SUSAN CURRY,

Grievant,

v. **Docket No. 95-29-518**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Susan Curry (Grievant) filed the following grievance against Respondent Mingo County Board of Education (MCBE) under W. Va. Code §§ 18-29-1, et seq., on or before September 12, 1995:

> Grievant, a substitute Cook, seeks reinstatement with retroactive back pay to the position held by Carol Spurlock at Lenore Grade School. She alleges that she should have been allowed to continue substituting for Spurlock and that her removal violated West Virginia Code §18A-4-15.

After her grievance was denied at Level I, Grievant appealed to Level II where a hearing was conducted on November 9, 1995. On November 16, 1995, a Level II decision denying the grievance was issued by the Superintendent's designee, Johnny Fullen. As authorized by W. Va. Code § 18-29-4(c), Grievant bypassed Level III, appealing to Level IV on November 22, 1995. Following a series of continuances, each of which was granted for good cause, a Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on July 29, 1996. The parties elected to file proposedfindings of fact and conclusions of law, and this matter became mature for decision upon receipt of those submissions on September 3, 1996.

As the facts in this matter are essentially undisputed, the following findings of fact are made from the record developed through Level IV.

FINDINGS OF FACT

1. On March 5, 1991, Carol Spurlock, a regular Cook employed at MCBE's Lenore Grade School (LGS), sustained a compensable on-the-job injury. Ms. Spurlock has not worked since that event.

2. On November 2, 1994, Grievant, then employed by MCBE as a substitute Cook, began working at LGS. Grievant was called off the substitute list and assigned to replace Ms. Spurlock during her absence. Prior to that date, Shirley Ferrell had been serving as a long-term substitute in place of Ms. Spurlock, but successfully bid into another position at another school.

3. As of November 1994, there were three regular Cook positions at LGS held by Ms. Spurlock, Judith Taylor and Shirley Jarrell. Ms. Taylor was physically on the job but Ms. Jarrell was also off on workers' compensation, with Freda Hensley substituting for her. By the end of the 1994-95 school year, Ms. Jarrell returned to work as a regular Cook.

4. Sometime in early 1995, MCBE decided to eliminate nine and one-half full-time Cook positions county-wide, including one full-time Cook position at LGS. MCBE initially notified Ms.Taylor, the least senior of the three regular Cooks then assigned to LGS, that she would be transferred at the beginning of the 1995-96 school year. This transfer notice was rescinded after Ms. Spurlock verbally advised MCBE of her intention to retire. Basedupon Ms. Spurlock's stated intentions, the basis for Ms. Taylor's transfer would no longer exist.

5. Ms. Spurlock did not retire or resign. Ms. Jarrell successfully bid into another position leaving her position vacant. MCBE posted this vacant position and Imogene Lowe, a regular Cook with at least thirteen years' seniority, was selected to fill the vacancy. See R Ex 2.

6. At the beginning of the 1995-96 school year, Ms. Taylor and Ms. Lowe were employed at LGS as regular full-time Cooks, and Grievant was not recalled to work as a substitute. Grievant was not issued any written notice under W. Va. Code §§ 18A-4-8b or 18A-2-7 that her assignment was being terminated.

7. MCBE has not taken any action to change Ms. Spurlock's status and recognizes that it is obligated, at a minimum, to place her in a full-time regular Cook position, should she be able to return to work.

DISCUSSION

In grievances that are not disciplinary in nature, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No.

33-88-130 (Aug. 19, 1988).

W. Va. Code § 18A-4-15 provides that a substitute called in to replace a regular employee is assigned "throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 18A- 4-8b]...." Hanner v. Fayette County Board of Education, Docket No. 95-10-288 (Oct. 12, 1995), cited by Grievant to support her contention that § 18A-4-15 gives her an entitlementto continue filling Ms. Spurlock's position until the absent employee returns to duty, involved substantially different facts. Hanner dealt with a proviso in § 18A-4-15 which allows regular employees at a specific location to fill in for an absent employee in the same classification for the duration of the other employee's absence. Moreover, the only issue in Hanner was whether a single vacation day taken by the substituting employee created a "break" in the substitute's period of service, thereby requiring that the next employee on the substitute or seniority roster be given the opportunity to rotate into the position. Accordingly, Hanner does not control the outcome of this grievance.

