

**JAN MALONE,**

**Grievant,**

**v. DOCKET NO. 96-24-084**

**MARION COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Ms. Jan Malone, Grievant, is employed as a substitute teacher by the Marion County Board of Education (Respondent). She filed this grievance, pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that the "Marion County Board of Education failed to uphold the written agreement and verbal contract. As a result gross misrepresentation of posted information which serves as a reliable source to Educators demonstrates unfair labor practice." As relief, Grievant seeks "[o]ne semester pay of permanent position in the kindergarten classroom and benefits. Work schedule be returned to what it was in the past - approximately 10 days per month."

Grievant was denied relief at Level I on January 25, 1996, by Mr. Randall Farley, Principal at Rivesville Elementary School (RES). On February 6, 1996, a Level II hearing was conducted by Superintendent Brewster, and the grievance was subsequently denied. At Level III, pursuant to W. Va. Code §18-29-4(c), Respondent waived participation in the grievance. Grievant appealed to Level IV on February 27, 1996. At Level IV, an evidentiary hearing was held on May 2, 1996, at the Grievance Board's office in Elkins, West Virginia. On May 20, 1996, the case became mature upon receipt of Respondent's proposed findings of fact and conclusions of law. ([See footnote 1](#))

### **DISCUSSION**

According to Grievant, Mr. Farley offered her a kindergarten position at RES for the first semester of the 1995-96 school year and she accepted. However, Mr. Farley, ([See footnote 2](#)) a principal, lacks

statutory authority to bind Respondent in this manner. The statute is clear as to the manner and procedures which must be followed in awarding positions to professional staff. See, W. Va. Code § 18A- 4-7a.

"Verbal contracts" as the one alleged in this case are illegal and not binding. The Supreme Court of Appeals of West Virginia, in Parker v. Summers County Bd. of Educ., 406 S.E.2d 744, 748 (W. Va.1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985), at 748, stated that "unlawful or ultra vires promises are nonbinding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity." Therefore, even assuming arguendo that Mr. Farley offered her a position which she accepted, Respondent is not bound by such an alleged "verbal contract" made without authority and illegally by one of its employees.

Grievant also contends that she relied on the wording in the posting which states that "[i]f the successful applicant is currently employed by Marion County Board of Education, transfer into this position will not occur until January 17, 1996, beginning of the second semester." Even though Grievant is employed as a substitute teacher, as needed on a day to day basis, she also believes that the above language in the posting entitled her to work as a substitute in the kindergarten position at RES until the end of the first semester.

However, Grievant's reliance on the statutory posting is provisions is unfounded. W. Va. Code §18A-4-7a [\(See footnote 3\)](#) contains no language which supports her position. Regardless of the wording of the posting, Grievant, by the very nature of her contract as a substitute, is entitled to work, only on a day to day basis, upon the mutual agreement of the Grievant and the principal requesting the substitute employee. Grievant, as a substitute teacher, is not entitled to any guaranteed specified number of days of employment. Furthermore, Respondent's early placement of the newly selected kindergarten teacher was not arbitrary or capricious. Respondent determined that it would be in the best interests of the children at RES to place the newly selected kindergarten teacher immediately into Grievant's position to allow the children to familiarize themselves with their new teacher who would be with them for the remainder of the school year.

Grievant also claims Respondent retaliated against her because the number of days she was called to substitute during the first semester decreased, after the filling of the RES kindergarten position. "Reprisal" is defined in W. Va. Code § 18-29-2(p) as "the retaliation of an employer or agent toward a grievant or other participant in the grievance procedure either for an alleged injury itself or

any lawful attempt to redress it." In order to establish that an action constitutes reprisal, the burden is upon the Grievant to show:

1. She engaged in a protected activity;
2. The employer had actual or constructive knowledge that Grievant engaged in the protected activity;
3. She was subsequently treated in an adverse fashion by her employer; and
4. The adverse action followed her protected activities within such period of time that one can infer retaliatory motivation.

If Grievant meets the above burden, Respondent may rebut the presumption of retaliatory action by demonstrating that it had legitimate nondiscriminatory reasons for its action. Should Respondent succeed in rebutting the presumption, Grievant may still prevail if the proffered reason for the adverse action is determined to be pretextual. W. Va. DNR v. Myers, 443 S.E.2d 229 (W. Va. 1994); Fasce v. Bd. of Directors\W. Va. Institute of Technology, Docket No. 94-BOD-1072 (Sept. 13, 1995).

Grievant's claim of retaliation fails, as she cannot establish the presumption that retaliatory action occurred. Grievant testified that, at the beginning of the school year, she told various principals in the county she was unavailable because she would be teaching kindergarten at RES during the first semester. Grievant also testified she did not inform these same principals that she was available after the RES kindergarten position was filled, but thought this was Respondent's duty or obligation. [\(See footnote 4\)](#) Therefore, it is logical to conclude that Grievant was not called to substitute as often as in the past because several area principals thought she was unavailable, thus, her claim of reprisal fails.

The following Findings of Fact were derived from the record developed at the Levels I, II, and IV.

### **FINDINGS OF FACT**

1. Grievant is employed by Respondent as a substitute teacher. She substituted as a kindergarten teacher at RES on a continuous basis during the beginning of the 1995-96 school year until that position was filled through a competitive bidding process.
2. The position for which Grievant was substituting at RES was posted for bid on September 8,

1995.

3. The posting stated that "[i]f the successful applicant is currently employed by Marion County Board of Education, transfer into this position will not occur until January 17, 1996, beginning of the second semester."

4. Grievant applied for the kindergarten position in question but was not awarded the position.

[\(See footnote 5\)](#)

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

### **CONCLUSIONS OF LAW**

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39- 255 (Dec. 22, 1995).

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994).

3. Unlawful or ultra vires promises are not binding when made by public officials, their predecessors or subordinates, when functioning in their governmental capacity and usually do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744, 748 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985).

4. Grievant failed to prove by a preponderance of the evidence that she was entitled to the substitute position for the first semester as a matter of law.

5. Grievant failed to prove by a preponderance of the evidence that Respondent retaliated against her for filing a grievance.

6. Grievant failed to show a violation, misapplication or misinterpretation of any statute, policy, rule, or regulation.

Accordingly, the grievance is be DENIED.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of

Marion 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.

DATED: May 30, 1996\_\_\_\_\_

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JEFFREY N. WEATHERHOLT  
ADMINISTRATIVE LAW JUDGE

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*Footnote: 1 Grievant elected not to submit proposed findings of fact and conclusions of law.*

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*Footnote: 2 Mr. Farley was not called as a witness at either the Level II or IV evidentiary hearings, but, as previously noted, denied this grievance at Level I.*

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*Footnote: 3 The posting provision of W. Va. Code §18A-4-7a provides:*

*Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period.*

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*Footnote: 4 Grievant failed to allege any statute which made this Respondent's burden.*

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*Footnote: 5 Grievant does not contest her non-selection.*