JUDY BARKER,

Grievant,

v. **Docket No. 98-22-496**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On November 4, 1998, Judy Barker (Grievant) filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., which stated the following:

> I was hired as Custodian III for Harts High School on November 2, 1998, however I will not be permitted to assume this position until Jan. 1999. The board has past (sic) a ruling not permitting my immediate transfer. This is unfair based upon the fact that it has occurred since the school year began, and I have already been moved twice.

As relief, Grievant sought immediate instatement to the position, and to be reimbursed for the additional mileage incurred in commuting from her residence to Guyan Valley High School rather than Harts High School. Grievant's supervisor at Level I did not have authority to grant relief, and the grievance was advanced to Level II where an evidentiary hearing was conducted on November 19, 1998. On November 24, 1998, the Superintendent's designee, Charles McCann, issued a decision denying the grievance. Grievant appealed to Level IV on December 7, 1998, by-passing Level III as authorizedby W. Va. Code § 18-29-4(c). Following a continuance which was granted for good cause shown, on February 26, 1999, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, wherein the parties supplemented the record developed at Level II. Grievant made an oral closing argument at the conclusion of the hearing, and the parties agreed to submit written arguments in support of their respective positions. This matter became mature for decision on March 17, 1999, following receipt of the parties' written post-hearing arguments. (See

footnote 1)

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 Lincoln County Board of Education (LCBE) as a Custodian III.

2. As of October 1998, Grievant was assigned to Guyan Valley High School.

3. On October 19, 1998, LCBE adopted an amended policy on Service Personnel Employment Practices which included the following provision pertinent to this grievance:

> In order for the Lincoln County Board of Education to provide continuity of service to the students of Lincoln County, service personnel (regular and substitute) will be limited to the number of posted positions they may bid into within the instructional term. After the fifth day prior to the beginning of the instructional term, or the fifth day of the second half of theinstructional term, no person employed and assigned to a service position in Lincoln County may transfer to another service position in the county during that half of the instructional term: Provided, That such person may apply for any posted, vacant position with the successful applicant assuming the position at the beginning of the next half of the instructional term; Provided, however, That service personnel who have been on approved leave of absence may fill these vacancies prior to the next semester. The superintendent may fill a position before the instructional term when it is determined to be in the best interest of the students.

G Ex B at L IV; J Ex 2 at L II.

4. LCBE adopted the policy set forth in Finding of Fact Number 3, above, to provide continuity by minimizing service personnel transfers during the school year, and to bring service personnel policies into line with policies applicable to professional employees, particularly the limitation on transfer of classroom teachers contained in W. Va. Code § 18A-4-7a. L III HT at 13-15; McCann testimony at L IV.

5. Sometime in October 1998, Grievant applied for a posted vacancy for a Custodian III at Harts High School. On November 2, 1998, LCBE approved Grievant's selection for the vacancy, but deferred her transfer into the position until the start of the following semester, January 22, 1999, in accordance with the policy set forth in Finding of Fact Number 3, above. G Ex B at L IV.

6. Since October 19, 1998, LCBE has consistently deferred transfers of regular school service employees to fill vacant positions in accordance with the policy set forth in Finding of Fact Number 3,

above.

7. Grievant did not assume the duties of the position at Harts High School until January 22, 1999, the beginning of the second semester of instruction in Lincoln County Schools. 8. It is a 14 mile round trip commute from Grievant's residence to Harts High School. It is a 56 mile round trip commute from Grievant's residence to Guyan Valley High School. L III HT at 4. From November 3, 1998, through January 21, 1999, Grievant was required to travel an additional 42 miles in order to reach her place of employment.

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.

Grievant contends that LCBE failed to comply with W. Va. Code § 18A-4-8b when it refused to assign her to the vacant position at Harts High School within 20 days after that vacancy was posted, notwithstanding her selection to “fill” the vacancy. Grievant relies upon language in the following pertinent portion of that statute, wherein the procedure for posting and filling school service personnel positions is described as follows:

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of the job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

In further support of her position, Grievant notes that the Legislature specifically addressed the concerns of the school board regarding continuity by placing the followinglimitation on the transfer of school service personnel in the aide classification in W. Va. Code § 18A-5-8(d):

> An aide may transfer to another position of employment one time only during any one half of a school term, unless otherwise mutually agreed upon by the aide and the county superintendent, or the superintendent's designee, subject to board approval: Provided, That during the first year of employment as an aide, an aide may not transfer to another position of employment during the first one-half school term of employment, unless mutually agreed upon by the aide and county superintendent

subject to board approval.

