ALPHA J. SIMPSON,

Grievant,

v. **Docket No. 96-29-431**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Alpha J. Simpson (Grievant) filed the following grievance against Respondent Mingo County Board of Education (MCBE) under W. Va. Code §§ 18-29-1, et seq., on or before August 27, 1996:

> Ms. Simpson was hired as a cook in 1993 to replace a person who was on workman's compensation. Ms. Simpson's employment contract states that she was assigned to the position "until the status of the regular employee is determined." This regular employee has not resigned or been released by her doctor to return to work. In spite of this, the county has chosen to post the position.

After her grievance was denied at Level I, Grievant appealed to Level II where a hearing was conducted on September 19, 1996. On September 27, 1996, a Level II decision denying the grievance was issued by the Superintendent's designee, Johnny Fullen. As authorized by W. Va. Code § 18-29-4(c), Grievant by-passed Level III, appealing to Level IV on October 4, 1996. A Level IV hearing was conducted in this Grievance Board's officein Charleston, West Virginia, on December 16, 1996. The parties elected to file proposed findings of fact and conclusions of law, and this matter became mature for decision upon receipt of those submissions on January 14, 1997.

As the facts in this matter are essentially undisputed, the following findings of fact are made from the record developed through Level IV.

FINDINGS OF FACT

1. On February 22, 1993, Dorles Belcher, a regular Cook employed by Respondent Mingo County

Board of Education (MCBE) at Gilbert Grade School (GGS), sustained a compensable on-the-job injury. Ms. Belcher has not worked since that event.

2. At an unspecified date between February 23, 1993, and August 27, 1993, MCBE posted a service personnel position vacancy for the position held by Ms. Belcher to be filled "until the status of the regular employee is determined." L II HT at 3-4.

3. Grievant successfully bid into the position described in Finding of Fact Number 2, above, and was issued a probationary contract of employment commencing on August 27, 1993. The contract specifies that Grievant is "[a]ssigned as a Cook I until the status of the regular employee is determined." See G Ex 1 at L II.

4. On January 30, 1996, the Interdisciplinary Examining Board of the West Virginia Workers' Compensation Division awarded Ms. Belcher a 6% permanent partial disability, denying her claim for a permanent total disability for her on-the-job injuries. See R Ex 2 at L IV. As of the date of the Level IV hearing on December 16, 1996, the final outcome of Ms. Belcher's claim was still pending in litigation. See R Exs 3 & 4 at L IV.

5. On March 12, 1996, MCBE Superintendent Everett Conn notified Grievant that he was proposing to reassign her to the preferred recall list for the 1996-97 school year. R Ex 5 at L IV. Grievant exercised her right to a hearing before the county board on this proposed action, but Grievant was placed on preferred recall, effective July 1, 1996. L II HT at 6.

6. On March 21, 1996, MCBE placed Ms. Belcher on its list of "unassigned" service personnel employees. See R Ex 7 at L IV.

7. On April 1, 1996, Ms. Belcher wrote to MCBE Assistant Superintendent Johnny Fullen indicating her intention to return to work as soon as her doctor released her. See R Ex 1 at L IV. Ms. Belcher had sent comparable correspondence to the board in prior years.

8. On August 22, 1996, MCBE posted a Cook I service personnel vacancy at GGS to be filled "for the 1996-97 school term only or until the status of the regular employee is determined." G Ex 2. at L II.

9. Grievant applied for the Cook I position at GGS but the job was awarded to Pamela Kirk, a Cook on MCBE's preferred recall list.

10. Ms. Kirk has greater seniority in the Cook classification of employment than Grievant.

11. As of August 22, 1996, MCBE had not terminated Ms. Belcher's employment nor had Ms.

Belcher resigned.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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 outcome of this grievance is governed by W. Va. Code § 18A-4-15 which provides as follows:

> The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
>
> * * *
>
> (2) To fill the position of a regular service employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position.

Under this provision, once the regular service employee whose position is being filled by a substitute returns, or their status changes so that the position is vacant, the substitute no longer has any claim to such position. See Bailey v. Putnam County Bd. of Educ., Docket No. 94-40-429 (Jan. 31, 1995). See also Curry v. Mingo County Bd. of Educ., Docket No. 95-29-518 (Jan. 17, 1997). In this particular situation, MCBE purports to have declared Ms. Belcher's position vacant by transferring her to the unassigned list. However, inconsistent with such status, it posted the GGS Cook I position for the 1996-97 school year only, or "until the status of the regular employee is determined." G Ex 2 at L II. This is essentially the same position Grievant had properly been awarded in accordance with W. Va. Code § 18A-4-15(2) in 1993, except that MCBE now appears to have elected to repost this job annually until such time as Ms. Belcher's status is resolved. (See footnote 1)

In the circumstances presented, MCBE has established no legitimate reason for ousting Grievant from her lawful place as a competitively-selected long-term substitute in favor of another competitively-selected long-term substitute. (See footnote 2) Respondent did not cite any specific language in W. Va. Code § 18A-4-15 which supports this yearly "revolving door" approach to hiring long-term substitutes, and the undersigned is unable to find any provision which supports this interpretation. See Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Accordingly, MCBE's action terminating Grievant's assignment as a long-term substitute is inconsistent with the statutory scheme provided in W. Va. Code § 18A-4-15 for assigning service employees to fill in for regular employees who are on extended absences, and was arbitrary and capricious. See State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E.2d 176 (1996).

In addition to the foregoing discussion, the following conclusions of law are appropriate to disposition of this matter:

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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. The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (2) To fill the position of a regular service employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position.

W. Va. Code § 18A-4-15.

3. "School personnel laws and regulations are to be construed strictly in favor of the employee."

Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

4. Where Grievant was duly selected under the provisions of W. Va. Code § 18A- 4-8b to fill a long-term substitute position resulting from the extended absence of a regular employee who suffered a compensable on-the-job injury "until the status of the regular employee is determined," MCBE violated W. Va. Code § 18A-4-15(2) when it terminated Grievant's assignment and reposted the position to be "filled for the 1996-97 school term only or until the status of the regular employee is determined," when the regular employee had not resigned nor had her employment been terminated by board action.

Accordingly, this Grievance is **GRANTED** . Respondent Mingo County Board of Education is hereby **ORDERED** to reinstate Grievant to her previous position as a long- term substitute and to award her all pay and benefits to which she is entitled, including, but not limited to, back pay with interest.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 28, 1997

Footnote: 1Had MCBE posted this position prior to June 30, 1996, it could also be argued that the justification for transferring Grievant to the preferred recall list at the end of the 1995- 96 school year had then ceased to exist. See Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996); Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996).

Footnote: 2It is recognized that MCBE faces a legal quandary in complying with the provisions of W. Va. Code § 23-5A-3 concerning Ms. Belcher's right to reinstatement. However, the actions taken in this instance regarding Grievant are

contrary to W. Va. Code § 18A- 4-15.