JANET LEE EPLING,

Grievant,

v. DOCKET NO. 94-03-1086

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Janet Lee Epling, filed the following grievance against the Boone County Board of Education ("Board") on or about August 15, 1994:

> Grievant alleges that Respondent failed to post 2 summer secretary positions in violation of W.Va. Code §§18-5-39 and 18A-4-8b. Grievant seeks compensation for the number of days these 2 individuals worked and all other benefits which accrue as a result of holding a summer position.

Following adverse decisions at the lower levels, Grievant appealed to level four on November 30, 1994. The grievance was set for hearing, and after several continuances for good cause, the parties agreed to submit the matter on the record developed below, including the transcript and exhibits of the level two hearing, and a copy of August 2, 1994, Board minutes, submitted by Grievant without objection after the level two hearing. This matter became mature for decision following receipt of the parties' proposed findings of fact and conclusions of law on September 11, 1995.

Background

Grievant is employed by the Board as a Secretary III at Lory-Julian Elementary School. On August 8, 1994, while delivering something to the Board office, Grievant discovered two individuals, Lynn Abbott and Debbie Albright, working as secretaries in the Board's central office. Lynn Abbott is regularly employed by the Board as a school secretary at Sherman Senior High School, and Debbie Albright is regularly employed by the Board as a clerk at Van Junior-Senior High School. One of the women holds a 10 month contract, and the other a 10-1/2 half month contract with the Board.

Grievant inquired of Bruce Williams, Director of Personnel, why the women were working in the Board's central office at that time. Mr. Williams informed her the women had been working in the office as substitutes since July 22, 1995. Lynn Abbott was substituting for Doris Jarrell, who had retired earlier that summer, and Debbie Albright was substituting for Vicki Halstead, who was temporarily off work due to illness. Both Jarrell and Halstead were regularly employed secretaries with the Board. Although not entirely clear from the record, it appears these two employees held 12 month contracts with the Board.

The August 2, 1995, Board minutes confirm Abbott and Albright were approved for employment as "substitute secretaries (summer only)". Mr. Williams asked Grievant if she would like to be placed on the substitute roster for future positions, and informed her hewould need her affirmance in writing. Grievant never confirmed in writing she wished to be placed on the substitute roster.

Lynn Abbott worked approximately 13 days in the substitute secretarial position for Doris Jarrell. Debbie Albright worked approximately 23 days as a substitute for Vicki Halstead.

Discussion

Grievant alleges these two positions were "summer" positions which should have been posted and filled in accordance with W. Va. Code §§ 18-5-39 and 18A-4-8b. Grievant seeks compensation for the longer substitute position, i.e., 23 days, plus a guaranteed position for the next summer.

The Board responds the positions were not part of a "summer school program" and thus W. Va. Code § 18-5-39 does not apply. Further, the Board responds it did not violate Code § 18A-4-8b in filling the positions with the substitutes, especially in light of the emergency situation which existed that summer when Doris Jarrell retired and Vicki Halstead needed surgery.

W. Va. Code § 18-5-39 governs the establishment of summer school programs for county boards of education, including the hiring of professional and service personnel for such programs. That section provides the summer school program shall be separate and apart from the full school term as established by each county. In addition, that section states:

> For the purpose of this section, summer employment for service personnel shall be defined, but not limited to, filling jobs and positions as defined in section eight, article four, chapter eighteen-a of this code and especially established for and which are to bepredominantly performed during the summer months to meet the needs of a county board of education.

It is clear from the testimony of Mr. Williams and indeed, Grievant's counsel seems to concede, there was no "summer school program" in effect in 1994, and further, Doris Jarrell and Vicki Halstead held 12 month contracts as secretaries for the Board, which positions were not established especially for summer school, but were in fact, year-long positions designed to meet the day-to-day administrative needs of the Board. Thus, the hiring provisions of W. Va. Code § 18-5-39 are inapplicable to the instant situation.

The second issue raised by the Grievant is whether the two substitute positions should have been posted by the Board before being filled with Abbott and Albright. Mr. Williams testified that, in the summer of 1994, the Board had been ordered by the State Department of Education to be in full compliance with the mandate by the Legislature to be on the AS400 main frame computer system, ideally by July 1, 1994. The Board had originally planned for Mr. Chapman, the director of financial services, to absorb the duties which had been performed by Doris Jarrell, who retired effective June 30, 1994, and not to fill the position. Those duties included keying in the data to get the AS400 system up and running. It turned out to be a bigger job than anticipated and it was clear the Board needed to get someone in quickly who was trained on the AS400 to finish the job. At about the same time, he discovered that Vicki Halstead, the other secretary in the Board's office, would be off for surgery. Ms. Halstead would also have been assisting in the computer project.