Grievant nonetheless submits that § 18A-4-15 entitles her to remain in Ms. Spurlock's position until Ms. Spurlock resigns, retires, or her employment is otherwise terminated. While MCBE did not terminate Ms. Spurlock's employment, and Ms. Spurlock has not returned to work, MCBE eliminated Ms. Spurlock's position at LGS as part of the reduction-in-force (RIF) which eliminated 9.5 Cook positions county-wide. Thus, only two Cook positions remained at LGS at the beginning of the 1995-96 school year, and those positions were properly filled by regular service personnel employees selected in accordance with W. Va. Code § 18A-4-8b. Accordingly, as there was no longer a "position" for Ms. Spurlock at LGS, there was likewise no position for Grievant to fill in her place.

Although Grievant was not notified that the position she was filling was being eliminated, there is no requirement to give such notice to substitutes who are removed from a particular assignment. Roach v. Mason County Bd. of Educ., Docket No. 95-26- 158, appeal pending, Civil Action No. 96-C-83, Mason County Cir. Ct.; Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994). See Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994). Notwithstanding that Ms. Spurlockmay have a basis to challenge the procedures MCBE followed in eliminating her position, Grievant's legal status as a substitute employee is separate and distinct from Ms. Spurlock's status as a regular employee receiving workers' compensation. Accordingly, although Grievant has standing to grieve the fact that her substitute assignment was discontinued, she does

not stand in the shoes of Ms. Spurlock, and does not receive the benefit of those statutory provisions which specifically protect service employees enjoying Ms. Spurlock's status.

In balancing the equities represented in this grievance, it is noted that Grievant was not selected to fill the long-term vacancy created by the absence of Ms. Spurlock through a competitive posting under W. Va. Code § 18A-4-8b, as provided in W. Va. Code § 18A-4- 15(2). Thus, Grievant remains an ordinary substitute, not enjoying the special status authorized for competitively selected long-term substitutes authorized in § 18A-4-15(2). See Eagle, supra. See also Messer v. Mingo County Bd. of Educ., Docket No. 93-23-479 (Aug. 1, 1994). However, the employees remaining in full-time Cook positions at LGS are in a favorable position because they obtained their positions through competitive posting under W. Va. Code § 18A-4-8b. See e.g., Bd. of Educ. v. DeFazio, 180 W. Va. 614, 378 S.E.2d 656 (1989); State ex rel. Rose v. Raleigh County Bd. of Educ., 179 W. Va. 275, 367 S.E.2d 223 (1988); Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). It is clear from the record that MCBE appropriately considered these equities in deciding how to proceed. Thus, in these circumstances, MCBE's decision to terminate Grievant's assignment to Ms. Spurlock's position was neither arbitrary nor capricious. See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). In addition to the foregoing discussion, the following conclusions of law are appropriate to disposition of this matter:

CONCLUSIONS OF LAW

1. Grievant is required to prove the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. A substitute school service employee who is filling in for an employee on an extended leave as permitted under W. Va. Code § 18A-4-15, but who has not been selected for such assignment as the result of a posting and the competitive bidding process outlined in W. Va. Code § 18A-4-8b, as provided by W. Va. Code § 18A-4-15(2), is not entitled to written notification that her assignment is being terminated. Roach v. Mason County Bd. of Educ., Docket No. 95-26-158, appeal pending, Civil Action No. 96-C- 83, Mason County Cir. Ct.; Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994). See Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29,

1994).

3. Grievant has failed to prove that MCBE violated W. Va. Code § 18A-4-15 when it discontinued Grievant's assignment as a long-term substitute Cook at LGS. See Roach, supra, Eagle, supra; Rose, supra.

Accordingly, this Grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 17, 1997