SANDRA MULLINS,

Grievant,

v. **Docket No. 99-26-322**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On June 25, 1999, Sandra Mullins (Grievant) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Mason County Board of Education (MCBE) violated W. Va. Code §§ 18A-4-8g and 18A-4-15, by requiring her to engage in a random selection tie-breaker to resolve seniority with another employee in the same classification of employment. As the grievance was filed during the summer, the grievance was initially processed at Level II. Following a Level II evidentiary hearing on July 20, 1999, MCBE Superintendent Larry Parsons denied the grievance through a written decision issued on July 26, 1999. Grievant waived consideration of the grievance at Level III as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on August 3, 1999. A Level IV hearing was conducted in this Grievance Board's office in Charleston,West Virginia, on October 6, 1999. (See footnote 1) The grievance became mature for decision on November 12, 1999, after written arguments were received from each of the parties.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Mason County Board of Education (MCBE) as an Aide, a school service personnel position.

2. Grievant began working for MCBE as a substitute Aide in December, 1989. Shirley Billings

began working for MCBE as a substitute Aide in December, 1993. Therefore, Grievant held greater seniority as a substitute Aide than Ms. Billings.

3. On January 26, 1999, MCBE posted notices for two Aide positions, a vacancy for a regular full-time Aide at Mason Elementary School (Mason), and a vacancy for a long-term substitute Aide at Northpoint Elementary School (Northpoint).

4. The vacancy at Mason was a permanent vacancy in that the Aide who previously held that position had applied for and received another full-time position. The vacancy at Northpoint was a temporary vacancy in that the Aide who held that position, Gloria Hatten, had assumed the posted position of long-term substitute for another Aide, Karen Greene, who was on an approved leave of absence for a disability. Thus, when Ms.Greene returned to work, Ms. Hatten would resume her regular duties as an Aide at Northpoint.

5. Grievant and Ms. Billings applied for the posted vacancies at Mason and Northpoint. Because Grievant held greater substitute seniority, she was given first choice between the two positions. Grievant elected to fill the Mason vacancy, and Ms. Billings was selected to fill the remaining vacancy at Northpoint.

6. MCBE approved placement of Grievant and Ms. Billings in their respective positions on February 8, 1999, and they entered into the duties of their new assignments on February 10, 1999. Grievant remained in the Mason position through the end of the school year.

7. Prior to the return of Ms. Hatten to her position at Northpoint, Ms. Billings was the successful applicant for a posted vacancy for a regular full-time Aide at Point Pleasant High School. (See footnote 2)

8. In the spring of 1999, along with more senior Aides, Grievant and Ms. Billings were notified of a reduction-in-force (RIF), and their names were placed on MCBE's preferred recall list. (See footnote 3)

9. Later in the spring, after the point in time when MCBE issued RIF notices to Grievant and Ms. Billings, Ms. Hatten left her position at Northpoint to take a regular full-time position at another school. MCBE posted the Northpoint vacancy as a permanent position.

10. Grievant and Ms. Billings applied for the Northpoint vacancy which resulted from Ms. Hatten's departure. At this point, MCBE officials determined Grievant and Ms. Billings held identical regular seniority as a result of each having entered into their duties on February 10, 1999, and

conducted a random drawing between them to determine priority. Ms. Billings won that drawing, and she was awarded the Northpoint vacancy on a permanent basis.

11. For purposes of future personnel decisions, although Grievant and Ms. Billings hold identical regular seniority dates, Ms. Billings will be considered the more senior employee as a result of having prevailed in the random drawing process in the spring of 1999.

12. Grievant later applied for and received a regular full-time Aide position at Central Elementary School for the 1999-2000 school year. Thus, Grievant did not suffer any loss of pay as a result of being RIF'd and placed on MCBE's preferred recall list.

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 § 4.19 (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. Ordinarily, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). However, the hiring, assignment, transfer and promotion of school service personnel is governed by a number of statutory provisions, each of which MCBE correctly applied in the circumstances presented by this grievance. Although Grievant went from holding a four-year edge over Ms. Billings in substitute seniority to where she is the next-most senior regular MCBE Aide to Ms. Billings, this result is dictated by application of the applicable statutes governing the personnel decisions at issue in this grievance.

