WINONA BISHOP,

Grievant,

v.

DOCKET NO. 03-55-042D

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Winona Bishop, filed this grievance against her employer, the Wyoming County Board of Education ("Board"), on December 23, 2002:

> Huff Consolidated School Special Education position improperly awarded to less senior applicant in violation of W. Va. Code 18A-4-8b and W. Va. Code 18A-4-8g. DEFAULT of Wyoming Co. BOE under 18-29-3 for failure to do required Level II hearing within period required by W. Va. Code 18-29-4b. Discrimination under 18-29-2(m) and favoritism under 18-29-2(o) in her non- selection. Failure to afford proper seniority credit under 18A-4-8g(e) from November 1999.
>
> Relief sought: Regular employee seniority and benefits from Nov. 1999, instatement to position at Huff Consolidated School and backpay and benefits from December 18, 2002; attorney's fees and such other relief to which she is entitled.

The grievance was denied at level one on January 2, 2003, by Principal Stephen M. Kirby. Grievant appealed to level two on January 6, 2003. By letter dated February 4, 2003, Grievant's counsel advised Superintendent Frank L. Blackwell that Grievant was claiming default for failure to set a level two hearing and render a level two decision in a timely manner. Thereafter, the parties agreed that a level two hearing would be set withoutwaiving Grievant's claim of default, and the level two hearing was held on February 13, 2003. At the same time, the Board appealed Grievant's claim of default to level four on February 12, 2003. The level two decision was rendered on March 17,

2003, wherein grievance evaluator Frank B. Mann, III, denied Grievant's claim of default, as well as the merits of her grievance. Grievant appealed to level four on March 20, 2003, and a level four hearing was held in Beckley, West Virginia, on June 12, 2003, addressing both the default issue and the merits of the grievance. This matter became mature for decision on July 12, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Erwin L. Conrad, Esq., Conrad & Conrad, and the Board was represented by Gregory W. Bailey, Bowles Rice McDavid Graff & Love.

SUMMARY OF EVIDENCE

Level Two Joint Exhibits

Ex. 1 -

Grievance documents.

Level Two Grievant's Exhibits

Ex. 1 -

Probationary Contract of Employment for Substitute Service Personnel for Winona Bishop, commencing August 27, 1986.

Ex. 2 -

April 21, 1998 memorandum from Kati Walls to Substitute Service Personnel, with attached Probationary Contract of Employment for Substitute Service Personnel for Winona Bishop, commencing August 21, 1997.

Ex. 3 -

Undated letter from Frank L. Blackwell enclosing Probationary Contract of Employment for Substitute Service Personnel for Winona Bishop, commencing November 19, 2002.

Ex. 4 -

November 18, 2002 Board minutes; Personnel List.

Ex. 5 -

Wyoming County Service Personnel Seniority List, as of January 28, 2003.

Ex. 6 -

Position Announcement-Service Personnel, November 25, 2002.

Ex. 7 -

November 26, 2002 notice of application from Winona Bishop to Frank L. Blackwell.

Ex. 8 -

November 14, 2002 Observation Form.

Ex. 9 -

January 14, 2003 Observation Form.

Level Four Grievant's Exhibits

Ex. 1 -

May 5, 2003 Personnel List.

Board Level Two Exhibits

Ex. 1 -

Position Announcement, October 29, 2002.

Testimony

Grievant testified in her own behalf, and presented the testimony of James R. McGrady. The Board presented the testimony of James R. McGrady.

Based upon a review of the testimony and evidence in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. At the time this grievance came on for hearing at level four, Grievant was employed by the Board as a half-time (.5) Aide assigned to Mullens Middle School.

2. Grievant was first employed by the Board as a Substitute Aide effective August 27, 1986. LII G. Ex. 1. Grievant's mother became gravely ill, and Grievant was terminated from the substitute list due to her need to care for her mother until her mother's death.

3. Grievant was restored to the Substitute Aide list for the Board on August 27, 1997. LII G. Ex. 2.

4. Grievant began substituting as a .5 special education aide at Mullens Middle School on November 16, 1998, providing assistance to a deaf student. The position was a newly created position being filled with a substitute, because it was believed the assignment would be temporary, based upon a belief that the student would master compensatory skills that would eliminate the need for the services of an aide. However,the assignment continued for another three years before it was posted as a regular aide position.

