DENISE BROWN,

Grievant,

v. **Docket No. 04-19-205**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Denise Brown ("Grievant") initiated this proceeding on March 2, 2004, alleging entitlement to a substitute position which began on January 20, 2004. She seeks compensation and benefits associated with the position, plus interest. The grievance was denied at level one on March 9, 2004. A level two hearing was held on May 5, 2004, and the grievance was denied in a decision dated May 19, 2004. Grievant appealed to level four on May 27, 2004, and a hearing was held in Westover, West Virginia, on August 16, 2004. Grievant was represented by counsel, John Roush of the School Service Personnel Association, and Respondent was represented by counsel, Amy Moats. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 14, 2004.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant had been employed by Respondent as a substitute cook since September 17, 2002. (See footnote 1)

2. Debra Cummings was also employed as a substitute cook with a seniority date of September 17, 2002.

3. Due to an oversight by Board officials, the seniority tie between Grievant and Ms. Cummings was never broken.

4. The computer system utilized by Respondent for compiling substitute seniority lists placed

Ms. Cummings ahead of Grievant on the list. The computer calls substitutes when needed, and Ms. Cummings received priority in getting the opportunity to accept positions. (See footnote 2)

5. On January 19, 2004, Carrie Showen, a cook at C.W. Shipley School, called the automated system to report off work for the following day, although another regular employee, Phyllis Dillow, had agreed to “step up” into her position, so a substitute was not needed.

6. Ms. Dillow also called the automated system for a substitute for January 20, 2004.

7. The computer system called both Ms. Cummings and Grievant to substitute at C.W. Shipley on January 20, 2004. 8. Upon arrival at the school on the morning of January 20, 2004, Grievant was informed that only one substitute was needed, and Ms. Cummings had been called first. Therefore, Grievant was sent to another school to work that day.

9. Ms. Cummings substituted in the cook position at C.W. Shipley until March 16, 2004, when the regular employee returned to work.

10. Shortly after the incident on January 20, 2004, it came to the attention of Board officials that the tie between Grievant and Ms. Cummings had never been broken. A drawing was held on February 5, 2004, and Ms. Cummings “won” the tiebreaker, placing her before Grievant on the substitute cook list.

11. Between January 20, 2004, and February 5, 2004, Grievant did not work as a substitute on four days on which there was school and she was available for work.

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.

Grievant's entire argument is based upon her belief that she was called to fill Ms. Dillow's position, which was the only position for which an actual substitute was needed that particular day. She, therefore, believes that she should have been the one to substitute at C.W. Shipley that day and for Ms. Dillow's extended absence. She contends that the Board's failure to break the tie between herself and Ms. Cummings, and the subsequent drawing, should have no bearing on the outcome of this

grievance. Substitutes are assigned to fill positions on the basis of seniority during the temporary absence of another employee, as occurred here. See W. Va. Code § 18A-4- 15(a). However, in a situation where two employees have an identical seniority date, W. Va. Code § 18A-4-8g requires that the tie be broken through a "random selection system established and approved by the county board." That statute further provides that the board "shall conduct the random selection within thirty days upon the employees establishing an identical seniority date." Obviously the tie between Grievant and Ms. Cummings was not broken within thirty days. Nevertheless, it has been observed by this Grievance Board:

> [I]in order to benefit from [the Board's] failure to strictly adhere to the 30-day time limit . . . for conducting the random selection, Grievant must demonstrate that she suffered some harm as a result of this error, or that the outcome might reasonably have been different if the drawing had been timely held. See Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98- DNR-204 (Feb. 26, 1999); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See also Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999).

Mullins v. Mason County Bd. of Educ., Docket No. 99-26-322 (Dec. 30, 1999).

Although there was, indeed, a very lengthy delay in the Board's actions insofar as breaking the tie in this situation, it did correct its oversight as soon as it was discovered. This Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible. See Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997). Moreover, when the drawing was held, Ms. Cummings prevailed, placing her before Grievant on the seniority list. Accordingly, Grievant has failed to prove that the outcome would have been different if the drawing had been conducted prior to January 19, 2004. As Grievant has argued, only one substitutewas needed on the day in question; as the next most senior substitute on the list, Ms. Cummings was entitled to placement in the cook position at C.W. Shipley. As with the tie- breaker, Respondent corrected the error which occurred when two substitutes were called and only one was needed, giving the position to the more senior substitute on the list. Grievant has proven no entitlement to the relief requested.

The following conclusions of law support this decision.

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. Respondent failed to break the seniority tie between Grievant and Debra Cummings within thirty days of their employment date, as required by W. Va. Code § 18A- 4-8g.

3. Grievant must demonstrate that she suffered some harm as a result of the Board's failure to conduct the tie-breaker within the 30-day time limit, or that the outcome might reasonably have been different if the drawing had been timely held. Mullins v. Mason County Bd. of Educ., Docket No. 99-26-322 (Dec. 30, 1999); See Della Mae v. W. Va. Div. of Natural Resources, Docket No. 98-DNR-204 (Feb. 26, 1999); McFadden v. W. Va. Dep't of Health & Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995). See also Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999). 4. Grievant has failed to prove by a preponderance of the evidence that she was entitled to the substitute position that began on January 20, 2004.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jefferson 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: September 17, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

After this grievance was filed, Grievant was placed in a regular, half-time position at North Jefferson Elementary School.

Footnote: 2

Apparently, when the two employees first began working as substitutes, Grievant was on the list first, but that changed when a new computer system was put into place. In any event, this does not appear to be relevant to the outcome of this grievance.