ROBIN ANDERSON,

Grievant,

v. **Docket No. 01-41-378**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Robin Anderson, a substitute secretary, filed this grievance against her employer, the Raleigh County Board of Education ("RBOE") on or about October 24, 2000. The original statement of grievance reads:

> Person[e]l Dept refused records that I requested under the Freedom of Info Act pertaining to the possible calling system calling order. Relief is to be provide[d] with the information requested and refused.

Prior to filing the grievance, Grievant had made a request for certain information. Dr. Emily Meadows, Personnel Director, responded to the request for information on October 16, 2001, declining to provide the information requested. Grievant filed this grievance at Level II, after receiving Dr. Meadows' response. On December 14, 2000, Grievant's representative, John Everett Roush, Esquire, sent a letter to Interim Superintendent Charlotte Hutchens, asking, among other things, that Grievant be allowed to amend the grievance to include a claim that “she was not contacted for a substitute secretarial assignment or assignments in proper rotational order in the time period from September 4, to and including October 12, 2000. . ..” A Level II hearing was held on May 18 and 23, 2001. At the Level II hearing, Mr. Roush stated the information sought was only evidence, and there was some question as to whether the request for information was a grievance. He stated the real concern was whether the automated calling system had operated properly, and again sought to amend the grievance. He stated the relief sought was to be paid for any days Grievant would have been called out to work had the calling system operated properly.

Respondent was represented by Dr. Meadows at Level II. She argued at that time that the grievance was not properly filed, because there was no informal conference. She also opposed any amendment to the statement of grievance. No ruling was made on these issues during the Level II hearing.

The grievance was denied at Level II on June 6, 2001, finding Grievant failed to establish that the automated calling system violated any rule, regulation, statute, or policy, or that there was any violation with regard to offering Grievant substitute assignments. The decision does not otherwise discuss the omission of the informal conference stage of the grievance procedure, or the proposed amendment to the grievance statement. The decision does not tell Grievant she must refile her grievance if she wishes to pursue the amendment. The undersigned concludes that the amendment to the grievance was allowed by the Level II grievance evaluator.

Grievant appealed to Level IV on June 13, 2001, bypassing Level III. The statement of grievance submitted at Level IV reads:

> Grievant, a substitute secretary, contends that Respondent failed to follow the rotation for substitute secretaries for the period of time between September 4, 2000 through and including October 12, 2000 in violation of West Virginia Code §§ [sic] 18A-4-15. Grievant also contends that she was denied information she requested concerning the calling of substitute secretaries during that period in violation of the Freedom of Information Act. (Some of that information was later provided at level II.)

As relief Grievant sought:

> (a) compensation for all wages or benefits lost as a result of any failure by Respondent to properly call Grievant as a substitute secretary; (b) theremaining information concerning the call out of substitutes during the time period in question. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by RBOE as a substitute secretary.

2. RBOE substitute employees may sign up to substitute in any or all of the three districts into which the county has been divided for such purposes. Grievant signed up to substitute in the Town and Shady Spring Districts.

3. RBOE uses a machine to place telephone calls to substitutes to fill vacancies on a rotating basis, by district. RBOE refers to this as the “automated calling system.”

4. When Grievant would go to work in a vacancy, other employees would tell her who had been working as a substitute secretary, and she became suspicious that the automated calling system was not calling substitutes in order.

5. On October 12, 2000, Grievant sent a letter to Dr. Emily Meadows, RBOE's Personnel Director, requesting “[a] copy of all calls made to substitute secretaries during the period of September 4, 2000 - October 12, 2000.” There is no indication in the letter that this request for information is a grievance.

6. Dr. Meadows responded to this request for information on October 16, 2000, declining to provide the information sought. 7. Grievant filed this grievance on October 24, 2000, at Level II, noting on the grievance form that Dr. Meadows issued a Level I decision on October 16, 2000. There was no informal conference, or formal Level I conference or decision.

8. Prior to the Level II hearing, RBOE provided to Grievant the call history from the automated calling system for the Town District for the period from September 14 through 27, 2000. This information shows who the system tried to call for each vacancy which was filled by a substitute in that district, and the results of the attempts. If the vacancy was not filled, the calling information was not provided. Grievant questioned particular calls made to substitutes during this time period. Dr. Meadows provided an explanation for the call history which satisfied Grievant's concerns for this period in this district. Dr. Meadows explained that one employee was skipped in the rotation because she had made herself unavailable, one was not called because she was not on the rotation during this time period, one had accepted another assignment, and one was working in an assignment two days a week and was not available for a particular three day assignment. She explained that in one instance the employee who was absent had called in on day two of her absence, creating a new vacancy, which the employee was not supposed to do. This human error improperly eliminated Hazel Brown from the vacancy, but did not directly affect Grievant. Thereafter, Ms. Brown was not called for some period of time, and Dr. Meadows did not know the reason for this. She explained that in another instance, an employee had reported off work with no substitute required. She realized this was wrong, and called the Help Desk. While staff was still trying to make the correction, the automated calling system started to place a call, then stopped, and the employee being called during

this confusion was skipped. For that reason, that employee was manually called and offered the next vacancy. She explained in one instance three employees who Grievant believed had not been called, were in fact called or were already in another assignment. Finally, Dr. Meadows explained that several substitutes who Grievant believed had notbeen called, had been called for the previous job which had been canceled, and therefore the information on that job had not been provided to Grievant initially.

