DEBRA HOLLY,

Grievant,

v. **Docket No. 96-23-174**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Debra Holly (Grievant) submitted this grievance pursuant to W. Va. Code §§ 18-29- 1, et seq., alleging that Respondent Logan County Board of Education (LCBE) improperly calculated her seniority for the 1991-92 school year in violation of W. Va. Code § 18A-4- 7b. (See footnote 1) This grievance was filed at Level I on April 2, 1996, (See footnote 2) and elevated to Level IV on May 6, 1996. Following a series of continuances, each of which was granted for good cause shown, a Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on December 17, 1996.

At the conclusion of the Level IV hearing, the parties agreed that the record would be complete once LCBE provided a copy of the Level II hearing transcript. On March 3, 1997, LCBE advised that the parties met at Level II to discuss the grievance but there hadbeen no Level II hearing. By Order dated March 26, 1997, the parties were provided until April 10, 1997, to supplement the record, or object to proceeding with a decision at Level IV. No response was received from either party. In view of the amount of time that has elapsed, remanding this grievance to Level II for another hearing would be inconsistent with the purpose of the education employees' grievance procedure stated in W. Va. Code § 18-29-1. Moreover, both parties had the opportunity to present evidence at Level IV and should have been aware that there was no Level II hearing. Accordingly, this grievance will be decided based upon the evidence and testimony presented at Level IV.

The facts in this matter are essentially undisputed. Therefore, the following findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant is employed by Respondent Logan County Board of Education (LCBE) as a classroom teacher. Grievant is certified in multi-subjects K-8, and has a master's degree in reading.

2. Grievant was first employed by LCBE for the 1989-90 and 1990-91 school years as a probationary teacher at Earling Grade School.

3. On March 28, 1991, LCBE terminated Grievant's employment during a reduction in force by LCBE.

4. Prior to the beginning of the 1991-92 school year, Grievant was informed by LCBE's Assistant Superintendent Garrett that she had been recalled as a classroom teacher for the 1991-92 school year, teaching math and science at Man Junior High School. She subsequently received a 200-day probationary contract of employment for the 1991-92 school year. R Ex 1. 5. Grievant's 1991-92 contract is dated August 27, 1991. Grievant signed the Teacher's Oath attached to the contract sometime during the 1991-92 school year. Although Grievant did not recall signing the document in the presence of a Notary Public, the document was notarized on May 4, 1992. R Ex 1.

6. The payroll attendance records maintained at Man Junior High School for the first semester of the 1991-92 school year indicate Grievant was hired as a "permanent substitute." (See footnote 3) See R Ex 4.

7. The minutes from LCBE's official board meetings reflect that school officials obtained board approval to employ Grievant as a substitute teacher on August 29, 1990. R Ex 2. Further, the minutes reflect that on December 12, 1991, Grievant was recalled from the preferred recall list as a teacher at Amherstdale Grade School, effective January 23, 1992, the beginning of the second semester of the 1991-92 school year. R Ex 2. Likewise, the minutes further reflect that Grievant was transferred from Amherstdale to Earling Grade School on January 21, 1992. R Ex 2.

8. Grievant was never advised that she was being transferred to Amherstdale Grade School. She was instructed by Mr. Garrett to report to Earling Grade School for the second semester of the 1991-92 school year.

9. There was no correspondence in Grievant's personnel file reflecting that she was notified of her hire as either a substitute or regular employee for the 1991-92 school year. Likewise, there was no

record of any correspondence advising Grievant of the transfers to Amherstdale or Earling Grade Schools.

10. On August 5, 1992, the West Virginia State Board of Education placed LCBE under its control as authorized by W. Va. Code § 18-2E-5. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

11. The foregoing takeover resulted from a number of irregularities discovered by the State Board of Education, including such problems as over 200 teachers who were teaching without proper certification, failure to issue continuing contracts of employment to employees who had obtained tenure, granting regular seniority for substitute teaching, and improperly awarding insurance and retirement benefits to substitute teachers. In addition, school administrators knowingly misrepresented the status of various personnel matters to LCBE's elected members on a recurring basis.

