CHRISTINE STANLEY,

Grievant,

v. **Docket No. 01-20-611**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Christine Stanley, filed this grievance against her employer, the Kanawha County Board of Education ("KBOE"), on October 16, 2001. The statement of grievance reads:

> Grievant, a substitute teacher's aide, contends that the Respondent improperly removed her from a substitute assignment at Capital High School while the substitute assignment was still available. Grievant alleges a violation of West Virginia Code §18A-4-15.

As relief Grievant seeks payment for lost wages, “credit of those days towards meeting her autism mentor requirements, any benefits, and interest on all monetary sums.”

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. At the time this grievance was filed, Grievant was employed by KBOE as a substitute aide.

2. David Byrd is employed by KBOE as an aide. On or about November 13, 2000, he was injured while on the job, by G.V., (See footnote 2) the autistic child to whom he was assigned as an autism mentor. At the time the child was attending school at Horace Mann Middle School.

3. On November 14, 2000, Grievant was called off the substitute rotation to replace Mr. Byrd while he was off work with the injury. Mr. Byrd at first used his sick leave, and when his sick leave had been exhausted, he took a leave of absence in the late Spring of 2001.

4. Mr. Byrd did not return to work during the 2000-2001 school year. His position was not posted after he took a leave of absence, and Grievant remained in his position through the end of the school year.

5. G.V. was to attend Capital High School in the fall of 2001.

6. On July 3, 2001, Mr. Byrd's doctor signed a form on which he stated it was possible that Mr. Byrd could return to work on light duty, with the limitation that he not be engaged in extensive walking or lifting. The doctor further asked that a list of duties be submitted. KBOE accepted this as a release to return to work on light duty, and did notsubmit a list of duties. KBOE believed working with G.V. to be light duty, because G.V. was a high school student who did not have to be lifted.

7. Mr. Byrd reported to Capital High School for work for two or three days before the students reported. During those two days, Mr. Byrd performed clerical and clean-up duties at Capital High School.

8. Mr. Byrd met with G.V.'s mother, and Betsy Fleshman, Lead Autism Teacher, on Friday, August 24, 2001. The student's mother believed Mr. Byrd would be her son's autism mentor for the school year.

9. On the first day students were to report to school, Monday, August 27, 2001, Mr. Byrd approached Clinton Giles, the Assistant Principal for Pupil Services and Facilities, and the Acting/Interim Principal at Capital High School, at about 7:15 a.m., and informed him that he would be unable to return to work because his doctor had not released him. This was not true. Mr. Byrd left the school, and did not return to work at Capital High School during the 2001-2002 school year.

10. Mr. Byrd was not counted as absent from work during any day in August 2001.

11. Mr. Giles tried to get a substitute aide for G.V. for the first day of school, but was not successful. The student's mother brought G.V. to school, and when she was told that Mr. Byrd would not be there, and there would not be an aide for her son, she took G.V. home.

12. It was reported to Karen Williams, KBOE's Coordinator of Human Resources, that Mr. Byrd had told G.V.'s mother that if G.V. hurt him again, he would sue her. Ms. Williams met with G.V.'s mother on Tuesday, August 28, 2001, and with Mr. Byrd on that same date. Ms. Williams told Mr. Byrd that she and other administrators felt it would be best if he left the situation at Capital High School. 13. Mr. Byrd was transferred by KBOE from Capital High School to a temporary aide position at Chesapeake Elementary School, effective August 28, 2001. He remained in that position

until October 2001, when he bid on a permanent position at Hayes Middle School, and was the successful applicant for that position.

14. Lisa Hoover, a regular aide for KBOE who was unable to work in her regular position due to temporary physical limitations, was placed in the autism mentor position at Capital High School on a temporary basis, beginning August 29, 2001. Grievant worked with Ms. Hoover for three days, August 29, 30, and September 4, 2001, to assist her and G.V. in the transition to a new aide and a new school. Grievant was not called back to work with G.V. after that.

DISCUSSION

Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant argued she was entitled to remain in the autism mentor position at Capital High School in the fall of 2001, because Mr. Byrd never returned to that position. Respondent argued when Mr. Byrd returned from his temporary absence, Grievant was no longer needed to fill in in his absence.

W. Va. Code § 18A-4-15 provides, in pertinent part:

> (a) 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 who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board: Provided, That if the 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 the position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b of this article. The substitute shall hold the position and regular employee status only until the regular employee returns to the position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to the position: Provided, however, That if a regular or substitute employee fillsa vacancy that is related to a leave of absence in any manner as provided in this section, upon termination of the leave of absence the employee shall be returned to his or her original position: Provided further, That no service person may be required to request or to take a leave of absence: And provided further, That no service person shall be deprived of any right or privilege of regular employment status for refusal to request or failure to take a leave of absence;

. . .

> (b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, 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 of employment, the 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 the absence.

