DOROTHY HINERMAN

v. **Docket No. 93-15-031**

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, employed by Respondent Hancock County Board of Education (HCBE) as a substitute worker, complained that HCBE erred when it removed her from an aide's position for which she had been awarded a contract of employment. The action occurred when the absent regular employee, whose position Grievant had been filling, formally resigned after a lengthy leave of absence but prior to the leave's targeted expiration date. The primary issue herein is whether HCBE was contractually bound to retain Grievant in the vacated position for a specified time, as she contends, or was required to post and immediately fill the vacated position via regular employment. (See footnote 1)

Findings of Fact (See footnote 2)

1. Grievant began substituting as a half-time aide at Weirton Heights Elementary (WHE) in December 1991, for Mary Anne O'Rourke.

2. Ms. O'Rourke subsequently took a formal leave of absence. Thereafter, on January 27, 1992, HCBE posted the aide's position as follows: (See footnote 3)

THE FOLLOWING POSITION IS TO FILL A LEAVE OF ABSENCE-
1 Aide I II III IV 200 Days 3.5 Hours
Weirton Heights Elementary
(Leave of Absence will terminate January 13, 1993.)

3. Grievant bid upon and received the aide's position. Prior to beginning her duties, Grievant signed HCBE's standard employment contract; a notation at the top of the contract stated, "To Fill a Leave of Absence." Grievant worked continuously in the position until the end of the school year. However, she was subjected to a reduction-in-force (RIF) action, effective the end of the 1991-92 term, June 1992.

4. HCBE reposted the WHE aide's position on May 27, 1992. This time the posting identified

the position as follows:

1 Aide I II III IV * 3.5 Hours

Weirton Heights Elementary

*To fill LOA [Leave of Absence] - Ending 01-13-93

Grievant reapplied for the posted vacancy.

5. By letter dated June 10, 1992, Superintendent Daniel Curry notified Grievant of the following:

Please be advised that [HCBE] . . . approved your transfer from the [RIF] roster, to 3.5 hours daily, 200 days annually, Weirton Heights Elementary, as a Supervisory Aide IV, to fill a leave of absence whichwill be ending on January 13, 1993.

Your transfer becomes effective with the 1992 - 1993 school year.

6. Grievant again signed a standardized employment contract; an addendum on this contract noted, "To Fill a Leave of Absence (Ends 01-13-93)."

7. Grievant returned to work in this position at the beginning of the employment term of the 1992-93 school year.

8. Prior to the ending date of her leave, Ms. O'Rourke resigned from her employment, with an effective date of September 29, 1992.

9. HCBE approved Ms. O'Rourke's resignation on October 12, 1992, and subsequently reposted the vacated position for regular employment.

10. Patricia Seders, a regular employee with more seniority than Grievant, was awarded the position. She replaced Grievant on October 28, 1992.

11. Grievant was again placed on the substitute aide list. As of December 10, 1992, the date of the level two hearing, she had worked only three and one half days.

12. Grievant filed a grievance and sought an award of the wages she would have earned as an aide at WHE from October 28, 1992 through January 13, 1993.

According to Superintendent Curry's January 15, 1993 level two decision, HCBE's position in the matter was that the January 13, 1993 date on Grievant's contract denoted "a maximum length of the approved leave of absence and not a contractual obligation tothe substitute" and that the "termination

of Ms. O'Rourke's employment ended the leave of absence." At level four HCBE argued, "Once [Ms. O'Rourke's] resignation was tendered and accepted, a vacancy existed which required [HCBE] to advertise to fill the vacancy."

Grievant contends at level four that

The Grievant was the successful applicant for this position as a result of the posting of the Weirton Heights position on two separate occasions in January, 1992, and May, 1992. After the second posting, Grievant was awarded the position until Ms. O'Rourke's leave of absence ended on January 13, 1993. The statute clearly confers upon Grievant regular employee status. The contract executed on June 10, 1992, confirms this status. The contractual relationship between Grievant and Respondent is governed by this document.

Grievant's Brief at 3-4.

Grievant argues that her contract provided for only three conditions upon which her employment could or would cease, namely, upon the expiration of the employment term designated on the face of the contract, January 13, 1993; dismissal for cause pursuant to W.Va. Code §18A-2-8; or finally, termination of the contract by the mutual consent of the parties. Grievant urges that Respondent breached the contract by removing her from the position prior to January 13, 1993.

Grievant does not dispute that HCBE had to post the permanently vacated position as stated in §18A-4-15(4). She argues that that statutory provision does not require that the successful applicant actually enter into the duties of the position within a prescribed period of time. She also refers to Roberts v. Marshall County Bd. of Educ., Docket No. 91-25-395 (Jan. 15, 1992), and notes that boards of education are not precluded from posting andfilling a position "long before the applicant is able to actually enter upon the duties of the position."