12. On August 26, 1992, Grievant signed a continuing contract of employment for the 1992-93 school year, indicating she had obtained tenure.

13. In December 1992, Grievant was awarded 200 days of seniority for the 1991-92 school year based upon her contract of employment. However, LCBE subsequently withdrew 100 days of Grievant's seniority for the first semester of the 1991-92 school year, after further review of the board minutes indicated that she had been employed as a substitute teacher. See R Ex 2.

14. Unless she read the LCBE meeting minutes, Grievant would have no reason to know that she was employed as a substitute as she and other similarly situated teachers were receiving the same pay and benefits as regular employees. Such improper actionswere regularly and systematically taken by LCBE personnel prior to August 5, 1992, in a deliberate effort to avoid compliance with various school personnel laws.

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. § 4.19 (1996); 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-4-7b provides as follows:

> Notwithstanding any other provision of this code to the contrary, seniority for professional personnel as defined in section one [§ 18A-1-1], article one, chapter

eighteen-a of this code shall be calculated pursuant to the provisions of section seven-a [§ 18A-7a] of this article as well as the following: Provided, That any recalculation of seniority of a professional personnel employee that may be required in order to remain consistent with the provisions contained herein shall be calculated retroactively, but shall not be utilized for the purposes of reversing any decision that has been made or grievance that has been filed prior to the effective date of this section:

(a) A professional employee shall begin to accrue seniority upon commencement of the employee's duties.

(b) An employee shall receive seniority credit for each day the employee is professionally employed regardless of whether the employee receives pay for that day: Provided, That no employee shall receive seniority credit for any day the employee is suspended without pay pursuant to section eight [§ 18A-28], article two of this chapter: Provided, however, That an employee who is on an approved leave of absence shall accrue seniority during the period of time that the employee is on the approved leave of absence.

(c) Any professional employee whose employment with a county board of education is terminated either voluntarily or through a reduction-in- force shall, upon reemployment with the same board of education in a regular full-time position, receive credit for all seniority previously accumulated with the board of education at the date the employee's employment was terminated.

(d) Any professional employee employed for a full employment term but in a part-time position shall receive seniority credit for each day of employment prorated to the proportion of a full employment day the employee is required to work: Provided, That nothing herein allows a regular full-time employee to be credited with less than a full day of seniority credit for each day the employee is employed by the board; Provided, however, That this calculation of seniority for part-time professional personnel is prospective and does not reduce any seniority credit accumulated by any employee prior to the effective date of this section: Provided, further, That for the purposes of this section a part-time employee shall be defined as an employee who is employed less than three and one-half hours per day.

In addition, W. Va. Code § 18A-2-2 provides, in pertinent part:

Before entering upon their duties, all teachers shall execute a contract with their boards of education, which contract shall state the salary to be paid and shall be in the form prescribed by the state superintendent of schools. Every such contract shall be signed by the teacher and by the president and secretary of the board of education, and when so signed shall be filed, together with the certificate of the teacher, by the secretary of the office of the board.

