

MARSHA BLANKENSHIP,

Grievant,

v.

Docket Nos. 00-50-135/138

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On December 3, 1999, Marsha Blankenship (Grievant) initiated a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Wayne County Board of Education (WCBE) had failed to permit her to “step-up” to fill a temporary vacancy in a full-day Cook position at the school where she was assigned as a substitute Cook. Grievant's immediate supervisor did not have authority to resolve the grievance, and the matter was appealed to Level II where an evidentiary hearing was conducted on February 4, 2000. On March 3, 2000, James J. Ross, the Superintendent's designee, issued a Level II decision denying the grievance. Grievant appealed to Level IV on April 6, 2000, by-passing Level III, as authorized by W. Va. Code § 18-29-4(c). This grievance was assigned Docket Number 00-50-135.

On March 20, 2000, Grievant filed a second grievance, alleging that WCBE continued to fail to permit her to “step-up” by refusing to recognize that she had attained regular status after working more than 30 consecutive days in the same position. This grievance was similarly waived to Level II where an evidentiary hearing was conducted on March 30, 2000. On April 10, 2000, this grievance was likewise denied by the Superintendent's designee, James J. Ross. Grievant again by-passed Level III, appealing to Level IV on April 14, 2000. This grievance was assigned Docket Number 00-50-138.

By agreement of the parties, these grievances were consolidated for hearing, and a Level IV hearing was conducted in WCBE's offices in Wayne, West Virginia, on May 18, 2000. [\(See footnote 1\)](#)

At the conclusion of that hearing, the parties waived oral and written closing arguments, and the matter became mature for decision at that time.

Based upon a preponderance of the credible evidence contained in the record established at Levels II and IV, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Wayne County Board of Education (WCBE) as a substitute Cook.
2. On November 3, 1999, Grievant was called to fill a vacancy for a half-time Cook at Spring Valley High School.
3. On at least one occasion between November 3, 1999, when Grievant began working at Spring Valley High School, and December 3, 1999, when this grievance was filed, a temporary vacancy arose at Spring Valley High School when a full-time regular Cook was absent.
4. WCBE does not recognize a substitute employee as having any entitlement to regular pay and benefits until the employee has held the same temporary position for 30 consecutive working days, or the employee has been competitively selected to fill a posted long-term vacancy as authorized by W. Va. Code § 18A-4-15(2). Because Grievant was not employed as regular service personnel, and she had not worked in the position at Spring Valley High School for 30 consecutive working days, she was not offered the opportunity to "step-up" and fill a temporary full-time Cook position prior to December 3, 1999.
5. WCBE permits substitute employees to "step-up" and fill a temporary vacancy in the same classification of employment after the substitute has been working in the same position for 30 consecutive working days.
6. When no regular employee, including a substitute who meets WCBE's criteria for regular pay and benefits, elects to "step-up" to fill a temporary vacancy, WCBE attempts to fill the vacancy by calling the next substitute on the rotation list for that classification, until an employee is found who is available, and willing to accept the assignment. Whenever Grievant's name on the rotation list is reached through this process, she is offered the opportunity to fill the full-time vacancy on a temporary basis, without forfeiting her right to return to the position she was originally called in to fill.
7. On occasion, supervisors responsible for requesting substitutes may have allowed substitute

employees who had not yet worked in the same position for 30 consecutive working days to “step-up” and fill a vacancy, based upon past experience that no substitute would become available, until that employee was reached on the substitute rotation list.

8. During the 1999-2000 school year, Grievant worked more than 30 consecutive days as a substitute half-time Cook at Spring Valley High School.

9. Grievant's temporary assignment at Spring Valley High School ended when an employee was selected to fill the position Grievant had been filling as a substitute. Grievant was called out to work the following day, as a substitute half-time Cook at Kellogg Elementary School.

10. When Grievant was called out to work at Kellogg Elementary School, WCBE no longer recognized Grievant as having any entitlement to receive regular pay and benefits, counting her first day at Kellogg as the first day in a new period wherein she would not acquire regular pay and benefits until she worked another 30 consecutive days in that position.

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. Resolution of this grievance requires application of certain provisions in W. Va. Code § 18A-4-15. That statute states, in pertinent part:

The county board shall employ and the county superintendent, subject to the approval of the county board, 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. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position: Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided herein, upon

termination of the leave of absence said employee shall be returned to his or her original position;

(3) To perform the service of a service employee who is authorized to be absent from duties without loss of pay;

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight [§ 18A-2-8], article two of this chapter, or death of the regular service employee who had been assigned to fill such position: Provided, That within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b of this article and section five [§ 18A-2-5], article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

(5) To fill the vacancy created by a regular employee's suspension: Provided, That if the suspension is for more than thirty working days the substitute service employee shall be assigned to fill the vacancy on a regular basis and shall have and be accorded all rights, privileges and benefits pertaining to such position until such termination by the county board becomes final. If the suspended employee is not returned to his job, the board shall fill the vacancy under the procedures set out in section eight-b of this article and section five, article two of this chapter; and

(6) To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis under the procedure set forth in section eight-b of this article.

Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned 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 under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

* * *

Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel in sections six, seven, eight and eight-a [§§ 18A-2-6, 18A-2-7, 18A-2-8 and 18A-2-8a], article two of this chapter.

Grievant's first complaint relates to not being allowed to "step-up" and fill a full-time Cook position when a temporary vacancy arises at the school where she is already assigned as a half-time substitute. Grievant suggests that an employee who is working as a half-time Cook at a particular school is the logical choice to fill in for an absent full-time Cook in the same location. Although this scenario provides a reasonable method for filling such a vacancy, it is not the procedure adopted by the Legislature. W. Va. Code § 18A-4- 15 specifies:

. . . if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position.

The language in the statute is unambiguous, and no further interpretation is required. See State ex rel. Myers v. Garner, 148 W. Va. 92, 133 S.E.2d 82 (1963); Kinsey v. Kinsey, 143 W. Va. 574, 103 S.E.2d 409 (1958). See also State v. Bragg, 152 W. Va. 372, 163 S.E.2d 685 (1968). The privilege of filling in for an absent employee is extended only to regular employees. Grievant had only been working as a substitute for 20 days at the time she filed her first grievance. Therefore, inasmuch as Grievant was neither regularly employed in a school service personnel position, nor employed for the required length of time to become entitled to regular pay and benefits, as of the time when the alleged violation occurred, WCBE correctly sought substitutes to fill the full-time Cook vacancy from the substitute list. Accordingly, WCBE did not violate W. Va. Code § 18A-4- 15 by failing to offer Grievant an opportunity to "step-up" and fill the vacancy created by the temporary absence of a full-time Cook at the school where Grievant was assigned as a substitute Cook.

Grievant's second claim alleges that WCBE failed to recognize her regular status after she worked for 30 consecutive days in the same position. At Level IV, Grievant clarified her position by explaining that she believes she is entitled to regular pay and benefits whenever she is employed as a substitute for the remainder of the school year, once she has crossed the threshold to regular status by working for 30 consecutive days. As applied to the facts in this grievance, Grievant's approach would require

WCBE to continue to pay her regular pay and benefits from the first day she reported to Kellogg Elementary School, whether that first day was the day following the termination of her previous substitute assignment, or even a week or a month or more following such assignment, solely because she worked more than 30 consecutive days in an assignment at Spring Valley High School during the same school year, and had thereby attained an entitlement to regular pay and benefits.

This Grievance Board has previously determined that the term, "regular employee status," as used in W. Va. Code § 18A-4-15, only entitles substitute service personnel to the "rights privileges and benefits" of a position until the regular service employee returns, or the position is filled pursuant to W. Va. Code § 18A-4-8b. Spencer v. Kanawha County Bd. of Educ., Docket No. 91-20-205 (July 23, 1991). Thus, an employee who has been competitively selected pursuant to W. Va. Code § 18A-4-8b to fill a posted vacancy for a long term substitute in accordance with W. Va. Code § 18A-4-15(2), loses their regular employment status when the regular employee returns, or the position is permanently filled. Id. Grievant's claim to continuing regular status, once she has been called in off the substitute rotation list, and permitted to work more than 30 consecutive days, is even more tenuous. See Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994).

Although substitutes "who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal" extended to regular employees, entitlements to regular pay and benefits are granted under more limited circumstances. When all of the provisions in W. Va. Code § 18A-4-15 are read in pari materia, it must be concluded that any entitlement to regular pay and benefits gained by a substitute employee, based upon working in a position for 30 consecutive days, ceases when the employee leaves that position, whether based on return of the regular employee, or competitive selection of another employee to fill the vacancy, and the substitute does not regain such entitlement until he or she works for another 30 days in another position. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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. W. Va. Code § 18A-4-15 does not require that a substitute employee, who is filling a vacancy created by the temporary absence of a regular employee, be offered the opportunity to fill the position of another absent employee who is employed in the same classification category of employment and at the same building or work location, unless the substitute has attained entitlement to regular pay and benefits under one of the methods authorized in W. Va. Code § 18A-4-

15. 3. A substitute school service employee who obtains entitlement to regular pay and benefits as a result of filling the same position for 30 consecutive days does not continue to enjoy such benefits after their assignment is terminated upon return of the regular employee who was absent, or when the position is filled through competitive posting. See Spencer v. Kanawha County Bd. of Educ., Docket No. 91-20-205 (July 23, 1991).

4. Grievant failed to establish that Respondent Wayne County Board of Education violated W. Va. Code § 18A-4-15, or any other statute, rule, policy, regulation or written agreement, by failing to allow her to “step-up” and fill the position of another regular Cook at the school where she was assigned as a substitute Cook, or by failing to continue according her the rights, privileges and benefits of a regular employee after the substitute assignment in which she worked for more than 30 days was terminated, and a new substitute assignment commenced immediately thereafter.

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 31, 2000

[Footnote: 1](#)

Grievant was represented by Susan Hubbard, a UniServ Consultant with the West Virginia Education Association, and WCBE was represented by counsel, David Lycan.