SANDRA STOWERS,

Grievant,

v. **Docket No. 98-22-156**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Sandra Stowers (Grievant), an employee of Respondent Lincoln County Board of Education (LCBE), initiated a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., on April 9, 1998, alleging that LCBE violated W. Va. Code § 18A-4-15, when she was not permitted to continue serving as a substitute for a half-time Secretary at Duval High School. The grievance was waived by Grievant's immediate supervisor at Level I, and a Level II hearing was conducted on April 27, 1998. Thereafter, on May 8, 1998, Charles McCann, the Superintendent's designee, issued a decision denying the grievance. Grievant then appealed to Level IV on May 13, 1998, waiving Level III as authorized by W. Va. Code § 18-29-4(c). Following a series of continuances, each of which was granted for good cause shown, a Level IV hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on August 5, 1998. This matter became mature for decisionon August 31, 1998, following receipt of proposed Findings of Fact and Conclusions of Law from the parties. (See footnote 1)

The pertinent facts in this matter are generally undisputed. Accordingly, the following Findings of Fact have been determined from the testimony and documentary evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education (LCBE) as a half-time Secretary.

2. On July 21, 1997, LCBE hired Teresa Ann Pauley as a half-time Secretary at Duval High School. J Ex 1 at L IV.

3. On August 5, 1997, LCBE posted a vacancy for a half-time Secretary at McCorkle Kindergarten Center. The posting specified that the half-time Secretary position was temporary and the successful applicant's temporary contract would expire upon completion of a building project at Midway Elementary, allowing the Kindergarten students to move to Midway Elementary. J Ex 2 at L IV. Ms. Pauley was the successful applicant for the temporary position at McCorkle Kindergarten Center.

4. Following Ms. Pauley's acceptance of the assignment at McCorkle, LCBE posted a temporary position for the half-time Secretary at Duval High School, pending Ms. Pauley's return, but not to exceed the 1997-98 school year. J Ex 3 at L IV.

5. At the time the half-time Secretary position was posted, Grievant was employed by LCBE as a half-time Secretary at Ferrellsburg Elementary School. See J Ex6 at L IV. Grievant held a probationary contract of employment for the Ferrellsburg position. J Ex 6 at L IV.

6. Grievant was the successful applicant for the temporary half-time Secretary position at Duval. Grievant was aware that the assignment to Duval would terminate upon completion of the building project at Midway Elementary and Ms. Pauley's return from McCorkle.

7. On February 18, 1998, LCBE Superintendent R.P. Powell sent notice to Grievant advising that the McCorkle Kindergarten students and staff would be moving to Midview Elementary on March 7, 1998. Accordingly, Grievant's last day as a temporary Secretary at Duval would be March 6, 1998, and Grievant would thereafter return to her regular half-time position at Ferrellsburg. J Ex 5 at L IV.

8. Superintendent Powell sent a similar letter to Ms. Pauley, dated February 18, 1998, advising her that she would be returning to Duval after her last day at McCorkle, March 6,1998. J Ex 10 at L IV.

9. On March 3, 1998, LCBE substantially completed the building project at Midway Elementary School. See J Ex 4 at L IV.

10. Ms. Pauley did not return to work on March 9, 1998, due to a serious injury or illness involving a family member. LCBE called Wanda Keaton, a substitute Secretary on LCBE's rotating roster, to work in place of Ms. Pauley. See J Ex 11 at L IV.

11. On March 20, 1998, LCBE posted a temporary vacancy for the half-time Secretary position

at Duval, pending the return of Ms. Pauley, but not to exceed the remainder of the 1997-98 school year. See J Ex 8 at L IV. On April 1, 1998, Grievant wasselected to fill this position, pending Ms. Pauley's return. Grievant worked in that position from April 8, 1998, until the end of the 1997-98 school year.

12. During the 21 work days that a substitute worked for Ms. Pauley at Duval, Grievant was required to commute an additional 36 miles each way from her residence to her place of employment at Ferrellsburg. Grievant seeks reimbursement for this additional commuting expense as her sole remedy in this grievance.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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-4-15 contains the following provisions pertinent to this grievance:

> The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> * * *
>
> (1) To fill the temporary absence of another service employee
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> * * *
>
> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis . . . .

Grievant's claim that LCBE violated W. Va. Code § 18A-4-15 by failing to permit her to continue working in place of Ms. Pauley during the duration of her absence is misplaced. Grievant was employed as a probationary school service employee at the time she successfully bid into another temporary position which had been posted in accordance with W. Va. Code § 18A-4-8b. Grievant was not “substituting” for Ms. Pauley, but filling a temporary vacancy resulting from Ms. Pauley's

successful bid on a separate temporary assignment at another school. Therefore, Grievant's employment status is not governed by the provisions of W. Va. Code § 18A-4-15, which regulates employment of substitute school service personnel. Likewise, the Grievance Board decisions (See footnote 2) relied upon by Grievant to support her position are inapplicable because they involve application of W. Va. Code § 18A-4-15 to "substitute" situations.

Grievant's alternative argument is that by the terms of the posting, she was to serve in the position held by Ms. Pauley until she actually returned from the temporary assignment at McCorkle. Although that assignment was terminated in accordance with the terms advertised by LCBE, Ms. Pauley did not physically return to her job at Duval, because she was coincidentally required to take leave due to a family illness, starting on the date she was scheduled to resume working at her regular position. Grievant's argument on this issue attempts to elevate form over substance in a manner which would compel LCBE to violate W. Va. Code § 18A-4-15 by failing to call in a substitute employee as required by that statute. It is abundantly clear that Ms. Pauley was not at work at Duvalas of March 9, 1998, for a reason separate and distinct from her assignment to McCorkle. Moreover, Grievant was aware that, as of March 6, 1998, Ms. Pauley's temporary position at McCorkle had ceased to exist.

In these circumstances, LCBE correctly called out a substitute service employee instead of leaving Grievant at Duval. Had LCBE done otherwise, it would have violated the rights of substitute school service employees to be called out to work at Duval in accordance with W. Va. Code § 18A-4-15. See Hall v. Mingo County Bd. of Educ., Docket No. 97-29-420 (Jan. 21, 1998); Gilmer v. Hancock County Bd. of Educ., Docket No. 96-15- 525 (Nov. 26, 1997).

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 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 county board shall employ and the county superintendent, subject to the approval of the county board of education, 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. See Hall v. Mingo County Bd. of Educ., Docket No. 97-29-420 (Jan. 21, 1998); Gilmer v. Hancock County Bd. of Educ., Docket No. 96-15-525 (Nov. 26, 1997). 3. Respondent Lincoln County Board of Education did not violate W. Va. Code § 18A-4-15, or any other statute, policy, rule or regulation, when it called in a substitute employee to work for 21 days in a half-time position at Duval High School occupied by Teresa Pauley, when Ms. Pauley called in sick on the first work day following the termination of her temporary assignment to McCorkle Kindergarten Center.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 10, 1998

Footnote: 1

Grievant was represented by Anita Mitter with the West Virginia Education Association. Respondent was represented by counsel, Erwin L. Conrad.

Footnote: 2

Gallion v. Lincoln County Bd. of Educ., Docket No. 97-22-108 (Dec. 31, 1997); Burns v. Monongalia County Bd. of Educ., Docket No. 96-30-395 Mar. 18, 1997); Ooten v. Mingo County Bd. of Educ., Docket No. 93-29-041 (Mar. 18, 1993).