DANNY CALHOUN,

Grievant,

v.

DOCKET NO. 97-41-428

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Danny Calhoun, filed the following grievance on or about June 19, 1997:

> Grievant, an electrician on the preferred recall list, contends that the Respondent has not posted a vacancy to temporarily fill the position of an absent electrician who has been absent for more than thirty days in violation of West Virginia Code §§18A-4-8b and 18A-4-15. Grievant seeks posting of the position and if he is the successful applicant he seeks wages, benefits and seniority retroactive to July 1, 1997. He also seeks interest on all monetary sums.

Following adverse decisions at the lower levels, Grievant appealed his grievance to level four on September 29, 1997. At the hearing in the Grievance Board's Oak Hill office on October 30, 1997, the parties agreed that default and timeliness were not issues in this grievance, and submitted the case on the record. The record consists of the level two transcript and decision issued September 19, 1997. This matter became mature for decision on November 16, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Joint Exhibit

Ex. 1 -

Grievance documents

Administration Exhibits

Ex. 1 -

August 6, 1997 letter from Gilbert Pennington to Dwight D. Dials

Ex. 2 -

Serdich v.Preston County Board of Education, No. 23536 (May 30, 1997)

Testimony

Grievant testified in his own behalf. Respondent presented the testimony of Racine Thompson, Gilbert Pennington, and Charles Jones.

FINDINGS OF FACT

1.

Grievant was first employed by the Board as a substitute custodian and became a regular custodian in 1995. LII Tr., pp. 19, 20.

2.

After a short period of time, Grievant bid on and received the position of Electrician II and served in that capacity for the school year 1996-97. LII Tr., pp. 20, 21.

3.

Grievant was notified, in accordance with the applicable statutes, that his position would be reduced commencing July 1, 1997. The notice was timely and appropriately given and a hearing was conducted before the Board at which Grievant appeared in person and by counsel.

4.

The Board, by timely action, adopted the recommendation of the Superintendent reducing in force the Grievant. Grievant did not file a grievance concerning the conduct of the hearing, the notice given, or any other matter related to the reduction in force.

5.

Grievant was placed on the preferred recall list for Electrician II and Custodian II, as the Grievant had previously served as a Custodian II.6.

Subsequent to the reduction in force, Grievant did not apply for any of the twenty or more posted custodian positions.

7.

Another employee, Ed Lilly, had been on leave of absence as a result of a workers' compensation claim and a work-related injury.

8.

For a period of time during the 1996-97 school year, a substitute had been utilized in the place of Mr. Lilly. Despite the fact that Mr. Lilly was off on leave of absence for greater than 30 days, his position was never posted.

9.

It was determined by the Electrician Crew Leader and the Director of Maintenance, and the Assistant Superintendent concurred, that there would be little or no need for scheduled overtime during the 1997-98 school year as a result of the completion of major projects in 1995-96 and 1996-97. These projects included additions to Ghent and Fairdale Elementary Schools, the completion of work at Pettus Elementary and Marsh Fork Elementary, and the utilization of an independent contractor for the complete rewiring of Park Junior High School.

10.

As a result of the foregoing, the practice of utilizing a substitute for Ed Lilly's position was discontinued July 1, 1997.

11.

The Director of Maintenance and the Assistant Superintendent testified that if Ed Lilly resigned immediately, that, based upon present and projected needs in the Maintenance Department, the position would not be filled, but would be replaced as need dictated, probably with an HVAC (Heating and Air Conditioning) employee rather than an Electrician. LII Tr., pp. 6, 86, 89, 90.

DISCUSSION

Grievant contends it is improper under W. Va. Code § 18A-4-15 for the Board not to post and fill Ed Lilly's position while he continues to be off on workers' compensation. W. Va. Code § 18A-4-15 provides, in pertinent part:

> The county board shall employ and the county superintendent, subject to the approval of the county board, 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: Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided herein, upon termination of the leave of absence said employee shall be returned to his or her original position;

Thus, Grievant argues, Mr. Lilly's position should have been and should now be posted and filled in accordance with W. Va. Code § 18A-4-8b once his leave of absence extended beyond thirty days. It is important to note that Grievant is not contending he would have been or now would be the successful applicant under Code § 18A-4-8b; rather, Grievant merely wants the opportunity to bid on the position.

