TERRI TENNANT,

Grievant,

v. **Docket No. 00-24-381**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Terri Tennant ("Grievant") initiated this proceeding in November of 2000, alleging that she should have been selected for a regular transportation aide position. She seeks as relief to be instated to the position, with retroactive seniority, benefits, and back pay, plus interest. The dates of the proceedings at level one are not reflected in the record. A level two hearing was held on November 13, 2000, followed by a written decision denying the grievance dated November 27, 2000. Level three consideration was bypassed, and Grievant appealed to level four on December 6, 2000. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on February 9, 2001. Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Stephen R. Brooks. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on February 26, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Marion County Board ofEducation ("MCBOE") as a substitute aide since January of 1995.

2. On February 23, 2000, MCBOE posted a special education aide position at Fairview Middle School. This position had been occupied by Denise Lowe, who was on an extended leave of absence, due to a Workers' Compensation injury. The posting stated that the position was for the remainder of the 1999-2000 school year only, explained that the position was vacant due to an

extended absence, and that "the position will terminate upon the return, resignation, or transfer of the regular employee." L II, Exhibit G-2.

3. Brenda Starcher was selected to fill the leave of absence position at Fairview Middle School. (See footnote 1)

4. Ms. Starcher served in the leave of absence position through the end of the 1999-2000 school year.

5. Although she had not yet received permission from her physician to return to work, Ms. Lowe attended in-service training on August 22, 23, and 25, 2000, so that she would not have to attend make-up sessions later in the school year. Ms. Lowe will be compensated for these days at the conclusion of the school year.

6. Ms. Starcher also attended in-service training August 22-25, 2000, and, when school began on August 28, she returned to the leave of absence position at Fairview Middle School. She served in that position until Ms. Lowe's return on September 20, 2000.

7. On August 29, 2000, MCBOE posted a vacancy for a special education bus aide at Fairmont Senior High School. Both Grievant and Ms. Starcher applied for the position. 8. On September 11, 2000, Ms. Starcher was awarded the aide position at Fairmont Senior, due to her regular employee status.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

As set forth in W. Va. Code § 18A-4-8b, service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with regularly employed personnel having hiring preference over substitutes. Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County Jan. 21, 1997). See Dorsey v. Nicholas County Bd. of Educ., Docket No.

34-87-041-4 (May 28, 1987), aff'd, Civil Action No. 87-C-275 (Cir. Ct. of Nicholas County Aug. 29, 1989). At the time of the posting and filling of the position at issue, Ms. Starcher was deemed to have regular employee status, giving her priority in hiring over Grievant, a substitute.

W. Va. Code § 18A-4-15(2) states that a substitute who serves in a leave of absence position extending beyond thirty days is to be given regular employee status. In turn, W. Va. Code § 18A-4-8g provides as follows regarding the status of substitutes who serve in such positions:

> A substitute school service employee shall acquire regular employmentstatus and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen [§ 18A-4-15(2) and (5)] of this article: Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority; Provided, however, That upon termination of a leave of absence or a suspension, the employee shall return to the status previously held.

Grievant contends that she was entitled to selection for this position over Ms. Starcher for two reasons. First, she argues that, because the posting stated that the Fairview Middle School position was for the “remainder of the 1999-2000 school year only,” Ms. Starcher should not have been allowed to remain in the position after the school year concluded. Second, Grievant contends that, when Ms. Lowe attended in-service training for three days in August, her leave of absence terminated, thus extinguishing Ms. Starcher's regular employee status.

Unfortunately, both of Grievant's arguments must be rejected. W. Va. Code § 18A- 4-15 clearly provides that an employee serving in a temporary vacancy created by an absence is entitled to fill the position until the absent employee returns, or the position is otherwise filled through competitive posting in accordance with W. Va. Code § 18A-4-8b. See Hanner v. Fayette County Bd. of Educ., Docket No. 95-10-288 (Oct. 12, 1995); Ooten v. Mingo County Bd. of Educ., Docket No. 93-29-041 (Mar. 18, 1993). In the case of a leave of absence position, W. Va. Code § 18A-4-15 states that the substitute is to remain in the position “until the regular employee shall be returned to such position.” It has previously been held that a board of education may not post and fill a long-term temporary position so that it is filled by the successful applicant only until the end of the school year, rather than until the employee on leave of absence returns, when there is no legitimate reason for doing so. Simpson v. Mingo County Bd. of Educ., Docket No. 96-29-431 (May28, 1997). “A board of education may not, through contract, contravene the requirements of a statute.” Hinerman v. Hancock County Bd. of Educ., Docket No. 93-15-031 (Jan. 31, 1994). There being no justification for re-posting Ms.

Lowe's position at the beginning of the new school year, Ms. Starcher was entitled to continue serving in the position throughout Ms. Lowe's absence. Simpson, supra; See Conley/Farley v. Logan County Bd. of Educ., Docket No. 98-23-425 (Feb. 3, 1999).

Grievant argues that the situation presented in the instant case is distinguishable from the circumstances which existed in Ooten, supra, where it was held that the brief return to work for a few hours by the absent regular employee did not terminate the absence or the substituting employee's right to remain in the position. Because Ms. Lowe's "return" was for three days and she will eventually be paid for those days, Grievant believes that this situation differs. However, the pivotal issue here is Ms. Lowe's work status at the time she attended in-service training. The training occurred prior to the beginning of school, and at no time did Ms. Lowe actually work in her position. In fact, when school began three days later, Ms. Starcher returned to the position and worked there until Ms. Lowe's actual return on September 20. Moreover, the posting for the Fairmont Senior High School position did not occur until August 29, when Ms. Starcher was undisputedly working in the leave of absence position. The undersigned finds that, pursuant to W. Va. Code § 18A-4-15, Ms. Lowe was not "returned to her position" until September 20, 2000.

Pursuant to the hiring priority set forth in W. Va. Code § 18A-4-8b, an employee serving in a leave of absence position pursuant to W. Va. Code § 18A-4-15 is entitled to placement over a substitute. See Messer, supra. Ms. Starcher was properly placed in Ms.Lowe's leave of absence position and was serving in it at the time of the posting at issue, giving her regular employee status and hiring priority over Grievant.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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. A substitute who serves in a leave of absence position extending beyond thirty days is to be given regular employee status. W. Va. Code §§ 18A-4-15(2) and 18A- 4-8g.

3. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluations of past service, with regularly employed personnel having hiring preference over substitutes. W. Va. Code § 18A-4-8b; Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County Jan. 21, 1997). See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987), aff'd, Civil Action No. 87-C-275 (Cir. Ct. of Nicholas County Aug. 29, 1989).

4. A board of education may not post and fill a long-term temporary position so that it is filled by the successful applicant only until the end of the school year, rather than until the employee on leave of absence returns, when there is no legitimate reason fordoing so. Simpson v. Mingo County Bd. of Educ., Docket No. 96-29-431 (May 28, 1997).

5. Brenda Starcher was properly serving in a leave of absence position at the time of the posting at issue, giving her regular employee status and hiring preference over Grievant, a substitute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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.

Date: March 8, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant did not apply for this position, due to the uncertainty of its duration.