

MARY THOMAS,

Grievant,

v. DOCKET NO. 95-28-524

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Ms. Mary Thomas (Grievant) filed a grievance against the Mineral County Board of Education (Respondent) on October 10, 1995. Grievant, employed by Respondent as a substitute custodian, alleges that Respondent erred when it removed her from a custodian position at Keyser High School (KHS) for which she had been awarded a "regular" contract of employment pursuant to W. Va. Code §18A-4- 15(2). The action occurred when the absent regular employee, whose position Grievant had been filling, formally resigned after a lengthy leave of absence. As relief, Grievant seeks back wages, benefits, attorney fees, and the correction of her seniority date.

Grievant was denied relief at Levels I and II. Pursuant to W. Va. Code §18-29-4(c), Grievant appealed the Level II decision to Level IV. At Level IV, an evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia, on January 30, 1996. The case became mature on March 22, 1996, with the receipt of the Level II transcript and supporting documents.

The following findings of fact are derived from the record.

FINDINGS OF FACT

1. Through a competitive bidding procedure, Grievant was selected to fill a Custodian III position at KHS.

2. On February 2, 1994, Grievant signed a contract to temporarily fill the position in question. The contract stated that "[t]he period of employment is to fill [a] leave of absence." Previously, Grievant had been employed by Respondent since October 10, 1990, as a substitute custodian.

3. On August 15, 1995, Respondent accepted the resignation of Mary Clifford, who had been on a leave of absence and whose position was being filled by Grievant. Respondent then returned Grievant to the substitute custodian list and posted the Custodian III position at KHS. Although Grievant was the most senior substitute custodian, the position was awarded to a regular employee who was seeking a transfer.

DISCUSSION

On February 2, 1994, Respondent entered into a contract, pursuant to W. Va. Code §18A-4-15(2), with Grievant to fill a custodian position at Keyser High School because the regularly employed custodian, Mary Clifford, was on a leave of absence. W. Va. Code §18A-4-15, in pertinent part, states:

The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

(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 section eight-b [§18A-4-8b] of the article and section five [§ 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[.]

Grievant's initial substitute employment at KHS was controlled by W. Va. Code §18A-4-15(2). The contract Grievant signed on February 2, 1995, was to fill the temporary leave of absence granted to Ms. Clifford by Respondent. However, after Ms. Clifford's resignation became effective on August 15, 1995, Respondent was bound to fill the vacancy pursuant to W. Va. Code §§ 18A-4-15(4) and 18A-4-8b.

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. Clifford could have returned to her position and resumed her duties at any time.

W. Va. 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, "[t]he period of employment is to fill [a] leave of absence." Upon Respondent's acceptance of Ms. Clifford's resignation, a vacancy immediately existed, and Grievant lost her status as a regular employee. At that point, Respondent was required by law, i.e., W. Va. Code §18A-4-15(4), to post and permanently fill the position "within twenty working days from the commencement of the vacancy."

Grievant also believes if she had been placed on the "transfer list" instead of the "substitute custodian list", she would have been the successful applicant for the Custodian III position at KHS. In this instance, W. Va. Code §18A-4-15 is the controlling Code section and W. Va. Code §18A-2-7, the transfer section for school personnel, is not applicable. Furthermore, it would have been improper for Respondent to maintain Grievant on the transfer list as a regular employee.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. 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).

3. The duration of Grievant's substitute contract for the position at KHS was dependent upon the continued temporary absence of the regularly-hired service employee. See generally, Hinerman v. Hancock County Bd. of Educ., Docket No. 93-15-031 (Jan. 31, 1994).

4. A substitute service worker may also be assigned "[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).

5. A board of education may not, through contract, contravene the requirements of a statute. Hinerman, supra.

6. After Ms. Clifford resigned, the position at KHS became permanently vacated and Respondent was obligated to post and fill the vacancy within twenty days. W. Va. Code §18A-4-15(4).

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

8. Grievant failed to prove the allegations of her grievance by a preponderance of the evidence.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Mineral 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 3, 1996

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE