SALLI GANOE,

Grievant,

v. **DOCKET NO. 97-14-229**

HAMPSHIRE COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Salli Ganoe, alleges she was denied seniority while working as a "Contract" Classroom Aide at Hampshire High School, in violation of West Virginia statutes governing the employment of school service personnel. She requests as relief that she be given seniority as of October 10, 1995, the date she first began working as a Contract Aide.

The grievance was denied at level one by Richard Hicks, Principal, on February 5, 1997. After a level two hearing was held on February 18, 1997, it was again denied by Gerald Mathias, Superintendent, by decision dated February 21, 1997. The grievance was also denied at level three by the Respondent Hampshire County Board of Education ("HCBOE") on April 15, 1997, following a hearing of the same date. Grievant appealed to level four on May 1, 1997, and a hearing was conducted in this Grievance Board's Morgantown, West Virginia, office on June 6, 1997. The parties declined to submit written proposals, so this grievance became mature for decision on that date.

The material facts in this case are undisputed and are contained in the following findings.

Findings of Fact

1. Grievant was originally employed by HCBOE on October 2, 1995, as a SubstituteClassroom Aide, and she received a contract for employment in that classification. In accordance with W. Va. Code § 18A-4-15, all substitute aides employed on that date participated in a drawing to establish their calling preference. Grievant drew number five of the fifteen individuals employed on October 2,

1995.

2. On October 10, 1995, Grievant was offered a position as a “Contract” Classroom Aide to tend to the needs of a handicapped student needing one-on-one attention. The position was posted as Aide II--Special Education, but no full-time employees were interested. HCBOE then offered the position to employees on the substitute list, and Grievant was the first to accept the position.

3. Grievant signed a “Supplemental Contract/Contracted Services Agreement,” which specified that she would be employed as a Classroom Aide at Hampshire High School and be compensated at a rate of $7.40 per hour for five days per week for the year's school term. (See footnote 1) This was in addition to her contract of employment as a substitute.

4. Grievant worked at Hampshire High School as a Contract Aide during the 1995-1996 and 1996-1997 school years, five days per week, six and one-half hours per day.

5. Contract Aides employed by HCBOE did not earn seniority and were not granted any other benefits given to substitute or regular, full-time employees.

6. Grievant did not work as a Substitute Aide until November 1, 1996. (See footnote 2) Her seniorityas a substitute was calculated to begin on that date, and she has earned no other seniority.

7. HCBOE's sole motivitation for hiring contract employees was to save the expenses associated with providing benefits to such employees.

Discussion

Because this is a non-disciplinary matter, the burden of proof is upon Grievant to prove her claims by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). Grievant's chief allegation in this case is that she should have earned seniority rights when she began working as a Contract Aide, not when she first worked as a substitute approximately one year later. This issue necessarily raises the broader question of whether HCBOE's hiring of “contract” employees without granting them seniority or other benefits is proper under the statutes governing employment of school personnel.

HCBOE contends that it appropriately calculated Grievant's seniority as a substitute, beginning on the date she first substituted for a regular, full-time employee. It argues that she was entitled to no seniority or other benefits while working as a Contract Aide, which it claims was an extracurricular or supplemental position to which no seniority rights attach. Conversely, HCBOE simultaneously

admits that its motivation for hiring contract employees was to save funds. Hampshire County must deal with an extraordinary number of handicapped and special needs students, because it is home to the “Potomac Center.” The Center was built in 1983 as the first of what were to be regional centers for education of handicapped children. However, the other centers were never built, so Potomac Center is the only one of its kind. Accordingly, because it is the onlypublic school specifically designated to deal with handicapped and special needs students, Potomac Center receives children from all over the state, and it consists of several buildings. Because so many students in the Hampshire County system are profoundly retarded or disabled, there is an increased need for one-on-one attention, usually by aides or other service personnel. Since there is a lack of state funding to pay for the substantially higher number of aides needed by HCBOE, it decided to employ full-time classroom aides under the contract system, saving the expense of providing full benefits to those employees.

HCBOE essentially admits that Grievant and other contract aides are regular, full-time employees. It has simply attempted, by having employees sign “supplemental” contracts for full- time work at an hourly wage, to avoid providing benefits to them. Although the level two decision addressed and determined that the Contract Aides were employed under “extracurricular” contracts, this argument was not specifically addressed by Respondent at level four. Extracurricular assignments are defined by Code § 18A-4-16, as follows:

> The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

Clearly, Grievant's position as a Contract Aide was not an extracurricular assignment. This provision specifically addresses situations in which employees perform duties in addition to their regular daily duties, and extracurricular duties have been deemed to be those which occur mostly “at times other than regularly scheduled working hours.” See Cruciotti v. McNeel, 183 W.Va. 424, 396 S.E.2d 191 (1990) (athletic trainer). Extracurricular does not encompass duties which occur onlyduring regularly scheduled working hours, on a daily basis, five days per week, especially in a case such as the instant one where the employee is not performing duties “additional” to his regular

duties. See State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W.Va. 176, 475 S.E.2d 176 (1996) (homebound teachers are not performing extracurricular duties).

Although not specified in Grievant's contract, HCBOE's Coordinator of Personnel Services testified at level four that the position was advertised and paid as an Aide II, which is a classification title contained in Code § 18A-4-8, the provision which establishes the class titles for all school service personnel. This section further states that "each service employee shall . . . be entitled to all service personnel employee rights, privileges and benefits provided under this or any other chapter of this code without regard to such employee's hours of employment or the methods or sources of compensation." (Emphasis added.) Accordingly, Grievant should be entitled to any benefits and seniority given to other service personnel, even though she is paid hourly for her services.

