

**PATRICIA GRIFFITH,**

**Grievant,**

**v.**

**Docket No. 99-03-172**

**BOONE COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Grievant, Patricia Griffith, filed this grievance against the Boone County Board of Education ("BBOE"). [\(See footnote 1\)](#) The statement of grievance reads:

Respondent employed a less senior substitute cook at Scott High School. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b & 18A-4-8g.

As relief, Grievant seeks "instatement to the position with back pay and all other benefits of regular employment retroactive to the date of the filling of the position." Before proceeding to the issues presented in this decision, two procedural matters need to be addressed. The first matter is simply to mark and admit the exhibits jointly submitted by the parties to supplement the Level II record. Those exhibits, as identified by Grievant's counsel, are:

Joint Exhibit 1 - A grievance form filed by Terry Kidd and dated December 8, 1997, which contains a date stamp of the Boone County Board of Education, and is marked by the Respondent as received on December 8, 1997.

Joint Exhibit 2 - A hand-written page which is signed "Terry Kidd."

Joint Exhibit 3 - A letter dated December 12, 1997, from Martha C. Hill, food Service Director, to Ms. Kidd.

Joint Exhibit 4 - A letter dated December 17, 1997, from Gary D. Sumpter, Superintendent of Schools, to Ms. Kidd.

Joint Exhibit 5 - A two-page "employment record of Terry Kidd" which contains the following notation, "April 7, 1998-S. Hill".

These five exhibits are Ordered admitted into evidence at Level IV.

The second matter involves the cancellation of the hearing scheduled on this grievance for September 8, 1999. Grievant has asked that BBOE be required to pay her travel expense from Florida to West Virginia for the hearing, and her salary for the days she missed work in Florida so she could attend the hearing. Neither party presented any evidence in support of their positions. BBOE's attorney, Timothy R. Conaway, had orally requested the continuance either late in the day on September 7, 1999, or early on September 8, 1999, due to a trial which had continued into September 8. He represented in a letter to Grievant's attorney, John Everett Roush, in response to Grievant's request for costs, that the court had appointed him to represent the defendant in a criminal case, the trial started on September 7, 1999, and it continued over to September 8, 1999, that he did not actively pursue these court appointments, and he did not structure his schedule in anticipation of the trial continuing for several days. He noted that, inasmuch as he had agreed to allow Grievant's testimony to be taken by telephone in the future, she would not have this same expense again. He further stated, "[m]oreover, your client is presently on the Boone County Board substitute list. We have every reason to believe your client resides in the State of West Virginia where she will be available for substitute work. If she is not residing in the State of West Virginia, I would suggest that it would be appropriate for your client to resign her position."

Grievant cited "the equitable powers granted to the administrative law judge pursuant to West Virginia Code §§ 18-29-5 and 18-29-3(o)," for the authority for such an award. Grievant's counsel acknowledged that the delay was not Mr. Conaway's fault and that it was not easily foreseeable, but stated, "my client bore the brunt of the expenses occasioned by the delay." Grievant's counsel also pointed out that any back pay awarded to Grievant would be offset by the wages she earned in her job in Florida. Finally, he cited the equitable maxim, "'. . . where one of two innocent parties must suffer because of the derelictions of a third party it is the least culpable of the two parties who should prevail,'" and argued that, while both parties were innocent here, Grievant was the less culpable.

The Grievance Board's Procedural Rules address requests for continuances at Rule 4.7, providing as follows:

Any party may request a continuance of a hearing or other proceeding related to a grievance. Requests for a continuance of a hearing will be granted upon a showing of good cause. Unless time does not permit, a request for a continuance is to be made in writing to the administrative law judge and served upon all parties of record. The administrative law judge may, upon his own motion, continue hearings or other proceedings.

Under the circumstances, Respondent properly made the request for a continuance, demonstrated good cause, and the continuance was granted.

The Grievance Board's Procedural Rules do not address the assessment of costs. W. Va. Code § 18-29-5 provides the undersigned with the authority to “allocate costs among the parties in accordance with section eight [§ 18-29-8] of this article.” W. Va. Code § 18-29-8 addresses in the first paragraph the expenses incurred at Levels I through III, and then in the second paragraph it addresses the expenses incurred on appeal to circuit court. It does not address any expenses incurred at Level IV.

The state employees grievance procedure provides at W. Va. Code § 29-6A-7 for the allocation of costs in certain situations as follows:

Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs.

The education employees grievance procedure does not contain a similar provision, however. “In the absence of specific statutory authority, litigants are normally responsible for their own fees and costs. See generally Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).” Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996). The undersigned finds no authority for the award requested by Grievant. Further, Respondent did not act in bad faith. Grievant's request for expenses is Denied.

Moving on to the issues presented by this grievance, the following Findings of Fact are made from the evidence presented at Level II.

