LISA ADKINS,

Grievant,

v. DOCKET NO. 97-22-272

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

and,

LESSIE LAMBERT,

Intervenor.

DECISION

This grievance was initiated by Grievant Lisa Adkins against the Respondent Lincoln County Board of Education ("LBOE"), alleging that a violation of W. Va. Code §§ 18A-4-8b and 18A-4-15 occurred when LBOE posted the position she had held as a substitute cook since February 1994, and it was filled by Intervenor Lessie Lambert. (See footnote 1) Grievant asserts that LBOE should not have posted theposition, and requests instatement into the position, compensation for lost wages, and all other lost benefits plus interest. Contrary to Grievant's assertion, LBOE had violated the cited Code Sections by retaining Grievant in her substitute position for over two years without ever posting the position, and corrected this violation by properly posting the position.

The following Findings of Fact are made based upon the evidence presented at Level II.

Findings of Fact

1. Grievant has been a substitute cook for LBOE for ten years. In February 1994, Bessie Adkins, a regular cook employed by LBOE at Harts High School, was injured on the job and could not work. Grievant was called off the substitute cook list as the next substitute in the rotation, to temporarily substitute for Bessie Adkins. She remained in this position until October 28, 1996, when Lessie Lambert was placed in the position.

2. Bessie Adkins has never requested a leave of absence, but she remains off work with her injury.

3. LBOE posted Bessie Adkins' position in October 1996, as a temporary position. (See footnote 2) Ms. Lambert, a regular cook for LBOE, bid on the posted position, and was awarded the position.

Discussion

Grievant does not argue she should have been selected for the posted position. Her argument is that LBOE should not have posted the position because Bessie Adkins was off work on Workers' Compensation, which is not a leave of absence. In the alternative, she argues that if the position should have been posted, the time for doing so was 1994, and since LBOE did not do so then, andno employee timely protested the failure to post the position, it had no reason to post the position two years later. Grievant finds this delayed reaction arbitrary and capricious. LBOE and Intervenor argue that LBOE was required by law to post and fill the position.

W. Va. Code §§ 18A-4-8b and 18A-4-15 require a board of education to post any vacancy for an employee on a leave of absence for more than 30 days. This Grievance Board has determined on many occasions that it is not necessary for the employee to formally request a leave of absence in order for these statutory provisions to be triggered, and that an employee off on Workers' Compensation is on leave of absence. Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996); Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Hensley v. Mingo County Bd. of Educ., Docket No. 93-29-037 (July 6, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54- 86-333-3 (Aug. 20, 1987). The undersigned finds no compelling reason to revisit this issue.

Failing to post the vacancy and allowing Grievant to remain in the position after 30 days without posting were violative of W. Va. Code §§ 18A-4-8b and 18A-4-15. LBOE corrected this violation and did what it was required by statute to do. The fact that it did not post the position in 1994 when it should have does not mean it was excused from the statutory posting requirement. Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

Grievant was placed in the position as a short-term substitute off the substitute rotation, and as such had no right to remain in the position after 30 days. See Parker v. Summers County Bd. of

Educ., 406 S.E.2d 744 (W. Va. 1991) ("employees do not acquire a property interest requiring due process protection by virtue of an illegal action." Rose, supra); Eagle, supra. "W. Va. Code § 18A-4-15 provides that a substitute called in to replace a regular employee is assigned `throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 18A-4-8b].'" Curry v. Mingo County Bd. of Educ., Docket No. 95-29-518 (Jan. 17, 1997). This is the period of time Grievant was assigned to Bessie Adkins' position. (See footnote 3)

The undersigned finds no evidence to support Grievant's argument that LBOE's action was arbitrary and capricious. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The burden of proof is on the grievant. In this case, while LBOE should have posted the position earlier, the fact that it chose to correct its error at some point in time, rather than perpetuating its mistake, is a reasonable decision, and is in fact what it was required to do.

Like the grievant in Lambert, supra (who is the Intervenor in this case), Grievant was able to remain in a position for several years without going through the selection process. During this period she received many of the benefits of a regular employee, (See footnote 4) and was able to add a significantamount of time to her substitute seniority. After Ms. Lambert was placed in the position, Grievant testified that she continued to receive substitute positions. It is difficult to see where Grievant has suffered any harm. Rather, she benefitted from LBOE's mistake for more than two years, and is entitled to nothing more.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. W. Va. Code § 18A-4-8b requires that county boards of education post all vacancies which occur as a result of an employee being on a leave of absence for more than 30 days. It is not necessary for the employee to formally request a leave of absence for these statutory provisions to be triggered, and an employee off on Workers' Compensation is on leave of absence. Livingood v.

Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996); Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Hensley v. Mingo County Bd. of Educ., Docket No. 93-29-037 (July 6, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987).

2. Grievant was not properly in the substitute position, as she did not obtain the position as a result of the selection process. As such, she had no right to remain in the position after 30 days. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991); Rose, supra. W. Va. Code § 18A-4-15.

3. Respondent Lincoln County Board of Education was required by statute to post Bessie Adkins' position, as Ms. Adkins had been off work for more than 30 days. It was not relieved of this requirement by its failure to comply with the statute for over two years, and its action inposting the position was not arbitrary or capricious. Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

Accordingly, this grievance is **DENIED**.

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.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 25, 1997

Footnote: 1

The record does not reflect when this grievance was filed, or what occurred at Level I. It is likely, given the nature of this grievance, that Grievant's supervisor was without authority to grant the relief requested. The grievance was denied at Level II on May 29, 1997, following a hearing held on May 19, 1997. Level III was waived, and Grievant appealed the

Level II Decision to Level IV on June 6, 1997. The parties agreed to submit this case on the record developed at Level II, and this case became mature for decision on July 29, 1997, with receipt of Intervenor's post-hearing written argument.

Footnote: 2

The only testimony taken at the Level II hearing was Grievant's. The record does not reflect what prompted LBOE to post the position at this time.

Footnote: 3

W. Va. Code § 18A-4-15 makes it clear that when an employee is on a leave of absence for more than thirty days and the position is posted and filled, the person who is hired through this posting, even though hired on a temporary basis, is "employed on a regular basis."

Footnote: 4

"That Grievant may have received certain regular-employee benefits . . . while temporarily employed . . . is not controlling since a board of education may confer such benefits upon its substitute employees `but such benefits shall not include regular employee status and seniority.' Code 18A-4-8g." Eagle, supra.