It is well established that employment as a substitute does not count toward accumulation of regular seniority. Jackson v. Monroe County Bd. of Educ., Docket No. 96- 31-208 (Aug. 29, 1996); Bish v. Marion County Bd. of Educ., Docket No. 93-24-191 (Dec. 28, 1993); Fulk v. Preston County Bd. of Educ., Docket No. 92-39-266 (Jan. 4, 1993). However, Grievant denies having been employed by LCBE in a substitute capacity. Grievant was consistently led to believe that she was employed as a regular probationary teacher. According to the Level IV testimony of Superintendent Myers, such conduct by the former LCBE was endemic, and resulted in the West Virginia Department of Education assuming administrative control of LCBE. There was no evidence that Grievant culpably participated in any improprieties. In Toney v. Lincoln County Board of Education, Docket No. 22-87-047-1 (Apr. 30, 1987), this Grievance Board recognized that "where one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail." A preponderance of the credible evidence of record indicates that Grievant was an innocent party in this matter as she was misled by LCBE's administrators and staff, just as LCBE was being misled by those same persons. Therefore, Grievant must prevail for two reasons. First, the administrators who misled Grievant were employed by LCBE, thereby making LCBE responsible for their actions under the doctrine of respondeat superior. See, e.g., Cremeans v. Maynard, 162 W. Va. 74, 246 S.E.2d 253 (1978); Griffith v. George Transfer & Rigging, Inc., 157 W. Va. 316, 201 S.E.2d 281 (1973); Porter v. South Penn Oil Co., 125 W. Va. 361, 24 S.E.2d 330 (1943). Alternatively, LCBE's failure to properly oversee the actions of its administrators makes the school board responsible for conduct that is patently arbitrary and capricious in the circumstances. See Cowen v. Harrison County Bd. Of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). (See footnote 4) Second, Grievant is protected by the school personnel laws and the grievance procedure from unfair treatment, and these laws are to be construed strictly in favor of the employee. Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Grievant was led to believe by LCBE employees with apparent authority to make such representations that she was employed as a regular probationary employee rather than as a substitute. Such regular employment status was further indicated by the fact thatshe was issued a probationary contract of employment for the 1991-92 school year which appears to be in compliance with W. Va. Code § 18A-2-2, and she received the same pay and benefits as a regular employee. Grievant did not culpably participate in any of the irregular actions taken by the LCBE staff in regard

to her employment status. Respondent's counsel acknowledged at Level IV that other LCBE employees who had been treated similarly to Grievant had obtained relief in the Circuit Court of Logan County. Level IV hearing examiners are authorized to "provide such relief as is deemed fair and equitable." W. Va. Code § 18-29-5(b). See, e.g., Standifur v. Univ. of W. Va. Bd. of Trustees, Docket No. 92-BOT-017 (Oct. 30, 1992); Rexroat v. Boone County Bd. of Educ., Docket No. 91-03-233 (June 15, 1992). Therefore, Grievant has established that she is entitled to an additional 100 days of regular seniority for the first semester of the 1991-92 school year.

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. § 4.19 (1996); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. 2. "[W]here one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two innocent parties who should prevail." Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987). See Grose v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997).

3. "School personnel regulations and laws are to be strictly construed in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

4. In circumstances where Grievant was led to believe that she was permanently employed as a classroom teacher by the actions of LCBE's designated administrators, including issuance of a regular probationary contract of employment that appears valid on its face, and Grievant further performed the same duties as a regular classroom teacher for an entire semester, LCBE is required to grant Grievant an additional 100 days of regular seniority for that time period.

Accordingly, the grievance is **GRANTED**. Respondent Logan County Board of Education is hereby **ORDERED** to credit Grievant with an additional 100 days of regular seniority as a classroom teacher for the first semester of the 1991-92 school year.

Any party may appeal this decision to the Circuit Court of Logan 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 ofthe 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: April 30, 1997

Footnote: 1

Initially, Katherine Justice was a Grievant in this matter. However, her representative indicated that her grievance had been resolved prior to the Level IV hearing.

Footnote: 2

LCBE did not challenge the timeliness of this grievance under W. Va. Code § 18-29-4.

Footnote: 3

This terminology is inconsistent with the board meeting minutes which indicate that Grievant was hired as an ordinary "substitute." The author of the payroll document did not appear to explain what was meant by this terminology.

Footnote: 4

Indeed, there is uncontroverted evidence that these administrators misled the board members to the point where various actions approved in LCBE's official minutes were the result of fraud or deceit perpetrated upon the board.