principal and told him she heard from another party that she was not supposed to be working her present schedule of three hours and twenty-five minutes, but only three hours and twenty minutes, and that the principal told her that would be fine.

Grievant explained that the reason she pursued the question of her work time was because she wanted to leave work before the other cooks so as not to be subjected to any possible further name calling by the supervisor. Grievant continued that, when she began to leave work at the earlier time, the supervisor reprimanded her for leaving too early. That prompted Grievant to visit the principal again. At that point he verified from another source that Grievant was supposed to work three hours and twenty-five minutes per day. Grievant said that after that, she remained at work for the additional five minutes. T.19-20.

Grievant said she was notified by WES's principal on March 16, 1994 that she would no longer be needed as a half-time cook at WES because the daily meal count was down, because the job was going to be eliminated and because the supervisor said she (Grievant) was not needed. T.18-19. Grievant stated that when she was called to the principal's office on March 16, she carried a hidden tape recorder to that meeting, also.

Grievant said she learned after she left WES that her supervisor had submitted a written evaluation about her to WES's principal, an evaluation which "was full of lies." Grievant

said she discovered that the supervisor recommended in the evaluation that her job be eliminated.5

During cross-examination Grievant admitted that, after she told the supervisor not to call her names anymore, the supervi sor never called her a name again while she remained at WES. However, Grievant stated that she "knew" the supervisor contin ued to talk about her because she saw the supervisor whispering to others and laughing when she came into the room.6

Grievant called upon a former co-worker at WES with whom she was friendly to testify about what had occurred between Grievant and the supervisor at WES. In short, this witness, the very person that Grievant claimed was the other target of the asshole remark, did not exactly corroborate Grievant's version

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5Grievant also said she learned through others that the supervisor had taken the name-calling out of WES and had referred to her as an asshole to a cook in another school.

6During the cross-examination, Grievant also opined that secretly taping her encounter with the principal had not been inappropriate or unprofessional; she attempted to justify that behavior on the ground that she did not know what the principal was going to say to her. WCBE's counsel also asked Grievant whether she had ever brought a prank item to school during her first few days of work at WES. Grievant conceded that she had brought a fake (rubber) pile of dog feces and placed it in the cooks' office. Grievant said the dog "doodoo" was a joke and expressed doubt that anyone could possibly be offended by it. of the name-calling incidents. Under cross-examination, this cook testified she did not hear any of the conversation that

preceded the asshole name-calling, but that she did hear the words "you assholes." She said she understood that the remark was directed to the "group," not just to Grievant and/or her self. This witness also said no students were present when the remark was made.7 T.57-58.

Among others, WES's principal and the head cook, Grievant's former supervisor, testified on behalf of WCBE. WES's principal described how cooking staff needs are determined by the school's meal count. According to him, in November 1993, prior to Grievant's starting date at WES, he learned that, based on the decline in the meal count, his school was overstaffed with cooks and could possibly lose the half-time cook slot. Despite this fact, he kept the half-time position filled with a substitute when the second semester began in January 1994 because he believed a full-day kindergarten proposed for the next year would drive up the meal count again and enable him to keep the half-time job.

The principal also described several encounters with Grievant's supervisor in which the supervisor complained of

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7Grievant also called upon and elicited the testimony of several other cooks who had previously worked with WES's head cook. Her counsel explained that his intention was to establish a "pattern" of behavior on the supervisor's part. This testimony is irrelevant because the issue in this case, and necessarily the scope of Grievant's burden of proof, is whether or not the supervisor harassed Grievant via the use of profanity or other unwarranted behavior.

Grievant's work practices and/or on-the-job behaviors. He also

said Grievant approached him about work-related problems rela tive to the supervisor. He stated that Grievant never com plained to him of any incidents of harassment or abusive lan guage on the part of the supervisor.

The principal said he eventually learned the full-time kindergarten program was not going to materialize and this fact as well as the diminished meal count throughout the winter months affected his decision to remove Grievant from the half-time cook's position. He said he was interested in seeing how the cooks could function without the half-time cook being there. The principal essentially admitted that, in the final analysis, Grievant's removal was primarily based on lack of need due to the insufficient meal count and, to some lesser extent, because of the discord between Grievant and Grievant's supervisor. See T.82-97.

