ROSA MOORE,

Grievant,

v.

DOCKET NO. 97-22-549

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rosa Moore, filed the following grievance against her employer, the Lincoln County Board of Education ("Board") in or about October 1997:

> Grievant is a former regularly employed teacher's aide who was reduced in force and placed on preferred recall at the end of the 1996-97 school year. Grievant also has been employed as a substitute teacher's aide for the 1997-98 school year. The Respondent posted a position that it described as a "supplemental one-hour" position to provide physical care to a special education student. The Respondent limited applications for this position to regular employees only. The Respondent did not receive any applications from regular employees. The Respondent did not fill this position, but it contracted with the mother of the special education student to perform this assignment and the Respondent is compensating this individual. The Grievant contends that the Respondent improperly advertised this position in that it should have been advertised as a half-time teacher's aide vacancy and Grievant requests posting of such, and if she is the successful applicant for this position, Grievant also requests retroactive wages, benefits and regular employment seniority.

A level two hearing was held on November 19, 1997, and Hearing Examiner Charles S. McCann denied the grievance by decision dated December 8, 1997. Grievant by- passed level three in accordance with W. Va. Code § 18-29-4(c), and appealed to levelfour on December 17, 1997. A level four hearing was conducted on February 26, 1998, and this matter became mature for decision on April 17, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Charles Damron, Esq.

SUMMARY OF EVIDENCE

LII Respondent's Exhibits

Ex. 1 -

Grievance form.

Ex. 2 -

August 29, 1996 Vacancy Bulletin.

Ex. 3 -

Temporary Contract of Employment dated September 16, 1996.

Ex. 4 -

October 29, 1997 memorandum from Charles McCann to Rosa Moore.

Ex. 5 -

October 30, 1997 letter from Charles McCann to Rosa Moore.

Ex. 6 -

Supplemental Service Personnel Vacancies for 1997-98 School Year.

Testimony

Grievant testified in her own behalf. Respondent presented no testimony.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed by the Board as a substitute aide and is on the preferred recall list.
2. Grievant worked as a special education aide in a “supplemental” position at Atenville Elementary School during the 1996-97 school year. R. Exs. 2, 3.
3. Grievant was reduced in force from that position at the end of the 1996-97 school year.
4. At the beginning of the 1997-98 school year, Grievant was called back to Atenville as a

substitute aide, working in the same position she had held the previous year. She worked approximately three hours and twenty minutes a day at a rate of $7.41 per hour.

5. During this same time, the Board decided it could utilize existing regular employees to care for the special education student for approximately two of the three hours that Grievant was performing the job. However, the Board could not find any existing regular employees to care for the student during the one-hour lunch period.

6. The Board posted the following position under the heading "Supplemental Service Personnel Vacancies For 1997-98 School Year."

SS08

Atenville Elementary
** Aide-Lunchroom

12:00-1:00 p.m.

**Supervision of handicapped student for one (1) hour.

The above posted service supplemental positions are for School Year 1997-98 only.

7. Grievant, who was also on preferred recall, did not receive a copy of this posting via certified mail. She had called the Board office on some other postings, and found out about this posting. However, she was told the posting was for regular employees only, and so she did not apply.

8. No regular employee accepted this position and the Board did not re-post the vacancy. Instead, the Board contracted with the special education student's mother to come into the school for the designated time at a rate of $20.00 per day.

9. Grievant was informed by the Board's secretary not to report for her substitute assignment following the filling of this position.

DISCUSSION

Grievant alleges the Board should have posted the vacancy as a half-time position, rather than a one-hour only position, relying upon W. Va. Code § 18A-4-8a, which providesthat a school service employee who works less than three and one-half hours per day must receive at least one-half the state minimum salary. Further, Grievant alleges it was a violation of W. Va. Code § 18A-4-8b for the Board to contract with the special education student's mother to perform this job for $20.00 per hour,

rather than filling it with an employee of the Board.

