PATRICIA GILMER

v. Docket No. 96-15-525

HANCOCK COUNTY BOARD OF EDUCATION

DECISION

Grievant, Patricia Gilmer, is employed by Respondent as a substitute teacher's aide and as a substitute cook. She filed this grievance on September 4, 1996, jointly with two other similarly affected employees, Linda Heiserman and Deborah Scott. Their grievance alleges that they, as substitutes, were not called out in the proper rotation from the substitute list.

An unfavorable Level I decision was rendered September 11, 1996. Grievants appealed to Level II and, after a hearing on October 7, 1996, an adverse ruling was made November 4, 1996. The matter was then appealed to Level III, whereupon it was waived to Level IV by the Respondent and assigned to the Wheeling Office of the West Virginia Education and State Employees Grievance Board on December 23, 1996. Grievants Heiserman and Scott withdrew their grievances January 6, 1997. A Level IV hearing was held regarding Ms. Gilmer's grievance on March 5, 1997. With the submission of briefs, the matter became mature for decision on or about April 9, 1997.

DISCUSSION

At the Level II hearing, the testimony of Grievant was that Respondent instituted a new automated computer call out system for the 1996-1997 school year. The purpose was to inform substitutes of job assignments. Employees were listed with priority being given to their “Start Date” or seniority. Grievant was on the substitute list for Aides and also for Cooks. (See Level's II and IV, Ex. No. 1)

Grievant's testimony at Level II established that at the beginning of the school year, she registered her name and Social Security number with the call out system and was assigned a PIN Number. At the beginning of the school year, she would be called by the computer and advised of the availability of work. Grievant would then respond with her PIN Number to either accept or decline the position. She was to be available for calls from 6 p.m. until 10 p.m. and from 5 a.m. until 12 Noon.

Ms. Gilmer's grievance concerns alleged malfunctioning of the new computer call- out system

which affected her on two occasions, August 27 and September 26, 1996.

August 27, 1996

Her first call under the new system was received at 6:16 PM, August 27, 1996, the day before the beginning of the school year. When she picked up the receiver, all she heard was “screeching”. (Level II Transcript, Page 8). About 2 minutes later the system called her again, with the same noise. No speech was discerned with either call. Her Caller ID revealed that the originating phone number was the Respondent's.

Exhibit number three, admitted at levels two and four is a computer generated list of calls along with their disposition for the period from August 27 to September 27, 1996. It contains the call-out records for Linda K. Heiserman, Deborah Scott, the Grievants who withdrew at Level IV, and Patricia Gilmer. As for the first incident, August 27, the exhibit shows that Grievant was called twice, 6:13 a.m. and 6:15 a.m., and that there was no answer. There was no screeching noted. Both calls were for a cook position at Weirton Heights Elementary School, the first to be from September 13th to September 17th, and the second from September 18th to September 23rd. Exhibit number two, compiled by Respondent from computer records, is a list of all substitute assignments made from August 27 until October 4. It gives the name of the substitute who received the assignment along with the date the call was completed. It indicates that the position in the second call went to Deborah Scott. According to Exhibit number one, Deborah Scott is senior to Ms. Gilmer, with a start date of September 23, 1994, as opposed to Grievant's date of October 21, 1994. Therefore, that position was rightly Ms. Scott's according to seniority. Also called was Linda Heiserman who was offered and accepted a one day position as a cook at Liberty Elementary. Ms. Heiserman is also senior to Grievant, and Grievant can not show that the job should have been hers. Neither the exhibits nor any other part of the record indicate the disposition of the first call, the cook position at Weirton heights from September 13th to the 17th.

It is the next aide assignment made August 27, that grievant questions. It was to a Ms. Showalter for August 29th. (See Level's II and IV, Ex. No. 2). Grievant is senior to Ms. Showalter on the Aide Seniority Order List. (See Level's II and IV, Ex. No. 1). Therefore, Grievant believes that she should have been called prior to Ms. Showalter, and this particular substitution should have been hers.

