ANITA EDMONDS,

Grievant,

v. **Docket No. 97-22-120**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Anita Edmonds, filed this grievance on two separate, non-related issues. These two issues were apparently consolidated below for hearing. First, Grievant avers the Lincoln County Board of Education ("LCBOE") violated W. Va. Code § 18-29-2 when it stopped paying her travel expenses between her two places of employment. She requests as relief to be reimbursed for these travel expenses. Second, Grievant argues LCBOE violated W. Va. Code §§ 18A-4-8 and 18A-2-5 when it did not reclassify her as a Secretary II. Grievant requests to be reclassified as a Secretary II and to receive appropriate compensation for the time she was employed as a Secretary but was paid as a Clerk, her current classification.

The procedural history of this case is somewhat confusing. This grievance was filed on November 19, 1996. A Level II hearing was held on December 2, 1996. No Level II Decision was ever issued and on February 25, 1997, Grievant's representative, Susan Hubbard, sent a letter to LCBOE stating Grievant had won by default. LCBOE did not respond to this letter. Although it is unclear when, sometime thereafter while Grievant'srepresentative was serving in the Legislature, LCBOE met with Grievant and agreed to settle the grievance. Grievant never received any settlement agreement after this meeting. Because there was no further word from LCBOE, Grievant the appealed this grievance to Level IV on March 5, 1997.

A Level IV hearing was scheduled for October 31, 1997. (See footnote 1) **That same notice informed LCBOE that the Level II transcript was due in this office on or before October 24, 1997. The Level II transcript has never been received by this Grievance Board. Counsel for LCBOE , Charles Damron, did not appear at the Level IV hearing, nor was there any word from**

him. As it was clear that appropriate notice of this hearing had been sent, a Level IV hearing was held on October 31,1997, as scheduled. Because there was a need for some documents from LCBOE, the undersigned Administrative Law Judge allowed the record to remain open. On November 20, 1997, the undersigned Administrative Law Judge wrote the parties ordering them to submit the specified documents. Although Grievant's representative did receive some of the materials she requested, the documents requested by the undersigned Administrative Law Judge were not sent. In the order of November 20, 1997, the parties were notified that the proposed Findings of Fact and Conclusions of Law were due and the case would become mature for decision on January 5, 1998. (See footnote 2) Given the sparse record in this case, this Decision is based upon the unrebutted testimony of Grievant at Level IV. The following Findings of Fact are derived from this information.

Findings of Fact

1. Grievant has been employed as a substitute Clerk by LCBOE for five years.
2. Grievant has been employed as a Secretary II in several schools during that time.
3. In January 1996, Grievant was called to substitute for Secretary II Wanda Jean Neal at McCorkle Elementary ("ME") and Duvall High School ("DHS").
4. Ms. Neal's position required her to work at ME in the morning and DHS in the afternoon. (See footnote 3) Ms. Neal was paid for her travel between the two positions.
5. When Grievant began working in the position she received travel pay. Sometime in September 1996, she was told she would not receive travel reimbursement any more. The rationale given was that she had to pass DHS on her way home.
6. Grievant first took the test to qualify for a Secretary's position in 1992 when she was hired. She did not pass the typing portion of the test. She asked to take the test over. In 1993, she retook the typing portion of the test and again failed.
7. At her Level II hearing, then Superintendent Dallas Kelly agreed to allow Grievant to retake the typing test on a computer, as this is the machine on which she usually typed.
8. Approximately a month before her Level IV hearing, Grievant was scheduled to retake the complete test.
9. In preparation for this last testing, Grievant arrived for her inservice training, as

scheduled, at the testing center at 4:30 p.m. the Friday before the test. (See footnote 4) Greg Miller, the Director of Vocational Programs, informed Grievant she would not be allowed to take the test on a computer even though she had been promised this adjustment by former Superintendent Kelly. Mr. Miller's reason for this change was because Superintendent Kelly was no longer in the LCBOE school system, and he did not have to comply with this adjustment. Additionally, Grievant was informed she was not allowed to use the correct key on the typewriter. At this inservice, the test takers were informed the test the following Monday would be a letter. They were also informed that 50 wpm was the required speed. No information was given about the allowed number of mistakes.

10. Grievant stayed at the inservice for approximately forty-five minutes to one hour and practiced typing a letter given her by Mr. Miller.