The Board's position is that Grievant has failed to demonstrate a need to fill Mr. Lilly's position, and it is within its discretion whether to replace Mr. Lilly at this time. In support of its opinion, the Board cites to W. Va. Code § 18A-4-10 which provides, in pertinent part, that:

> When an allowable absence does not directly affect the instruction of the pupils or when a substitute employee may not be required because of the nature of the work and the duration of the cause for the allowable absence of the regular employee, the administration, subject to board approval, may use its discretion as to the need for a substitute where limited absence may prevail.

The Board contends that Mr. Lilly's position, as an Electrician, does not directly affect the instruction of the pupils, and the nature of the work does not mandate the employment of a substitute or other replacement at this time.

It is well-settled that W. Va. Code §§ 18A-4-8b and 18A-4-15 require a board of education to post any vacancy for an employee on a leave of absence for more than 30 days. This Grievance Board has determined on many occasions that it is not necessary for the employee to formally request a leave of absence in order for these statutory provisions to be triggered, and an employee off on workers' compensation is on leave of absence. Adkins v. Lincoln County Bd. of Educ., Docket No.

97-22-272 (Aug. 25, 1997); Livingood v. Mingo County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996); Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Hensley v. Mingo County Bd. of Educ., Docket No. 93-29-037 (July 6, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987).

Failing to post Mr. Lilly's vacancy initially once he had been off for more than 30 days and allowing a substitute to remain in the position days was violative of W. Va. Code §§ 18A-4-8b and 18A-4-15. However, as noted above, Grievant does not contend that he should have been placed in the position, or that he is entitled by seniority or otherwise to the position. The remaining issue is whether the Board is now required to post Mr. Lilly's position. This Grievance Board, in Adkins, supra, held that the initial failure of a Board to post a vacancy resulting from a leave of absence does not relieve the Board of the duty to post under the provisions of Code §§ 18A-4-8b and 18A-4-15. However, under the facts presented in the instant case, W. Va. Code § 18A-4-10 appears to conflict with the applicable provisions of W. Va. Code § 18A-4-15, and Grievant concedes in his proposed findings of fact and conclusions of law that W. Va. Code § 18A-4-10 presents an exception to the requirements set forth in W. Va. Code § 18A-4-15. He argues, however, that if the board relies on this exception, it must present evidence in support of its assertion, and the Grievant has a right to rebut the board's evidence. Consequently, the issue left to decide is whether the Board's decision not to replace Mr. Lilly at this time was based on sufficient evidence to demonstrate a lack of need, or was arbitrary and capricious, as Grievant contends. I find the Board has presented sufficient evidence, as detailed in Finding of Fact Nos. 9 and 10, to demonstrate it has no need to replace Mr. Lilly at this time, and therefore, is not required to post and fill that vacancy.

CONCLUSIONS OF LAW

1. W. Va. Code §§ 18A-4-8b and 18A-4-15 require a county board to post all vacancies which occur as a result of an employee being on a leave of absence for more than 30 days. It is not necessary for the employee to formally request a leave of absence in order for these statutory provisions to be triggered, and an employee off on workers' compensation is on leave of absence. Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-272 (Aug. 25, 1997); Livingood v. Mingo County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996); Eagle v. Marion County Bd. of Educ.,

Docket No. 94-24-226 (Nov. 23,1994); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Hensley v. Mingo County Bd. of Educ., Docket No. 93-29-037 (July 6, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987).

2. The failure of a county board to post initially a vacancy which occurs as a result of an employee being off on a leave of absence for more than 30 days, does not relieve the county board of the duty to post. Adkins, supra; Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

3. County boards have the discretion not to call a substitute when an allowable absence does not directly affect the instruction of students or when a substitute is not needed because of the nature of the work and duration of the absence. W. Va. Code § 18A-4-10.

4. Grievant has failed to prove by a preponderance of the evidence that the Board needed to fill the vacancy created when Ed Lilly was off work on leave of absence, and its decision not to continue a substitute in that position after July 1, 1997, was not arbitrary, capricious, or in violation of W. Va. Code §§18A-4-8b and 18A-4-15.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 9, 1998