A county board of education's discretion in filling vacant school service personnel positions is limited by W. Va. Code § 18A-4-8b. See Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 630 (1993). Portions of W. Va. Code § 18A-4-8b pertinent to this grievance provide:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in theposition for which he or she applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
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> (4) Substitute service personnel; and
>
> (5) New service personnel.
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> * * *
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> For purposes of determining seniority under this section an employee's seniority begins on the date that he or she enters into his assigned duties.

In the first instance, MCBE applied the foregoing statute correctly when it permitted Grievant to select the regular Mason vacancy over the temporary long-term Northpoint vacancy ahead of Ms. Billings, because Grievant had more seniority as a substitute. See W. Va. Code § 18A-4-8b. Naturally, Grievant does not take exception to MCBE's actions to this point.

MCBE then selected Ms. Billings to assume the duties of the temporary vacancy at Northpoint in

accordance with the provisions of W. Va. Code § 18A-4-15, which governs employment of substitute service personnel employees. Portions of W. Va. Code § 18A-4- 15 pertinent to this grievance provide:

> 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:
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> (1) To fill the temporary absence of another service employee;
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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: 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 . . . .

Certain aspects of the foregoing provisions have been restated in W. Va. Code § 18A-4-8g, which controls seniority for regular and substitute school service personnel in the following manner:

> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen [§ 18A-4-15(2) and (5)] of this article: Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.
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> If two or more employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the county board.
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> A board shall conduct the random selection within thirty days upon the employees establishing an identical seniority date. All employees with an identical seniority date within the same class title or classification category shall participate in the random selection. As long as the affected employees hold identical seniority within the same classification category, the initial random selection conducted by the board shall be permanent for the duration of the employment within the same classification category

> of theemployees by the board. This random selection priority shall apply to the filling of vacancies and to the reduction in force of school service personnel: Provided, That if another employee or employees acquire seniority identical to the employees involved in the original random selection, a second random selection shall be held within thirty days to determine the seniority ranking of the new employee or employees within the group.
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> Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose.
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> * * *

At this point, Grievant takes issue with MCBE's actions, arguing that W. Va. Code § 18A-4-15 only required the vacancy resulting from Ms. Greene's leave of absence to be filled by a long-term substitute selected through the posting procedures set forth in W. Va. Code § 18A-4-8b, and not the position which resulted from Ms. Hatten leaving Northpoint to fill in for Ms. Greene. According to Grievant, MCBE should not have filled the temporary absence created by Ms. Hatten's selection to fill in for Ms. Greene by posting the vacancy. Instead, MCBE should have called in a substitute from the substitute rotation list. However, this Grievance Board has determined that W. Va. Code § 18A-4-15 applies equally to a secondary long-term vacancy created by proper application of the Code to fill an initial long-term vacancy, explicitly rejecting Grievant's proposed interpretation. Loy v. Wetzel County Bd. of Educ., Docket No. 97-52-561 (June 8, 1998).

Grievant suggests that the inequitable result in this case, where Grievant has suffered a reversal of her seniority status in comparison to Ms. Billings, warrants reconsideration and reversal of Loy. However, this Grievance Board will only change its established precedent when the current interpretation is demonstrated to be clearly wrong. See Belcher v. W. Va. Dep't of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). See also Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). Grievant has not offered any substantial legal basis for overturning the precedent established by this Grievance Board in Loy, supra.

Having determined that MCBE properly applied W. Va. Code § 18A-4-15(2) when it posted the Northpoint vacancy that resulted from Ms. Hatten's absence while filling in for Ms. Greene, the next issue to be resolved is whether MCBE acted properly when it determined the relative regular seniority

of Grievant and Ms. Billings by a random selection process. As previously noted, this aspect of service employee personnel law is controlled by provisions in W. Va. Code §§ 18A-4-15(2) and 18A-4-8g. Because these statutes relate to the same subject, they must be read and applied together in accordance with the in pari materia doctrine. See Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984); Farley v. Zapata Coal Corp., 167 W. Va. 630, 281 S.E.2d 238 (1981); Eastham v. Cabell County Bd. of Educ., Docket No. 92-06-397 (Apr. 16, 1993).

Although Grievant and Ms. Billings entered upon their duties through different routes, MCBE correctly determined that each employee was entitled to regular employment status. Grievant's status as a regular employee is not in dispute because she successfully obtained a permanent vacancy in accordance with W. Va. Code § 18A-4-8b. However, Ms. Billings was only selected to fill a temporary vacancy as a long-term substitute, serving until Ms. Greene returned from a leave of absence. Thus, Grievant contends Ms. Billingswas not entitled to begin accumulating regular seniority until she received the permanent posted Aide vacancy at Point Pleasant High School.

