WILLIAM K. HALL,

Grievant,

v. **Docket No. 94-29-1110**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

RON MATNEY, JOSEPH HOWARD and

JOEL T. CRUM,

Intervenors.

D E C I S I O N

Grievant, William K. Hall, grieves his non-selection for one of four posted bus operator positions. He states the Mingo County Board of Education ("MCBOE"):

filled bus operator positions with less senior applicants in violation of W. Va. Code §§18A-4-8b and 18a-4-8g [sic]. Grievant seeks instatement into the position of his choice with retroactive backpay, seniority, and other benefits.

Grievant also wants MCBOE to credit him with seniority. Grievant and all Intervenors were substitute employees at the time of the postings.

This grievance was denied at Levels I and II and waived at Level III. A Level IV hearing was held on May 18, 1995. Thisgrievance became mature for decision on July 5, 1995, after the submission of proposed findings of fact and conclusions of law. (See footnote 1)

Background

Grievant was originally employed by MCBOE in the 1971-72 and 1972-73 school years as a substitute bus operator. His substitute starting date at that time was in March 1972. He testified that during the 1972-73 school year, he was hired by MCBOE as a regular bus operator for eighty-seven

days, to replace Mr. Bucci, a regular driver, who was on disability. He stated he does not remember if this position was posted, and that it was MCBOE's practice at that time to fill these positions with the most senior substitute, in this instance the Grievant. There is no record of Grievant's hiring as a regular bus operator in MCBOE's minutes. Grievant argued it was clear he was a regular employee because MCBOE took retirement out of his pay check and required him to fill out papers after he received the position. Intervenor Joseph Howard testified it was normal practice for a long-term substitutes to be called in to fill out papers and to have retirement deducted when they had served in a position for longer than thirty days, and he had been treated in that manny.

Grievant was very unclear about his employment status after the 1972-73 school year, and how it occurred. He did state, "I was not terminated, and I did not resign." Further testimony revealedGrievant did not take the required physical exam or required written recertification test for the 1973-74 school year. Further, Grievant made no contact with MCBOE at any time to clarify his status. Grievant was not qualified to be a bus operator again until 1991. Thus, the undersigned Administrative Law Judge finds that Grievant voluntarily severed his employment relationship with MCBOE by his failure to obtain the necessary certifications he knew were required.

When he returned to employment with MCBOE, Grievant asked that his past employment time be "bridged" or added to his current employment time. After MCBOE consulted with his union representative, his substitute starting date was changed by informal agreement from September 16, 1991 to September 1, 1990. This seniority adjustment resulted in Grievant receiving several positions, and other bus operators repeatedly questioned Grievant's right to this additional seniority.

These complaints caused MCBOE to reevaluate their prior decision and after review of the pertinent Code Sections and discussion with their attorney, MCBOE decided they had incorrectly adjusted Grievant's seniority, and returned his substitute starting date to September 16, 1991. This readjusted date was used when the four positions at issue were filled.

After posting these four regular bus operator positions on September 19, 1994, but before filling them, MCBOE consulted at length with the West Virginia School Service Personnel Association, which represented most of the applicants. MCBOE then filled thepositions based on the substitute starting dates of the applicants. MCBOE filled the positions in the following manner:

SUBSTITUTE

STARTING

NAME	DATE	LOCATION
Patsy Dingess	2/4/86	Gilbert Area
Randolph Livingood	2/7/86	Gilbert Area
Joe Howard	2/1/91	Williamson Area
Joel T. Crum	2/7/91	Matewan High School

Intervenor Ron Matney grieved the placement of Intervenor Joel T. Crum. (See footnote 2) By a Level II grievance decision, dated December 2, 1994, Intervenor Matney was instated into the Matewan position because his substitute starting date was February 4, 1991 - three days prior to Intervenor Crum's. With the readjustment of his substitute starting date to September 16, 1991, Grievant's date was later than all individuals who received these positions, including the displaced Intervenor Crum.

Additionally, the Level IV testimony indicated that Grievant, Intervenors and Mr. Livingood were all given preferred recall status by MCBOE, pursuant to MCBOE Policy 807.01A adopted November 13, 1990. Exactly when each of the above-named individuals was given this status is unclear, but Assistant Superintendent Johnny Fullen's unrebutted testimony was they all had been given this status by MCBOE. This policy states:

It shall be the policy of The Board of Education of the County of Mingo to post and fill all service personnel vacancies that exist for more than thirty (30) consecutive working days from the payroll records submitted and signed by the school principal.

The positions will be advertised for a long term substitute until the status of the regular employee is determined, or until the end of the current school term which ever occurs first. (See footnote 3)

MCBOE rescinded this policy on October 6, 1994, approximately two days before these positions were filled.

A review of the applicable case law indicates the four positions were awarded incorrectly. Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), clarifies how these regular positions are to be filled. In Ferrell, MCBOE correctly filled a regular cook position based on the amount of regular seniority the applicants had received while filling posted positions created by a regular employee's leave of absence. The applicants were, at the time, both substitute employees,

who had acquired regular seniority while filling these positions. The four positions at issue should have been awarded based on the applicants' regular seniority, if any.

Unfortunately, the record is unclear as to exactly how much regular seniority each of the employees involved in this case have. The evidence at hearing focused on Grievant's seniority, and the substitute hiring date of the applicants. Since Intervenors, Mr.Livingood, and Grievant all received preferred recall status, pursuant to MCBOE's prior policy, it is clear they were all considered regular employees at one time, pursuant to W. Va. Code §18A-4-8g.

