LISA ADKINS,

Grievant,

v. **DOCKET NO. 01-22-041**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

and

CORA BRUNTY,

Intervenor.

DECISION

This grievance was initiated by Grievant, Lisa Adkins, against Respondent, Lincoln County Board of Education ("LBOE"), alleging a violation of W. Va. Code §§ 18A-4-8b, 18A-4-8g(e), and 18A-4-15 occurred when she was not selected for a posted half-time cook position. She alleges the successful applicant, Intervenor, Cora Brunty, was a substitute cook with less seniority than she, who was improperly placed in the position in settlement of a grievance. As relief she sought:

> instatement into the half-time position at issue and the opportunity to “step- up” into a full-time position which was available due to the absence of a regular full-time cook at Guyan Valley High School as Ms. Brunty has been permitted to do. Grievant also seeks full-time wages, benefits, and regular seniority retroactive to the date of the filling of the half-time vacancy. Grievant also seeks interest on all monetary sums. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant has been employed by LBOE as a substitute cook since 1989.
2. Intervenor, Cora Brunty, has been employed by LBOE as a substitute cook since August

1994.

3. Grievant has more substitute seniority than Ms. Brunty.

4. In the fall of 1998, a long-term substitute, half-time cook position at Guyan Valley High School was posted. Grievant and Ms. Brunty applied, and Ms. Brunty was selected. She served in this position from about October 8, 1998, through November 4, 1998.

5. On November 5, 1998, Ms. Brunty was removed from the position and replaced by Grievant, after Grievant filed a grievance questioning Ms. Brunty's substitute seniority. Grievant remained in the position until February 19, 1999, when the regular employee, Eva Midkiff, returned to work. She did not step-up into any positions during that time.

6. Ms. Brunty filed a grievance challenging LBOE's action in removing her from the position. Grievant was not aware of that grievance, and did not intervene. This Grievance Board found in Brunty v. Lincoln County Board of Education, Docket No. 99-22- 069 (July 13, 1999)(Brunty I), that Ms. Brunty should have remained in the position, because she had more regular seniority than Grievant, and LBOE should have used regular seniority, not substitute seniority to fill the position. Ms. Brunty was awarded back pay and regular seniority for the period when she should have been in the position rather than Grievant. LBOE appealed that decision to circuit court, and Ms. Brunty did not receive her award. 7. LBOE continued to fill positions based upon the substitute seniority of substitutes who applied for posted positions, rather than regular seniority, after the decision in Brunty I. During the 1999-2000 school year, Grievant was awarded a full-time long-term substitute position at Ferrellsburg Elementary over Ms. Brunty based upon her superior substitute seniority. She was in that position the entire school year.

8. In August of 2000, Ms. Midkiff bid on a cook position at Harts High School, and was awarded that position. The half-time cook position at Guyan Valley High School was then posted as a regular position. Grievant and Ms. Brunty applied. The record does not reflect whether there were other applicants. Neither Grievant nor Ms. Brunty was earning regular seniority in a long-term substitute or regular position at any time during the posting period.

9. Ms. Brunty was placed in the posted half-time cook position at Guyan Valley High School in settlement of eight grievances she had filed. As part of the settlement she also received back pay for the period from November 5, 1998, through February 19, 1999, and regular seniority for this period, as was awarded to her in Brunty I. She did not receive back pay or regular seniority for the

Ferrellsburg Elementary position which was awarded to Grievant for the 1999-2000 school year.

10. Ms. Brunty was able to step-up into a full-time cook position at Guyan Valley High School for part of the 2000-2001 school year as a result of being placed in the half- time cook position.

11. Ms. Brunty will lose her position at Guyan Valley High School at the end of the 2000-2001 school year as a result of several cook positions, including this one, being eliminated.

12. Grievant worked from the beginning of the school year through September 18, 2000, in a full-time position. After that she worked two hours a day, four days a weekthrough a grant program, for the entire school year, and she worked one half day as a substitute.

