LYNN GALLION,

Grievant,

v. **Docket No. 97-22-108**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Lynn Gallion (Grievant), an employee of Respondent Lincoln County Board of Education (LCBE), initiated a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on August 1, 1996, alleging that LCBE violated W. Va. Code § 18A-4-15 when it failed to call her to substitute for the duration of another employee's absence. After the grievance was informally denied at Level I, her formal grievance was waived to Level II, and a hearing was conducted on October 2, 1996. Assistant Superintendent Donna Martin, the Superinten dent's designee, issued a decision on December 18, 1996, denying the grievance. Grievant appealed to Level III, and LCBE waived consideration of the grievance as authorized by W. Va. Code § 18-29-4(c). Grievant appealed to Level IV on February 24, 1997. This matter was held in abeyance at Grievant's request until October 1997, when a Level IV evidentiary hearing was scheduled. Following a Level IV hearing in this Grievance Board's office in Charleston, West Virginia, on November 20, 1997, this matterbecame mature for decision upon receipt of a transcript from the Level II hearing on December 3, 1997.

The pertinent facts in this matter are essentially undisputed. Accordingly, the following Findings of Fact have been determined from the testimony and exhibits presented at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education (LCBE) as a substitute Aide.

2. Grievant is the most senior substitute Aide on LCBE's call-out list.

3. During the regular school year, Aides are normally called out for substitute service early on the same morning their services are required. Indeed, LCBE has written guidelines for calling out substitute service personnel which state that "substitutes will normally be called between 5:00 and 8:00 a.m. for a day of work."

4. During the regular school year, Myra Johnson, an employee in LCBE's central office, calls out substitute service employees early on the mornings they are required to work. However, during the summer school session in 1996, service employees were called out for substitute service by Brenda Adkins, a Secretary in LCBE's central office.

5. Ms. Adkins works four days a week, Tuesday through Friday, during the summer. Her work day begins at 8:00 a.m.

6. On Sunday, Naomi McComas called Ms. Adkins' home to advise that she would be unable to work as an Aide on Monday and needed a substitute. 7. As the senior substitute Aide, Grievant had been called out during the previous week to substitute for Ms. McComas in LCBE's extended summer program on Tuesday, Wednesday and Thursday.

8. LCBE's extended summer program does not operate on Fridays.

9. Ms. Adkins was aware that Grievant had previously filled in for Ms. McComas. Ms. Adkins was also aware that the Aide was required to meet a special education bus driver not later than 6:55 a.m. on Monday morning, to begin a bus run transporting special education students to LCBE's extended summer program.

10. Ms. Adkins attempted to call Grievant at home on three occasions during Sunday afternoon and evening, the last attempt being made after 8:30 p.m.

11. After being unable to reach Grievant, Ms. Adkins succeeded in contacting the next most senior Aide on LCBE's rotation list, Monya Triplett. Ms. Triplett subsequently substituted for Ms. McComas for four days, Monday through Thursday.

12. Ms. McComas did not return to duty during the extended summer program.

13. Upon determining that Ms. McComas would not be returning, and Ms. Triplett would not be available to substitute for Ms. McComas during the final week of the summer session, Ms. Adkins called the next Aide on LCBE's substitute rotation list. After two substitute Aides declined to work, the third substitute Ms. Adkins called, Gloria Pritchard, accepted the assignment, and worked the last

four days in place of Ms. McComas.

14. Grievant was available to substitute for Ms. McComas on each day of her continuous absence.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-15 contains the following provisions pertinent to this grievance:

> 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:
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> * * *
>
> (1) To fill the temporary absence of another service employee
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> * * *
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> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, 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 . . . . All substitutes shall be employed on a rotating basis according to the length of their service time until each has had an opportunity to perform similar assignments . . . .

Grievant contends she is entitled to relief because LCBE did not employ her as a substitute "throughout the period of the regular employee's absence" in accordance with § 18A-4-15. The statute clearly provides that an employee called in to substitute for a particular employee is entitled to fill the temporary vacancy created by that absence until the absent employee returns, or the position is otherwise filled through competitive posting in accordance with W. Va. Code § 18A-4-8b. See Hanner v. Fayette County Bd. of Educ.,Docket No. 95-10-288 (Oct. 12, 1995); Ooten v. Mingo County Bd. of Educ., Docket No. 93-29-041 (Mar. 18, 1993).

According to the evidence presented, as of the Sunday afternoon when Ms. McComas notified Ms. Adkins she would not be able to work on Monday, LCBE had not been notified of the duration of Ms. McComas' absence. Therefore, LCBE was not previously aware that Ms. McComas' absence would continue into the following week. Nonetheless, consistent with the statute, Ms. Adkins recognized that, because Grievant had been substituting for Ms. McComas during the previous week, Grievant had the right to continue filling that vacancy. See Ooten, supra. Otherwise, there would be no legal reason to attempt calling Grievant, rather than the next most senior substitute on LCBE's roster.

Although Ms. Adkins was not technically "on duty" over the weekend, she made three attempts to call Grievant on Sunday afternoon and evening. This represented a good-faith effort to notify Grievant of an opportunity to continue substituting for Ms. McComas. See Lentz v. Berkeley County Bd. of Educ., Docket No. 89-02-153 (Sept. 22, 1989). See also Jennings v. Wyoming County Bd. of Educ., Docket No. 96-55-322 (Nov. 18, 1997); Dolin v. Greenbrier County Bd. of Educ., Docket No. 97-13-095 (Nov. 8, 1997). Moreover, Ms. Adkins recognized that the Bus Operator could not properly start his scheduled run at 6:55 a.m. the following morning, unless he had a qualified Aide to assist with the special education students he was required to transport. Given these circumstances, Ms. Adkins reasonably decided to proceed down the substitute roster on Sunday evening, based upon the requirement for an Aide to start the assignment before the normal working hours for LCBE employees. See Bowman v. Marion County Bd. of Educ., DocketNo. 96-24-261 (Apr. 29, 1997). As LCBE's agent designated to call out substitutes during the summer, Ms. Adkins properly exercised the discretion the school board had delegated to her by calling out the next most senior substitute Aide to work in place of Ms. McComas. Id.

