RICHARD HIXENBAUGH

v. Docket No. 94-15-215

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, a substitute bus operator employed by Respondent Hancock County Board of Education (HCBE), initiated a grievance on April 7, 1994, in which he alleged a violation of W.Va. Code 18A-4-15. He complains that he is being denied "the opportuni ty to make a full day's wages" and seeks morning substitute call-outs and "compensation for any lost wages." Grievant did not prevail at any of the lower grievance levels and appealed to level four on or about May 26, 1994. The parties agreed to a record decision. The record consists of the decisions rendered at levels one and two on May 4 and May 16, 1994, respectively, and a transcript of the May 13, 1994 level two hearing. Grievant submitted fact/law proposals on August 1, 1994, while HCBE apparently elected to stand on its level two decision.

There is no dispute as to the essential facts in this case.

At the time Grievant filed this complaint, he had been driving Bus No. 3's afternoon run (half-day) on a daily, uninterrupted basis since October 1993. This "p.m." run started at 2:00 p.m. and ended at 4:00 p.m. At the point Grievant had held the afternoon driving run continuously for twenty days or more, HCBE granted him some regular employee benefits such as sick leave and holiday pay.

Thereafter, HCBE effectively removed Grievant from the rotating substitute driving roster. As such, HCBE gave all other substitutes on the roster priority before it offered Grievant the opportunity to substitute for a morning run.1 HCBE

believed that because Grievant had acquired a long-term run, he was precluded from remaining on the rotating substitute roster. According to HCBE, had Grievant remained on the roster and accepted other (one-day) substitute runs, he would have relin quished his ongoing substitute run, thereby losing any temporary benefits. See T.11 and 13-14.

The parties do not dispute that, when a substitute worker is assigned to fill a vacant position created by the long-term absence of a regular service employee, a board of education must, "within twenty working days from the commencement of the leave of absence, . . . give regular employee status to a person

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1On occasion, Grievant had been asked to drive a morning run when other substitutes in rotation either refused the assignment or were busy with another run.

hired [pursuant to W.Va. Code, 18A-4-8b] to fill such posi tion." W.Va. Code 18A-4-15(2).

Grievant claims he has attained regular employee status and believes he should remain on the substitutes' rotating roster and retain said regular employee status.2 As support, Grievant relies on this portion of Code 18A-4-15:3

All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same build ing or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first

offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position [emphasis added].

On the one hand, HCBE's logic that Grievant does not have any priority on the substitutes' rotational roster appears

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2HCBE does not deny that it has permitted its regularly-hired or "contracted" half-time driver to substitute on afternoon runs. Administrative notice can also be taken that HCBE permits regularly employed bus operators to "substitute" on a long-term basis for other such operators on extended leave of absence. See Smith v. Hancock County Bd. of Educ., Docket No. 93-15-358 (Mar. 31, 1994).

3Grievant also argued in his level four brief that he is entitled to be called out for extra-duty driving pursuant to Code 18A-4-8b. This issue was not raised in Grievant's pleadings or at the level two hearing, although Grievant's representative began to question Marcia Kobily, HCBE's substitute clerk, about the regular operators' extra-duty roster but dropped the line of questioning when Ms. Kobily replied that she knew nothing about extra-duty call outs. The matter was not discussed further. See level two Transcript. A grievance issue not fairly raised by the employee or considered by the employer at the lower grievance levels will not be addressed at level four. See W.Va. Dept. of Health and Human Serv. v. Hess, 431 S.E.2d 681 (W.Va. 1993).

sound. Essentially, substitute employment, including long-term

substitute employment in which "regular" status is attained, is temporary employment. Thus, even when a substitute service worker attains regular employee status, he or she remains on that job only until voluntarily giving it up or in the event the regular employee returns to work. Given that scenario, it would appear that a service worker who has gained temporary regular employee status should no longer be retained on the substitutes' rotating roster for other substitute jobs.

