NANCY PHILLIPS,

Grievant,

v. **Docket No. 01-20-121**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant, Nancy Phillips, a substitute employee, against Respondent, Kanawha County Board of Education ("KBOE"), when a posted Clerk position at Capital High School was not filled "within twenty working days in violation of West Virginia Code §§18A-4-15 & 18A-4-8b." As relief she seeks instatement into the position, back pay, regular seniority to the date twenty days after the posting closed, and regular employee benefits to which she would have been entitled had she been placed in the position. (See footnote 1)

The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings.

Findings of Fact

1. Grievant has been employed by KBOE as a substitute employee since February 1997. She has passed the Clerk competency test, and has worked in various positions as a substitute Clerk since 1997. She has substituted in a Clerk position at Capital High School for three years. (See footnote 2)

2. On August 7, 2000, KBOE posted a 220 day Clerk II position at Capital High School. The closing date for making application was August 14, 2000. This is not the same Clerk position being filled by Grievant as a substitute. Grievant applied for the posted position, as did 19 regular employees. This was the third time this position had been posted. The record does not reflect what occurred during the first two postings.

3. On August 13, 2000, John Clendenen, Principal of Capital High School, sent a Requisition

for Personnel Employment form to KBOE's Human Resource Office, requesting that Grievant be placed in the posted Clerk II position.

4. As a courtesy to Principal Clendenen, and so the applicants would have some idea about what the position would entail, Karen Williams, KBOE's Coordinator in the Human Resource Office, gave Principal Clendenen the names of the two most senior applicants so he could talk to them about filling the position. This is her standard procedure. When this did not result in an applicant being placed in the position, Ms. Williams sent Principal Clendenen the entire list of regular employee applicants, ranked by seniority, so that he could contact them. Principal Clendenen again sent a Requisition Form to the Human Resource Office requesting that Grievant be hired. Ms. Williamsreturned the Requisition Form to Principal Clendenen, and told him there were regular employee applicants who had not been offered the position.

5. Principal Clendenen contacted the first six applicants on the list, and numbers eight, ten, and eleven. He told at least three applicants, "'I got a lady that's been here that I think that I want to have a job[,] but it's your job if[,] you know you have the right to claim the job.'"

6. Grievant asked Principal Clendenen for the applicant list, and if they could not do something to get the position filled. He turned the applicant list over to Grievant and Ms. Risk, the secretary at Capital High, to contact the remaining applicants on the list.

7. Grievant contacted Jenette Wheatcraft, Zina Watts, and Angela White. If an applicant inquired about the duties, she would describe the duties, explaining that it involved manning the switchboard, being responsible for a payroll of about 200 people, and preparing trip and operations requests. If an applicant asked, she told her it was a tough job.

8. Ms. Risk contacted one or more of the applicants. The record does not reflect whether Ms. Risk contacted all seven applicants who were not contacted by Grievant or Principal Clendenen.

9. Katie Austin, the regular employee ranked number 17 by seniority on the applicant list, was not contacted by Principal Clendenen, Grievant, or Ms. Risk, nor was Connie Bradley. Ms. Bradley was not contacted because Ms. Williams told Principal Clendenen her name should not have been on the list. Ms. Austin was not contacted because Principal Clendenen knew her from when she was in junior high school, and believed she had harassed him.

10. In early January 2001, Superintendent Ron Duerring directed Ms. Williams to call everyone on the applicant list and to fill the position. Ms. Williams began calling theemployees on the list in

order. The first 11 employees on the list declined to accept the position.

11. Reba Jones, the twelfth employee on the list, accepted the posted position. She reported to work at 7:00 a.m. Principal Clendenen told Ms. Jones, "'[t]here's the phone and here's the walkie-talkie. It's time to go to work. It's 7 o'clock in the morning. We've got many, many things that we have to do.'" She was left to answer the switchboard, and perform other duties, and was given no instruction regarding any of these duties. At 9:00 a.m., Ms. Jones told Principal Clendenen that she could see she was not wanted there, and she left, resigning her position. At Ms. Jones' request, KBOE rescinded its action in placing her in the position. Ms. Jones then filed a grievance over the way she was treated at Capital High School. Ms. Jones no longer wants the position.

12. Ms. Williams has taken no further action to fill the position, because she is concerned that the environment at Capital High School needs to be changed to make people feel welcome, rather than threatened.

Discussion

Grievant bears the burden of proving the allegations of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). W. Va. Code § 18A-4-8b addresses when a service personnel position is to be filled, providing:

> 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 such 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.

W. Va. Code § 18A-4-8b provides with regard to how the selection is to be made:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughoutthe 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 the position 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;
>
> (4) Substitute service personnel; and
>
> (5) New service personnel.