Grievant's former supervisor at WES denied she uttered the word assholes to her cooks in general, and to Grievant in particular, although she admitted she had used the term "you sluts" to the cooks. She described this verbal form of ending the work day as an "inside joke" among the cooks who served at WES for a number of years. She said she was sorry and would not use such language again.

The supervisor also explained why she had recommended that Grievant's stint at WES be ended. The supervisor claimed that, from the very beginning, Grievant had insisted in reporting to work each day before she was due despite being told to keep her scheduled hours. She said Grievant also ignored her authority and persisted in doing things her own way or in the manner jobs were performed in other schools. She said she finally felt that the divisiveness in the kitchen outweighed any benefits from the

half-time position and that the full-time cooks could perform all of the required work. Grievant did not rebut any of the supervisor's testimony.

No one was hired to replace Grievant or otherwise fill the half-time cook's slot. In addition, one of WES's regular cooks testified that the supervisor along with the remaining full-time cooks got all of their work done with plenty of time to spare after Grievant's departure from WES. There was absolutely no evidence presented that the full-time cooks were ever short-handed or otherwise adversely affected by the loss of the part-time cook.

Finally, both Grievant and her former supervisor at WES, presented witnesses and documentation as to their past and present ability to effectively perform their respective jobs as cook and/or head cook (cook supervisor). One especially strong commendation was made by a WES teacher who noted that the supervisory cook did an excellent job in managing the food services program at WES.

II

Grievant's primary argument seems to be that, because she had been employed for more than thirty days in the same position at WES, she was entitled to the full benefits and rights of a regular employee, pursuant to West Virginia law, and could not be removed from that position until the end of the school year. In this vein, Grievant argues that her removal from the half-time cook's position at WES was illegal, arbitrary and capri cious and in violation of her due process rights.

Grievant also contends that her supervisor at WES disliked, intimidated, and harassed her, subjecting her to verbal abuse. Among other things, Grievant asserts that MCBE's officials knew

at the end of the first semester what the meal count at WES would be for the rest of the school year and had determined that a need existed to keep the half-time position filled during the entire second semester. According to Grievant, circumstances had not significantly changed with respect to the meal count after she assumed the position, and she had never been repri manded by WES's principal about her job performance. Grievant suggests that her removal from WES was retaliatory in nature since it occurred only a few days after the supervisor had threatened her during a confrontation about the name-calling incident. Grievant concludes that MCBE abused its discretion by not letting her finish the school year in that the reasons given for her removal were not supported by the evidence and were mere pretext for her wrongful discharge due to illegal motives.8 MCBE denies any wrongdoing in this situation and contends that Grievant did not prove her case by a preponderance of the

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8According to Grievant, at the time of the level two hearing she had missed thirty-seven working days at WES, amounting to $682.41 in wages, and had also lost four days of sick leave.

evidence. According to MCBE, the head cook's language in front of Grievant was certainly "crass" but did not rise to the level of harassment as contemplated by Code 18-29-2(n). MCBE also essentially argues that the decision to no longer utilize a substitute half-time cook at WES due to lack of need was not violative of Code 18A-4-15 nor was it an arbitrary and capri cious exercise of its discretion to assign school personnel.

III

When a substitute worker is assigned to fill a vacant position created by the long-term leave of absence of a regular service employee, a board of education must, "within twenty working days from the commencement of the leave of absence, . . . give regular employee status to a person hired [pursuant to W.Va. Code, 18A-4-8b] to fill such position." W.Va. Code 18A-4-15(2). However, all substitute employment, including long-term substitute employment in which "regular" status is attained, is essentially temporary employment. Thus, even when a substitute service worker attains regular employee status, he or she remains on that job only until voluntarily giving it up or in the event the regular employee returns to work.

In this case, Grievant's quest to recover the lost wages and benefits she seeks must fail because she did not establish she had attained "regular" employee status in conjunction with her job at WES. This is because Grievant failed to demonstrate that she received her job via any type of posting and competi tive bidding as set forth in Code 18A-4-8b. Thus, it cannot be determined that Grievant had acquired regular employee status. That Grievant may have received certain regular-employee bene fits from MCBE while temporarily employed at WES is not control ling since a board of education may confer such benefits upon its substitute employees "but such benefits shall not include regular employee status and seniority." Code 18A-4-8g.