### **FINDINGS OF FACT**

1. At all times pertinent to this grievance, Grievant was employed by BBOE as a substitute cook. She was first employed by BBOE on March 3, 1992, as a substitute cook. Grievant voluntarily resigned her employment with BBOE effective August 16, 1994, and her name was removed from the substitute list. On February 7, 1995, she was reemployed by BBOE as a substitute cook, and has been continuously employed by BBOE as a substitute cook since that time. From March 21, 1995, through March of 1996, she was also employed as a substitute bus operator. On May 7, 1996, she also began working as a substitute aide and substitute custodian for BBOE, while continuing to work as a substitute cook.

2. Grievant bid on a long-term substitute cook position, and was employed by BBOE in that position, full-time, from August 20, through November 2, 1998. She earned regular seniority during this period.

3. On November 18, 1998, BBOE posted a half-time (four hours a day) cook position at Scott High School. Grievant applied for the position, as did 12 other applicants. 4. The successful applicant was Terry Kidd. Ms. Kidd had been employed as a substitute cook by BBOE prior to her selection for this position, since October 5, 1997. Prior to that, she had been employed by BBOE from March 8, 1993, until March 16, 1996, when Martha Hill, the food service director, asked that her name be removed from the substitute cook list because she said Ms. Kidd was not available for work, that is, she would not come to work when called. In the fall of 1997, Ms. Kidd's name was returned to the substitute cook list at her request. Her seniority from March 8, 1993, through March 16, 1996, was returned as a result of a grievance. Ms. Kidd earned regular seniority when she was employed in two long- term substitute cook positions from December 1997, through January 12, 1998.

5. Grievant had more regular seniority than Ms. Kidd.

6. Grievant had good evaluations.

### **DISCUSSION**

Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996). Grievant first questioned the calculation of her substitute seniority, arguing her break in service was not a resignation, but rather was a request for a leave of absence, or simply a request not to call her as she would not be available. Second, she argued if it was a resignation, she should still be allowed to

count her seniority before the break in service. Third, she argued at the hearing that, regardless of the amount of substitute seniority, she had more regular seniority than Ms. Kidd, and should have been selected for that reason. Grievant did not pursue this argument in her written argument.

Finally, Grievant found it troubling that Ms. Kidd was not treated as having a break in service due to her filing of a grievance, and that Grievant should not receive different treatment simply because she did not file a grievance and was honest in saying she would not be available. Due to the outcome of this grievance, this issue need not be addressed; however, the undersigned will note that there is insufficient information in the record to adequately compare the events surrounding the removal of Ms. Kidd's name from the substitute list to Grievant's voluntary resignation, or to make a finding regarding whether Ms. Kidd's seniority should have been returned to her. The undersigned would note that it is clear Ms. Kidd did not voluntarily resign her employment.

Respondent argued that W. Va. Code § 18A-4-8g clearly sets out the seniority rules, and Grievant lost her seniority when she resigned. It argued that the form returned by Grievant to BBOE in 1994 saying she did not wish to be employed as a substitute could only be seen as a resignation, BBOE treated it as a resignation, and that the letter sent by BBOE to Grievant informing her that her name had been removed from the substitute list and wishing her well resolved any ambiguity. [\(See footnote 2\)](#) Respondent pointed out that Grievant did not then inform BBOE that it was mistaken and that she did not intend to resign. Respondent also responded that it is substitute seniority which controls in this instance, and Ms. Kidd had the most substitute seniority. Respondent did not indicate how it arrived at this conclusion.

As to whether Grievant resigned in 1994, she returned a form to BBOE on which she had checked, "[n]o, I am not interested in being employed as a Substitute Service Employee for School Year 1994-95 at this time." She stated she was working out of town, and was not able to substitute. She did not sign an employment contract until she was reemployed by BBOE in 1995. Regardless of what Grievant intended, BBOE treated this as a voluntary resignation. BBOE did not attempt to hide this from Grievant, and Grievant did not tell BBOE that she did not intend to resign. Grievant has not pointed out any impropriety in BBOE treating this as a voluntary resignation, and it appears entirely proper. Grievant was not available for work, stated she was not interested in being employed as a substitute, and did not request a leave of absence for a definite period of time. Grievant voluntarily resigned her employment.

This Grievance Board has previously addressed the effect of a voluntary break in service. Generally, an employee "cannot recapture seniority based upon their years of experience before a voluntary break in service." Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996). This principle was established in Chapman v. Webster County Board of Education, Docket No. 92-52-349 (February 25, 1993). Chapman was not retroactive, however. "[E]mployees who had been credited with experience prior to a voluntary break in service before the date of the Chapman decision would be allowed to keep it. Those employees who voluntarily left a board's employment after the date of Chapman, February 25, 1993, could not do so." Dempsey, supra. Grievant voluntarily left her employment after February 25, 1993, and could not be credited with her years of service prior to her resignation.

The final issue is whether regular seniority or substitute seniority should have determined which applicant should have been chosen. Although Grievant did not argue this point in her written argument for some reason, she did argue it at Level II, and the undersigned cannot simply ignore this issue given the Grievance Board's prior rulings on this issue. With regard to filling long-term temporary positions, W. Va. Code § 18A-4-15 provides, 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: . . . (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.

