LORI E. TEAFF,

Grievant,

v. **Docket No. 96-15-505**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Lori Teaff, is a substitute teacher for Respondent with a certification in Health and Physical Education, K through 12. She filed this grievance September 18, 1996, claiming that discrimination was caused by a new computerized substitute teacher call-out system. A Level I decision denying her grievance was rendered October 3, 1996, and appealed to Level II October 4, 1996. A Level II hearing was held October 23, 1996, and an adverse decision was handed down November 1, 1996. The grievance was appealed to Level III on or about November 6, 1996. Waived on to Level IV on November 12, 1996, Grievant requested that a decision be made on the evidence from the lower level record. The case became mature for decision on or about February 11, 1997, with the receipt of Grievant's proposed findings of fact and conclusions of law.

DISCUSSION

At the Level II hearing held October 23, 1996, the evidence established that Respondent instituted a computer call out system for the 1996-1997 school year. This system did not operate correctly. Assistant Superintendent of Schools, Mary Ann Bucci, testified that Respondent's computer consultants from Texas had been contacted and were to try to repair the system. (Level II transcript, pages 14 and 15.)

Because of the computer error, the call out of substitute physical education teachers was inequitable. There were three substitute physical education teachers subject to being called on a daily basis, D. Robinson, M. Martin and Grievant. During the period in question, September 2 to October 22, 1996, the computer called Ms. Robinson over thirty-two times, Ms. Martin, eight times and Grievant, only six times. (Level II transcript, pages 13 and 14.). An unmarked exhibit, used and prepared by Ms. Bucci concerning the above statistics was attached to the Level II transcript. From

this exhibit, it seems a reasonable conclusion that neither Grievant nor Ms. Martin was called until after Ms. Robinson had declined or did not respond. Their fourteen calls, would have been reduced to five or six if Ms. Robinson had taken all the jobs for which she was called.

Clearly, this was an unfair allocation of substitute teaching assignments. It favored Ms. Robinson by giving her income that should be been available to the others, and giving her an advantage in the acquiring of seniority rights. (W.Va. Code, § 18A-4-7(a), third paragraph). It was obviously important to be called and to accumulate as many hours as one could.

W.Va. Code, § 18-29-2(m) defines discrimination as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

The test for discrimination as established by Hickman v. Webster County Bd. of Educ.,Docket No. 96-51-050 (July 19, 1996) is:

1. Was Grievant similarly situated to another employee?
2. Was Grievant treated differently in regard to a significant aspect of her employment?
3. Was the difference in treatment related to or justified by actual job conditions?

An analysis of the facts in this grievance clearly suggests discrimination. Grievant has shown that she was treated differently and that such treatment was not based upon actual job responsibilities. It was the result of a computer error. D. Robinson was not called more than thirty times to the grievant's six because of superior qualifications. All were equally qualified as physical education instructors, and as such, were similarly situated. The elements of discrimination have been proven by a preponderance of the evidence.

As a remedy, Grievant has requested that she be paid for the number of days worked by Ms. Robinson minus the number of days actually worked by Grievant. However, several factors weigh against this as the solution. To pay Grievant in this manner would only compound the error by compensating her as well as Ms. Robinson. This would also result in Respondent paying twice for services rendered. If Respondent had been shown to have intentionally discriminated based upon some illegal concept, the paying of Grievant might be proper as a punitive measure. However, the discrimination was based upon a mistake beyond the control of the Board. There is no suggestion that once the error was revealed to it that it ignored the problem or otherwise failed to attempt to correct it.

Based upon the foregoing discussion and other matters of record, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Respondent, for the 1996-1997 school year instituted a computer operated call out system for the purpose of notifying substitute health and physical education teachers of work assignments.

2. There were three health and physical education teachers listed to be called, all of whom were certified as physical education teachers, K through 12.

3. The three health and physical education teachers were all equally qualified for substitute teaching assignments in health and physical education and were therefore similarly situated.

4. During the period of September 2, 1996 to October 22, 1996, the computer called Ms. Robinson over thirty-two times, Ms. Martin eight times, and Grievant, six times. 5. The larger volume of calls received by Ms. Robinson was because of computer error and not superior qualifications or other job related criteria.

CONCLUSIONS OF LAW

1. Discrimination is defined at West Virginia Code § 18-29-2(m) as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.”

2. Grievant was subjected to discrimination during the period from September 2, 1996 to October 22, 1996, by not being called for substitute teaching assignments a number of times which would be equitable as compared with Ms. Robinson.

Accordingly, this grievance is **GRANTED**. Respondent is hereby **ORDERED** to take corrective action to prevent future disparity of this nature and to take steps to remedy the disparityproven in this grievance by adjusting the number of future substitute teacher health and physical education assignments to favor Grievant until such time as parity is reached. A suggested method would be to decide the next fifty calls between Ms. Martin and Grievant such that Ms. Martin is called twenty-four times and Grievant twenty-six times. Ms. Robinson would not be called until such time as Ms. Martin and the Grievant have been called to total thirty-two times each.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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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JAMES D. TERRY

Administrative Law Judge

DATE: July 18, 1997