

LISA OWENS,

Grievant,

v.

Docket No. 97-22-121

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On May 8, 1996, Lisa Owens (Grievant) initiated a grievance pursuant to W. Va. Code §§ 18A-29-1, et seq., contending that Respondent Lincoln County Board of Education (LCBE) violated W. Va. Code §§ 18A-4-15 and 18A-4-8b in regard to the manner in which it filled a Behavioral Disorder Aide position at Hamlin Elementary School. The grievance was advanced without resolution to Level II where evidentiary hearings were conducted on June 12 and June 25, 1996. Thereafter, no Level II decision was issued. Grievant appealed to Level IV on March 5, 1997, where the matter was held in abeyance at the request of Grievant's representative. A Level IV hearing was eventually scheduled and conducted in this Grievance Board's office in Charleston, West Virginia, on November 20, 1997. The parties were provided an opportunity to submit written, post-hearing arguments, and this matter became mature for decision following receipt of Grievant's written argument on December 22, 1997. Inasmuch as LCBE was unable to transcribe the Level II hearing, this matter will be decided solely upon the basis of the evidence presented at Level IV. Accordingly, the following findings of fact pertinent to resolution of this grievance have been derived from the Level IV record.

FINDINGS OF FACT

1. Grievant has been employed by Respondent Lincoln County Board of Education (LCBE) as a substitute Aide for nearly twelve years. Grievant is the most senior substitute Aide employed by LCBE.
2. In September 1995, shortly after the beginning of the 1995-96 school year, LCBE required a part-time Aide for a special education student at Hamlin Elementary School (Hamlin). Reva Wade,

another substitute Aide employed by LCBE, was then working a part-time Aide assignment in the cafeteria at Hamlin. Without posting, Ms. Wade was given this assignment, in addition to her duties in the cafeteria. Ms. Wade was paid for a half-time school service personnel position for performing the additional special education assignment.

3. On January 23, 1996, LCBE posted the vacancy for an Aide at Hamlin. The posting described the position as both "supplemental" and "temporary," further indicating that the Aide would be employed from 11:00 a.m. to 2:05 p.m., with payment in the amount of \$18.00 per day only for those days the student was present. G Ex A.

4. The posting described in Finding of Fact Number 3 specified: "Applicant may be required to obtain passive restraint training. Position for remainder of School Year 1995-96 only and position will be abolished if student(s) IEP [individual education plan] changes or student(s) moves from school." G Ex A. The posting described in Finding of Fact Number 3 further stated: "Applicants must be regular employees of the Lincoln County Board of Education." G Ex A.

5. Grievant and Ms. Wade were qualified to hold the Aide position at issue, although neither of them were regular employees of LCBE.

6. No regular employee applied for the Aide position prior to the closing date of January 30, 1996. See G Ex A. On February 6, 1996, the Aide position at Hamlin was again posted, stating the same terms of employment as previously described in Findings of Fact Numbers 3 and 4. G Ex. B.

7. Willis Roy, a regular LCBE employee, timely applied for the Aide position at Hamlin in accordance with the posting described in Finding of Fact Number 6, and was selected to fill the position. Mr. Roy worked one day in the position, and then resigned.

8. On March 6, 1996, the Aide position at Hamlin was posted for a third time, repeating the language contained in the two previous postings. G Ex C.

9. As of the closing date in the third posting, March 15, 1996, no regular employee had applied for the vacancy. See G Exs C & D. Because she was not a regular employee, Grievant did not apply for the position at issue during any posting period.

10. Ms. Wade applied for the vacancy on the third posting and was awarded the position for the remainder of the school year.

11. The position at issue was re-posted as a full-time Aide position for the 1996- 97 school year. Grievant does not contest that posting, or the outcome of the selection process.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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.

The following portion of W. Va. Code § 18A-4-8b is pertinent to this grievance.

Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

W. Va. Code § 18A-4-15 provides, in pertinent part, as follows.

The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

(6) To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis. . . .

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. . . . All substitutes shall be employed on a rotating basis according to the length of their service time until each has had an opportunity to perform similar assignments. . . .

Grievant established by a preponderance of the evidence that a part-time position for an Aide existed at Hamlin shortly after the beginning of the 1996-97 school year. Although Grievant further established that she was then the most senior Aide on LCBE's substitute list, she did not demonstrate that she was next in the established rotation to be called for this assignment. Accordingly, no violation of W. Va. Code § 18A-4-15 has been established. See Gallion v. Lincoln County Bd. of Educ., Docket No. 97-22-108 (Dec. 31, 1997); 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).

Grievant also complains that each of the three postings for the position in question was improper because LCBE limited applications to regular employees only. Further, Grievant asserts that the position should have been posted as at least a regular half-time position, rather than as a "supplemental" position at a daily rate of pay. In support of this argument, Grievant cites Ganoe v. Hampshire County Board of Education, Docket No. 97- 14-229 (July 30, 1997). However, neither Ganoe nor State ex rel. Boner v. Kanawha County Board of Education, 197 W. Va. 176, 475 S.E.2d 176 (1996), upon which the Ganoe holding is based, involved limiting supplemental assignments to school service employees holding regular status.

Moreover, Grievant never applied for the position when it was posted on three separate occasions, and the limited evidence requires considerable speculation as to whether she would have received the position, had it been posted in the manner she proposes. See Akers v. Raleigh County Bd. of Educ., Docket No. 94-41-1076 (Apr. 27, 1995). Further, notwithstanding any alleged impropriety in the posting, the position at issue no longer exists, so the only remedy warranted by the facts established, re-posting, is no longer appropriate.

Under these circumstances, the issue has become moot and any ruling on the merits of this issue would constitute an inappropriate advisory opinion. See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.20 (1996); Harrison v. Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.E.2d 606 (1986); Akers, supra; Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989). Cf. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994) (issue not moot where grievants applied for position that was filled by another employee and subsequently abolished). Grievant's claim that the position should have been posted as at least a half- time position similarly involves a moot issue that is not appropriate for decision where no meaningful relief can be granted. Id. Moreover, even if this posting were not moot, Grievant would first have to apply for the re-posted position in order to establish the required standing to grieve this issue. See, e.g., Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. LoganCounty 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. W. Va. Code § 18A-4-15 requires a county board of education to employ substitute school service personnel to temporarily fill vacancies in newly created positions prior to employment of a school service employee in such position on a regular basis in accordance with W. Va. Code § 18A-4-8b. See Hall v. Mingo County Bd. of Educ., Docket No. 97-29-420 (Jan. 21, 1998); Byers v. Marion County Bd. of Educ., Docket No. 94-24-388 (Dec. 29, 1995).

3. W. Va. Code § 18A-4-15 requires that substitute school service employees be called for assignments on the basis of seniority, on a rotating basis. Grievant failed to establish by a preponderance of the evidence that LCBE violated W. Va. Code § 18A-4-15 by failing to offer her a substitute assignment at Hamlin Elementary School in September 1996.

4. Inasmuch as Grievant never applied for the posted position of Special Education Aide, and the position is no longer available, Grievant's challenge to the terms of the posting is now moot. See Harrison v. Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.E.2d 606 (1986); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989). Ruling upon a moot issue would constitute an advisory opinion, and this Grievance Board does not render advisory opinions. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.20 (1996). See Bryant v. Fayette County Bd. of Educ., Docket No. 91-13-198 (Mar. 13, 1992); Lewis v. Greenbrier County Bd. of Educ., Docket No. 91-13-198 (June 12, 1991).

Accordingly this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 11, 1998