All school service personnel positions must be considered either regular, extracurricular, or extra-duty assignments. Extracurricular assignments are those "activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis." W. Va. Code § 18A- 4-16(1). This position does not fit into either the extracurricular or extra-duty definitions, as it occurs during regular school hours, and therefore, it must be a regular position, which must be filled according to the provisions of W. Va. Code § 18A-4-8b.

W. Va. Code § 18A-4-8b requires that all existing school service personnel jobs or positions occurring throughout the school year must be posted and filled on the basis of seniority, evaluations, and qualifications. Applicants must be given preference in filling the position in the following descending order: Regular employees, preferred recall list employees, substitute employees, and new applicants.

The Board erred in limiting applications for the position to regular employees only. Had a regular employee applied for and accepted the position, he or she would have been given priority for the position, but there is nothing which prevents other personnel from applying for the position, or allows a board of education to limit the applicants to regular employees. Further, the Board erred in contracting the one-hour only position with the mother of the special education student, who was not an employee of the Board in any capacity. The mother should be considered a new employee for purposes of filling this position. Further, the contractual scheme of employment for school personnel does not allow for the hiring of contract employees to perform full time regular duties of school service personnel positions. State ex rel. Boner v. Kanawha County Bd. of Educ., 475 S.E.2d 176 (W. Va. 1996); Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997). If a board is prohibited from contracting out a full time position, it is fair to conclude that the same restriction would apply to one-half time positions. The Board should have accepted bids from all service personnel employees for the position, before hiring a new employee for that position, or before contracting out that position to a non-employee.

Grievant also alleges the position should have been posted as a one-half time position. W. Va. Code § 18A-4-8b requires that all postings for job vacancies "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." The posting did not include the amount of pay for the one-hour only position. W. Va. Code § 18A-4-8a provides that a school service employee who works less than three and one- half hours per day must receive at least one-half the state minimum salary provided in that Code Section. Therefore, even if the school service employee hired works only one hour in compliance with the posting, he or she is entitled to one-half salary for that day, and that information should have been provided on the posting.

CONCLUSIONS OF LAW

1. All school service personnel positions must be considered either regular, extracurricular, or extra duty assignments. Regular assignments must be posted and filled pursuant to W. Va. Code § 18A-4-8b.

2. The one-hour only lunchroom aide position was a regular assignment, and should have been posted and filled according to the provisions of W. Va. Code § 18A-4-8b.

3. W. Va. Code § 18A-4-8b requires that all existing school service personnel positions be posted and filled on the basis of seniority, evaluations and qualifications. Applicants must be given preference in filling the position in the following descending order: Regular employees, preferred recall list employees, substitute employees, and new applicants.

4. The Board violated the posting provisions of W. Va. Code § 18A-4-8b when it limited applications for a school service personnel position to regular employees only.

5. The Board violated W. Va. Code § 18A-4-8b in filling the position with a new applicant over preferred recall list and substitute employees.

6. The contractual scheme of employment for school personnel does not allow for the hiring of contract employees to perform full time regular duties of school service personnel positions. State ex rel. Boner v. Kanawha County Bd. of Educ., 475 S.E.2d 176 (W. Va. 1996); Ganoe v. Hampshire County Bd. of Educ., Docket No. 97-14-229 (July 30, 1997).

7. A school service employee who works less than three and one-half hours per day must receive at least one-half the state minimum salary provided in W. Va. Code §18A-4-8a, and the Board violated the posting requirements of W. Va. Code § 18A-4-8b by not providing that information

on the posting.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to re- post the one-hour only lunchroom aide position in accordance with W. Va. Code § 18A-4- 8b, and to include all the required information on the posting. If Grievant is the successful applicant, she shall be instated into the position if it is still available, and shall receive back- pay of one-half the state minimum salary provided in W. Va. Code § 18A-4-8a for the duration of the regular assignment, as well as regular seniority for the assignment.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 8, 1998