Although Grievant's rights under W. Va. Code § 18A-4-15 were not violated when Ms. Triplett was called in to fill in for Ms. McComas on Monday, was LCBE nonetheless obligated to call Grievant to substitute for the remaining days when Ms. McComas was continuously absent? The statutory language "throughout the period of the regular employee's absence" is clear and unambiguous. See Hanner, supra; Ooten, supra. In this instance, the regular employee's absence did not cease. Instead, a second substitute was called out based upon exigent circumstances. Those circumstances in no way arose as the result of any dereliction or fault on Grievant's part. Thus, although LCBE may not have provided clear guidance to Ms. Adkins covering the specific circumstances which arose in

this instance, once LCBE knew Ms. McComas would not be returning on the succeeding days, the school board was obligated to offer Grievant the opportunity to resume her duties substituting for Ms. McComas. Id.

The record does not indicate exactly when Ms. Adkins, or any other LCBE official responsible for assigning substitute service personnel, became aware that Ms. McComas would continue to be absent. Ms. Adkins did not work Monday, and the record is silent as to who, if anyone, instructed Ms. Triplett to continue filling in for Ms. McComas for the following three days. Subsequently, when Ms. Adkins learned that Ms. Triplett would not be available for the last week of the program, she nonetheless continued down the substitute roster calling out less senior people, apparently believing Grievant had forfeitedher right to continue replacing Ms. McComas because she had not been "available" on Sunday to resume her assignment on Monday morning. That assumption was inconsistent with the dictates of W. Va. Code § 18A-4-15. See Dyer v. Lincoln County Bd. of Educ., Docket No. 97-22-056 (Sept. 15, 1997); Byers v. Marion County Bd. of Educ., Docket No. 94-24-388 (Dec. 29, 1995); Hanner, supra; Ooten, supra. See generally Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Grievant established by a preponderance of the evidence that, once the substitute who replaced her due to exigent circumstances was no longer available, she should have been called and offered an opportunity to resume substituting as an Aide during the continuing absence of Ms. McComas. See Brown v. Braxton County Bd. of Educ., 93-04- 254 (Sept. 17, 1993). Grievant has demonstrated an entitlement to compensation for the last four days of Ms. McComas' absence.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. "School personnel laws and regulations are to be construed strictly in favor of the

employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). 3. W. Va. Code § 18A-4-15 provides that a school service employee properly assigned to fill the position of an absent employee shall hold that position throughout the period of the regular employee's absence. Hanner v. Fayette County Bd. of Educ., Docket No. 95-10-288 (Oct. 12, 1995); Ooten v. Mingo County Bd. of Educ., Docket No. 93-29-041 (Mar. 18, 1993).

4. "Attempts to contact employees by telephone are generally acceptable, although the reasonableness and good faith of the attempts must be determined by examining the specific facts of each case." Jennings v. Wyoming County Bd. of Educ., Docket No. 96-55-322 (Nov. 18, 1997).

5. Upon learning that the regular employee would continue to be absent, the school board's designated agent for calling out substitute employees made a good-faith effort to call out Grievant to continue in her assignment, consistent with W. Va. Code § 18A-4-15. See Lentz v. Berkeley County Bd. of Educ., Docket No. 89-02-153 (Sept. 22, 1989). See also Jennings, supra; Dolin v. Greenbrier County Bd. of Educ., Docket No. 97- 13-095 (Nov. 8, 1997).

6. Where the board's agent, an off-duty secretary, was unable to contact Grievant before approximately 8:30 p.m. on a Sunday evening, to offer an opportunity to continue her substitute assignment as a special education Aide, which assignment required the Aide to commence a bus run to transport special education students at 6:55 a.m. the next morning, unforeseen exigent circumstances justified the decision to call out the next most senior substitute on the list of eligible substitutes. See Bowman v. Marion County Bd. of Educ., Docket No. 96-24-261 (Apr. 29, 1997). See also Jennings, supra; Hurley v. Mingo County Bd. of Educ., Docket No. 92-29-068 (Feb. 19, 1993). 7. Where a substitute assigned to fill the position of a continuously absent regular employee has the period of her service interrupted by circumstances beyond her control, such substitute retains priority to resume the assignment. See Hanner, supra; Ooten, supra.

8. Grievant established by a preponderance of the evidence that LCBE necessarily became aware that the regular service employee for whom Grievant had been assigned to substitute was continuously absent as of the time when it was necessary to call out another substitute to replace the regular employee. As of that point, Grievant was entitled to priority to resume the assignment in accordance with W. Va. Code § 18A-4-15. See Brown v. Braxton County Bd. of Educ., 93-04-254 (Sept. 17, 1993).

Accordingly, this Grievance is **GRANTED, IN PART**. Respondent Lincoln County Board of Education is hereby **ORDERED** to compensate Grievant for all pay and benefits she would have received as a substitute for Naomi McComas during the last four days of Ms. McComas' assignment during the extended summer program.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: December 31, 1997