Mr. Williams testified he had a substitute secretary list consisting of six individuals. Mr. Williams called the six individuals on the list. All six individuals were either not available, did not feel they could perform the task because they did not have computer skills, or simply did not want the position. Mr. Williams then reviewed what secretaries he had with the necessary computer skills, and called Abbott and Albright to offer them the substitute positions. They accepted the positions with the caveat they were for the summer only, so as not to jeapordize their regular contracts with the Board. Mr. Williams testified that was why the Board minutes approving their employment reflected "summer only".

W. Va. Code § 18A-4-15, deals with the employment of service personnel substitutes. With regard to Doris Jarrell's position, the Code authorizes the employment of substitutes

> "to temporarily fill a vacancy in a permanent position caused by severance of employment by the . . . retirement . . . of the regular service employee who had been assigned to fill such position: Provided, that within twenty days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b [§ 18A-4-8b] of this article and section [§ 18A-2-5], article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

As stated above, upon Doris Jarrell's retirement on June 30, 1994, the Board was not anticipating filling the vacancy, but rather distributing her duties among the existing staff, especially Mr. Chapman, director of financial services. It was not until later that it was determined that someone with the necessarycomputer skills was needed to effectuate the mandate of the Legislature to be on line with the AS400 computer program. Ms. Abbott was not hired as a substitute for the position until July 22, 1994 and worked a total of 13 days in the position.

Grievant alleges the Board violated this Code section because it did not fill the vacancy pursuant to Code § 18A-4-8b within twenty working days from the commencement of the vacancy. While technically correct, the Board did not perceive there was a vacancy following Ms. Jarrell's retirement because it did not intend to fill her position. Once it became clear there was an emergency need for someone in that position, it filled it in an expedited manner. Ms. Abbott did not work more than 20 days in the position, thus it was never necessary to post the vacancy once she vacated the position at the end of the summer.

With regard to Vicki Halstead's position, Code § 18A-4-15 provides for the employment of a substitute:

> (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 a 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.

Grievant relies on subsection (2) in alleging the Board violated the statute. However, there is no evidence that Vicki Halstead was on a "leave of absence" as defined in Code § 18A-4-15(2). Indeed, she was not off work for more than thirty days. Debbie Albright was hired to substitute for Vicki Halstead, who wasoff work for 23 days. The hiring of Albright falls more squarely within subsection (1) of the statute providing for the hiring of a substitute to fill the temporary absence of another service employee.

Grievant's argument boils down to this: the positions should have been posted pursuant to W. Va. Code § 18A-4-8b, and, if they had been, she would have received one of the positions because she had more seniority than Abbott and Albright. As far as regular employees are concerned, the statute only provides that if there is a regular service employee employed in the same building or work station as the absent employee and who is employed in the same classification category of employment, the regular employee shall be first offered the opportunity to fill the position of the absent employee. Here, there were no regular employees in the same building or work station as Ms. Jarrell and Ms. Halstead. Thus, the Board turned, unsuccessfully, to its substitute secretary roster. W. Va. Code § 18A-4-15 does not instruct county boards of education what to do in an instance where all the substitutes on an existing roster are unavailable to fill needed positions.

In the instant case, the Board looked at the secretaries it had who had been trained on the AS400 computer and called those who it deemed would be capable of performing the task. Mr. Williams testified that Abbott and Albright had, of all the secretaries, the greatest amount of training and experience in the AS400 and the tasks which needed to be completed. It is not disputed Grievant had more regular seniority than Abbott or Albright, although sheranked 23rd overall in countywide secretarial seniority. However, there is nothing that prohibits the Board from doing what it did. The Board, having attempted to fulfill its statutory obligations to fill the vacancies with substitutes, had the discretion, in this particular instance, to pick those secretarial employees it knew had the necessary computer experience and offer them the temporary assignments. Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

Conclusions of Law

1. In order to prevail, Grievant must establish the truth of her allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. Grievant failed to prove by a preponderance of the evidence that the Board violated W. Va. Code § 18-5-39.

3. Grievant has failed to prove the Board violated W. Va. Code §§ 18A-4-15 and 18A-4-8b. Indeed, the Board fulfilled its statutory duties under Code § 18A-4-15 in attempting to fill the positions from its substitute secretary roster. Being unsuccessful in that attempt, and facing a need for immediate, short-term assistance, the Board did not abuse its discretion in filling the positions with

the most qualified secretaries available. Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 10, 1995