JUDY SMITH,

Grievant,

v. **Docket No. 96-29-492**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On October 4, 1996, Judy Smith (Grievant) filed a grievance against her employer, the Mingo County Board of Education (MCBE), under W. Va. Code §§ 18-29-1, et seq., protesting the practice of sending students from the classroom of an absent teacher to her classroom, rather than obtaining a qualified substitute to teach in the missing teacher's classroom. The grievance was denied at Level I, and Grievant appealed to Level II where an evidentiary hearing was conducted on October 31, 1996. Thereafter, Johnny Fullen, the Superintendent's designee, issued a decision denying the grievance at Level II on November 12, 1996. As permitted by W. Va. Code § 18-29-4(c), Grievant by-passed Level III, appealing to Level IV on November 20, 1996. A Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on January 30, 1997. This matter became mature for decision at the conclusion of the hearing as the parties made oral closing arguments, waiving the opportunity to make written post-hearing submissions. Based upon the entire record, including the transcript from the Level II hearing, and the testimony of the witnesses who appeared at Level IV, the following Findings of Fact are made in this grievance.

FINDINGS OF FACT

1. Grievant is employed by the Mingo County Board of Education (MCBE) as a classroom teacher at Matewan High School (MHS), teaching advanced mathematics classes, including trigonometry, pre-calculus, calculus, and algebra. She has been teaching at MHS for fourteen years.

2. Jada Hunter is the Principal at MHS. She was assigned to that position on January 2, 1996.

3. MHS operates on a "block schedule" wherein each class is taught for a period of ninety minutes each day. Grievant teaches three classes each day, with a ninety minute planning period, and a duty-free lunch period.

4. On several occasions during the 1996-97 school year, commencing on August 30, 1996, Ms. Hunter found it necessary to reassign a number of students to another teacher's classroom when their regular teacher was absent, and no substitute teacher was available. This practice is referred to at MHS as "farming out."

5. On August 30, 1996, and on twelve additional occasions prior to January 30, 1997, a group of five to nine students reported to Grievant's classroom after her class began. One of the students had a list of students who were to report to Grievant's classroom. Usually, but not always, the students had a written assignment from their regular teacher for that class period.

6. There are eleven (11) students assigned to Grievant's first period class, twenty (20) students assigned to her third period class, and nine (9) students assigned to her fourth period class. L II HT at 9. During second period, Grievant is assigned her planning period. Only Grievant's first and fourth period classes were assigned additional students from another teacher's class.

7. Grievant is certified to teach mathematics in grades seven through twelve and social studies in grades seven through nine. In most instances, Grievant is not certified to teach the students who are farmed out to her classroom. See L II HT at 3.

8. Grievant is expected to "supervise" these additional students, but not to provide them with instruction on their regular curriculum. Ordinarily, Grievant does not receive any advance notice that these additional students are being assigned to her classroom for the period.

9. On occasion, but not in every instance, it is necessary for Grievant to divert her attention from her regular students to supervise the behavior of the additional students, or to otherwise attend to their needs. The behavior of the students farmed out to Grievant's class will occasionally disrupt her regular classroom teaching activity.

10. On August 30, 1996, Principal Jada Hunter issued a "General Information" memorandum to her faculty which included the following:

> If you've noticed on the master schedule, there are only two teachers with a planning period first period and only three second period. This week has been extremely taxing with three teachers out Wednesday and today and no hope of getting substitutes. I certainly appreciate the assistance of everyone who covered classes. However, we

still have two teachers who will not cover classes. Therefore, it will be necessary to farm students out in the future, when a sub is not available.

11. At the time Principal Hunter issued the memo described above, three teachers were absent, including one teacher who was hospitalized, and one teacher whose spouse was terminally ill. See L II HT at 5.

12. Although MCBE attempts to call out substitutes on the basis of their certification, substitutes are not always available who are certified to teach the classes they are assigned. L II HT at 3-4.

13. Ms. Hunter's primary consideration in assigning students to another teacher's classroom is whether the teacher's regular class can absorb the number of additional students involved, rather than the teacher's certification to teach the subject matter assigned to the farmed out students.

14. In most cases, when Grievant was called upon to have additional students farmed out to her classroom, Ms. Hunter had no more than one work day's advance notice that a regular teacher would be absent. Grievant usually advises Ms. Hunter when she will be absent on the last workday prior to her absence. In many cases, Ms. Hunter had no advance notice that teachers would be absent, learning of their absence when they called in sick at the beginning of the school day.

15. On occasion, Ms. Hunter supervises the class or classes of an absent teacher so the students do not have to be farmed out to another teacher's regular classroom.

16. As of January 30, 1997, MCBE had spent approximately $108,000 on substitutes (teachers and service personnel) for the 1996-97 school year.

17. Grievant is concerned that her advanced math classes will be taken away and assigned to another teacher if her student's test scores decline as a result of the disruptions to her regular classes.

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.

In addition to the pertinent facts previously stated, Grievant provided evidence that, during the 1995-96 school year, she and other MHS classroom teachers agreed to waive one-half of their

planning period on days when another teacher was absent, and no substitute was available, dedicating that time to fill in for the absent teacher on those occasions. This agreement was made between the MHS Faculty Senate and Ms. Hunter's predecessor as MHS Principal. However, at the beginning of the 1996-97 school year, Grievant and her husband, Larry Smith, who is also a classroom teacher at MHS, advised Ms. Hunter that they were no longer willing to forego part of their planning period.