Ms. Dingess' status is different. She worked as a substitute bus operator from 1986 to 1988. After that time she became a contract driver. She picked up students in outlying parts of the county and drove them, in her own vehicle, to the nearest bus stop. She was paid either per diem or per student. Thus, she was not a bus operator or a regular employee, but more on the order of an independent contractor. W. Va. Code §18A-4-8.

Given Ms. Dingess' status, and lack of regular employment, Grievant has proven one of the four positions was filled improperly. Grievant did not prove the other three positions were awarded improperly as he did not demonstrate he had more regular seniority than the other successful applicants. What remains unclear is whether Grievant or Intervenor Crum is entitled to the fourth position.

Before either Grievant's substitute starting date or regular employment time can be calculated, the issue of what to do with his time in the 1970's must be resolved. The answer as to whether Grievant can recapture substitute time is clear. (See footnote 4) W. Va. Code §18A-4-8g says substitute time continues to accumulate until the employee's relationship with the county board is "severed." Grievant severed his employment relationship with MCBOE when he failed to meet the prerequisites for continuing employment in the Fall of 1973. W. Va. Code §18A-4-8g makes no mention of recapturing substitute time, and it is deemed lost by Grievant's voluntary and intentional act. Thus Grievant's first day as a substitute is September 16, 1991.

The answer to Grievant's request to recapture his alleged regular seniority from 1972-73 is also in the negative. Grievant presented no evidence of MCBOE action changing his status from that of a substitute to a regular employee during this time. Assistant Superintendent Fullen and Director of Transportation Bill Kirk both testified an extensive search was made of old board minutes and no such action was found. Indeed, Grievant, in his own testimony, called himself a long-term substitute.

Grievant did not remember if the position was posted. He stated he received the position because he had the most seniority. The fact retirement was "taken out" of Grievant's compensation, and he was required to sign some papers is not persuasive as Intervenor Howard testified this was a common occurrence. Accordingly, Grievant has not proven he was employed as a regular employee during the 1972-73 school year. (See footnote 5)

The above discussion will be supplemented by the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant worked as a substitute bus operator in the early 1970's and voluntarily severed his employment relationship with MCBOE. Grievant was not employed as a regular bus operator during this time.

2. Grievant was rehired by MCBOE as a substitute bus operator and his first day worked as a substitute was September 16, 1991.

3. Grievant, Intervenors and Mr. Livingood have all worked as regular bus operators for MCBOE in posted positions created by another employee's absence. The amount of regular seniority each employee has is unclear from the record.

4. Ms. Dingess, who received one of the positions at issue, has worked for MCBOE as a substitute bus operator and as an independent contractor. She has never been employed as a regular service personnel employee.

5. MCBOE assigned the three remaining positions to Intervenors Howard and Crum and Mr. Livingood. Intervenor Matney replaced Intervenor Crum after a successful grievance.

6. MCBOE filled the positions at issue by using the applicants' substitute starting date.

Conclusions of Law

1. The Grievant has the burden of proving his case by a preponderance of the evidence. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

2. Grievant did not prove he was employed as a regular bus operator during the early 1970's.

3. Service personnel positions are to be filled on the basis of seniority, qualifications and evaluations of past service. W. Va. Code §18A-4-8b.

4. When filling service personnel positions, the amount of regular seniority the applicants' possess must be utilized to award the position, if such seniority is present. Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).

5. Grievant proved one of the positions at issue, the one held by Ms. Dingess, was improperly filled as she possessed no regular seniority. Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).

6. Because Grievant did not demonstrate he had more regular seniority than Howard, Matney, or Livingood, no substantive violation of W. Va. Code §18A-4-8b is found in the filling of these positions.

7. MCBOE did not abuse its substantial discretion in the filling of the three positions identified in Conclusion of Law 4. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

8. W. Va. Code §18A-4-8g does not provide a method for recapturing substitute seniority after a voluntary break in service, thus Grievant may not change or increase his seniority with his time from the early 1970's.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Grievant may not recapture his seniority from the 1970's. MCBOE is directed to calculate the regular seniority of Grievant and Intervenor Crum and to award Ms. Dingess' position, if it is still available, to the individual with the most regular seniority. Back pay and all other benefits of the successful employee are to be adjusted accordingly.

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

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 29, 1995

Footnote: 1The original mature date was extended at the request of the Grievant and consent of the Respondent. Additionally, the parties submitted a Joint Stipulation of Fact on August 15, 1995. This stipulation was not considered as it had no bearing on the issues raised by the parties.

---

*Footnote: 2At the beginning of the Level IV hearing, Grievant's representative asked to dismiss Intervenor Crum as he had lost his position to Intervenor Matney. Intervenor Crum did not attend the Level IV hearing. MCBOE objected because Grievant's representative, although she previously had represented Intervenor Crum, did not represent him in this matter. This motion was **DENIED**.*

Footnote: 3Although not specifically stated by this policy, MCBOE's interpretation of this policy was that it required them to place employees who received long term substitute positions pursuant to postings, on the preferred recall list when they were terminated from these positions. Employees were treated as regular employees while in these positions and received regular seniority.

Footnote: 4Although Grievant's substitute seniority is not germane to the awarding of these positions, it is an issue contested by the parties, inherent in his grievance, and in need of resolution.

Footnote: 5The issue of whether Grievant can recapture this regular seniority, need not be addressed as Grievant has not proven he had past regular seniority.