In addition, Grievant notes that the Legislature has specifically limited transfers by professional personnel during the school year by enacting the following language in W. Va. Code § 18A-4-7a:

> After the fifth day prior to the beginning of the instructional term, or after the first day of the second half of the instructional term, no person employed and assigned to a professional position may transfer to another professional position in the county during that half of the instructional term: Provided, That such person may apply for any posted, vacant positions with the successful applicant assuming the position at the beginning of the next half of the instructional term: Provided, however, That professional personnel who have been on an approved leave of absence may fill these vacancies prior to the next semester, The superintendent may fill a position before the next instructional term when it is determined to be in the best interest of the students.

Grievant argues that the foregoing statutory provisions, when read together, permit a county board to exercise discretion on whether to fill a school service personnel position by transfer of current regular employees only in the particular circumstances specified in W. Va. Code § 18A-5-8(d), which applies solely to service personnel in the aide classification. Grievant similarly contends that the express declaration that county boards may limit transfers by aides implicitly indicates no such limitation applies to other classifications of school service personnel. This Grievance Board has not previously addressed the legal issue raised in this grievance. However, several rules of statutory construction support Grievant's position challenging LCBE's action. “In the interpretation of statutory provisions the familiar maxim expressio unius est exclusio alterius, the express mention of one thing implies the exclusion of another, applies.” Syl. Pt. 9, Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984). “Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.” Syl. Pt. 3, Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975). “Technical words used in a statute will be presumed to have been used in a technical sense and will ordinarily be given their strict meaning.” Woodell v. Dailey, 160 W. Va. 65, 68-69, 230 S.E.2d 466, 469 (1976).

The controlling statute, W. Va. Code § 18A-4-8b, contains an imperative statement that a posted vacancy “shall be filled.” See Crusenberry v. Norfolk & W. Ry., 155 W. Va. 155, 180 S.E.2d 219 (1971); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997). A

determination of what is meant by the term “filled” in W. Va. Code § 18A-4-8b is crucial to resolution of this grievance. Grievant argues that “filled” means selected for and physically assigned or transferred to the position. LCBE maintains that once Grievant has been selected for a position, the position has been filled, and the employer retains discretion on the exact reporting date for the employee to commence working in the new position.

It is apparent that the Legislature's use of “fill” in the above-quoted portion of W. Va. Code § 18A-4-7a, means more than selecting a person to hold the position. TheCode proviso following the restriction on professional transfers explicitly permits the school board to “fill” the vacancy with someone on an approved leave of absence, or when the superintendent determines that it is in the best interest of the students. That proviso modifies the Legislature's limitation on the physical “transfer” of professional employees, not the process of application and selection. Thus, consistent with Grievant's argument, the position is not “filled” until the employee is actually placed in the position. See Woodell, supra. As noted by Grievant, the Legislature similarly used the term “fill” to mean physically or actually placing an employee in a position, when it explained the process for employing substitute service personnel in W. Va. Code § 18A-4-15. Id. Indeed, LCBE uses “fill” in this same context within the policy at issue: “The superintendent may fill a position before the next instructional term when it is determined to be in the best interest of the students.” J Ex 2 at L II.

Grievant's argument is also supported by the fact that the Legislature placed a specific limitation on transfers of school service personnel in the aide classification during the school term by enacting W. Va. Code § 18A-5-8(d). This express provision regarding aides implies that no such limitation applies to other school service personnel who are selected for transfer to a vacant position. (See footnote 2) See Manchin, supra. Further, when W. Va. Code §§ 18A-4-8b, 18A-5-8, and 18A-4-7a, are read together, it becomes clear that the Legislature intentionally limited transfers by school personnel during the school term onlyin certain specific circumstances, none of which are present in this grievance. See Smith, supra.

