WANDA HARDMAN,

Grievant,

v. **Docket No. 97-21-181**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Wanda Hardman (Grievant) filed this grievance in accordance with W. Va. Code §§ 18A-29-1, et seq., on January 7, 1997. Grievant alleges that Respondent Lewis County Board of Education (LCBE) violated W. Va. Code §§ 18A-4-8a, 18A-4-8, 18A-4-8b, and 18A-5-8, when it unilaterally rescinded an agreement to pay her overtime and compensate her as a Supervisory Aide. At Level I, Grievant's supervisor did not have authority to resolve the grievance. Accordingly, the matter was elevated to Level II where an evidentiary hearing was conducted on March 6, 1997. A Level II decision denying the grievance was issued by Edward D. Bennett, the Superintendent's designee, on March 26, 1997. Grievant appealed to Level III, where LCBE waived participation in the grievance as permitted by W. Va. Code § 18-29-4(c). Grievant appealed to Level IV on April 14, 1997. Thereafter, the parties agreed to submit the matter for decision on the recorddeveloped at Level II, and agreed to a briefing schedule. This matter became mature for decision on August 18, 1997, upon receipt of Grievant's proposed findings.

There is no significant dispute between the parties regarding the essential facts in this matter. Accordingly, the following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence contained in the transcript of the Level II hearing.

FINDINGS OF FACT

1. Grievant is employed by Respondent Lewis County Board of Education (LCBE) as a bus

aide, a school service personnel position.

2. Grievant's duties in her regular position as a bus aide during the 1996-97 school year involved making morning and afternoon bus runs on a special education bus. HT at 11.

3. In October 1996, Gabriel Devono, Personnel Director for LCBE, asked Grievant to perform duties between her morning and afternoon bus runs which involved providing teacher's aide services to X, a special education student. (See footnote 1)

4. On October 22, 1996, Grievant signed an agreement which was approved by LCBE in a meeting on October 21, 1996. The agreement stated as follows:

> I agree to the change of my daily work schedule to include the performance of additional duties and responsibilities. These additional duties consist of working as a teacher's aide for [X], a wheelchair boundstudent, when this child is present at Weston Central School. I also agree to perform other related teacher's aide duties as assigned by the principal throughout Weston Central School if [X] is absent from school.
>
> In agreement for the performance of the above stated duties, I will receive one pay grade above my current pay grade and overtime wages pursuant to federal and state law. I will also be entitled to all rights, privileges and benefits including, but not limited to, the accrual and payment of holiday pay, sick leave and OSE days.

G Ex 1.

5. Pursuant to the agreement set forth in Finding of Fact Number 4, Grievant received the designation of "supervisory aide" and pay for overtime in excess of four hours per week, bringing her total compensation to $140 per day.

6. Prior to Grievant's agreement to perform teacher's aide duties at Weston Central School, X had been assisted by a substitute aide.

7. Shortly after the beginning of the 1996-97 school year, X was out of school for two weeks for a medical operation. When X returned to school, the same substitute was called to work with X.

8. Flora Turner, an aide on LCBE's preferred recall list filed a grievance in early October 1996 alleging that LCBE was not following the proper rotation in calling out substitute aides.

9. Grievant became aware that Ms. Turner had filed a grievance regarding some aspect of LCBE's providing aide services to X.

10. In the process of investigating Ms. Turner's grievance, Mr. Devono determined that the position should have been posted at the beginning of the school year. 11. Subsequently, on December 18, 1996, LCBE decided to resolve Ms. Turner's grievance, which was still at Level I, by

posting the position of special education aide at Weston Central. See A Ex 1.

12. On December 19, 1996, Mr. Devono notified Grievant in writing that the additional duties and responsibilities she had agreed to assume in October were being posted as a new aide position. A Ex 1.

13. Ms. Turner was the successful applicant for the posted aide position at Weston Central. On January 8, 1997, Grievant was relieved of her additional aide duties and her pay was reduced from $140 per day to approximately $92 per day.

14. Grievant did not consent to the change in pay and duties described in Finding of Fact No. 13.

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-4-8a(7) provides:

> No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

In addition, W. Va. Code § 18A-4-8 ¶ 95 states:

> No service employee, without his written consent, may be reclassified by class title, nor may a service employee, without his written consent, be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and any subsequent years.

Further, W. Va. Code § 18A-5-8(b) provides:

> An aide shall not be required by the operation of this section to perform noninstructional duties for an amount of time which exceeds that required under the aide's contract of employment or that required of other aides in the same school, unless the assignment of such duties is mutually agreed upon by the aide and the county superintendent, or the superinten dent's designated representative, subject to board approval. The terms and conditions of such agreements shall be in writing, signed by both parties, and may include additional benefits.

