AIDA MEREDITH,

Grievant,

v. **Docket No. 98-33-383**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Aida Meredith, employed by the Monongalia County Board of Education (MCBOE) as a teachers aide, filed a level four grievance appeal on October 7, 1998, in which she alleged that on January 21, 1998, a regularly employed bus operator was improperly assigned to substitute in a newly created, mid-day, teacher aide assignment, until Grievant was awarded the position on February 16, 1998. Grievant alleges violations of W. Va. Code §§18A-4-15,18A-4-8 **,** and 18A-4-8e **,** and seeks reimbursement of wages she would have received beginning January 21, 1998. (See footnote 1)

The grievance appeal form indicates that no decision was issued at level one. A level two hearing was conducted on August 13, 1998; however, no decision was issued at that level. Grievant elected to bypass level three, as is permitted by W. Va. Code §18-29- 4(c). A level four hearing was conducted on December 7, 1998, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by the parties on or before January 11, 1999.

The facts of this matter are undisputed and may be set forth as the following formalfindings of fact.

Findings of Fact

1. Grievant has been employed by MCBOE for approximately twenty-two years, and is presently assigned as a teacher aide in the Transportation Department.

2. Effective January 21, 1998, a new, mid-day, run was created which required the assignment of a teacher aide. The run was one hour and fifteen minutes in duration.

3. Prior to the 1997-98 school year, it had been the practice of MCBOE to assign a regular employee at a workstation to substitute in supplemental assignments.

4. Effective the 1997-98 school year, it was the practice of MCBOE to hire substitute

employees to temporarily fill a vacancy in a newly created position until the position could be filled with a regular employee.

5. On January 21, 1998, a regular, full-time bus operator was assigned to substitute as the teacher aide for the newly created run. The bus operator continued to function in this capacity during the time the position was posted, until it was filled with a regular employee.

6. Grievant was awarded the assignment effective February 16, 1998, and held the position the remainder of the 1997-98 school year.

Argument

Grievant argues that because MCBOE chose not to use a substitute in the position, pending the posting and filling process, it was required to use an employee in the correct classification. Grievant asserts that the individual given the assignment did not hold the classification title, and had not passed the aide competency test. Grievant claims thatbecause she was the most senior regular aide, she was entitled to “step up” to the assignment during the posting period, under the provisions of W. Va. Code §18A-4-15.

MCBOE acknowledges that Grievant's argument is based upon its past practice of using regularly employed drivers and aides to cover for absent employees; however, in compliance with W. Va. Code §18A-4-15, that practice had been changed effective the beginning of the 1997-98 to school year, and vacant positions were filled with substitute employees. MCBOE explained that the bus operator was assigned the position on January 21, 1998, because she was available to immediately cover the run, and concedes that it erred by allowing her to continue in the position. Accepting the error, MCBOE asserts that as a regular employee, Grievant was ineligible for the assignment until it was filled on a regular basis.

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.

Grievant was not entitled to “step up” to the position in question during the posting period. After discussing the procedure for assigning substitute service personnel employees, W. Va. Code §18A-

5-15 states in pertinent part:

That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category ofemployment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

This issue was previously addressed by the Grievance Board in the matter of Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995). Although that grievance involved summer positions, the issue is identical. In Panrell/Marsh, the Board held that the “step up” provision of Code §18A-4-15 was clearly inapplicable to a newly created position. Citing Terek v. Ohio County Bd. of Educ., Docket No. 91-35-160 (Aug. 30, 1991), it was noted that the “step up” provision of Code §18A-4-15 gives regular employees an opportunity to fill an absent employee's job, with the assignment of a substitute employee to the position of the regular employee who remains on the job, when three events occur. One, a regular employee is absent. Two, a substitute is necessary for temporary employment. Three, an existing regular employee moves temporarily to the absent employee's position instead of having the substitute fill it. Because the position in the present grievance was newly created, there was no absent employee for whom Grievant could substitute.

MCBOE's action is further supported by additional language in Code §18A-4-15, which states that a board of education shall assign substitute service personnel in a number of circumstances, including, “(6) To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis under the procedure set forth in section eight-b of this article.” Therefore, while Grievant has established that MCBOE assigned the wrong employee to substitute, she has failed to prove that she wasentitled to the assignment prior to her appointment on or about February 16, 1998.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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.

2. W. Va. Code §18A-4-8b requires boards of education to post and date notices of all job vacancies, including newly created extracurricular assignments, for at least five working days, and to fill such vacancies within twenty working days of posting.

3. Grievant was not entitled to "step up" into the position in question prior to posting and filling because there was no absent regular employee. See W. Va. Code §18A-4-15; Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995); Terek v. Ohio County Bd. of Educ., Docket No. 91-35-160 (Aug. 30, 1991).

4. W. Va. Code §18A-4-15(6) requires a county board of education to assign substitute service personnel to temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis.

5. Grievant has failed to prove that she was entitled to hold the extracurricular assignment prior to the date of her appointment, or that she was otherwise entitled to any relief. Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: January 27, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

W. Va. Code §18A-4-8 provides the class titles and definitions for service personnel employees. Section 18A-4-8e requires that competency tests be administered to service employees who do not hold a classification title in a particular category, to allow them to meet the definition of the classification title in another category. No further discussion of these

provisions is necessary.