Discussion

Grievant is challenging the settlement agreement which resulted in Ms. Brunty being placed in the regular half-time cook position at Guyan Valley High School in the fall of 2000. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968)." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). The burden of proof is upon a grievant challenging a settlement to prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of law or public policy. Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997); Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

As between Grievant and Ms. Brunty, W. Va. Code § 18A-4-8g would now require that Grievant be placed in the position at issue, based upon her greater substitute seniority. That Code Section was amended by the Legislature during the 2000 session. Effective July 1, 2000, it provides, in pertinent part:

> (e) A substitute school service employee shall acquire regular employment status and seniority if the employee receives a position pursuant to subsections (2) and (5) [§ 18A-4-15(2) and (5)], section fifteen 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; Provided, however, That upon termination of a leave of absence or a suspension, the employee shall return to the status previously held. If the employee returns to substitute status, the employee shall retain any regular employee seniority

> accrued, however, this seniority may not be used in the bidding process for regular positions unless the employee again attains regular employee status or has attained preferred recall status. County boards shall not be prohibited fromproviding any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

Prior to this statutory amendment, the position should have been filled with the substitute with the most regular seniority, based upon Brunty I, assuming no regular employee applied for the position. Thus, Grievant argues, it was contrary to law to place Ms. Brunty in this position.

LBOE argued the settlement was fairly made and was equitable, based upon the prior history of Grievant and Ms. Brunty. Grievant pointed out, however, that Ms. Brunty would gain preferred recall rights when her position was eliminated at the end of the school year. Dakon v. Preston County Bd. of Educ., Docket No. 00-39-390 (Mar. 27, 2001). LBOE noted that, with the many positions being cut, it was not likely that Ms. Brunty would benefit from this.

Intervenor argued Grievant could not now attack the settlement when she did not intervene in Ms. Brunty's grievances. This argument might carry more weight had it been demonstrated that Grievant knew of Ms. Brunty's grievances. Grievant testified, however, that she was not aware of Brunty I. There was no evidence that she knew of any of the other grievances either, nor did she have a duty to intervene. State ex rel. Monk v. Knight, 201 W. Va. 535, 499 S.E.2d 35 (1997).

Intervenor also argued for the first time in her post-hearing written argument that Grievant had not demonstrated she would have been placed in the position had it not been given to Ms. Brunty. Indeed, no evidence was introduced about other applicants, if indeed there were any, and no one challenged this during the hearing process. Grievant was not on notice that anyone was challenging this aspect, and this Grievance Board ordinarily does not consider arguments raised for the first time in post-hearing written argument for this reason. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996). Nonetheless, a grievant challenging the propriety of a board action in filling a position must demonstrate more than a flaw; the grievant must demonstrate that had theprocess been properly conducted, she would have received the position. However, an appropriate remedy where the grievant fails to produce evidence that she would have received the position, is to require the board of education to evaluate the candidates again. Marshall v. Monongalia County Bd. of Educ., Docket No. 00-30-276 (Jan. 12, 2001); Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (Mar. 16, 2000).

The undersigned concludes that Grievant has demonstrated the settlement was technically contrary to law. However, as between Grievant and Ms. Brunty, the settlement was fair and equitable. Grievant received the Ferrellsburg Elementary position for a full year when it should have been Ms. Brunty's, and Ms. Brunty received this position for a full year. While Ms. Brunty did indeed get to step-up into a full-time position while holding this position, as Grievant pointed out, likewise, the Ferrellsburg Elementary position was a full-time position. Ms. Brunty has not gained anything over Grievant other than her preferred recall rights. LBOE presented evidence that four half-time cook positions will likely be eliminated, one full-time cook position will be eliminated, and two full-time cook positions will be reduced to half-time positions. Given Ms. Brunty's seniority, LBOE represented that it was unlikely she would benefit from her preferred recall rights. Likewise, had Grievant been placed in the position at issue, she would not be likely to benefit from these rights. While Ms. Brunty may benefit from the new statutory provision which requires that regular seniority rather than substitute seniority be considered in filling positions if an employee is on preferred recall, the undersigned concludes that the settlement agreement should nonetheless be upheld.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon a grievant challenging a settlement to prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of law or public policy. Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997); Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

2. Grievant demonstrated that the settlement agreement was technically contrary to law. However, as between Grievant and Ms. Brunty, the settlement was fair and equitable, and should be upheld.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: July 16, 2001

Footnote: 1

The record does not reflect when this grievance was filed, or what occurred at Level I. A hearing was held at Level II on December 18, 2000, and the grievance was denied at Level II on January 22, 2001. Level III was waived by Grievant, and she appealed the Level II Decision to Level IV on January 30, 2001. A Level IV hearing was held on April 3, 2001. Grievant was represented by John Everett Roush, Esquire, Respondent was represented by James W. Gabehart, Esquire, and Intervenor was represented by Anita Mitter. This grievance became mature for decision on May 15, 2001, the deadline for submission of reply briefs.