* * *

> Aides shall have the option of agreeing to supervise students and of renewing related assignments annually . . . .

Also pertinent to this grievance are the following portions of W. Va. Code § 18A-4- 8b:

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service employees to observe for at least five working days. The notice of such job vacancy shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

* * *

> All employees whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the basis of seniority.

* * *

> No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

* * * *

Finally, the following language in W. Va. Code § 18A-4-8h is pertinent:

> Upon the effective date of this section [July 1, 1996], no school service personnel shall be permitted to become employed in more than one regular full-day position, nor more than two one-half day positions at the same time . . . .

Grievant's claim that LCBE violated W. Va. Code § 18A-4-8b when it rescinded her agreement to serve as a supervisory aide to X cannot be upheld on the facts established. From the start of the school year, the duties relating to providing special education aide services to X constituted a position vacancy which LCBE was obligated to post and fill in accordance with the provisions of W. Va. Code

§ 18A-4-8b. See Langmyer v. Ohio County Bd. of Educ., Docket No. 95-35-565 (Mar. 12, 1996). See generally State ex rel. Rose v. Raleigh County Bd. of Educ., 179 W. Va. 275, 367 S.E.2d 223 (1988); Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988). Once Ms. Turner filed a grievance regarding one aspect of this position, LCBE properly resolved the matter by determining that W. Va. Code § 18A-4-8b required that the position be posted. See generally Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995); Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990), aff'd, Cir. Ct. of Kanawha County No. 90-AA-67 (Apr. 3, 1992).

While it is clear that Grievant may not prevail on the issue of retaining the supervisory aide position she obtained without a proper competitive posting, whether LCBEis obligated to continue paying Grievant at the higher rate of pay through the end of the 1996-97 school year requires further analysis. Ordinarily, the continuing contract of a school service employee can only be modified without the employee's consent if the school board properly terminates the contract pursuant to W. Va. Code § 18A-2-6. Bd. of Educ. v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982); Bostic v. Greenbrier County Bd. of Educ., Docket No. 90-13-346 (Oct. 30, 1990). However, in this particular situation, Grievant's continuing contract was as a bus aide, not as a supervisory aide.

LCBE apparently entered into the written agreement with Grievant in order to comply with the provisions of W. Va. Code § 18A-5-8 relating to the authority and compensation of service personnel designated as supervisory aides. However, Grievant was not already assigned to an aide position in the school, but was employed only as a transportation aide. Moreover, as previously discussed, LCBE subsequently recognized that the position should have been posted as a newly-created vacancy. Further, not only was LCBE's agreement with Grievant contrary to W. Va. Code § 18A-4-8b because the position was not properly posted, this arrangement likewise violated W. Va. Code § 18A-4-8h, effective July 1, 1996, inasmuch as Grievant was effectively holding two full-day service personnel positions at one time. Under these circumstances, the agreement between LCBE and Grievant was ultra vires, and Grievant is not entitled to the benefit of the provisions of W. Va. Code §§ 18A-4-8a or 18A-4-8. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996). See also Malone v. Marion County Bd. of Educ., Docket No. 96-24-084 (May 30, 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. The actions of a county board of education as employer on the one hand and as a grievance evaluator on the other are separate and distinct. Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995); Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990), aff'd Cir. Ct. of Kanawha County No. 90-AA-67 (Apr. 3, 1992). Cf. W. Va. Code §§ 18-5-1, et seq., & 18-29-1, et seq.

3. The agreement entered into between Grievant and LCBE whereby Grievant was to perform the duties of supervisory aide to student X, in addition to her duties as a regular bus aide, was ultra vires, in that the position vacancy was not properly posted in compliance with W. Va. Code § 18A-4-8b, and Grievant was improperly permitted to occupy the equivalent of two full-time service personnel positions contrary to W. Va. Code § 18A-4-8h. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996). See also Malone v. Marion County Bd. of Educ., Docket No. 96-24-084 (May 30, 1996).

4. Grievant failed to prove by a preponderance of the evidence that she was entitled to remain in the position of supervisory aide, in addition to her position as a busaide, or that rescinding the agreement to compensate her as a supervisory aide in the circumstances presented was contrary to law.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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: September 30, 1997

Footnote: 1

The student involved in this matter has been identified only by a letter, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., Jones v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Edwards v. McDowell County Bd. of Educ, Docket No. 93-33-118 (July 13, 1994).