ELIZABETH PANRELL and

ROSEMARY MARSH,

Grievants,

v. **DOCKET NO. 94-30-586**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance was initiated on or about July 14, 1994, by Elizabeth Panrell and Rosemary Grace Marsh ("Grievants") against the Monongalia County Board of Education ("MBOE"), alleging the following:

> Grievants were assigned to work in a summer program as Bus Operators on June 27, 1994. They were removed and other Bus Operators were assigned to these positions for the remainder of the summer program. Grievants contend their removal violates W.Va. Code §18-5-39. Grievants seek compensation for all work missed during the summer of 1994 and reinstatement to said summer program positions in the future.

The grievance was denied at Levels I (on or about July 19, 1994), and II (on or about September 21, 1994). Level III was waived, and the parties agreed to submit this case at Level IV on the record developed at Level II, supplemented by Grievants'proposed Findings of Fact and Conclusions of Law. (See footnote 1) This matter became mature for decision on February 22, 1995, upon receipt of the lower level record.

The undisputed facts, as developed at the September 1, 1994, Level II hearing, are set forth below.

Findings of Fact

1. Grievants are employed by the MBOE as regular bus operators. Grievants are not on the substitute bus operator list.

2. During the summer of 1994 MBOE had five newly created summer bus operator positions available, for the purpose of transporting children enrolled in the pre-school program called Evenstart (a federally funded Headstart program), three days a week, beginning June 27 and ending July 27, for a total of fourteen days. None of the five positions was posted.

3. Richard Gemas, MBOE Transportation Director, was notified of the need for buses for the Evenstart program on or about June 8, 1994. At that time, however, the list of students was not finalized, and Mr. Gemas was unable to determine how many buses would be needed until the week before the Evenstart program began.

4. The five summer bus operator positions were filled via telephone calls. Mr. Gemas called MBOE regular bus operators who were not working in some other summer position (See footnote 2), by seniority, andoffered these five bus operator positions. Mr. Gemas filled three of the positions, but was then unable to reach the next two most senior regular bus operators on his list, Vernon Jamison and Steve Culhane. Mr. Gemas reached Jamison and Culhane after the conclusion of the first day of the Evenstart program (June 27, 1994); and, when called by Mr. Gemas, both accepted the summer bus operator positions for the remainder of the Evenstart program, beginning June 28, 1994.

5. Vernon Jamison, Steve Culhane, and the other three regular bus operators who filled the five summer bus operator positions, have more seniority as regular bus operators than either of Grievants.

6. Grievant Panrell received a telephone call on June 27, 1994, at 6:00 a.m., from Mr. Gemas, asking whether she was available to work, and when she answered in the affirmative, she was assigned one of the Evenstart runs on June 27. She worked one day only and was paid accordingly. She was told by Mr. Gemas during the June 27 telephone call that he had been unable to reach Vernon Jamison and Steve Culhane, but both would be back from vacation that evening. She received a telephone call at 6:00 a.m., on June 28, 1994, from Mr. Gemas, who told her another bus operator was going to take the run and she would not need to report to work.

7. Grievant Marsh received a telephone call on June 27, 1994, from Mr. Gemas, asking whether she would like to come to work, and when she agreed to do so, she was assigned one of the Evenstart runs on June 27. She worked one day only and was paidaccordingly. Grievant Marsh did not recall whether Mr. Gemas indicated during the June 27 telephone conversation that he could not reach Jamison and Culhane. Grievant Marsh received a telephone call very early on June 28, 1994,

from Mr. Gemas, who informed her she would not be needed to make the bus run because another driver had been reached and had agreed to take the run.

Discussion

In order to prevail, Grievants have the burden of proving their cases by a preponderance of the evidence. Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). Grievants must also demonstrate they have been adversely affected. See Shobe v. Latimer, 253 S.E.2d 54 (W.Va. 1979); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). Grievants failed to demonstrate that had MBOE filled the five summer bus operator positions in accordance with statutory requirements, they would have been entitled to receive two of the positions for any period of time. Accordingly, the grievance must be denied.

Grievants have proven that the proper procedure was for MBOE to post the five summer bus operator positions in accordance with W.Va. Code §18A-4-8b. However, Grievants, in their efforts to use MBOE's Code violation to their own advantage, have mixed and matched the distinctions between "substitute service personnel" and "regular service personnel," and it is here that Grievants' claims fail.

W.Va. Code §18A-4-8b requires a board of education to post all newly created school service personnel positions for at least fiveworking days, and to fill such positions within twenty working days from the posting date notice. This statutory provision applies to summer positions, and precludes a board of education from filling a short-term summer position with a substitute. Caldwell v. Mercer County Bd. of Educ., Docket No. 91-27-483 (Jan. 6, 1992); See also W.Va. Code §18-5-39. Clearly then, this provision applied to the five summer bus operator positions, and MBOE was required to post the positions.