It is not disputed that LCBE acted to reduce the amount of personnel turmoil and disruption that may occur when a service personnel vacancy occurs, and employees transfer to fill that position, and new vacancies are created as the most senior employees fill their positions of choice. However, the Legislature has already balanced the interests of county boards and school employees by placing such limitations on certain categories of personnel described in W. Va. Code §§ 18A-5-8(d) and 18A-

4-7a, but not all service and professional personnel. Accordingly, after being duly selected in accordance with W. Va. Code § 18A-4-8b, LCBE improperly deprived Grievant of her right to transfer to a vacant service personnel position as a Custodian III at Harts High School.

Ordinarily, the relief provided to a grieving employee under the education grievance procedure involves a "make-whole" remedy, intended to restore the employee to his or her rightful place as an employee of the county board. Gillispie v. Kanawha County Bd. of Educ., Docket No. 98-20-216 (Aug. 26, 1998). See W. Va. Code § 18-29-5(b); Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992); Sanders v. Putnam County Bd. of Educ., Docket No. 97-40-459 (Dec. 3, 1997). See also W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Monteith v. Bd. of Educ., 180 W. Va. 31, 375 S.E.2d 209 (1988). See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989).

In this instance, Grievant is claiming an entitlement to reimbursement for theadditional commuting expenses she incurred as a result of having to continue traveling to a job that was significantly further from her home than the position which she was entitled to hold immediately after she was selected for transfer. This Grievance Board has previously awarded mileage reimbursement to grievants who demonstrated that “but for” their employer's improper actions, they would not have incurred certain travel or commuting expenses. See, e.g., Ali v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-474 (June 30, 1998); Manns v. Lincoln County Bd. of Educ., Docket No. 97- 22-257 (Oct. 20, 1997). Grievant has documented her additional mileage as 42 miles daily while she was required to commute from her residence to Guyan Valley High School (a 56 mile round trip) rather than Harts High School (a 14 mile round trip). Therefore, LCBE will be required to reimburse Grievant for her mileage for each day between November 3, 1998, and January 21, 1999, that she reported for duty at Guyan Valley High School. This reimbursement will be at the same per mile rate paid to other LCBE employees who are reimbursed for travel in behalf of LCBE.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the 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. "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).

3. "After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions." W. Va. Code § 18A-4-8b. Respondent violated this Code provision by restricting a school service personnel employee from transferring to a posted, existing, and vacant position, for which she had been duly selected during the school year, until the beginning of the next instructional term or semester.

4. Hearing examiners at Level IV of the grievance procedure for education employees are authorized to "provide such relief as is deemed fair and equitable." W. Va. Code § 18-29-5(b). Gillispie v. Kanawha County Bd. of Educ., Docket No. 98-20-216 (Aug. 26, 1998). See Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992).

5. Ordinarily, the relief provided to a grieving employee under the education grievance procedure, W. Va. Code §§ 18-29-1, et seq., involves a "make-whole" remedy, intended to restore the employee to his or her rightful place as an employee. Gillispie, supra. See W. Va. Code § 18-29-5(b); Graf, supra; Sanders v. Putnam County Bd. of Educ., Docket No. 97-40-459 (Dec. 3, 1997). See also W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Monteith v. Bd. of Educ., 180 W. Va. 31, 375 S.E.2d 209 (1988). See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989).

6. Grievant established by a preponderance of the evidence that she incurredadditional travel expenses of 42 miles daily when Respondent failed to transfer her to a vacant school service personnel position which she had been duly selected to fill in accordance with W. Va. Code § 18A-4-8b. See Gillispie, supra; Ali v. W. Va. Dep't of Health & Human Resources, Docket No. 97-HHR-474 (June 30, 1998); Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997).

Accordingly, this grievance is **GRANTED**. Respondent Lincoln County Board of Education is

hereby **ORDERED** to reimburse Grievant for her additional travel expenses from November 3, 1998, through January 21, 1999, as previously discussed in this decision.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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 transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 30, 1999

Footnote: 1

Grievant was represented by counsel, John Roush, of the West Virginia School Service Personnel Association. LCBE was also represented by counsel, James W. Gabehart.

Footnote: 2

If, as LCBE contends, W. Va. Code § 18A-4-8b gives the county board discretion on when to implement transfers of school service personnel to lateral positions at another location, there would be no reason for the Legislature to enact a specific transfer limitation for aides through W. Va. Code § 18A-5-8(d).