11. The following Monday, just before the typing portion of the test was administered, Mr. Miller informed the test takers the test would not be a letter, but would consist of two different papers, and one had some type of columns on it. The test takers were also informed they could not have more than ten mistakes. 12. Grievant had a speed of 50 wpm or greater, but because she had more than 10 errors, her typing test was not graded, and she was not allowed to take the other portion of the Secretary's test.

13. Grievant contacted Marshall Hamilton (See footnote 5) at the State Department of Education ("SDOE"). He informed her a computer could be used in taking the test, and that the 50 wpm were to be corrected for error; thus, the number of mistakes are deducted from the words per minute to achieve an adjusted score. He did not indicate the correct key could not be used.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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.

The issue of travel reimbursement will be addressed first. On this issue, the case of Sexton v. Boone County Board of Education, Docket No. 94-03-044 (June 22, 1994), relates to the issue and is instructive. In Sexton, the grievant requested travel expenses for travel from his morning position to his afternoon duties. The Administrative Law Judge found the grievant was entitled to this compensation because the grievant was a full-time, itinerant employee, scheduled daily to work in two different areas. A September 4, 1990 Opinion issued by State Superintendent Henry Marockie concerning an Adult Basic Education ("ABE") teacher employed under two different ABE contracts is also instructive. Dr. Marockie noted these two positions would be "independent of one another." Additionally, this Grievance Board has ruled that if a grievant's travel from one position to another is not connected by any employment contract, the grievant is responsible for the expenses connected with her travel to her employment site, the same as any other employee. See Wheeler v. Lincoln County Bd. Of Educ., Docket No. 96-22-535 (June 15, 1997) (travel to separate, evening position). Accord, Cool v. Webster County Bd. of Educ., Docket No. 51-86-118-2 (Oct. 15, 1986).

In this instance it is unknown whether the two positions are independent of one another, or whether the two positions make up one itinerant position. This was the information sought by the November 20, 1997 Order. Given this state of affairs and the mandate from the West Virginia Supreme Court of Appeals in Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979), that "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee", the undersigned Administrative Law Judge finds Grievant is entitled to travel reimbursement between the two positions for the entire time she was employed in Ms. Neal's position. Id. at Syl. Pt. 1.

The second issue is whether Grievant should be reclassified and paid as a Secretary for the time she worked in a Secretarial position even though she has never passed the qualifying test. A review of the Code Section which controls competency testing will be helpful in resolving these issues.

W. Va. Code §18A-4-8e states in pertinent part:

> The purpose of these [competency] test shall be to provide county boards of education a uniform means of determining whether school service personnel employees who do not hold a classification title in a particular category of employment can meet the definition of the classification . . .

. . .

Achieving a passing score shall conclusively demonstrate the qualifications of an applicant for the class title. Once an employee passes the competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment . . . .

. . .

Competency tests shall be administered to applicants in a uniform manner under uniform testing conditions.

. . .

A minimum of one day of appropriate inservice training shall be provided employees to assist them in preparing to take the competency tests.

Several issues become clear after examining the requirements of this Code Section. First, employees cannot be classified in a particular classification unless they pass the required test. Thus, Grievant's request for this reclassification must be denied as she has not passed the Secretarial test.

Second, the purpose of the inservice training is to acquaint the applicant with the test content, scoring, and format, and to offer the applicant a chance to practice or "brush up on" the necessary skills. It is not designed to teach the applicants the answers to the test. Quintrell v. Lincoln County Bd. of Educ., Docket No. 95-22-05 (Aug. 31, 1995). W. Va. Code § 18A-4-8e requires an eight hour inservice. However, this Grievance Board, in Quintrell, supra, stated that although employees must be offered this eight hours of training, they may choose to leave after "sign[ing] a written waiver stating they do not wish to receive further inservice and are ready to take the competency test. " Id.; See Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988). It appears from the testimony Grievant did not wish to stay at the inservice site any longer, but it is also clear she did not sign a waiver. It is also understandable an employee may not wish to stay at the inservice site for eight hours, if the beginning time for the inservice is 4:30 p.m. on Friday, as it was here.

Additionally, it appears the inservice did not acquaint Grievant with the test content, scoring, and format. She was not informed at inservice she would be required to type a letter, and this is what she was given to practice. On the day of the test she was given two different things to type, neither of which was a letter, and one of these pages contained columns. She was not informed of the accepted error rate until the day of the test.

