DEBRA BROWNING,

Grievant,

v. **Docket No. 98-22-039**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Debra Browning (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 October 23, 1997, alleging that LCBE violated W. Va. Code §§ 18A-4-8b and 18A-4-15, when it failed to call her to substitute for an absent Aide consistent with her seniority on the county's substitute Aide rotation list. After the grievance was denied at Level I, her grievance was elevated to Level II, and a hearing was conducted on January 5, 1998. Thereafter, on February 4, 1998, Charles McCann, the Superintendent's designee, issued a decision denying the grievance. Grievant then appealed to Level IV on February 10, 1998, waiving Level III as authorized by W. Va. Code § 18-29-4(c). Grievant requested that this matter be decided upon the record developed at Level II, and this matter becamemature for decision on March 12, 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 limited testimony presented at Level II.

FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education (LCBE) as a substitute Aide.

2. LCBE ordinarily calls out substitute Aides on the basis of the geographic area to which they

are assigned. Grievant is assigned to the Hamlin area.

3. Grievant is the most senior substitute Aide on LCBE's call-out list for the Hamlin area.

4. From October 8 through 21, 1997, LCBE called out Gloria Pritchard, a substitute Aide assigned to the Guyan Valley area, to assist a special education student at a school in the Hamlin area.

5. Grievant was next in the order of rotation to be called out for a substitute Aide assignment in the Hamlin area. LCBE skipped over Grievant, and other substitute Aides, to secure an Aide who had been trained to work with a special education student who was wearing braces. Ms. Pritchard had previously obtained the training required. 6. Grievant was not qualified to provide the care required by this particular student as such care could only be provided by a person who had received appropriate specialized training in accordance with W. Va. Code § 18-5-22.

7. Prior to October 8, 1997, Grievant had received training in dealing with special education students, but that training did not include training with braces. After this grievance was filed, LCBE provided eight hours of update training to Grievant and other Aides. Training on assisting students with braces and related devices was included in this update. This particular training was conducted by a Physical Therapist, and lasted approximately twenty to thirty minutes.

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:
>
> * * *
>
> (1) To fill the temporary absence of another service employee
>
> * * *

> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began hisassigned 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 . . . . All substitutes shall be employed on a rotating basis according to the length of their service time until each has had an opportunity to perform similar assignments . . . .

The parties also rely upon a portion of W. Va. Code § 18-5-22 which states:

> [S]pecialized health procedures that requires the skill, knowledge and judgment of a licensed health professional, shall be performed only by school nurses, other licensed school health care providers as provided for in this section, or school employees who have been trained and retrained every two years and subject to the supervision and approval by school nurses.

Although Grievant testified that she was qualified to work with special education students, and believed she could have assisted a student wearing braces without the benefit of the additional training she later received, the undersigned administrative law judge is not persuaded that Grievant was qualified to provide the care required by this particular student. In the absence of expert testimony by a qualified health care professional that specialized training contemplated by W. Va. Code § 18-5-22 is not required, this Grievance Board will defer to the judgment of the county board in such matters. See Glick v. Logan County Bd. of Educ., Docket No. 97-23-435 (Jan. 29, 1998); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Cir. Ct. of Kanawha County, No. 95-AA-106 (Jan. 8, 1997). See also Payne v. McDowell County Bd. of Educ., Docket No. 33-88-126 (Sept. 15, 1988); Sall v. Wood County Bd. of Educ., Docket No. 54-86-311-3 (Mar. 20, 1987).

Grievant further contends that she should prevail in this grievance because LCBE failed to provide her updated training prior to October 8, 1997, when this requirement for a substitute Aide with specialized training arose. W. Va. Code § 18-5-22 provides that“[t]he state board of education shall work in conjunction with county boards to provide training and retraining every two years as recommended by school nurses and implemented by the state department of health.” Neither this language nor any other Code provision appears to mandate that LCBE provide training so that substitute Special Education Aides remain qualified to fill in for any absent Aide. Obtaining the requisite training to meet initial qualifications or retain qualifications for a school service personnel position is ordinarily the responsibility of the employee. Zirkle v. Hancock County Bd. of Educ.,

Docket No. 94-15-525 (Feb. 24, 1995). See Burdette v. Kanawha County Bd. of Educ., Docket No. 89-20-228 (Sept. 25, 1998); Bartley v. Barbour County Bd. of Educ., Docket No. 01-88-062-2 (Aug. 31, 1988). Grievant has failed to demonstrate that any provision in W. Va. Code § 18-5-22, or any other statute, policy, rule, or regulation, shifts this burden to LCBE in the circumstances presented by this grievance. Although it is not clear from the record how Ms. Pritchard received the training necessary to perform these duties, there was no evidence or allegation that this employee benefitted from favoritism on the part of LCBE in receiving her training. Therefore, Grievant has not established any entitlement to relief in this matter.

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. ofEduc., 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. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. 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).

4. W. Va. Code § 18-5-22 prohibits a county board from allowing a Special Education Aide to provide specialized health care procedures to a student unless that Aide has received appropriate training to provide such service.

5. Respondent Lincoln County Board of Education did not violate W. Va. Code § 18A-4-15 by failing to call Grievant in order of seniority to substitute as a Special Education Aide when she was

not qualified to perform the essential duties of that position.

6. With the exception of appropriate inservice training in preparation for competency tests as mandated in W. Va. Code § 18A-4-8e, the employer is not ordinarily required to provide the requisite training for an employee to meet initial qualifications, or retain minimal qualifications, for a school service personnel position. See Zirkle v. Hancock County Bd. of Educ., Docket No. 94-15-525 (Feb. 24, 1995); Burdette v. Kanawha County Bd. of Educ., Docket No. 89-20-228 (Sept. 25, 1998); Bartley v. Barbour County Bd. of Educ., Docket No. 01-88-062-2 (Aug. 31, 1988). 7. Respondent Lincoln County Board of Education was not required by W. Va. Code §18-5-22, or any other applicable statute, policy, rule or regulation, to provide initial training, or update training, which would permit Grievant to perform the essential duties of a Special Education Aide position in the temporary absence of the regular employee. Id.

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: May 19, 1998

Footnote: 1 Grievant was represented by Susan Hubbard with the West Virginia Education Association. Respondent was represented by its counsel, Charles H. Damron.