9. After the Level IV hearing, RBOE provided to Grievant the work records of all substitute secretaries in Raleigh County for the school year 2000-2001, which has been admitted as Grievant's Exhibit 1. It shows that Melissa Faw works in two districts, and she worked at Shady Spring High School on September 5, 2000, and at Beckley-Stratton school on September 6, 2000. The exhibit does not show what districts any of the assignments are in. Ms. Faw worked in four different vacancies during the period from September 4 through October 12, 2000. Judith Cole works in all three districts. She worked at Shady Springs High School September 15, 2000, at Liberty High School September 19, at Beckley-Stratton school September 21, at Cranberry-Prosp. October 4, at Liberty High School October 6, and at Shady Springs High School starting October 10, 2000. Marie Ziegler works in two districts. She worked on October 5, 6, and 11, 2000, in three different vacancies.

10. During the period from September 4 through October 12, 2000, Grievant worked in four different vacancies. The record does not reflect the districts in which these vacancies were located.

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). When a substitute is to be employed to fill a vacancy created by the temporary absence of a regular employee, the substitute must be selected “on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments. . ..” W. Va. Code § 18A-4-15. Grievant argued Grievant's Exhibit 1 demonstrates that the automated calling system “did not function properly,” pointing to the information outlined above in Finding of Fact Number 9. She alsopointed out that if letters of the alphabet are assigned to the secretaries in order of seniority, and the records from the time period in question are examined, the order of assignments is not close to being alphabetical. Grievant did not point to any assignment, however, which she believed she

should have had. (See footnote 2)

Respondent argued the grievance was not properly filed at Level II, and it was not timely filed. Respondent also argued Grievant had not demonstrated the automated calling system was operating unlawfully.

The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). W. Va. Code § 18-29-3(a) provides, in pertinent part:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. . . . Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing.

W. Va. Code § 18-29-4(a) requires that:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.
>
> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
>
> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated

representative on a form furnished by the employer or agent.

Only working days are counted in determining when the time period runs for filing a grievance. Holidays, weekends and other school closings are not counted. W. Va. Code § 18-29-2(b). No evidence was presented regarding any holidays or other school closings.

Neither party identified a particular date when Grievant began to question whether the automated calling system was working properly. Grievant questioned in her grievance a period of time from September 4 through October 12, 2000. October 24, 2000, is eight working days after October 12, 2000. The grievance was timely filed.

As to the grievance being filed at Level II, without an informal conference, Respondent did not offer any testimony or argument that the informal conference could have resolved the grievance. The record does not reflect who supervises Grievant; however, the evidence gives the impression that it is Dr. Meadows who would be able to discuss the automated calling system. Dr. Meadows discussed the automated calling system with Grievant and her representative at Level II, answering their questions, and offering to look at any particular instance where Grievant believed the system had notfunctioned properly. This all has served the purpose of the informal conference, and sending the grievance back to the informal conference stage at this point would not be useful.

The information in Grievant's Exhibit 1 does not establish that the automated calling system did not function properly. As noted, substitutes may work in one, two, or three districts. There is a rotation list for each district. The exhibit does not indicate in what district the substitute was working for any assignment. The exhibit does not indicate the time periods during which a substitute may have asked not to be called, or when the substitutes were not available or refused an assignment when called. It only indicates in what districts the substitutes chose to work, the dates they worked, the amount of time worked each day, the rate, the job number, the “con day,” who they substituted for, and at what school. Although Grievant noted in particular that Ms. Cole worked in five assignments, and worked two consecutive days during the period in question, Ms. Cole has signed up to work in all three districts, while Grievant only works in two. It is entirely possible that Ms. Cole received a different assignment on two consecutive days, as Grievant pointed out, because the two assignments were in different districts, and she was next up on the rotation list in two districts. The same is true of Ms. Ziegler who works in two districts and worked two consecutive days in different assignments.

As to Grievant's point that the list of assignments is in no particular order, the undersigned would first note that it does not appear that the list compiled by Grievant from Grievant's Exhibit 1 is entirely accurate, as it has Alyce Williamson listed as working on October 2, 2000, while Grievant's Exhibit 1 does not show this; although it does show she worked October 20, 2000. Second, given that there are three districts, each with its own rotation, and some substitutes work in one district, some work in two districts, and some work in all three districts, some substitutes worked in an assignment for several days at a time, and some substitutes may have removed themselves from the substitute list for aperiod of time, the undersigned does not conclude as Grievant does, that the assignment list should be more or less, in some type of order. Dr. Meadows' testimony as detailed in Finding of Fact Number 8 points out that any number of things can happen, including human error, which can lead to assignments not being filled in “alphabetical order.”

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is on the party asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997).

2. The grievance was timely filed.

3. W. Va. Code § 18-29-4(a) requires that:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

4. The Level II hearing in this grievance served the same purpose as an informal conference.

5. 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).

6. The evidence does not establish that the automated calling system was not functioning properly, nor does it establish that Grievant was not called for any particular job for which she should have been called, or that she otherwise was harmed in any way.

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. 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: January 28, 2002

Footnote: 1

A Level IV hearing was held on October 25, 2001. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by Erwin L. Conrad, Esquire. The record was left open to allow the parties to submit additional documentation about the order in which substitutes were called out. This documentation was provided to the undersigned on December 10, 2001, and will be marked as Grievant's Exhibit 1, and admitted into evidence. This matter became mature for decision on December 17, 2001, upon receipt of the last of the parties' written arguments.

Footnote: 2

Grievant was informed by the undersigned that the grievance procedure was not the proper forum for pursuing violations of the Freedom of Information Act. This argument was not pursued in Grievant's written argument, and is deemed abandoned.

Grievant testified at the Level II hearing that the automated calling system records showed she had been called on October 12, 2000, at 7:13 p.m., and did not answer the telephone; however, neither her Caller ID nor her answering machine registered any such call. She testified this was for a two week assignment. She did not testify as to whether she would have accepted the assignment. Grievant did not argue at Level IV that she should have had this assignment, however, and that issue is also deemed abandoned.