5. In Spring 1999, Grievant began taking sign language classes, and completed two semesters of sign language one and two.

6. At some point, Grievant began to appeal to Assistant Superintendent James McGrady to post the position, because she was not receiving benefits. Mr. McGrady discussed the matter with Superintendent Blackwell, and it was agreed that not only would the position be posted, it would be posted so that only Grievant could get the job. For that reason, a requirement that the applicant have sign language skills was added to the posting. LII Tr., p. 25.

7. On October 29, 2002, a position announcement was posted for a .5 regular special education aide at Mullens Middle School, with a deadline of November 13, 2002. The posting included as a minimum requirement that the applicant “[u]nderstand sign language and ability to sign with American Sign Language.” LII R. Ex. 1.

8. This position was the same position in which Grievant had been substituting since 1998. She applied for and received the Mullens Middle School position, effective November 19, 2002. LII G. Exs. 3-5.

9. Five days later, on November 25, 2002, another position announcement was posted for a full-time special education aide at Huff Consolidated School, with a deadline of December 11, 2002. LII G. Ex. 7.

10. Grievant applied for the Huff Consolidated School position on November 26, 2002. G. Ex. 7. 11. Linda Bailey was selected for the Huff Consolidated School Aide position. Ms. Bailey's seniority date is December 4, 2002. LII G. Ex. 5.

12. Both Grievant and Ms. Bailey met the minimum qualifications for the Huff Consolidated School Aide position, and had good evaluations. See LII G. Ex. 9. (See footnote 1)

13. Ms. Bailey entered into the duties of her position at Huff Consolidated School effective December 18, 2002. LII Tr., p. 20.

14. Grievant was informed by Assistant Superintendent James McGrady that she was not eligible for the Huff Consolidated School position, because she was not permitted to transfer within the first half of the school year without the consent of the Board. He had investigated to see if there were any other employees who had sign language skills, and there was no one else. Consequently, the administration agreed she was needed at Mullens Middle School because of her sign language training. LII Tr,. pp. 19, 27.

15. Ms. Bailey was permitted to transfer within the first half of the school year because she did not possess any special skills which would prevent another employee from stepping into her old position.

16. Grievant filed this grievance on December 23, 2002. Her original grievance statement read as follows:

> I applied for Special Education Aide vacancy at Huff Consolidated School. I was the most senior candidate for the position. The position was awarded to Linda Bailey, who is less senior than I am. I allege violations of WV Codes, 18A-4-8b and 18A-4-8g. I am requesting placement into the position of Special Education Aide at Huff Consolidated School, back wages, benefits, and employment seniority. I also request reimbursement for thedifference in mileage. I am now driving 74 miles per day to Mullens Middle School. At Huff Consolidated I would only be driving 40 miles round trip per day.

17. She received the level one response on January 2, 2003.

18. Grievant appealed to level two on January 6, 2003, by hand-delivering her grievance form to Karen Brooks, Superintendent Blackwell's secretary.

19. Grievant asked Ms. Brooks for a waiver form, because she was going to need more time to prepare her grievance. Mr. McGrady was there, and informed Grievant there was no need to sign a waiver as it usually took more than five days anyway for a level two hearing to be scheduled.

20. Grievant received a telephone call from Mr. McGrady on or about January 10, 2003, informing her a meeting had been set for January 30, 2003, at 2:00 p.m.

21. Later that same day, Mr. McGrady called Grievant again, telling her he needed to cancel that date due to a dedication ceremony, and that the meeting would be rescheduled.

22. Grievant received no further communications from the Board, until her counsel notified it in writing on February 4, 2003, that it had defaulted on her grievance. LII Jt. Ex. 1.

23. By agreement of the parties, and without waiving the claim of default, a level two hearing was held on February 13, 2003, at which time Grievant sought to amend her grievance statement. The Board objected to the amendment, only with regards to the timeliness of her claim for three years seniority credit, and the statement was amended to reflect the grievance statement reproduced on page 1, *supra*, of this decision.