W. Va. Code § 18A-4-15 was amended, effective July 1, 2000, and overruled Grievance Board precedent which "held that an extended absence automatically converted to a leave of absence with or without a request from the absent employee, triggering the posting provisions of Code § 18A-4-8b." Jarvis v. Logan County Bd. of Educ., Docket No. 01-23-003 (Nov. 20, 2001). After the amendment,

> only when a regular employee requests and receives a leave of absence in writing are the posting and selection provisions of Code § 18A-4-8b triggered. In the absence of a leave of absence in writing, a regular employee's absence will be treated as a "temporary absence" under subsection (a)(1).

Id.

Thus, even though Mr. Byrd's position was not posted, Grievant was entitled to remain in the position until Mr. Byrd asked for, and was granted, a leave of absence in excess of 30 days, or until he returned to work. Mr. Byrd took a leave of absence in the late Spring of 2001, when he exhausted his sick leave. If the leave of absence was toextend beyond 30 days, the position had to be posted. The record does not reflect the length of the leave of absence. The position was not posted, and Grievant was allowed to remain in the position through the end of the school year.

Grievant was only entitled to remain in the position "to fill the temporary absence of another service employee." Mr. Byrd did, in fact, return to work for KBOE in August 2001. At that point he obviously was no longer temporarily absent. Once Mr. Byrd returned to work for KBOE, Grievant was no longer needed to serve in a substitute capacity for Mr. Byrd. The fact that Mr. Byrd was transferred

to another position almost immediately does not change the fact that he had returned from his absence, and Grievant was no longer needed as a substitute for Mr. Byrd due to his absence from employment. Dale v. Kanawha County Bd. of Educ., Docket No. 92-20-099 (Aug. 6, 1992). Mr. Byrd's transfer was a new event which created a new vacancy at Capital High School.

Grievant disputed that the form signed by the doctor released Mr. Byrd to return to work, and that working with G.V. was light duty. Whether working with G.V. was light duty is of no relevance, as the issue is whether Mr. Byrd returned to work from his temporary absence, not whether he could return to his old position. As to whether the release was sufficient, Ms. Williams testified that the group which assists employees in their return to work found this release to be a release to work light duty, and it appears that it is, even though the doctor did request additional information. Further, regardless of whether it was a sufficient release, the fact remains that Mr. Byrd did return to work, and Grievant was no longer needed to fill in for his temporary absence. Whether he was able to return to work is really none of Grievant's concern.

Grievant also argued that once she was called back to work on August 29, 2001, to assist Ms. Hoover, she somehow again became entitled to remain in the position. Regardless of whether Ms. Hoover should have been placed in the position, Grievant did not demonstrate that she was next in line in the substitute rotation to fill in until the vacancywas filled on a permanent basis. Further, Grievant was called in simply to assist G.V. in the transition to a new autism mentor, and a new school; a necessary situation the school service personnel laws do not address. She was not called in to fill the vacancy.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element 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. A substitute employee properly assigned to fill the position of an absent employee on a temporary basis shall hold that position throughout the period of the regular employee's absence. W. Va. Code § 18A-4-15.

3. Once Mr. Byrd returned to work in August 2001, Grievant was no longer needed to substitute for him as he was no longer absent from work, regardless of whether he returned to the

same position, or accepted a transfer elsewhere. Dale v. Kanawha County Bd. of Educ., Docket No. 92-20-099 (Aug. 6, 1992); W. Va. Code § 18A-4-15.

Accordingly, this grievance is **DENIED**.

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: June 28, 2002

Footnote: 1

The grievance was denied at Level I on October 31, 2001. Grievant appealed to Level II, where a hearing was held on November 26, 2001. A Level II decision denying the grievance was issued on December 10, 2001. Grievant bypassed Level III, appealing to Level IV on December 17, 2001. A Level IV hearing was held on January 24, 2002. At the conclusion of the hearing, Grievant's counsel requested an additional day of hearing for the purpose of taking the testimony of witnesses who did not appear for the first day of hearing. The testimony of one witness was taken on May 1, 2002. A third day of hearing was held on May 3, 2002, at which time a subpoenaed witness (David Byrd), whose testimony Grievant's counsel believed was necessary to the grievance, failed to appear, and the hearing was continued to another date. The final day of hearing was held on June 12, 2002, at which time the record was closed without the testimony of Mr. Byrd, whomGrievant had not been able to serve with a subpoena. 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 25, 2002, upon receipt of the last of the parties' written arguments.

On June 20, 2002, Grievant, acting on her own, submitted a letter in which she attempted to present additional testimony and documentary evidence, and in which she asked if a particular action which occurred after the last day of hearing was legal. This additional testimony, which was not sworn, and was not subject to cross examination, and the additional documentary evidence, all submitted after the record was closed, will not be considered. The propriety of the

action about which Grievant inquired is not properly before the undersigned, and will not be addressed.

Footnote: 2

The parties asked that the student's initials be used, as is the usual practice.