NANCY CONRAD,

Grievant,

v. **Docket No. 00-34-341**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Nancy Conrad, employed by the Nicholas County Board of Education (NCBOE) as an Aide, filed a level one grievance on August 23, 2000, in which she alleged a violation of W. Va. Code §18-5-39 when she "was denied the opportunity to substitute in a vacant summer aide position . . . pending it's filling pursuant to a West Virginia Code §18A-4-8b posting." The relief sought by Grievant was "retroactive compensation for all lost wages and benefits and interest on all monetary sums," for the first thirteen days of the assignment completed by another employee.

After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the claim to level four on October 31, 2000. The parties agreed that the matter could be submitted for decision based upon the lower level record, supplemented with proposed findings of fact and conclusions of law filed on January 10, 2001. (See footnote 1) The grievance was transferred to the undersigned for disposition on January 16, 2001.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by NCBOE as an Aide since October 12, 1984.

2. On June 12, 2000, NCBOE posted an extra curricular vacancy announcement for four Bus/Instructional Aides. These positions were to consist of three, eight hour days per week from June 27 to August 3, 2000.

3. Prior to the summer of 2000, it had been NCBOE's practice to assign unsuccessful applicants for summer positions as substitutes when the successful applicants were absent.

4. Grievant had not been employed by NCBOE in previous summers, but was placed on the

substitute list in Summer 2000 at her request.

5. Peggy Fitzwater was the only other regular aide on the summer substitute list with more seniority than Grievant. Ms. Fitzwater was assigned most of the summer to a long-term position for Carolyn Chapman.

6. Sometime after the June 12 posting, NCBOE realized that a fifth Aide position would be needed for the summer. Mike Westfall, an Aide with a seniority date of March 7, 1995, was assigned to the position, effective June 27, 2000, based upon his prior summer work experience as a regular employee in 1997 and as a substitute in 1999.

7. On July 10, 2000, NCBOE posted a vacancy announcement for the position of Aide held by Mr. Westfall, to be effective July 18 through August 3, 2000.

8. On July 20, 2000, Grievant was called to work, at which time she discovered that Mr. Westfall had been substituting, pending posting of the position, since June 27, 2000.

9. Grievant was awarded the assignment by NCBOE, effective July 27, 2000.

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 §4.21 (2000); 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.

Grievant argues that she was entitled to the substitute assignment under the provisions of W. Va. Code §18-5-39, which had been amended effective July 1, 2000, to provide:

When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

NCBOE argues that Mr. Westfall had been awarded the summer assignment consistent with its past practice, and that its officials had no inkling that the statutory requirements would be changing within a matter of days. If there was a mistake made in this case, NCBOE asserts that it is not unreasonable to conclude that it was an excusable one.

Although the statutory change became effective in mid-summer, NCBOE's claim that its

administrators were unaware of the amendment does not alter personnel rights. Understanding that school administrators are not attorneys, it remains their duty to be aware of school laws, and changes thereto, and to insure they are followed. In fact, thechange to Code §18-5-39 had occurred several months earlier, and only became effective July 1, 2000.

Because Grievant was the most senior substitute on July 1, 2000, she was entitled to the Aide position which became available on July 18, 2000. Because she was not placed in the position until July 27, 2000, Grievant is entitled to back pay, with interest, and benefits, if any, she would accrued for the five days of work between July 18 and July 27, 2000. Grievant is not entitled to back pay beyond July 18, 2000, because "[i]t is a well-settled principle of statutory construction in this state that a statute is presumed to operate prospectively, unless retroactive applicability is clearly expressed or necessarily implied from the statute's language. Syl. Pt. 3, Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980); See Conley v. Workers' Compensation Div./Hercules, 199 W. Va. 196, 483 S.E.2d 542 (1997); Hatton v. Div. of Corr., Docket No. 99-CORR-156 (July 30, 1999); W. Va. Code § 2-2-10(bb) (1989). Therefore, Grievant was not entitled to the assignment when it was initially filled on June 27, 2000, and there is no evidence that positions filled prior to July 1, 2000, were to be rescinded.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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 §4.21 (2000); 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. Effective July 1, 2000, W. Va. Code §18-5-39 was amended to allow regular employees to work as substitutes for summer employees during their absence.

3. Grievant has proven by a preponderance of the evidence that she was entitled to the Aide position effective July 18, 2000.

4. Grievant was not entitled to assume a substitute assignment given another employee prior to July 1, 2000, because the amendment to W. Va. Code §18-5-39 was not retroactive in application.

Accordingly, the grievance is **GRANTED**, and NCBOE is Ordered to compensate her for lost wages with interest, and benefits for the period of July 18 through July 27, 2000.

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

Date: February 8, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by John E. Roush, Esq., of WVSSPA, and NCBOE was represented by Erwin L. Conrad, Esq.