ORDER DENYING GRIEVANT'S CLAIM OF DEFAULT

Grievant claims she prevailed by default when the Board failed to timely schedule and hold her level two hearing. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, i.e., the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); Bloomfield v. Ohio County Bd. of Educ., Docket No. 01- 35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01- MCVTC-391D (Sept. 14, 2001). If Grievant establishes that the required response was not made in a timely manner, the Board may then show that the delay was due to a statutory excuse of sickness or illness, or that Grievant agreed to waive the time lines. Donnellan, *supra*.

W. Va. Code § 18-29-3(a) provides that, "[i]f a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default." There is no dispute the level two hearing was not scheduled or held within the five-day time frame specified by statute. However, timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory time frame. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v.

Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). The Board argues that Grievant waived the time lines for the scheduling the level two hearing when she came into the Board office and asked for a waiver form because she needed additional time toprepare for the level two hearing. At that time, Mr. McGrady informed her the level two hearing was rarely scheduled within five days and that it was unnecessary for her to complete a waiver form.

The Board further argues that Grievant did not timely advance her claim of default, despite several opportunities. Specifically, when Mr. McGrady telephoned Grievant on January 10 to inform her the hearing would be held on January 30, she did not object or otherwise indicate she had a problem with that date. Later, when Mr. McGrady called back to cancel that date due to a conflict, Grievant again did not object or raise a claim of default.

A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. *See* State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences. Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993). It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997). Here, Grievant herself indicated she would need more time to prepare for the level two hearing, and asked Mr. McGrady for a waiver. He simply told her it was not a problem to extend the hearing date, and she did not need to complete a waiver. Even after two telephone calls regarding the hearing date, Grievant raised no objection. It is simply unfair for Grievant to sit on her rights, giving Mr. McGrady no reason to believe there was a problem with the time frame, and then inform the Board later that she is claiming a default. It is clear that Mr. McGrady was attempting to work with Grievantto find a suitable date for the hearing. Therefore, Grievant's claim for default is hereby **DENIED**.

DISCUSSION

In a non-disciplinary matter, the burden rests with Grievant to prove the elements of her grievance by a preponderance of the evidence. 156 C.S.R § 4.21. Grievant claims she should have been granted the full-time Aide position at Huff Consolidated School based upon her greater seniority. She also claims she is the victim of discrimination and favoritism, because the successful applicant was

permitted to transfer to a new position within the first one-half term of her employment, while Grievant was denied the same opportunity. Finally, Grievant alleges a violation of W. Va. Code § 18A-4-8b when her long-term substitute position was not timely posted, claiming she is now entitled to three years' seniority and benefits for serving in that position.

The Board contends it followed the applicable statute when it decided not to allow Grievant to transfer within the first one-half term, and denies that decision constitutes discrimination and/or favoritism. Further, the Board argues that any claims to seniority and benefits back to 1998 are time-barred and should be denied.

W. Va. Code § 18A-4-8b provides that, “a county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in . . . [§ 18A-4-8] . . ., on the basis of seniority, qualifications and evaluations of past service.”

It is acknowledged in the statute, however, that the most senior, qualified individual may not always be awarded a position. Specifically, the statute provides that, “[i]f 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.” Id.

There is no dispute that Grievant had greater seniority than Ms. Bailey, the successful applicant for the Huff Consolidated School Aide position, or that she was otherwise qualified for the position. Nevertheless, the Board denied Grievant the Huff Aide position, relying upon the language found in W. Va. Code § 18A-5-8(d):

> An aide may transfer to another position of employment one time only during any one half of a school term, unless otherwise mutually agreed upon by the aide and the county superintendent, or the superintendent's designee, subject to board approval: Provided, *That during the first year of employment as an aide, an aide may not transfer to another position of employment during the first one-half school term of employment, unless mutually agreed upon by the aide and county superintendent, subject to board approval.* (Emphasis added).