However, this Grievance Board has previously determined that an employee who takes a long-term substitute position in accordance with W. Va. Code § 18A-4-15(2) is entitled to “regular employment status” once the employee enters upon his or her duties. See Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Mingo County Cir. Ct., No. 94-C-238 (Jan. 21, 1997); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd, Kanawha County Cir. Ct., No. 93-AA-217 (Feb. 15, 1994); Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992). Therefore, MCBE was required to accord regular employment status, including credit for regular seniority, to Ms. Billings. Hensley v. Mingo County Bd. of Educ., Docket No. 93-29- 037 (July 6, 1994); Bushko, supra.

Inasmuch as Grievant and Ms. Billings entered into regular status on the same day, (See footnote 4) albeit by different routes, they held identical regular seniority for purposes of competing for vacancies posted under W. Va. Code § 18A-4-8b, and W. Va. Code § 18A-4-8g mandated that MCBE establish priority between them within 30 days. (See footnote 5) See Hughes v. Mason County Bd. of Educ., Docket No. 99-26-185 (Aug. 11, 1999).

More than 30 days passed from the time Grievant and Ms. Billings established identical regular seniority to the day when MCBE required them to engage in a randomselection process to determine the priority between them as required by W. Va. Code § 18A-4-8g. However, in order to benefit from

MCBE's failure to strictly adhere to the 30- day time limit in the Code for conducting the random selection, Grievant must demonstrate that she suffered some harm as a result of this error, or that the outcome might reasonably have been different if the drawing had been timely held. See Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See also Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). Grievant presented no evidence to support a contention that MCBE's delay constituted “harmful error” under the circumstances present. See Arbogast v. Randolph County Bd. of Educ., Docket No. 94-42-1093 (May 12, 1995).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. 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 § 4.19 (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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as thatdiscretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

> 3. 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.

4. When a regular school service employee is selected to fill a primary long- term vacancy resulting from the extended absence of another regular employee pursuant to W. Va. Code § 18A-4-15, the secondary long-term vacancy created by that employee's temporary absence must likewise be posted and filled in accordance with W. Va. Code §§ 18A-4-15 & 18A-48b. Loy v. Wetzel County Bd. of Educ., Docket No. 97-52-561 (June 8, 1998).

5. When an individual is competitively selected under W. Va. Code § 18A-4-8b procedures to fill the position of a school service employee on leave of absence, W. Va. Code § 18A-4-15(2) requires the school board to give "regular employee status" to suchindividual. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Mingo County Cir. Ct., No. 94-C-238 (Jan. 21, 1997); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug 4, 1993), aff'd, Kanawha County Cir. Ct., No. 93-AA- 217 (Feb. 15, 1994).

6. A school service employee selected to fill a position under W. Va. Code §18A-4-15(2) is a regular employee for the time he or she serves in the position. Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992).

7. Grievant failed to establish by a preponderance of the evidence that her employer violated W. Va. Code §§ 18A-4-15, 18A-4-8g, 18A-4-8b, or any other statute, policy, rule, regulation or written agreement applicable to her employment situation, by the manner in which it determined her seniority priority relative to Shirley Billings after she and Ms. Billings first entered into the performance of their duties as employees entitled to regular seniority on the same day. See Hughes v. Mason County Bd. of Educ., Docket No. 99-26-185 (Aug. 11, 1999).

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: December 30, 1999

Footnote: 1

Grievant was represented by counsel, John Roush, of the West Virginia School Service Personnel Association. Respondent was also represented by counsel, Howard Seufer, with Bowles Rice McDavid Graff & Love.

Footnote: 2

This position was established for the 1998-99 school year only, as it was based on the Individual Education Plan (IEP) of a special education student.

Footnote: 3

As a result of subsequent events, it does not appear that Ms. Billings was ultimately RIF'd.

Footnote: 4

Although Grievant had been a substitute with MCBE for nearly nine years, she had not previously held a long-term substitute position pursuant to W. Va. Code § 18A-4-15(2).

Footnote: 5

Grievant does not take exception to the methodology of the random drawing process employed to decide relative seniority in this case.