Unfortunately for Grievant, her claim for wages is not supported by the applicable law. W.Va. Code §18A-4-15 provides, in pertinent part, that a substitute is employed

(1) To fill the temporary absence of another service employee;

(2) To fill the position of a regular service employee on leave of absence: Provided that if such 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 such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§18A-4-8b] of this article. The substitute shall hold such position and regular

employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

* * *

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position; Provided, that within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in . . . [§§18A-4-8b and 18A-2-5] and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position[.]

Grievant's initial substitute employment at WHE was controlled by Code §18A-4-15(1). It appears from the record that, at that time, the length and duration of Ms. O'Rourke's absence had not been confirmed. After HCBE granted Ms. O'Rourke a formal leave of absence, it was bound to fill the temporarily vacated position pursuant to Code §18A-4-15(2). It is true, as Grievant maintains, that the contract she signed at the beginning of the 1992-93 term specified three conditions upon which the employment could terminate.

However, the controlling factor in this matter is that Grievant's substitute employment was predicated upon her filling a position in which the regularly-hired employee was temporarily absent. Grievant was not hired to fill a position which had been permanently vacated. In theory, Ms. O'Rourke could have returned to her position prior to the expiration of her leave. Code §18A-4-15(2) provides that substitute employment for a temporarily vacated position shall only continue "until the regular employee shall be returned to such position."

Grievant also neglected to note that the contract she signed also stated, "This contract shall at all times be subject to any and all existing laws . . . and such laws shall be a part of this contract." Once Ms. O'Rourke resigned her position, an immediate vacancy existed. At that point, HCBE was required by "existing" law, i.e., Code §18A-4-15(4), to post and permanently fill the position "within twenty working days from the commencement of the vacancy."

Grievant's argument that HCBE was under no legal obligation to accept Ms. O'Rourke's formal resignation prior to the end of her approved leave on January 13, 1993, is not persuasive. Had HCBE

declined the resignation when tendered by Ms. O'Rourke, it might have incurred unwarranted legal and financial obligations with respect to Ms. O'Rourke's continued employment.

Finally, Grievant's reliance upon Roberts does not help her case. Roberts involved the posting and filling of position vacancies for an upcoming school term. In this case, Ms. O'Rourke's formal resignation created an immediate vacancy, unlike the situation which occurred in Roberts. (See footnote 4) HCBE was indeed required by Code §18A-4-15(4) to post and fill the WHE vacancy with a regularly hired employee in a timely manner and to place Ms. Seders, the successful applicant, in the position. Ms. Seders had every right to be placed in the permanently vacated position prior to January 13, 1993 so that she could accrue "all rights, privileges and benefits pertaining to such position," including seniority.

In addition to the factual and legal determinations contained in the foregoing discussion, the following formal conclusions oflaw are made.

Conclusions of Law

1. A substitute service worker shall be hired by a board of education "[t]o fill the position of a regular service employee on leave of absence[.]" If the leave extends 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 such position." Such status shall continue "only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position." W.Va. Code §18A-4-15(2).

2. The duration of Grievant's substitute contract for the position at WHE was dependent upon the continued temporary absence of the regularly-hired service employee.

3. A substitute service worker may also be employed "[t]o temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position." However, "within twenty working days from the commencement of the vacancy, the board shall [permanently] fill such vacancy. . .and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position[.]" W.Va. Code §18A-4-

15(4).

4. A board of education may not, through contract,contravene the requirements of a statute.

5. Once the position at WHE became permanently vacated, HCBE was obligated to post and fill the vacancy within twenty days; the person hired to fill the vacancy was entitled to immediate placement in order to accrue seniority and other benefits pertaining to the position.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: January 31, 1994

Footnote: 1Following adverse decisions at the lower levels, the grievance was appealed to level four. The case was set for hearing but continued on two occasions. Eventually, the parties agreed to submit the case for a level four decision based on stipulated facts and documentary evidence, supplemented by written argument.

Footnote: 2The parties' stipulations have not been reproduced exactly as submitted; rather, the data has been reworded somewhat and information of record has been added for the sake of clarity.

Footnote: 3Information about the salary range has been omitted.

Footnote: 4Basically, Roberts stands for the proposition that boards of education may post and fill position vacancies prior

to the time that the newly-hired workers must actually report for duties. In Roberts, the respondent board of education posted four positions from May 13 to 17, 1991. These positions would not be available until the beginning of the 1991-92 school term, in late August 1991. The dispute in that case arose when the board failed to award the grievant, on the reduction-in-force list for the 1991-92 term, one of the projected vacancies simply because he had been regularly employed at the time of the posting.