DEBORAH BURNS,

Grievant,

v. **Docket No. 96-30-395**

MONONGALIA COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Deborah Burns, a substitute aide, alleges that she was improperly removed from a position as a substitute classroom aide. She seeks back pay from March 29, 1996, the date of her removal, through the end of the 1996 school year. After denials of the grievance at the lower levels, a level four hearing was conducted in this Grievance Board's Morgantown, West Virginia, office on November 26, 1996. This matter became mature for decision on December 20, 1996, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

The relevant facts relating to this grievance are not in dispute and are contained in the following findings.

Findings of Fact

1. Grievant is employed by Respondent as a substitute aide, and her substitute seniority date is December 12, 1994.

2. Carla Seigwarth (sic), a regularly employed aide, vacated her position as aide in an early childhood classroom at Mountainview Elementary School at the beginning of the 1996 second semester on January 11, 1996.

3. Effective January 22, 1996, Grievant was placed in the early childhood classroom as substitute aide until the position could be filled with a regular employee.

4. The aide position was posted by Respondent from January 11, 1996, through January 19,

1996. After the position was offered to and rejected by regularly employed aides, the most senior substitute who applied for the permanent position was Wanda Sickles, whose substitute seniority date was October 1, 1991. (See footnote 1) Ms. Sickles was selected to fill the position on a permanent basis, not as a substitute.

5. Grievant served as substitute aide in the vacant position until March 29, 1996, the day before spring break. She was informed at that time that the position had been filled on a full-time basis.

6. Ms. Sickles began serving in the aide position on April 9, 1996, after spring break, although she had not yet been formally hired by Respondent. At the subsequent Board meeting (date unknown), it was decided that the position would not be filled on a permanent basis, due to financial cutbacks. However, Ms. Sickles was retained in the position as a substitute until the end of the school year. 7. At the level two hearing, the decision had not yet been made by Respondent as to whether or not the Mountainview aide position would exist for the 1996-1997 school year, and the matter was not addressed at level four.

Discussion

Grievant asserts that Respondent's placement of another substitute aide in the position violated W.Va. Code § 18A-4-15, which states in pertinent part:

> The county board shall employ . . . substitute service personnel on the basis of seniority to perform any of the following duties:
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> . . . To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, . . . 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 [18A-4-8b] . . . and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position[.]

The section goes on to describe how substitutes are to be assigned to vacancies, stating, in part, as follows:

> A substitute with the greatest length of service time, . . . shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the [18A-4-8b procedure].

W.Va. Code § 18A-4-15 (1994) (emphasis added). It is the last phrase upon which Grievant relies as the basis for her contentions; since the position was not filled on a regular basis by Ms. Sickles, Grievant had the right to remain as substitute until such time as it was filled or eliminated. (See footnote 2)

Prior decisions of this Grievance Board provide guidance regarding the issues presented here. In Spencer v. Kanawha County Bd. of Educ., Docket No. 91-20-205 (July 23, 1991), it was held thata substitute service employee had no right to remain in a position once it was permanently filled, even in a situation where an error was made in filling the position with a person who should not have been selected. The incorrectly placed regular employee was allowed to remain in the position until the appropriate applicant was placed, and it was determined that Grievant's rights were extinguished when the position was filled, albeit incorrectly. Ooten v. Mingo County Bd. of Educ., Docket No. 93-29-041 (March 18, 1993), presented a situation in which the respondent contended that, due to a brief return to work for a few hours by the absent regular employee, for whom the grievant was substituting, it was not improper for them to follow their normal rotation procedure and place the next available substitute aide in the position the following day. However, the Grievance Board determined that there had been no interruption in the regular employee's leave status, the brief return to work had been voluntary instead of paid, and the grievant had the right to continue in the position, pursuant to § 18A-4-15.

Respondent argues that it did not act improperly. Ms. Sickles applied for a posted position, was qualified, and had the most seniority, so she was properly placed in the position. It further alleges that, if Ms. Sickles had been formally hired by the Board, then subsequently reduced in force, Grievant would still have relinquished her rights to the position at the time Ms. Sickles was hired. When Ms. Sickles began serving in the position on April 9, it was Respondent's intention that she serve permanently, not as a substitute. However, at the subsequent Board meeting, the upcoming reduction in force was discussed, and it was decided that the aide position at Mountainview Elementary would remain a substitute position.

Respondent ignores the fact that Ms. Sickles was never “hired” as a regular, full-time aide. The instant case is a situation in which the position was never filled on a regular basis, although itwas properly posted, applicants were considered, and a candidate was selected. School personnel can only be employed by the county board of education, after recommendation by the superintendent.

(See footnote 3) W.Va. Code § 18A-2-1. Moreover, when the Board declined to fill the position on a permanent basis, it was completely improper to then retain Ms. Sickles as a substitute. This is not a situation in which a board of education has decided to eliminate a position held by a substitute, in which case a substitute has no continuing right to remain in the position. Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994). Respondent's retention of Ms. Sickles as a substitute after the decision not to fill the position permanently makes it unquestionable that the aide position was not eliminated at that time.

Pursuant to § 18A-4-15, Grievant had the right to remain as a substitute aide until the position was permanently filled. Since this did not occur, Respondent acted improperly in removing Grievant from the position on March 29, 1996. The evidence indicates that Grievant was employed intermittently after that time as a substitute aide, so the back pay to which she is entitled must be offset by any pay she received for such employment through the end of the school year for 1996.

Conclusions of Law

1. In non-disciplinary matters, a grievant must prove all of the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990). 2. A substitute service employee has no right to remain in a position once it is filled on a permanent basis. Spencer v. Kanawha County Bd. of Educ., Docket No. 91-20-205 (July 23, 1991).

3. An employee who is properly placed in a vacant position as a substitute must be retained in the position until it is filled on a regular basis. W.Va. Code § 18A-4-15; See Ooten v. Mingo County Bd. of Educ., Docket No. 93-29-041 (March 18, 1993).

Accordingly, this grievance is **GRANTED**, and Grievant is awarded all back pay she would have received if retained in the substitute aide position until the end of the 1996 school year, offset by any pay she received for other substitute jobs, and interest pursuant to W.Va. Code § 56-6-31.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of Monongalia 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: April 18, 1997 _____ **DENISE MANNING**

Administrative Law Judge

Footnote: 1

The record does not reflect the date upon which the decision to hire Ms. Sickles was made.

Footnote: 2

There appears to be no dispute between the parties regarding the grievant's seniority and rotation rights to initially be called to fill the position as a substitute.

Footnote: 3

The lower level record reflects that, prior to the board meeting, the decision to select Ms. Sickles had been made by the school's principal and the superintendent.