On the other hand, Grievant is correct that 18A-4-15 permits a "job swapping" situation between a regular employee and a substitute under certain circumstances. According to the statute, regular employees may attain this temporary work situation on a rotational, seniority basis. Obviously, the purpose of this provision is to permit regular employees to temporarily earn the higher wages and gain the valuable work experience in a higher-level job within certain job classes, or, in the case of half-time workers, to gain temporary full-time work. See, e.g., Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

While job swapping or upgrading is permitted under Code 18A-4-15 among affected employees who have been assigned to the same building or working station as the absent employee for whom the substitute has been hired, a board of education is not required to implement this exchange between bus operators. This is because bus operators are not assigned to a building to work and essentially do not share a common work site or station since their work is performed on their own designated buses. See Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993); Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (March 6, 1992)(a bus operator's actual work site is,

for all practical purposes, his or her own individual bus and/or driving route).

In this case, the underlying question of Grievant's employ ment status and whether Grievant was entitled to priority over other substitute drivers for available morning runs need not be reached.4 At level two, HCBE raised a timeliness issue, espe cially with regard to the payment of back wages. In response, Grievant offered absolutely no reason for his failure to file a grievance until six months after he had attained the long-term substitute assignment and some regular benefits in October 1993. Arguably, HCBE's assigning morning substitute runs to drivers other than Grievant could be considered an ongoing practice; however, Grievant failed to identify any time that such an event occurred, let alone when the last event occurred.

The grievance statute, Code 18-29-4(a)(1), requires that grievance proceedings be initiated within fifteen days following

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4There is no evidence to suggest that Grievant attained this half-time job via an actual, formal job posting and the essentially seniority-based service personnel bidding process outlined in W.Va. Code 18A-4-8b. However, it could be that Grievant was offered the assignment initially as the result of being the most senior substitute on HCBE's rotating substitute drivers' roster next in line for an available long-term job. HCBE's utilization of this process is described in more detail in Smith v. Hancock County Bd. of Educ., Docket No. 93-15-358 (Mar. 31, 1994).

"the occurrence of the event upon which the grievance is based, . . . the date on which the event became known to the grievant

or . . . the most recent occurrence of a continuing practice giving rise to a grievance . . .." The Grievance Board has consistently denied grievants' claims when respondents properly raise and prove the affirmative defense of untimeliness, and grievants do not establish good cause for their delay. Lilley v. Summers County Bd. of Educ., Docket No. 93-45-399 (June 16, 1994); Cox v. Kanawha County Bd. of Educ., Docket No. 93-20-049 (Mar. 31, 1993); Booth v. Brooke County Bd. of Educ., Docket No. 92-05-386 (Mar. 2, 1993); Winland v. Wetzel County Bd. of Educ., Docket No. 92-52-490 (Feb. 16, 1993); Seckman v. Brooke County Bd. of Educ., Docket No. 92-05-106 (Jan. 29, 1993); Steele v. Wayne County Bd. of Educ., Docket No. 50-87-062-1 (Sept. 29, 1987).

Moreover, had Grievant timely filed this grievance and also prevailed on his claim that he had priority over other substi tute drivers for morning substitute assignments, his request that he be awarded back wages would have to be denied. Grievant bears the burden of proving each and every aspect of his com plaint.5 Grievant presented no evidence as to how many times substitute drivers other than him had been called for available morning runs after October 1993. In fact, he stated at the level

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5Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

two hearing that no idea when or how many times he had been "passed over" for said runs. T.7-8.

Findings of Fact

1. HCBE afforded Grievant, a substitute bus operator,

some regular employee benefits such as sick leave and holiday pay because Grievant had remained in a long-term, steady after noon driving assignment for more than twenty days. At the same time, HCBE removed Grievant from the rotating substitute driving roster, although it called him on occasion for a morning driving assignment when no other substitute driver was available.

2. HCBE presently gives a half-time (morning), regular employee first option on any afternoon substitute assignments.

3. Grievant presented no evidence at the level two hearing as to the total number of morning substitute runs that had been assigned for the 1993-94 school year or when the last such assignment occurred.

4. Although Grievant had been granted certain "regular" employee benefits at least six months prior to filing his grievance, he offered no explanation as to why he waited until April 1994 to initiate a complaint.

Conclusions of Law

1. A grievance must be initiated at level one "within fifteen days following 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 . . .." W.Va. Code 18-29-4.

2. Grievant failed to timely file a grievance and, more over, failed to establish any evidentiary basis for which to support an award of back wages.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: September 30, 1994