In addition, Grievant's apparent reliance upon the last paragraph in Code 18A-4-15 is misplaced. This portion of the statute provides that "[s]ubstitute service employees who have worked more than thirty days for a school board shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel . . . ." Grievant

had not been subjected to a suspension, a dismissal or a non-re
newal of her substitute's contract when released from the
temporary assignment at WES and placed back in the substitute
rotation. Moreover, because Grievant had not attained regular
employee status upon the call-out assignment to WES, she re
mained a temporary substitute there and had no statutory job
protection or due process rights, under Code 18A-4-15 or any
other law, to notice and hearing with respect to retaining that
assignment, despite the fact she had held the job for more than
thirty days. See Rose v. Nicholas County Bd. of Educ., Docket
No. 93-34-063 (June 29, 1994).

Finally, the record does not support that Grievant's
supervisor subjected Grievant to harassment as contemplated by
W.Va. Code 18-29-2(n). Harassment is defined in 18-29-2(n) as
"repeated or continual disturbance, irritation or annoyance of
an employee which would be contrary to the demeanor expected by
law, policy and profession."

Grievant's supervisor admitted that she used the word
"sluts" in Grievant's presence on one occasion. However, the
evidence overwhelmingly supports that the supervisor did not
direct the word to Grievant or otherwise intend to malign
Grievant. Nevertheless, while the supervisor intended no harm,
she offended Grievant. The record reflects that when Grievant
asked the supervisor to cease using the term slut, it did not
happen again. Therefore, the supervisor engaged in no "repeat
ed" or "continual" use of a term likely to disturb, irritate,
annoy or offend Grievant. The same can be said with regard to
Grievant's contention that the supervisor called her and another
worker assholes. Simply put, Grievant reported that only one
incident of the asshole name-calling occurred in her presence

and that she asked the supervisor to quit. Grievant does not allege that the supervisor ever repeated the word in her pres ence.9

In summary, it cannot be concluded that Grievant was wrongfully "terminated" from her job at WES by way of "retalia tion" on the part of the supervisor. While the supervisor "recommended the elimination" of the half-time cook's job, the supervisor does not have any power to actually release a

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9Contrary to Grievant's allegation that the supervisor used foul language in front of students, the preponderance of the evidence supports that the supervisor never uttered curse words or other any other offensive language in the students' presence.

substitute worker. Additionally, Grievant's contention that a need still existed for a half-time cook at WES until the end of the school year in question is not borne out by the weight of the evidence. Rather, it appears from the record that a half-time cook was not needed to finish the school year.

In addition to the foregoing, the following findings and conclusions are appropriate.

Findings of Fact

1. Grievant is employed as a substitute cook, presumably, under a contract for a substitute service personnel.

2. In November 1993, the principal at WES learned the meal count had declined to the extent that the school was overstaffed with cooks and could possibly lose a half-time cook's slot. At that point WES's regularly-employed half-time cook was filling in for a full-time cook on sick leave, and a temporary worker, hired for the job via a posting process, was

performing the half-time cook's job.

3. When the first semester of the 1993-94 school year ended, WES's temporary half-time cook bid on another position closer to her residence. Thereafter, when the second semester began, a decision was made to fill the half-time cook's slot with a substitute, basically because of a desire to retain the position and also due to the distinct possibility that a pro posed full-day kindergarten program the next school year would boost WES's meal count.

4. In January 1994, Grievant was called to work as a substitute half-day cook at WES. Grievant does not contend and the record does not support that she received the assignment pursuant to the posting and bidding process.

5. From almost the beginning of Grievant's tenure at WES, Grievant and her supervisor experienced interpersonal problems about work-related matters, the resolution of which went so far as to involve hidden tape recorders and repeated visits to the school's principal by the parties.

6. At approximately the end of the first week of March 1994, WES's principal learned that the half-time cook's job at WES would be RIFed effective the 1994-95 school year. Either then or somewhat later, he discovered that the full-day kinder garten program targeted for the next school year apparently was not going to materialize.