Both Grievant and Ms. Bailey were in their first year of regular employment as Aides, and thus were limited in movement by the above Code provision. Mr. McGrady admitted that he was upset when Grievant applied for the Huff position a mere five working days after receiving the position at Mullens - the same position she had been after him to post, and for which he subsequently tailored the posting to ensure she would get the job. However, despite his frustration, he testified the primary

reason Grievant was not awarded the Huff position was because there were no other persons who could fill her position at Mullens caring for the deaf boy. Thus, since Grievant's transfer was subject to approval by the superintendent and the Board, it was determined she was needed at Mullens, and would not be granted the Huff position. Ms. Bailey was not restricted from transferringbecause her position did not require any specialized training or skills and could be subsumed by any otherwise qualified person.

Grievant contends that, had the Board properly credited her with regular seniority for the three previous years she served as a substitute Aide, she would not have been considered in her first year of regular employment, and thus would not have been limited by Code § 18A-5-8(d). Further, Grievant sees the Board's action of allowing Ms. Bailey to transfer, but not her, as an act of discrimination and favoritism.

There is no dispute Grievant was hired in 1999 to temporarily fill a newly created .5 Special Aide position at Mullens Elementary to assist a deaf student. Mr. McGrady testified that, at the time the vacancy was established in October 1999 for the Special Education Aide position, it was believed the position would only be temporary until the student could master some basic communication skills. That is the reason it was initially filled with a substitute pursuant to the procedures set forth in W. Va. Code § 18A-4-15(a)(6), which provides that substitutes shall be hired 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 . . . [§ 18A-4-8b] . . .".

W. Va. Code § 18A-4-8b(g), however, requires boards of education to post and date notice of all job vacancies of established existing or newly created positions with a five-day minimum posting period, and provides that all vacancies shall be filled within 20 working days from the posting date notice for said job vacancies. At some point it became apparent that the Special Aide position held by Grievant was not temporary, seeing as how she continued substituting in that position until November 2002, when it was finally postedand filled - with Grievant. Grievant claims she is entitled to regular seniority credit and benefits for the time she served as a substitute until November 2002.

The Board denies Grievant is entitled to any regular seniority or benefits for her service, and also claims Grievant's claim is untimely. W. Va. Code §18-29-4(a) provides the following directions regarding when a grievant must file a grievance:

> within fifteen days following the occurrence of the event upon which the grievance is

> based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C- 02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384(Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

Grievant's claim regarding the Board's failure to post and fill the Special Aide position are clearly untimely. She was well aware from October 1999 through November 2002 that she was working in a substitute position which had not been posted and filled pursuant to statute, and knew she was not receiving regular seniority and benefits.

Moreover, even if Grievant's claim was found to be timely, she would not be entitled to recovery. Unless a substitute holds a position that has been filled in accordance with the posting requirements of W. Va. Code § 18A-4-8b, no entitlement to rights, benefits, and privileges of regular employment exists. Clark v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997). Grievant did not hold her substitute position by virtue of a posting, and it is well-settled by this Grievance Board that, pursuant to W. Va. Code §18A- 4-8g, Grievant cannot receive regular seniority for the period of time she worked in a substitute position that was not posted and competitively bid. Lambert v. Lincoln

County Bd. of Educ., Docket No. 93-22-549 (Sept. 29, 1994). See Hilmon v. Kanawha County Bd. of Educ., Docket No. 00-20-286 (May 31, 2001); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000); Cisco v. Mingo County Bd. of Educ., Docket No. 00-29-087 (July 20, 2000).

In Hilmon, the Grievance Board stated, "[t]his question [entitlement to regular seniority] has been answered repeatedly by the Grievance Board in the negative." The underlying basis for these decisions is that the grievants enjoyed the benefit of long term continued employment in positions that would have been unavailable to them had thepositions been originally posted. (See footnote 2) Having obtained the benefit of long term continued employment, it has been viewed as inappropriate to reward the silence that facilitated such continued employment with an award of regular seniority (to the detriment of other employees). The facts of the present case are not distinguishable from those considered by the Grievance Board on prior occasions.

Because Grievant is not entitled to regular seniority for the time period from October 1998 through November 2002, she was properly considered to be within her first year of regular employment in November 2002. The Board's decision not to allow her to move to another Aide position within the first one-half term of her first year is supported by statute, and by a legitimate concern for the best interests of the student being assisted by Grievant.

Grievant's related claims of discrimination and favoritism can be quickly disposed of here. Grievant claims it was discriminatory for the Board to allow Ms. Bailey to move to another position within the first one-half of her first term, while denying Grievant the same opportunity.