As to the requirement that "competency tests shall be administered to applicants in a uniform manner under uniform testing conditions" it appears that this was not done. There is conflict between how Mr. Hamiliton stated the test could and should be given and how it was conducted by LCBOE. Since Grievant's testimony is unrebutted, and it is not unreasonable to accept the statements she attributed to Mr. Hamilton, they will be accepted as true. Thus, the undersigned Administrative Law Judge finds, for this case, the keyboarding portion of the test can be given on a computer, the error rate is used to adjust the speed rate, and a correct key may be utilized during the test.

Additionally, it must be noted that if the then Superintendent told Grievant during her Level II grievance hearing, that she would be allowed to take the test on a computer, this reasonable promise cannot be revoked by Mr. Miller at a later date when there is a new Superintendent.

Thus, in reviewing the process by which the Secretary's test was given, the undersigned Administrative Law Judge finds Grievant is entitled to retake the test withinone month of this Decision. This testing should occur after a proper inservice, following the guidelines established in Quintrell and by the SDOE, and on a computer. If, Grievant passes this test she is to be reclassified from the date of her last testing in the Fall of 1997.

The last issue to examine is whether Grievant should be paid for working out of classification. Clearly, Grievant worked as a Secretary II while she substituted for Ms. Neal. Just as clearly Grievant was not qualified to be placed in this position. Given these two facts, the undersigned Administrative Law Judge finds that both parties benefitted from this arrangement. Grievant had long-term employment, (See footnote 6) and LCBOE employed a Clerk in a secretarial position. Further, Grievant did not complain of this inequity until she had been in the position for over eight months. W. Va. Code § 18-29-5(b) allows the undersigned Administrative Law Judge to provide for an equitable remedy. Thus, given the equities of the situation, and the failure of Grievant to raise the issue until the last month of her employment

in Ms. Neal's position, the Grievant will be allowed the difference in pay between the two classifications from fifteen days prior to the time she filed this grievance until she ceased work in Ms. Neal's position. (See footnote 7) See W. Va. Code §§ 18-29-4(a) and 18-29- 5(b).

The above discussion is supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. "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. Because the unrebutted testimony from Grievant is that the two jobs were one full-time position, she is entitled to compensation for travel from one site to another. Accord, Sexton v. Boone County Bd. of Educ., Docket No. 94-93-044 (June 22, 1994); Cool v. Webster County Bd. of Educ., Docket No. 51-86-118-2 (Oct. 15, 1986).

4. LCBOE violated W. Va. Code § 18A-4-8e, because it did not provide an inservice which acquainted the applicant with the test content, scoring, and format.

5. LCBOE violated W. Va. Code § 18A-4-8e, because it failed to administer the test in a uniform manner under uniform testing conditions.

6. LCBOE violated an agreement which was made during the grievance process which promised Grievant she could take the test on a computer.

7. Grievant demonstrated she worked out of classification.

Accordingly, this grievance is GRANTED. LCBOE is ORDERED to pay Grievant travel reimbursement for all her travel between ME and DHS during the time she substituted for Ms. Neal.

Additionally, LCBOE is ORDERED to allow Grievant to retake the Secretary's competency test after an opportunity for a full, eight hours of inservice by June 30, 1998. Grievant will be allowed to use a computer for this test. Mr. Miller, in assessing whether Grievant passes the

test, will apply the guidelines mandated by SDOE. If Grievant passes the test, she will be reclassified to a Secretary position from her last test date in the Fall of 1997. Grievant is to be paid as a Secretary for any time after that date that she worked in a Secretarial position. Further, Grievant is to be paid as a Secretary for the time she worked in Ms. Neal's position from fifteen days prior to November 11, 1996, until that temporary position ended.

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 the record can be prepared and transmitted to the appropriate court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 27, 1998

Footnote: 1

At Grievant's request, this grievance was placed on hold for a period of time.

Footnote: 2

Ms. Hubbard submitted these proposals, Mr. Damron did not.

Footnote: 3

One of the documents requested by the undersigned Administrative Law Judge was the original posting for this position or positions, so it could be determined if Ms. Neal's position was one full-time position, or if she held two part-time positions.

Footnote: 4

These issues about the inservice and the competency test were incorporated into this grievance as there was no objection, and they were part and parcel of the overall grievance.

Footnote: 5

Mr. Hamilton's exact title is unknown, but he has some responsibility in the area of state competency testing.

Footnote: 6

The undersigned Administrative Law Judge takes administrative notice of the fact there are fewer clerical positions in a school system than secretarial positions.

Footnote: 7

Although there was testimony Grievant may have worked as a Secretary after this time, the information is unclear and lacks the certainty required to make a further monetary award.