7. On March 8, 1994, Grievant's supervisor referred to Grievant and another worker as "assholes" and later that day addressed her staff as "sluts" in a joking manner as they left the building. Grievant openly objected to the remarks and asked that the name-calling cease. There is no evidence that the supervisor used either the term slut or asshole in Grievant's

presence again. The evidence also preponderates that the supervisor never uttered foul language in the presence of children.

8. Sometime in March 1994, Grievant's supervisor prepared an evaluation of Grievant's performance with a written addendum and recommended to WES's principal that, due to certain aspects of Grievant's work performance and the dissension in the kitchen that the half-time cook's position be eliminated.10

9. The record supports that both Grievant and her super visor at WES are competent and valued employees, as evidenced by the ample endorsements of record from either teaching staff or past and present co-workers and supervisors. However, the record also supports that, during Grievant's tenure at WES, Grievant may have been somewhat stubborn and authoritative, and the supervisor somewhat insensitive and high-handed as the two parties interacted with one another.

10. Staffing requirements for cooks assigned to a school allow one cook per 125 meal counts. From November 1993 through March 1994, WES's monthly average of the daily meal counts ranged from 285 to 337 per month, well below the allowable range of 375 to sustain even three full-time cooks.

11. In a memorandum dated March 14, 1994, WES's principal asked the assistant superintendent to terminate the half-time cook's position at his school due to the drop in the meal count and resultant overstaffing situation which triggered the RIF of the regularly-employed half-time cook for the coming school year.

12. WES's principal's testimony that Grievant was released from the half-time cook's position primarily because of lack of need of a half-time cook due to the insufficient meal count and

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10Grievant did not request that the evaluation be purged from her files or otherwise raise an issue over the evaluation's content or the evaluative process.

secondarily because of the discord between Grievant and Grievant's supervisor is credible. The lack of need was borne out by the fact that, after March 16, 1994, the three full-time cooks completed their work with time to spare and the school meal program suffered no adverse effects.

Conclusions of Law

1. According to W.Va. Code 18A-4-15(5), a board of education must confer regular employee status upon a substitute who has filled in for more than thirty days for an employee who has been suspended.

2. While a board education may bestow various employee benefits upon its substitute workers, W.Va. Code 18A-4-8g and 18A-4-15(2) specify that a substitute filling in for an employee on an extended leave can attain regular employee status, includ ing due process job protections and seniority rights, only as the result of a posting and competitive bidding process as outlined in Code 18A-4-8b.

3. Grievant, who was filling in for an absent worker, not a suspended worker, failed to establish she had attained regular employee status as contemplated by W.Va. Code 18A-4-8g and 18A-4-15(2) since she offered no evidence that she had obtained the position at issue via any form of Code 18A-4-8b's posting and bidding procedure. See Hixenbaugh v. Hancock County Bd. of Educ., Docket No. 94-15-215 (Sept. 30, 1994).

4. Pursuant to the last paragraph in W.Va. Code 18A-4-15, "[s]ubstitute service employees who have worked more

than thirty days for a school board shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel . . . ." Since Grievant was not suspended, dismissed or subjected to a contract non-re newal in conjunction with her employment as a substitute cook, this portion of the statute is not applicable herein.

5. "There is no statute which places restrictions on the removal of a substitute from a particular position, regardless of the length of service of the employee in a particular assign ment, and such actions are within the discretion of the county superintendent of schools per W.Va. Code 18A-4-15. Vest v. Nicholas County Bd. of Educ., Docket No. 92-34-020 (May 20, 1992)." Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

6. Harassment is defined in W.Va. Code 18-29-2(n) as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." When a determination is made that on-the-job harassment of an employee has occurred, the relief to be gained is an order that the harassment cease and desist. See e.g., Helvey v. W.Va. Workers' Comp. Fund, Docket No. 91-WCF-034 (Mar. 30, 1992).

7. The record herein does not support a finding that Grievant was subjected to harassment during her tenure at WES. Moreover, since Grievant did not complain of harassment while working at WES, any relief which she could have obtained had she proven the charge is no longer available. Id.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: November 23, 1994