SHERRY RICHARDS,

Grievant,

v. Docket No. 99-20-108

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sherry Richards filed this grievance against the Kanawha County Board of Education ("KCBOE"). Her grievance states:

> **I was overlooked in the rotation of substitute clerk for the position of Warehouse Clerk at Crede. The position was filled with someone else beginning November 17 to the current date.**

The relief sought was "to be compensated for the days that I should have been allowed to work, from November 17, 1998, to December 31, 1998." (See footnote 1) **Grievant amended the relief sought to November 17, 1998, to December 4, 1998, when she learned of Kanawha County's nepotism policy. Grievant's mother, Mary Clark, is the foreman at the Crede warehouse. Ms. Clark had been off work since April 1998, but returned to work on Monday, December 7, 1998.**

This grievance was denied at all lower levels. After the Level II decision was issued, it was discovered that some of the testimony given at Level II was in error. Mr. Withrow, KCBOE's attorney asked the Level II Grievance Evaluator to rescind her original decision and open the record for additional testimony. By the time this letter was received by the Grievance Evaluator, the grievance had already been appealed to Level IV, and Mr. Withrow decided to correct the error during these proceedings. The grievance wasappealed to Level IV on March 8, 1999, and a Level IV hearing was held on May 5, 1999. This case became mature for decision on that date, as the parties agreed to make oral arguments at hearing in lieu of proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant argues she should have been called to fill the substitute Warehouse Clerk position at the Crede warehouse. She maintains that someone removed her name from the substitute list and added the name of the substitute employee who received the position, Henry Thomas, after he was already in the position. She also argued someone "whited out" her name on the list and wrote Mr. Thomas' name over hers. Grievant agrees that because of the nepotism policy, she is currently ineligible for employment at the Crede warehouse, as she would be supervised by her mother.

Respondent argues Grievant did not meet her burden of proof, and did not demonstrate that any incorrect actions were taken in filling the substitute position. Respondent noted Grievant did not establish she would have been the next individualcalled out on the rotation list, and that her mother's position at the warehouse calls into question if Grievant should have been called at all, since her mother could have returned to work at any time.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was placed on the substitute Secretary list after she passed the competency test in 1996. She was never called out to work and did not question why until late 1998, when she found out there was no telephone number listed for her. (See footnote 3)

2. On November 7, 1998, Thomas Gunnoe, a Warehouse Clerk, called in sick. He has never returned to work. His position was not filled with a substitute until November 17, 1998.

3. On November 12, 1998, Grievant called Karen Williams, Coordinator of Personnel, to place her name on the substitute Warehouse Clerks' list . Ms. Williams did not know Grievant was Ms. Clark's daughter. Ms. Clark was on sick leave at the time Grievant called Ms. Williams. Ms. Williams told Grievant to call the Acting Warehouse Foreman, Connie Mullins, to place her name on the substitute list.

4. Although Grievant had not passed the competency test for a Warehouse Clerk at that point in time, she could still place her name on the list, because none of thesubstitutes were

qualified for the position as none had taken or passed the Clerk competency test. (See footnote 4)

5. Grievant called Ms. Mullins on November 12, 1998, and asked that her name be placed on the Warehouse Clerks' substitute list. Ms. Mullins knew Grievant was Ms. Clark's daughter.

6. On or about November 17, 1998, Henry Thomas was called out to substitute in Mr. Gunnoe's position.

7. Grievant found out through her mother on December 4, 1998, that Mr. Thomas had been called to fill this substitute position, and she filed her grievance on that date.

8. Both Grievant's and Mr. Thomas' names were on the original substitute list. Level II, Grv. Ex. No. 1. (See footnote 5) The section where these names should have been placed had no more room for additional names, and Grievant's and Mr. Thomas's name had been added above this typed list. Mr. Thomas's name was before Grievant's on this list, but as these names were outside the regular listing, it was impossible to tell which name had been placed on the list first. Grievant's name had been "whited out" sometime after Mr. Thomas' name was placed on the list. (See footnote 6) 9. Grievant obtained this original KCBOE document, containing the names of all potential warehouse substitutes, from her mother when Ms. Clark returned to work on December 7, 1998. (See footnote 7)

10. Grievant did not know what the document looked like on or about November 17, 1998. (See footnote 8)

11. KCBOE calls out substitutes on a rotating basis in accordance with W. Va. Code § 18A-4-15. By November, KCBOE was having trouble filling substitute positions. No evidence was presented to demonstrate whether Grievant's or Mr. Thomas's name was on the list first, whether the Warehouse Clerk's substitute list was utilized in calling out a substitute for Mr. Gunnoe, or if Mr. Thomas was offered the position without his name even being on the list as Grievant contends. No evidence was presented to identify who called Mr. Thomas to substitute, or who "whited out" Grievant's name.

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 theW. 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.

"A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957).

In this case, Grievant has failed to meet her burden of proof. No evidence was presented by Grievant on the key issues involved. Grievant did not call either Ms. Mullins or Ms. Clark to give testimony about what happened. Of course, if KCBOE did not follow the proper procedure identified in W. Va. Code § 18A-4-15 in calling out substitutes to fill the position, and Grievant could demonstrate she would have been the next person called, she would be entitled to the relief she seeks. Although Grievant voiced what she had heard had happened, these double hearsay reports alone, without substantiating evidence or sworn testimony, cannot prove Grievant's case. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Baker v. Bd. of Directors/W. Va.Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-112A (June 26, 1998); Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

Conclusions of Law

1. 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.

2. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957). 3. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT- 359 (Apr. 30, 1998); See Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97- BOD-112A (June 26, 1998); Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

4. Grievant has failed to meet her burden of proof. Grievant presented insufficient, substantiating data in the form of evidence or sworn testimony, to support her beliefs that the substitute position in question was filled incorrectly.

5. Grievant did not demonstrate KCBOE violated W. Va. Code § 18A-4-15 when it call Mr. Thomas to fill the substitute position, as she did not prove she would have been the next person to be called to fill this position.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the

appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 26, 1999

Footnote: 1

It is unclear why Grievant chose these dates, as the Warehouse Clerk she would have substituted for has never returned to work.

Footnote: 2

Grievant was pro se, and Respondent was represented by KCBOE's General Counsel James Withrow.

Footnote: 3

At this time, Grievant has also passed the competency test for Warehouse Clerk and remains qualified as a Secretary, but she has not called to obtain her PIN (Personal Identification Number). This number is required before a substitute can be paid. No reason was offered as to why Grievant has not taken this important step.

Footnote: 4

This situation was rectified as of December 1998.

Footnote: 5

A copy of this exhibit had been submitted with the record. It was impossible to see whether anything had been "whited out" by examination of this copy. At Level IV, the original was placed into evidence to replace this copy.

Footnote: 6

Grievant attempted to argue her name had been "whited out" and Mr. Thomas's had been written over hers. This argument is not supported by the document. It is clearthat when Grievant's name was "whited out", Mr. Thomas' name was on the document because part of his name was accidently "whited out" at the same time.

Footnote: 7

There was no evidence presented to demonstrate Ms. Clark had prior permission to give her daughter this original work record.

Footnote: 8

Grievant indicated her mother had stated, that Ms. Mullins had said, that Mr. Thomas' name was added to the

list after he started work. Although the rules of evidence do not generally apply to grievance proceedings, this double hearsay will be given no weight, especially since Grievant had the right to call both Ms. Clark and Ms. Mullins and failed to do so.