Grievant has demonstrated that the position at issue was not filled within twenty working days from the posting date. The reason offered by KBOE for its inaction in this case was that Principal Clendenen had created a hostile working environment, because he wanted Grievant to receive the position. Ms. Williams stated she did not believe it would be productive to send another applicant to fill the position until the work environment changed, even though she believed there was at least one other regular employee who was interested in the job.

Grievant asserted that all applicants ahead of her in seniority had been contacted and had declined the position, and she should be placed in it. The evidence does not support this conclusion. Katie Austin and Connie Bradley were not contacted, and there is no evidence that Diane Young was contacted. The record does not reflect how many substitute employees applied, or their seniority. Grievant only testified she was told atsome point by Ms. Williams' secretary that she was next on the

list. The regular employee seniority list bears the statements, “substitutes have not been ranked for this position,” and “additional employees on riff will need to be considered before substitutes.”

Whether Principal Clendenen has created a hostile work environment, and if so, what action should be taken, are not issues for the undersigned to resolve. If Principal Clendenen was creating a hostile environment for the successful applicant when that person appeared for work, it would seem that the appropriate action would have been for Principal Clendenen's superior to address this inappropriate behavior with Principal Clendenen, and then fill the position. There is no indication that this had occurred as of the date of the Level IV hearing.

The statutory provisions applicable to the issue at hand are quite clear and easy to apply in this situation. These statutory provisions require that the position be filled within 20 working days by the most senior applicant who holds the classification title, and who has satisfactory evaluations. Regular employees have priority over substitute employees in filling positions. Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997). There were many, many regular employees who applied for the position. It should have been a simple matter for Ms. Williams to go down the list of applicants by seniority and simply offer them the position.

Principal Clendenen stated at the Level II hearing that because of the nature of the posted position, “being a clerk at J.D. Robins for a month does not qualify you for this position.” While Principal Clendenen may certainly hold that opinion if he likes, the law says otherwise. An employee with no experience whatsoever who holds the Clerk title, or who has passed the Clerk competency test, is deemed qualified for this position, and must be placed in the position if she is the most senior applicant and has satisfactory evaluations. Hackney v. Jackson County Bd. of Educ., Docket No. 00-18-113 (June 9, 2000). An employee with little or no experience obviously could not step into the positionand be able to perform all the duties immediately without some on the job training. Even an employee with much experience would need some training on the procedures at a school with which she was not familiar. This does not mean that the employee is not qualified for the position, and it is incumbent upon KBOE to see that the employee receives this training. Otherwise, the only employee who would ever be able to serve in this position is someone who has already worked at Capital High, and who already received this training. The statutory provisions applicable to filling school service personnel positions simply do not work this way.

It is clear that this entire process has been tainted by Principal Clendenen's actions. It has also

been tainted by Grievant's participation in contacting the applicants. Further, so much time has now passed that the applicant list is stale. There is no way to know who would have accepted the position had it been properly filled in a timely manner, but it is not likely Grievant would have been the successful applicant had the process been conducted in a fair and proper manner, simply because she is not a regular employee, and there were many regular employee applicants who held the Clerk title.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. School service personnel vacancies must be posted, and they must be filled within 20 working days of the date the posting is closed, with the employee with the most seniority, who is qualified and has satisfactory evaluations. Regular employees have priority over substitute employees in filling vacancies. W. Va. Code § 18A-4-8b. 3. Qualifications means “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.” Id.

4. Grievant has not demonstrated that she should have been selected for the posted position.

5. The selection process has been so tainted by the actions of Principal Clendenen, Grievant's participation in the selection process, and the delay in filling the position, that it cannot be filled from the August 7, 2000 posting.

Accordingly, this grievance is **DENIED**. However, the Kanawha County Board of Education is **ORDERED** that, if it still wishes to fill the Clerk position at issue here, it cannot fill the position from the current applicant list. It must post the position again.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 7, 2001

Footnote: 1

This grievance was filed on January 29, 2001, where Grievant's supervisor responded that the "grievance must be resolved at a higher level." Grievant appealed to Level II, where a hearing was held on March 5, 2001. The Level II Decision, dated March 19, 2001, found that Grievant had not established she should be placed in the position, but ordered the position filled within 15 days. Grievant appealed to Level III, where KBOE voted to waive participation in the grievance. Grievant then appealed to Level IV on April 5, 2001. A Level IV hearing was held on May 23, 2001. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision on June 26, 2001, upon receipt of the parties' written arguments.

Footnote: 2

How Grievant came to be in this position for three years is not clear to the undersigned. Grievant stated she works half the day for "Food Services," and half her salary is paid by "Food Services." The parties agreed that Grievant holds substitute status with KBOE, and Grievant did not dispute that she should be considered a substitute employee for purposes of determining whether she was entitled to any priority in filling the position at issue.