"Discrimination" is defined by W. Va. Code 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential,exceptional or advantageous treatment of another or other employees." W. Va. Code 18- 29-2(o).

The test to determine whether Grievant has established a prima facie case of discrimination or favoritism requires Grievant to establish by a preponderance of the evidence:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with

preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

Grievant has established a prima facie case of discrimination and favoritism. She is similarly situated to Ms. Bailey, but Ms. Bailey was given an advantage which Grievant was denied. However, the Board has successfully articulated a legitimate reason for its decision regarding Grievant's employment status, and there is no evidence that this reason is pretextual. Therefore, Grievant has failed to prove discrimination or favoritism.

The above findings and discussion are supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, i.e., the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01-MCVTC-391D (Sept. 14, 2001). If Grievant establishes that the required response was not made in a timely manner, the Board may then show that the delay was due to a statutory excuse of sickness or illness, or that Grievant agreed to waive the time lines. Donnellan, *supra*.

2. W. Va. Code § 18-29-3(a) provides that, "[i]f a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default."

3. Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory time frame. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). 4. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date. *See* State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). 5. Grievant sought to waive the time frame at level two in the first instance, and cannot now complain that the level two hearing was not scheduled or held within the statutory time frames.

6. W. Va. Code § 18A-4-8b provides that, "a county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in . . . [§ 18A-4-8] . . ., on the basis of seniority, qualifications and evaluations of past service."

7. "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." W. Va. Code § 18A-4-8b.

8. W. Va. Code § 18A-5-8(d) provides:

> An aide may transfer to another position of employment one time only during any one half of a school term, unless otherwise mutually agreed upon by the aide and the county superintendent, or the superintendent's designee, subject to board approval: Provided, That during the first year of employment as an aide, an aide may not transfer to another position of employment during the first one-half school term of employment, unless mutually agreed upon by the aide and county superintendent, subject to board approval.

9. Grievant was in her first year of regular employment as an Aide, and thus was limited in movement by the above Code provision

10. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998).

11. The Board successfully proved Grievant's claims to regular seniority and benefits from 1998 through 2002 were time-barred.

12. W. Va. Code § 18A-4-15(a)(6) provides that substitutes shall be hired 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 . . . [§ 18A-4-8b] . . .". Grievant was hired in October 1998 pursuant to this provision.

13. Unless a substitute holds a position that has been filled in accordance with the posting requirements of W. Va. Code § 18A-4-8b, no entitlement to rights, benefits, and privileges of regular employment exists. Clark v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997). Grievant did not hold her substitute position by virtue of a posting.

14. It is well-settled by this Grievance Board that, pursuant to W. Va. Code §18A- 4-8g, Grievant cannot receive regular seniority for the period of time she worked in a substitute position that was not posted and competitively bid. Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-549 (Sept. 29, 1994). See Hilmon v. Kanawha County Bd. of Educ., Docket No. 00-20-286 (May 31, 2001); Crowder v. Kanawha County Bd. of Educ., Docket No. 00-20-178 (Sept. 15, 2000); Cisco v. Mingo County Bd. of Educ., Docket No. 00-29-087 (July 20, 2000).

15. "Discrimination" is defined by W. Va. Code 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential,exceptional or advantageous treatment of another or other employees." W. Va. Code 18- 29-2(o).

16. The test to determine whether Grievant has established a prima facie case of discrimination or favoritism requires Grievant to establish by a preponderance of the evidence:

> (a) that she is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
>
> (c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant

establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

17. Grievant has established a prima facie case of discrimination and favoritism.

18. The Board has successfully articulated a legitimate reason for its decision regarding Grievant's employment status, and there is no evidence that this reason is pretextual.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 28, 2003

Footnote: 1 *G. Ex. 9 contains favorable observation forms of Grievant's performance. Since no issued was raised as to Ms. Bailey's performance, it is assumed she had favorable observations and/or evaluations as well.*

Footnote: 2 *Grievant did not hold American Sign Language training at the point in time she began her substitute assignment in November 1998, and would have had no advantage over other more senior substitute aides had the position been posted during that time frame.*