DONNA HARLESS,

Grievant,

v. **DOCKET NO. 98-22-100**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Donna Harless, against her employer, Respondent Lincoln County Board of Education ("LBOE"), alleging a violation of W. Va. Code § 18A-4-8b occurred, when LBOE posted two positions as supplemental positions, and then converted them to half-time positions without reposting them. As relief she sought instatement into one of the positions, with back pay, retroactive seniority, and benefits, or reposting of the positions, and retroactive seniority and benefits if she were the successful applicant.

The following Findings of Fact are made based upon the evidence presented at the Level II and Level IV hearings. (See footnote 1)

Findings of Fact

1. Grievant is employed by LBOE as an Aide.

2. LBOE posted two vacancies for Cafeteria Helpers, one at Duval High School and one at Guyan Valley High School. The posted work hours were, "3 hours - 10:00 a.m. - 1:00 p.m.", and the posted rate of pay was $7.41 per hour.

3. The tasks to be performed by the Cafeteria Helper, as listed on the posting, were:

    1. Serve as a helper to the Cook III or Food Service Secretary in performing routine duties of providing nutritious meals to students (excludes cooking).

    2. Assist Food Service Secretary in the point of service line.

    3. Assist Cook in the stocking of foods on the service line.

4. Assist Cook in the serving of meals to students.

5. Assist Cook in the daily cleanup of the dining area.

6. Perform other duties assigned by the School Principal, Food Service Director, Cook III or Food Service Secretary.

4. Grievant applied for the posted Cafeteria Helper vacancy at Guyan Valley High School, but later withdrew her application. She did not apply for the posted Cafeteria Helper vacancy at Duval High School, because it was farther from her home, and was not worth it to her as she would receive no benefits.

5. Linda Adkins, a substitute Cook with eight years of substitute experience with LBOE, applied for the posted Cafeteria Helper vacancy at Duval High School, and wasselected for the position. She filed a grievance alleging the assignment should be a regular assignment, and she should receive a contract, benefits, seniority, and any difference in pay. Ms. Adkins was represented by John Roush, an attorney who is employed as an employee representative by the West Virginia School Service Personnel Association.

6. Barbara Pennington, a substitute Cook with 11 years experience with LBOE, applied for and was selected for the posted Cafeteria Helper vacancy at Guyan Valley High School. She intervened in Ms. Adkins' grievance, and requested the same relief as that requested by Ms. Adkins.

7. Mr. Roush stated at Ms. Adkins' Level II hearing, held on November 19, 1997, when asked whether the jobs would have to be reposted as half-time Cook positions, "I don't think that would be necessary. They were posted and everybody interested applied. . . . My contention is that [anyone more senior who wanted the job] should have bid on the job. . . . Those folks could have protected themselves by applying for the positions." Respondent's Exhibit 1.

8. LBOE settled Ms. Adkins' grievance by awarding her and Ms. Pennington the requested relief. The positions were made half-time Cook positions, with benefits and seniority, and the vacancies were not reposted.

9. Grievant did not intervene in Ms. Adkins' grievance.

10. Grievant's representative, Gordon McClanahan, also is employed as an employee representative by the West Virginia School Service Personnel Association. He is not an attorney.

11. Grievant has more seniority than Ms. Adkins, but less seniority than Ms. Pennington. 12. LBOE posted the vacancies as three hour, Cafeteria Helpers, because the county is over the state funding formula for service personnel, and this is one method LBOE has used

to deliver the services in the least expensive way.

Discussion

"The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). "This Grievance Board has recognized the principle that grievance settlements should be upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 95-23-190 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996)." Fiorini v. W. Va. Div. of Highways, Docket No. 98-DOH-001 (Aug. 17, 1998).