Because of these prior events, Grievant took exception to the statement in Ms. Hunter's memo regarding "two teachers who will not cover classes," and alleged that students were sent to her classroom in retaliation for her refusal to give up her planning period. This claim of "reprisal" under W. Va. Code § 18-29-2(p) was raised for the first time at Level IV. Respondent objected to this claim being addressed at Level IV, contending that this is a new grievance which Grievant is prohibited from raising for the first time at Level IV under W. Va. Code § 18-29-3(j). The undersigned finds that this claim is different from the original claim alleging a violation of W. Va. Code § 18-29-2(a), and Respondent should have had an opportunity to address this separate issue through the lower levels of the grievance procedure. Accordingly, this claim will not be considered further in this decision. See W. Va. Code § 18-29-3(j); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995). See generally, W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 775 (1993). (See footnote 1)

In her original grievance, Grievant contended that a situation had developed at MHS which directly impacted on her "conditions of employment." See W. Va. Code § 18-29-2(a); York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Ford Motor Co. v. NLRB, 441 U.S. 488 (1979). In particular, she alleged that MCBE's failure to obtain substitute teachers, except in circumstances constituting actual emergencies, constitutes a substantial detriment to, or interference with, her effective job performance within the meaning of W. Va. Code § 18-29-2(a). This Grievance Board has previously recognized that employees may seek relief under W. Va. Code §§ 18-29- 1, et seq., on the basis that an employer's action, policy, or practice constitutes a "substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees." W. Va. Code § 18-29- 2(a); Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997);

York v. Mingo County Bd. of Educ., Docket No. 95-29-519 (Apr. 23, 1996); Maynor v. Kanawha County Bd. of Educ., Docket No. 96-20-008 (Mar. 7, 1996); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996); Relihan v. Greenbrier County Bd. of Educ., Docket No. 90-13-189 (Aug. 27, 1990); Johnson v. Kanawha County Bd. of Educ., Docket No. 89-20-255 (July 21, 1989).

Under W. Va. Code § 18A-2-9 "the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned." In addition, "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Further, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See also Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985). In this context, MCBE undoubtedly recognizes that its inability to provide substitute teachers at all times when a regular teacher is absent represents a situation which is far from ideal. However, that does not mean that MCBE is violating W. Va. Code § 18-29-2(a) in these circumstances.

This Grievance Board recently determined that, in order for a grievant to prevail in a claim of this nature, he or she must prove by a preponderance of the evidence that the action, policy or practice which forms the basis for the complaint "poses a substantial detriment to . . . effective job performance." Bradley, supra (emphasis in original). In the circumstances presented in this grievance, it is apparent that the additional students coming into Grievant's mathematics classes inevitably disrupts her teaching activity to some degree. As these events took place on at least twelve occasions in one semester, these actions are more than de minimis. (See footnote 2) However, Grievant has not presented persuasive evidence that the policy or practice which she grieves poses a substantial detriment to, or interference with, her effective classroom instruction or job performance. See Bradley, supra.

Grievant also contends that MCBE's actions through Ms. Hunter violate the provision in the West Virginia Constitution calling for a "thorough and efficient system of free schools." W. Va. Const., Art. XII, § 1. By no means do the actions complained of here approach the level of interfering with the

efficiency of the school system. See Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). (See footnote 3) In any event, this particular constitutional provision does not constitute a statute, policy, rule, regulation, or written agreement under which Grievant works within the meaning of W. Va. Code § 18-29-2(a) and, therefore, Grievant does not have standing to invoke this standard under the grievance procedure. See Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996).

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. An administrative law judge at Level IV will not rule upon a legal claim in a grievance that was not properly presented for consideration at the lower levels of the grievance procedure. Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995). See W. Va. Code § 18-29-3(j); Wells v. Bd. of Directors, Docket No. 94-MBOD-334 (Aug. 22, 1996); Crawford v. Mercer County Bd. of Educ., Docket No. 94- 27-958 (Apr. 13, 1995). See generally W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 775 (1993).

3. Grievant failed to establish by a preponderance of the evidence that MCBE's failure to provide substitute teachers, thereby necessitating that students from absent teachers' classes be assigned to her classroom, constitutes "a substantial detriment to or interference with [her] effective classroom instruction [or] job performance." See W. Va. Code § 18-29-2(a); Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997); Maynor v. Kanawha County Bd. of Educ., Docket No. 96-20-008 (Mar. 7, 1996); Relihan v. Greenbrier County Bd. of Educ., Docket No. 90-13-189 (Aug. 27, 1990).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Mingo County or the Circuit Court of Kanawha 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: May 29, 1997

Footnote: 1It should be noted that there was no evidence that Grievant is assigned additional students more frequently than any other teacher at MHS, or that such assignments were made on any basis other than the number of additional students a teacher could add to her regular class without overcrowding the classroom.

Footnote: 2This Grievance Board has previously declined to grant relief where only de minimis matters are involved. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Payton v. Lincoln County Bd. of Educ., Docket No. 89-22-653 (Feb. 16, 1990). De minimis matters are so called after a Latin phrase, de minimis non curat lex, which means "the law does not care for, or take notice of, trifling matters." See Black's Law Dictionary 482 (Revised 4th Ed. 1968).

Footnote: 3It is recognized that MCBE's financial difficulties, which contributed to the situation at issue, arose to some degree from the inequities identified in Pauley.