It further provides regarding substitutes:

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.

Code § 18A-4-8b provides that the selection of an employee to fill a posted position, whether permanent or long-term temporary, is to be made based upon seniority, qualifications and evaluation of past service. It further states:

Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;
- (2) Service personnel whose employment has been discontinued in accordance with this section;
- (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
- (4) Substitute service personnel; and
- (5) New service personnel.

. . .

For purposes of determining seniority under this section an employee's seniority begins on the date that he or she enters into his assigned duties.

. . .

The seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed by the county board of education within a particular job classification. . . .

W. Va. Code § 18A-4-8g also addresses seniority for school service personnel, providing, in pertinent part:

Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five, article two of this chapter and continues until the employee's employment as a regular employee is severed with the county board. Seniority shall not cease to accumulate when an employee is absent without pay as authorized by the county board or the absence is due to illness or other reasons over which the employee has no control as authorized by the county board. Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen of this article, after executing with the board a contract of employment as provided in section five, article two of this chapter.

The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter or employment as a substitute with the county board is severed. Seniority of a regular or substitute employee shall continue to accumulate except during the time when an employee is willfully absent from employment duties because of a concerted work stoppage or strike or is suspended without pay.

For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e of this article:

A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen of this article: Provided, That a substitute employee who accumulates regular seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

. . .

Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose.

. . .

None of these statutory provisions clearly states whether regular seniority or substitute seniority is to govern when two substitutes are competing for a long-term temporary position under these circumstances. This Grievance Board has determined, however, that in such circumstances, "the actual amount of regular seniority time the applicants possess must be utilized to award the position, if such seniority is present." Dempsey, supra. "It is apparent from reading the above cited statutory provisions together that regular seniority is to take precedence over substitute seniority, with one clear exception: when filling a position until it is posted. W. Va. Code § 18A-4-15 is clear in stating that in this instance, it is substitute seniority which governs. No other exception is stated." Brunty v. Lincoln County Bd. of Educ., Docket No. 99-22-069 (July 13, 1999). As between Grievant and Ms. Kidd, Grievant had more regular seniority. However, the record does not reflect the regular seniority of the other applicants. Accordingly, Grievant has not demonstrated she should have received the position at issue, and it is appropriate to require BBOE to review the regular seniority of all qualified



applicants as of the time the position at issue was posted, and to award the position to the qualified applicant with the most regular seniority.

The following Conclusions of Law support the Decision reached.

### **CONCLUSIONS OF LAW**

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).

2. An employee who voluntarily resigned her employment after February 25, 1993, "cannot recapture seniority based upon their years of experience before a voluntary break in service." Dempsey v. Mingo County Bd. of Educ., Docket No. 96-29-020 (June 28, 1996).

3. Grievant cannot be credited with her years of service prior to her voluntary resignation.

4. "[W]hen filling service personnel positions, the actual amount of regular seniority time the applicants possess must be utilized to award the position, if such seniority is present." Dempsey, *supra*. Hughes v. Mason County Bd. of Educ., Docket No. 99-26-185 (Aug. 11, 1999); Brunty v. Lincoln County Bd. of Educ., Docket No. 99-22-069 (July 13, 1999).

5. Grievant demonstrated a flaw in the selection process. The qualified applicant with the most regular seniority should have been placed in the position at issue. While Grievant demonstrated she has more regular seniority than the successful applicant, she did not demonstrate she was the applicant with the most regular seniority. Grievant did not demonstrate she was entitled to the position.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent Boone County Board of Education is **ORDERED** to review its records and determine which qualified applicant held the most regular seniority as of the date the position at issue was posted. If Grievant is found to be the applicant with the most regular seniority, she is to be placed in the position, effective the date it was filled by Ms. Kidd, and be paid back pay from that date, offset by any pay she received from Respondent as a result of her employment as a substitute, and any wages she earned while employed elsewhere in a position which would have prevented her from simultaneously holding the subject position; her regular seniority is also to be adjusted to reflect her service in that position from that date; and she is to be awarded any other benefits to which she would have been entitled had she

been placed in the position originally.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

**BRENDA L. GOULD**

**Administrative Law Judge**

**Dated: March 16, 2000**

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[Footnote: 1](#)

*The record does not reflect when this grievance was filed, or what occurred at Level I. Grievant appealed to Level II, where a hearing was held on April 12, 1999. A Level II decision denying the grievance was issued on April 20, 1999. Grievant waived Level III, appealing to Level IV on April 26, 1999. After this grievance was set for hearing and continued for good cause shown on several occasions, the parties agreed that this grievance could be decided based upon the record developed at Level II. This grievance became mature for decision on March 8, 2000, upon receipt of the last of the parties' written arguments.*

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[Footnote: 2](#)

*Grievant argued she never received the letter from BBOE. BBOE's witness testified the letter would have been sent to the address Grievant had provided to them. Grievant testified she did not remember getting the letter. Whether Grievant received this letter is of no moment.*