MBOE apparently believes it is excused from this statutory mandate, because (1) it did not know of the five bus operator positions until it was too late to post the positions to have them filled the first day, and (2) it cured the posting by calling all regularly employed bus operators not already employed in another summer position, in order of seniority, and offered them the positions. Although MBOE appears to have had good intentions, W.Va. Code §18A-4-8b does not provide an exception for inadequate planning, nor does it allow a board of education to utilize a seniority-based calling list as an alternative to posting. In fact, if telephonic notice is given, the service employees called must be

told the position has been posted, and the contents of the posting must be read to the service employees. Dingess, et al., v. Kanawha County Bd. of Educ., Docket No. 20-86-011 (Nov. 12, 1986). See also, Hairston v. Logan County Bd. of Educ., Docket No. 92-23-350 (Dec. 29, 1992). MBOE was required to post the summer bus operator positions, and, in accordance with W.Va. Code §18A-4-15(6), to temporarily fill the positions with substitute busoperators until such time as the positions could be properly posted.

The next question is whether Grievants would have received the positions had the proper procedure been followed. Grievants admit regular bus operators Jamison and Culhane, who filled the two positions to which Grievants claim entitlement (as well as the bus operators who filled the remaining three positions), had more seniority than either Grievant. Had MBOE posted the positions, it is clear Grievants have not shown they would have been permanently assigned to the positions. See W.Va. Code §§18-5-39 and 18A-4-8b (summer school service positions to be filled on the basis of seniority, qualifications and evaluation of past service).

As to whether Grievants should have continued in these positions after June 27, until the positions were properly posted and filled, the answer turns on W.Va. Code §18A-4-15. Grievants argue once MBOE reached employees on the calling list who accepted the positions (Grievants), MBOE could not then replace those persons the next day with someone who could not be reached the first day (Jamison and Culhane). As Respondents admitted at the Level II hearing, this is indeed the rule used in calling out substitutes. Grievants, however, are not substitutes and should never have been called to fill the positions temporarily in the first place. Therefore, the rules applicable to calling out substitutes are not applicable here.

As Grievants quite correctly point out in their proposed "Conclusions of Law", W.Va. Code §18A-4-15 requires a county board to:

> assign substitute service personnel...[t]o temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. (Emphasis added.)

There is a clear and intended distinction in the West Virginia Code between "substitute service personnel" and "regular service personnel", and the distinction is key to the determination of many important employment rights. See Vance v. Logan County Bd. of Educ., Docket No. 92-23-045

(May 21, 1992). Grievants were not substitute service personnel; therefore, they could not be called upon to fill the bus operator positions until properly posted.

Grievants' argue in their proposed Conclusions of Law that the following "proviso" of W.Va. Code §18A-4-15 provides the statutory basis for their claims:

> Provided, That if there are regular service employees employed in the same building 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.)

Grievants argue this proviso allows regular bus operators to be employed in this situation rather than substitutes.

This Board has previously addressed the clear and unambiguous language of this proviso, and as such, this proviso is clearlyinapplicable to a newly created position. In Terek v. Ohio County Bd. of Educ., Docket No. 91-35-160 (Aug. 30, 1991), this Board stated:

> In other words, the proviso gives regular employees an opportunity to fill an absent employee's job and allows for assigning the substitute employee the position of the regular employee who remains on the job. The proviso is applied when these three events occur: One, a regular employee is absent, two, a substitute is necessary for temporary employment, and three, an existing regular employee moves temporarily to the absent employee's position instead of having the substitute fill it.

Grievants failed to prove as a matter of law that they were entitled to fill the newly created positions until posted.

The following conclusions of law support denial of the grievance.

Conclusions of Law

1. In order to prevail, Grievants must prove the allegations in their complaint by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. W.Va. Code §18A-4-8b requires boards of education to post and date notices of all job vacancies, including newly created summer positions, for at least five working days, and to fill such vacancies within twenty working days of posting. MBOE was therefore required to post the five

summer bus operator positions.

3. W.Va. Code §§18-5-39 and 18A-4-8b require newly created summer school personnel positions to be filled on the basis of seniority, qualifications and evaluation of past service.

4. W.Va. Code §§18-5-39 and 18A-4-15 require a county board of education to assign substitute school personnel to temporarily fill newly created summer school personnel positions until the positions are filled through posting.

5. Grievants failed to prove they should have received the summer bus operator positions, or are otherwise entitled to relief.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 24, 1995

Footnote: 1 Respondent declined to submit fact/law proposals.

Footnote: 2 MBOE employs regular bus operators in maintenance and transportation positions during the summer. Those already employed in such positions were not called about the Evenstart positions because Mr. Gemas decided these employees would not be interested in a position lasting only fourteen days.