

**NANCY TRICKETT**

**v. Docket No. 95-39-413**

**PRESTON COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Nancy Trickett, employed by the Preston County Board of Education (Board) as a Cook, filed a level one grievance on July 19, 1995, in which she alleged a violation of W.Va. Code §18A-4-8b when the Board failed to timely post a position of full- time Cook II while the regular employee was on leave of absence throughout the 1994-95 school year. Grievant requests compensation for lost wages in the amount of \$6,975.00, seven and one-half days of personal leave, and other benefits to which she is entitled. After the grievance was denied at levels one, two, and three, appeal was made to level four on September 15, 1995. An evidentiary hearing was conducted to supplement the lower-level record on December 22, 1995, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before January 19, 1996.

The material facts of this matter are not in dispute and may be set forth in the following findings. 1. After working several years as a substitute employee, Grievant was hired by the Board as a regular, full-time employee in 1984.

2. Classified as a Cook, Grievant worked continuously until the end of the 1991-92 school year at which time her employment was terminated as part of a reduction in force.

3. During the 1992-93, 1993-94, and 1994-95, school years Mary Mays, a Cook II at Valley Elementary School, was absent due to a work-related injury.

4. During each of the three years in question, Ms. Mays' position was filled with a substitute employee.

5. Grievant inquired a number of times as to the possibility of posting the position held by Ms. Mays; however, during the 1992-93 and 1993-94 school years she was substantially fully employed as a substitute and did not pursue the matter any further.

6. During the 1994-95 school year, Grievant was assigned as a half-time Cook II at West Preston Junior High School. In this capacity Grievant earned only half the salary and annual leave that she would have earned had she held Ms. Mays' position.

7. Grievant initially consulted a representative of an employee organization in April 1995, and discussed the matter with Personnel Director David Miller on May 10, 1995.

8. On May 23, 1995, the Board posted the Cook II position held by Ms. Mays.

9. In June, the Board awarded the position to Grievant, effective the 1995-96 school year.

10. Grievant dated a completed level one grievance form July 19, 1995; it was marked "received" by the Board on July 24, 1995.

The Board argues that this grievance was not initiated within the time limits set forth in W.Va. Code §18-29-4(a)(1):

Before a grievance is filed and 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.

Grievant concedes that she was aware of Ms. Mays' absence since 1992 and that she filed a grievance only after she incurred significant losses as the result of her 1994-95 assignment, but argues that the timeliness issue must be disregarded because the Board failed to raise the matter at level two. Although the level two decision did address the issue, Grievant argues that this "gratuitous" ruling is not in compliance with the requirements of W.Va. Code §18-29-3(a) that "[a]ny assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing."

A review of the level two transcript establishes that four individuals participated in the hearing: Grievant, her representative, Assistant Superintendent David Temple, who was the Superintendent's designee as grievance evaluator, and David Miller, principal at Valley Elementary, who was called as a witness by the Grievant. The Board had no representative to present its position.

W.Va. Code §18-29-6 provides:

[t]he chief administrator or his or her designee, the governing board or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross examine and to rebut evidence.

As a neutral party, the grievance evaluator acted in less than a fair and impartial manner when he raised the issue of timeliness to rule on behalf of the Board. The error was compounded when the issue was initially raised in the level two response, depriving Grievant of the opportunity to address the matter prior to a decision being rendered. [\(See footnote 1\)](#) Because the issue of timeliness was first raised in the level two decision, later than permitted by statute, this affirmative defense may not defeat Grievant's claim at level four.

Addressing the issue of posting and filling the position in question, the Board's position, as stated in the level two decision, is that Ms. Mays had not requested a leave of absence in writing in advance of the absence, as required by County Policy 8-4, and that pursuant to Policy 8-28, employees receiving Workers' Compensation temporary disability benefits are considered on paid leave status, not on a leave of absence. Also cited was an interpretation of the State Superintendent of Schools, dated December 12, 1990, which stated that an employee receiving Workers' Compensation benefits remains on paid status with a board of education based on the provisions of W.Va. Code §18A-4-10 which equates said compensation with time on personal leave. [\(See footnote 2\)](#) At the level four hearing Mr. Temple testified that after Grievant's representative provided him with the Grievance Board decision in the matter of Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994), the issue was reviewed. Following a subsequent consultation with the State Superintendent, the position was posted. Mr. Temple asserted that the Board has acted on the best advice available throughout this period of time.

W.Va. Code §18A-4-15 specifically requires the position of an employee on leave of absence beyond thirty days be filled pursuant to the requirements of Code §18A-4-8b. Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994). Whether or not Ms. Mays was receiving Workers' Compensation benefits is not controlling. Any absence

beyond twenty days, due to illness or other causes, will be considered a leave of absence for the purpose of substitute employment under Code §18A-4-15(2), even though a formal request for a leave of absence has not been filed by the absent employee. Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991); Stutler v. Wood County Bd. Of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). Thus, the Board was required to post the Cook II position thirty days after Ms. Mays' injury, fill the position according to statute, and allow the employee to remain in the position until Ms. Mays returns. Because Grievant was denied the opportunity to hold this full-time, substitute position during the 1994-95 school year she was deprived of \$6,975.00 in wages and seven and one-half days of personal leave.

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

#### Conclusions of Law

1. Because the Board failed to raise the issue of timeliness at or before the level two hearing, this affirmative defense cannot defeat Grievant's claim at level four. W.Va. Code §18-29-3.

2. Grievant has proven by a preponderance of the evidence that the Board failed to post and fill a position vacated by an employee receiving temporary Workers' Compensation benefits, a violation of W.Va. Code §18A-4-15.

Accordingly, the grievance is GRANTED and the Board ORDERED to pay Grievant the salary she would have received for the full-time Cook II position throughout the 1994-95 school year, plus all leave time and other benefits she would have accrued as a full-time employee, less the salary and benefits she earned as a substitute employee.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston 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.

**Date: May 8, 1996** \_\_\_\_\_

**SUE KELLER**

**Senior Administrative Law Judge**

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**Footnote: 1** *As indicated by this discussion, a true hearing was not conducted at level two. To function in compliance with the procedure set forth in W.Va. Code §§18-29-1, et seq., both parties must be present. The Board's representative should have raised the issue of timeliness at or before the hearing. It is the responsibility of the grievance evaluator to impartially consider the claim, and the response, prior to making a determination.*

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**Footnote: 2** *These documents were not made part of the record.*