CYNTHIA K. HUNGATE,

Grievant,

v. **Docket No. 99-41-065**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Cynthia K. Hungate (Grievant) against Raleigh County Board of Education (RCBE), alleging that she was the victim of discrimination when RCBE did not select her for a secretarial position. Grievant seeks pay and benefits for the days she would have worked in the position.

The grievance was denied at Level I by RCBE's Director of Personnel, Emily Meadows (Personnel Director Meadows), on December 1, 1998. A Level II hearing was held on January 25, 1999, before Grievance Evaluator Connie Giammerino. Grievant was represented at this hearing by John Roush, Esq. and Sandra Boland, and RCBE was represented by Personnel Director Meadows. The grievance was denied at Level II by Ms. Giammerino on February 4, 1999. Grievant waived consideration at Level III pursuant to W. Va. Code § 18-29-4(c).

Grievant appealed her grievance to Level IV, where a Level IV hearing was held before the undersigned administrative law judge, at the Grievance Board's Beckley office,on May 25, 1999. At that hearing, Grievant was again represented by John Roush, Esq. and Sandra Boland, and RCBE was represented by Personnel Director Meadows and Erwin Conrad, Esq. The parties were given until June 24, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date.

The following Findings of Fact have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is a substitute school service employee classified as a secretary.

2. On November 10, 1998, Grievant was assigned to substitute for secretary Linda Meadows at RCBE's Academy of Careers and Technology. Linda Meadows had advised her principal that she would be using her accumulated annual leave, and would then begin using her accumulated sick leave.

3. Sick leave absences are often extended by additional doctor's excuses, and RCBE does not always know when an employee will return from sick leave, annual leave, workers compensation leave, or other leave.

4. It had been RCBE's policy not to post the vacant positions created by employees absent on leave when the employee's return date was unknown or uncertain, but to allow substitutes to continue in those positions until the regular employee returned.

5. It had been RCBE's policy to post the vacant positions created by employees absent on leave when it knew that the employee's leave would be more than 30 days in length. 6. On November 4 - 6, 1998, Personnel Director Meadows attended the State Personnel Directors Annual Conference, where Howard Seufer, Esq. advised that school service personnel positions should be posted whenever an employee's absence exceeds 30 days.

7. Upon learning this, Personnel Director Meadows began posting all positions that had been or would likely be vacant for 30 or more days.

8. On November 30, 1998, Linda Meadows' position was posted, and Grievant applied for it. A more senior applicant, substitute Kelly Lilly (Lilly), was selected. Grievant, however, continued in the position until January 4, 1999, when Lilly took over.

9. Linda Meadows' position was the first one posted under RCBE's new policy of posting all positions that had been or would likely be vacant for 30 or more days.

10. By January 11, 1999, Personnel Director Meadows had ascertained the names of all RCBE employees whose positions had been or would likely be vacant for 30 or more days. These positions were posted on either January 12, or January 19, 1999.

11. Linda Meadows is not related to Personnel Director Meadows.

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. A preponderance of the evidence is defined as "evidence which is of greater weight or moreconvincing 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

___This grievance began when Personnel Director Meadows attended the State Personnel Directors Annual Conference, where Howard Seufer, Esq. advised that school service personnel positions should be posted whenever an employee's absence exceeds 30 days. Mr. Seufer's advice was based on W. Va. Code § 18A-4-15, which provides, in pertinent part:

> 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;
>
> (2) To fill the position of a regular service employee on leave of absence: Provided, That if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article.

W. Va. Code § 18A-4-8b provides that "[b]oards shall be required to post and date notices of all job vacancies. . . ."

This Grievance Board has held that, once it is determined that a regular employee's leave of absence is to be greater than thirty days, a county board of education is obligatedto post and fill the vacancy with a long-term substitute pursuant to W. Va. Code § 18A-4-8b. Bays v. Putnam County

Bd. of Educ., Docket No. 95-40-096 (July 21, 1995). See Serdich v. Preston County Bd. of Educ., 200 W. Va. 34, 488 S.E.2d 34 (1997); Clark & Melton v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997); Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996); Hensley v. Mingo County Bd. of Educ., Docket No. 93-29-037 (July 6, 1994).

Grievant alleges that she was the victim of discrimination when RCBE did not select her for the secretarial position at its Academy of Careers and Technology. Grievant bases her discrimination claim on the fact that, in the past, RCBE had filled other vacant positions with substitutes without posting them, and argues that, had these positions been posted, she might have applied for and received one of them.

W. Va. Code § 18-29-2(m) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In order to establish a prima facie case of discrimination, a grievant must prove:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. Of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstratea legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was mere pretext. Steele, supra.

Grievant failed to establish a prima facie case of discrimination. Grievant has shown that she was similarly situated, in a pertinent way, to one or more other employees, in that she was one of many substitute service personnel who could apply for vacant positions posted by RCBE. However, Grievant has failed to prove that she was, to her detriment, treated by her employer in a manner that

other employees were not.

Personnel Director Meadows, having learned that a personnel policy of RCBE was incorrect, sensibly changed that policy. It is not disputed that both the old and the new policies were applied equally to all substitute service personnel. Unfortunately for Grievant, the position she occupied was the first one posted under RCBE's new policy. She therefore bore the brunt of the new policy, when she was ousted by a more senior applicant. However, because the new policy was applied equally to all substitute service personnel, Grievant has failed to prove that she was, to her detriment, treated by her employer in a manner that other employees were not.

Finally, to the extent that RCBE's previous policy might have been in error, and negatively impacted Grievant, past mistakes by RCBE do not bind it to continue an unlawful policy. Samples v. Raleigh County Bd. of Educ., Docket No. 98-41-391 (Jan. 13, 1999); Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989).

Consistent with the foregoing discussion, the following Conclusions of Law aremade in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, 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. Discrimination is defined as any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W. Va. Code § 18-29-2(m).

3. In order to establish a prima facie case of discrimination, a grievant must prove:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. Of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was mere pretext. Steele, supra. 4. Grievant failed to establish, by a preponderance of the evidence, a prima facie case of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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. 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.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated July 6, 1999