Seniority for school service personnel is addressed by Code §§ 18A-4-8b and 18A-4-8g. Code § 18A-4-8b designates how a county board is to make decisions concerning promotion and filling vacancies in service personnel positions, which is, in part, determined by seniority. It states that "[f]or purposes of determining seniority under this section an employee's seniority begins on the date that he enters into his assigned duties." The determination of seniority for service personnel is more specifically discussed in Code § 18A-4-8g, which states, in pertinent part:

> Seniority 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 section five, article two of this chapter and shall continue until the employee's employment as a regular employee is severed with the county board of education. . . . Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen, article four of this chapter, after executing with the board a contract of employmentas provided in section five, article two of this chapter (See footnote 3) . . . .
>
> For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e of this article[.] . . .

The section further provides that substitute and regular employee seniority are to be calculated separately and are never to be combined.

HCBOE contends that Grievant was neither a substitute nor a regular employee when she was working as a Contract Aide. There is no question that Grievant was not working in any of the substitute situations set forth in Code § 18A-4-15, which include situations in which another

employee is absent or a position is temporarily vacant. “Regular full-time employee” is defined by Code § 18-1-1(i) as “any person employed by a county board of education who has a regular position or job throughout his employment term, without regard to hours or method of pay.” There can be no argument that Grievant's contract specified that she would have a job as an aide at Hampshire High School for the entire school year. This is quite different from substitute situations in which the job is performed on a temporary, short-term basis until the regular employee returns or the position is filled on a permanent basis. For example, Grievant's substitute employment contract, introduced at the lower level hearing, stated that the period of employment was “on-call basis,” as opposed to daily scheduled employment. Grievant was a regular, full-time employee of HCBOE while working as a Contract Aide.

While not precisely addressing the issue in question here, a similar factual situation was thebasis for the Supreme Court of Appeals' recent decision in Boner, supra. The petitioners sought to prevent the Kanawha County Board from carrying out its plan to eliminate seven full-time homebound teaching positions and hire teachers on an hourly basis to fill the same instructional needs. The Board's admitted reasons for the plan were quite similar to HCBOE's; it sought to eliminate the full-time positions in favor of hiring part-time, hourly paid teachers without benefits in order to save funds. While the Court determined that it did not have the authority to direct the Board to only employ full-time teachers as homebound instructors, it did determine that the Board's plan was contrary to West Virginia's statutes governing employment of school personnel. The Court held that to allow the Board to eliminate full-time teaching positions, without a showing of a corresponding reduction in need, would circumvent the Code's contractual scheme of employment for teachers, whereby teachers must execute a contract before entering upon their duties and become entitled to various benefits and protections set forth by statute. The Boner Court further stated that, while it would not necessarily oppose the hiring of hourly-paid homebound teachers, authorization for any system allowing this would require new legislation.

The instant case differs in that no full-time aide positions have been eliminated to make way for the hiring of hourly-paid aides. However, HCBOE has essentially attempted, in an effort to save funds, to employ classroom aides on a full-time basis, but avoid paying them benefits by labelling them as hourly employees. HCBOE has admitted that it had a need for more aides than it had funds for full-time personnel. Just as with the homebound teachers, Respondent's system directly

contravenes the contractual scheme governing the employment of service personnel. As noted by the Court in Boner, under this logic, a county board of education could pick any group of employees and declare them to be hourly employees in order to avoid paying the benefits and protectionsassociated with full-time employment. (See footnote 4) If this were allowed, all of the statutes governing the hiring, promotion, benefits, seniority and other issues affecting the employment of school personnel would be a farce.

In accordance with the above discussion, the undersigned finds that Grievant's employment as a Contract Aide was a full-time, regular position with all attendant rights and benefits set forth in West Virginia's school personnel statutes. Therefore, Grievant is entitled to regular, full-time seniority beginning on October 10, 1995, to be calculated separately from her seniority as a substitute.

Conclusions of Law

1. In non-disciplinary matters, the burden of proof is upon the grievant to prove her claims by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. The contractual scheme of employment for school personnel does not allow for the hiring of hourly-paid employees to perform the full-time, regular duties of school service personnel positions. See State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W.Va. 176, 475 S.E.2d 176 (1996).

3. Seniority for regular school service employees begins on the date such employee enters upon regular employment duties pursuant to an employment contract with the county board of education. W. Va. Code § 18A-4-8g. 4. Grievant was improperly denied seniority and other benefits of regular, full-time employment while employed as a Contract Aide.

5. Grievant's position as a Contract Aide was a regular, full-time service personnel position governed by the statutes pertaining to the employment of school personnel.

Accordingly, this grievance is **GRANTED**, and Grievant shall be given seniority and all other benefits attendant to regular, full-time employment as of the date she began working as a Contract Aide on October 10, 1995.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hampshire 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.

DATE: July 30, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

The contract which Grievant signed when she initially began working as a Contracted Aide on October 10, 1995, could not be produced by either party. However, the parties seemed to be in agreement that the 1995 contract was essentially the same as the 1996 contract, which was introduced into evidence.

Footnote: 2

Grievant testified that she took a substitute position after discovering that she had not been credited with seniority while working as a Contract Aide. The evidence seems to indicate that thiswas a temporary assignment, and she returned to her job as a Contract Aide after working as a substitute for a short time.

Footnote: 3

Code § 18A-2-5 requires that all service personnel execute a written contract with the board before beginning their duties. The provision further designates the form for such contracts, which must specify the job classification, employment term, period of employment, and salary.

Footnote: 4

The Grievance Board has previously condemned the practice of working substitutes on a full-time basis without giving them benefits, such as seniority, insurance and leave. However, Talerico v. Harrison, Docket No. 17-88-021-3 (June 23, 1988), was based upon a Superintendent's opinion of several years ago, and the state's statutes were also different at that time.