



**Members**  
James Paul Geary  
Chairman  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

**GASTON CAPERTON**  
Governor

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

**BRENDA BURDETTE**

**v.**

**Docket No. 89-20-228**

**KANAWHA COUNTY  
BOARD OF EDUCATION**

**D E C I S I O N**

Brenda Burdette, who is employed as a substitute aide for Respondent, alleges illegality in Respondent's refusal to retain her in a special education Aide II position she filled as a substitute. Her grievance was denied at Levels I and II, consideration was waived at Level III, and she advanced her grievance to Level IV on May 26, 1989. A hearing was held July 26, 1989, during which the parties agreed that the Level II evidentiary record should be considered and Respondent waived its right to submit proposed findings of fact and conclusions of law. With receipt of Grievant's proposals on August 25, 1989, this matter may be decided.

The facts are not in dispute. A position of Aide II in special education at Midland Trail Elementary School was advertised and Grievant applied and was interviewed during the Fall Semester 1988. The principal of the school, Mrs. Joyce Embrey, thereafter asked Grievant if she wanted the

job and furthermore let Grievant fill the position for a week, beginning November 28, 1988, during which Grievant could try it. At the end of the week Grievant told Mrs. Embrey she wanted the job. Thereafter, due to Grievant's concern that employment in the position would have some adverse effect on divorce proceedings in which she was involved, she requested that Mrs. Embrey delay sending in the papers that were necessary for a proper contract to be drawn up but she continued to serve in the position as a substitute. After her papers were finally submitted, on January 31st she was advised that in processing them it was found that she was not educationally qualified for the position. On February 3, 1989, she was accordingly taken out of the position, which was then filled by a fully-qualified aide.

At Level IV Grievant contends that Respondent failed to train her so that she would be qualified for the special education aide position and that Respondent illegally gave her no formal notice or opportunity for a hearing prior to removing her from the position.<sup>1</sup>

---

<sup>1</sup>The contentions made at Level IV differ from those made below. While the original statement of the grievance was not provided the undersigned, Grievant's attorney stated at the Level IV hearing that Grievant had thought she was denied the position because of a new statutory provision requiring all new employees of a board of education to have a high school diploma but, as the grievance progressed, it became clear that the problem was that she was not qualified for a special education aide position under the definition  
(Footnote Continued)

"Aide II" is defined by W.Va. Code §18A-4-8 (1988) as

those personnel referred to in the "Aide I" classification who have completed a training program approved by the state board of education, or who hold a high school diploma or have received a general educational development certificate. Only personnel classified in an Aide II class title shall be employed as an aide in any special education program.

Grievant concedes that she had neither a high school diploma nor a G.E.D. (general educational development certificate) nor has she been involved in any training program that would qualify her as an Aide II. She contends as follow, however, in her proposed conclusions of law:

1. County boards of education are required to provide training programs to employees within the Aide classification. These programs must be provided prior to filling a vacancy pursuant to West Virginia Code 18A-4-8b. Said programs are specifically designed for Aides working with exceptional students. (West Virginia Code 18-20-2 and West Virginia Code 18-5-13[10])

2. Employees may meet the definition of Aide II by possession of a high school diploma or equivalent or by completion of a training program app[roved] by the state board of education. (West Virginia Code 18[A]-4-8)

3. The Governing Institution was obligated to provide a training program for Grievant prior to filling the

---

(Footnote Continued)

of Aide II provided at W.Va. Code §18A-4-8. Grievant's requested relief, to be put into the position plus backpay, has remained constant throughout these proceedings although Grievant should recognize that it would be contrary to law for her to be instated to a position for which she is not qualified. Furthermore, it is axiomatic that it is an abuse of the grievance procedures for an employee to continue to press a grievance after becoming aware that there is no validity to his or her claim. While such an abuse may not have occurred in this matter, that the allegations have changed and those made at Level IV are, as reflected infra, so clearly meritless may indicate at least a questionable casualness in pursuing this matter through Level IV.

Special Education vacancy at Midland Trail Elementary School. Had they [sic] met this obligation at that time or at any time during Grievant's employment in the Aide classification, Grievant would have met the definition of Aide II.

Quite simply, Grievant points to no statutory provision obligating Respondent to provide or enroll Grievant in a training course that would qualify her as an Aide II. Any reliance on W.Va. Code §18-20-2 is misplaced. While that does provide in part,

Any teacher aide employed to assist teachers in providing services to exceptional children under this article shall, prior to assuming such duties, complete a four-clock-hour course of training in areas specifically related to the education of exceptional children, to be provided by the county in accordance with rules and regulations of the state board of education[,]

the training referred thereto is not that referred to in the Aide II definition which would provide the recipient essentially the equivalent of a high school diploma.<sup>2</sup> Similarly, W.Va. Code §18-5-13(10), part of the section of the statute entitled "Authority of board generally," by requiring providing of in-service training for aides and the training referred to in Code §18-20-2 also does not require a county board of education to give training of the sort referred to in the Aide II definition, and, in fact, makes no reference at all to such.

---

<sup>2</sup>The training referred to by W.Va. Code 18-20-2 is a special, limited four-hour training to prepare an aide, already qualified as an Aide II under W.Va. Code §18A-4-8, for the special duties of the position involved, for exceptional students may be gifted or handicapped.

Grievant's second contention may even more summarily be rejected. Her proposed conclusions of law provide,

4. After working thirty days for a school system, substitutes are granted all rights pertaining to suspension or dismissal that are accorded regular service personnel by West Virginia Code 18A-2-6, 18A-2-7, 18A-2-8, and 18A-2-8a. (West Virginia Code 18A-4-15)

5. Grievant was given no formal notice or opportunity for hearing prior to losing the position at Midland Trail Elementary. She was merely told her services were no longer required. The Governing Institution did not even attempt compliance with the statutes governing suspension and dismissal despite the fact Grievant had held that position for well over thirty days.

The short answers to this contention are (1) Grievant has not been dismissed from her employment since she remains a substitute employee and (2) she was never placed in the position as a regular employee but simply as a substitute and therefore she neither gained nor lost the position. W.Va. Code §18A-4-15, which provides for how substitute service personnel are to be assigned duties, recognizes that substitute duties are by their very nature temporary. Nothing in the law requires notice or hearing advocated by Grievant upon cessation of those duties when, as here, Respondent fills a vacant position with a regular employee.<sup>3</sup>

---

<sup>3</sup>Since the record does not establish why the position was vacant in midyear, it cannot be known which specific provision of W.Va. Code 18A-4-15 would apply. This decision also does not address whether Grievant was properly assigned to the position as a substitute.

While Grievant's disappointment at being disallowed from continuing the duties is understandable, she points to no impropriety in Respondent's actions.

In addition to the foregoing, the following findings of fact and conclusions of law are appropriate:

#### Findings of Fact

1. Grievant, a substitute Aide, applied for a special education Aide II position.

2. Grievant filled the position as a substitute from November 28, 1988, to January 31, 1989, when she was advised that review of her papers revealed she was not educationally qualified to fill the position as a regular employee. Respondent subsequently filled the position with a fully-qualified regular employee.


#### Conclusions of Law

1. Since Grievant was not educationally qualified for the Aide II position, she was not improperly removed from it when review of her application revealed that she was not qualified.

2. Respondent was not required by law to train Grievant so that she would be educationally qualified for the special education Aide II position.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County and 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 Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

  
\_\_\_\_\_  
SUNYA ANDERSON  
HEARING EXAMINER

DATED: September 25, 1989