AUDREY SADDLER,

Grievant,

v v.

Docket No. 02-41-420

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Audrey Saddler, filed this grievance on August 6, 2002, against her employer, the Raleigh County Board of Education ("RCBOE"). Her Statement of Grievance reads:

> Grievant is regularly employed as a Secretary. Grievant alleges Respondent utilized a substitute in a 5-day vacancy during the summer rather than[,] herself a regular employee. Grievant alleges a violation of West Virginia Code §18-5-39.
>
> Relief sought: Grievant seeks reimbursement for all lost wages with interest.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on December 26, 2002. A Level IV hearing was scheduled for February 10, 2003, but the parties agreed to submit the case on the record developed below. This case became mature for decision on March 13, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by RCBOE as a Secretary III. 2. Grievant notified RCBOE she wanted to work during the Summer of 2002, by completing the proper form.

3. When a need for a substitute occurs in the summer, the department or individual needing a

substitute is to call RCBOE's Personnel Department. This procedure is different from the procedure followed during the regular school year, where these calls are covered by an automated system, and the system calls from a substitute list.

4. The calls to regular personnel who wish to work during the summers are made on the basis of seniority.

5. Grievant was fifth on this list in terms of seniority.

6. One person ahead of Grievant had been called out prior to July 29, 2003, making Grievant fourth on the list.

7. On or about July 29, 2002, the automated system was incorrectly notified there was a need for a summer substitute. The system then called an employee from the regular substitute list, not the summer substitute list.

8. This substitute position was to be for one day, but was extended for the entire week, July 29 - August 2, 2002.

9. No one in the Personnel Department was aware of this need, or that a substitute had been called in incorrectly.

10. On Thursday, August 1, 2002, while Grievant was attending a summer inservice, she was informed by a co-worker that a substitute was filling a vacancy instead of a regular employee.

11. At the end of the inservice, around 3:30 p.m., Grievant went to the Personnel Department and asked about this position. 12. The individual who normally handled this area, Judy Chapman, had already left for the day, and her supervisor, Emily Meadows, Director of Personnel, said she would have Ms. Chapman check out the issue and call Grievant back.

13. The following day, Ms. Chapman found out an error had occurred in the reporting of this vacancy.

14. By the time this error was reported and verified, there was no time to correct the problem before the final day of the assignment.

15. Grievant was available for work the entire summer, but was never called to substitute for a summer vacancy. (See footnote 2)

Issues and Arguments

Grievant asserts she should have been called out for the assignment, and since she was not, W.

Va. Code § 18-5-39 was violated, and she is entitled to compensation for the week she might have worked. Grievant asserts she does not have to prove she would have received the position, as she was the only one who grieved the error. Grievant cites Daniels v. Mingo County Board of Education, Docket No. 90-29-329 (October 31, 1990), rev'd Civil Action 90C-8358, (Mingo County Cir. Ct. April 16, 1992), at note 10, for support of this argument.

Respondent agrees the assignment was handled incorrectly, but notes that since Grievant was not next in line to be called out, she has not proven she is entitled to compensation.

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 § 4.21 (2000); 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 alleges a violation of W. Va. Code § 18-5-39 which states:

> (f) Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [§ 18A-4-8b], article four, chapter eighteen-a of this code. When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis. When any summer employee who is employed in a summer position is granted a leave of absence for the summer months, the board shall give regular employment status to the employee for that summer position which shall be filled under the procedure set forth in section eight-b, article four, chapter eighteen-a of this code. The summer employee on leave of absence has the option of returning to that summer position if the position exists the succeeding summer or whenever the position is reestablished if it were abolished. The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to all rights, privileges and benefits provided in sections five-b, eight, eight-a, ten and fourteen [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14], article four, chapter eighteen-a of this code: Provided, That those persons are not entitled to a minimum employment term of two hundred days for their summer position.
>
> . . .
>
> (h) For the purpose of this section, summer employment for service personnel

> includes, but is not limited to, filling jobs and positions as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code andespecially established for and which are to be predominantly performed during the summer months to meet the needs of a county board.

(Emphasis added.)

RCBOE agrees an error did occur, and a regular employee who had indicated a desire to substitute during the summer should have been called out to fill the position in question. Since the parties agree this request for a substitute was not handled correctly, the only issue is whether Grievant should be compensated for a week's work. Grievant cites Daniels, supra, at note 10, as support for her position that since she was the only one who grieved, she should receive the money, regardless of whether she would have been called to serve in the position. In Daniels, the Mingo County Circuit Court found the Mingo County Board of Education could choose not to fill a custodial position after an offer was
accepted because the grievant was "a potential rapist." Id. The dicta in footnote 10 of the Daniels Decision indicates a grievant should have entitlement to a position if he or she was minimally qualified and was the only one who grieved.

This dicta has not been followed by the Grievance Board. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was "next in line." See Richards v. Kanawha County Bd. of Educ., Docket No. 99-20- 108 (May 5, 1999); Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (Apr. 30, 1998); Little v. Richards v. Kanawha County Bd. of Educ., Docket No. 96-20-352 (Apr. 30, 1998). In this case the record reveals there were three people who would need to refuse the position before Grievant would have been offered it. No evidence was presented to show these individuals would have been unable to serve if called. Accordingly, although Grievant has demonstrated a violation of W. Va. Code § 18-5-39, and Respondent agreesthis was the case, there is no evidence to support Grievant should receive what, in essence, would be a windfall by paying her for a week of work she did not perform. Grievant has not shown she suffered any damages in the form of back pay, and the facts of this case do not justify granting equitable relief.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 § 4.21 (2000); 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. A violation of W. Va. Code § 18-5-39 did occur.

3. Grievant did not meet her burden of proof and demonstrate she would have been called to serve in the position as there were three people who would need to refuse the position before she could be offered it.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Raleigh County. Any such appeal must be filed within thirty (30) daysof 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 properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: April 29, 2003

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and RCBOE was represented by Attorney Erwin Conrad.

Footnote: 2

The testimony on this issue was a bit confusing, as Grievant stated she had some health problems during the Summer of 2002, but she then testified she was available for work the entire summer and was never called out. Test. Grievant, Level II Transcript at 13.