When carefully analyzed, Grievant's contention is that the settlement agreement entered into between Ms. Adkins and LBOE was in violation of law. She agrees that the positions should have been made half-time Cook positions, but believes instead of awarding this as relief to Ms. Adkins, LBOE should have reposted the vacancies. The question presented here is, whether it was a violation of law for LBOE to award Ms. Adkins and Ms. Pennington the relief they sought, rather than reposting the positions. ThisGrievance Board has already determined this type of relief is appropriate in rendering relief in two decisions. (See footnote 2)

In Mullins v. Logan County Board of Education, Docket No. 91-23-029 (April 30, 1991), the school board posted a bus run as a supplemental run. The grievant in that case, a substitute employee, was awarded the run, and was paid $22.50 per day for four hours of work, rather than in accordance with the statutory state minimum pay scale for working in excess of three and one-half hours per day. The grievant was awarded wages in the amount of the state minimum pay scale.

In Ganoe v. Hampshire County Board of Education, Docket No. 97-14-229 (July 30, 1997), the grievant, a substitute employee, was employed as a classroom aide. The position had been posted as an "Aide II -- Special Education." When no full-time employee had applied, the position was offered to substitutes, and the grievant was the first to accept the position. The grievant signed a "supplemental contract/contracted services agreement," was paid at an hourly rate, and received no benefits or seniority. The grievant was awarded seniority and benefits as a full-time regular

employee.

Grievant asserts that LBOE violated the law when the posting occurred, by designating the vacancies as part-time Cafeteria Helper positions, when, according to the posting itself, the duties of the positions were Cook duties, and there is no "Cafeteria Helper" position listed in W. Va. Code §18A-4-8b. Grievant did not apply for the Duval position at that time, nor did she grieve at that time, contesting the legitimacy of theposting. Rather, she waited until another employee was selected, grieved, and was successful, and then challenged the settlement entered into by the parties. Only then did she come forward and say she would have been an applicant for the position, had it been posted differently. However, by Grievant's own argument, it was obvious from the posting that these were Cook positions. Grievant has not demonstrated that the settlement was not fairly entered into, or was in violation of law or public policy, or that she otherwise is entitled to any relief.

Respondent argued that Grievant's representative should be precluded from taking a position opposite of that taken by Mr. Roush in Ms. Adkins' grievance. The West Virginia case cited by Respondent does not support this proposition. Syllabus Point 2 of Dillon v. Board of Education of County of Wyoming, 171 W. Va. 631, 301 S.E.2d 588 (1983), cited by Respondent, states:

> Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts.

The common understanding of the word "party" is the person named in the proceeding who is affected by the outcome; that is, the named grievant and respondent. The undersigned is not aware of any context in which counsel for a party becomes a party to the proceeding. Neither the cited Syllabus Point nor the text of the Dillon decision indicates that the Court is referring to counsel when it speaks of parties. Grievant was not a party to Ms. Adkins' grievance, and is not precluded from arguing a position different from that argued by Ms. Adkins, albeit by counsel.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

2. "This Grievance Board has recognized the principle that grievance settlements should be

upheld unless it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 95-23-190 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996)." Fiorini v. W. Va. Div. of Highways, Docket No. 98-DOH-001 (Aug. 17, 1998).

3. Grievant failed to prove by a preponderance of the evidence that the settlement of Linda Adkins' grievance was not fairly made or was in contravention of law or public policy.

Accordingly, the 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 ofthe 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: November 5, 1998

Footnote: 1

The record does not reflect when this grievance was filed. The parties represented that Grievant's supervisor responded that he or she had no authority to grant the requested relief. Grievant appealed to Level II, where a hearing was held on January 16, 1998. The grievance was denied at Level II on March 18, 1998, and Grievant bypassed Level III, appealing to Level IV on April 3, 1998. This matter was set for hearing and then continued,as Grievant's counsel John Roush, withdrew due to a potential conflict of interest. A Level IV hearing was held before the undersigned Administrative Law Judge on September 30, 1998. Grievant was represented by Gordon McClanahan, West Virginia School Service Personnel Association, and Respondent was represented by Erwin Conrad, Esquire. This grievance became mature for decision on October 15, 1998, upon receipt of the last of the parties' written arguments.

Footnote: 2

Respondent is cautioned, however, that a different rule may be applicable in a slightly different scenario, and these types of settlements should be entered into with caution. See Dawson, et al., v. Cabell County Bd. of Educ., Docket No. 97-06-072 (Oct. 14, 1997); and Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994).