Grievant further testified that other persons, having less seniority, were called by the system and

notified of assignments that should have been hers. She was able todetermine through conversations with other substitute aides that the substitute list was not being followed according to seniority.

September 26, 1996

Such was the case, Grievant believes, on September 26, when the computer system called her again, advising of a position as a bus aide. She responded with her PIN number as required, and after receiving the proper information, reported to work. She discovered that another substitute aide was also assigned. Grievant worked one-half day, but was advised that the other aide should fill the position beyond that point. Grievant was paid for the one-half day worked.

Grievant contends that as a consequence of this erroneous call, she missed being called for another substitute position the next day, September 27th. Grievant's understanding is that the computer regarded her as still on assignment as a bus aide, and didn't call her for another assignment the next day. If not for the error, she would have received, on that day, an assignment which went to Wanda Showalter, who is junior to Grievant, but is in the next position down on the seniority list. Also, Debra Board and Nancy Lafferree, both junior to Grievant received assignments on the 26th. (See Level's II and IV, Ex. No. 2).

Respondent's contention appears to be that Grievant was called on September 26th and was not eligible for an assignment until the rotation came around to her again. Grievant contends that she should have been placed at the top of the rotation, since her assignment on the 26th was an error.

The undersigned accepts Grievant's contentions as the more reasonable, and believes it is unfair to place Grievant at the bottom of the rotation. This would in effect bepunishing her for Respondent's error. She is the innocent party and should accorded the benefit of being so.

Accordingly, for this reason, the undersigned believes that grievant has borne her burden of proving that she should have been called September 27, 1996, and that she was denied a position. It is clear from the evidence that the computerized call out system was not functioning properly, and that as a result, Grievant suffered damages.

Also for August 27, 1996, there is sufficient evidence to show that Grievant was available, and should have been called for a position which was awarded to another substitute, who had less seniority. This represented a violation of W. Va. Code § 18A-4- 15, requiring that such substitutions be made on basis of seniority. In pertinent part, it states:

The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

(1) To fill the temporary absence of another service employee; ....

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Based upon the foregoing discussion and other matters of record, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. During the 1996-1997 school year, Grievant was employed by Respondent as a substitute aide and as a substitute cook.

2. Grievant and other substitute aides and cooks were listed in each of the two separate categories, the order of the list being based upon seniority. As vacancies developed, a substitute was assigned as a replacement, with the following assignment rotating to the next most senior substitute. 3. For the 1996-1997 school year, Respondent instituted a computerized call out system for the purpose of notifying substitutes of their work assignments.

4. Respondent's computer was to call substitutes from the catagories described in Finding of Fact number two above.

5. On August 27, 1996, Respondent's computer functioned improperly, calling Grievant at her home twice, but emitting a screeching sound instead an understandable message. As a result, on that date, Grievant was not properly notified of a assignment which was instead given to a substitute with less seniority.

6. On September 26, 1996, Respondent's computer called Grievant to fill a position as a school bus aide. The call was made in error and after working one-half day, Grievant was required to relinquish the position to the rightful substitute. Grievant was compensated for the one-half day worked.

7. The next day, September 27, 1996, Grievant was not called, nor was she assigned to one of the five available substitute aide positions.

CONCLUSIONS OF LAW

1. In a grievance involving a non-disciplinary action, Grievant must prove her case 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).

2. The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to fill the temporary absence of another service employee. W.Va. Code § 18A-4- 15. 3. Respondent's computer malfunction caused a violation of W.Va. Code § 18A- 4-15 and as a direct result, Grievant was not being called for available work as a substitute on August 27, 1996 and September 27, 1996.

Accordingly, the grievance is **GRANTED**. Respondent is ordered to compensate Grievant for one day's lost wages incurred as a result of computer malfunction on August 27, 1996 and one-half days wages as a result of computer malfunction on September 27, 1996.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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.

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JAMES D. TERRY

Administrative Law Judge

DATE: November 26, 1997