SABRINA BELCHER,

Grievant,

v. **Docket No. 95-29-024**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

JOEL T. CRUM,

Intervenor.

D E C I S I O N

Grievant, Sabrina Belcher, is employed as a substitute bus operator with the Mingo County Board of Education ("MCBOE"). She grieves her removal from a long-term substitute position. Joel T. Crum, Intervenor, was the individual placed in the position. This grievance was denied at Levels I and II and waived at Level III. A Level IV hearing was held on April 7, 1995, and this case became mature for decision on May 18, 1995, after the submission of proposed findings of fact and conclusions of law.

The facts, although somewhat confusing, are not in dispute.

Findings of Fact

1. Nancy Copley, a regular bus operator, was injured prior to the start of the 1994-95 school year, and she was unable to assume her regular duties in the Delbarton area.

2. Joel T. Crum, Intervenor, as the substitute with the most seniority, was called to fill Ms. Copley's duties on September 1, 1994, the first day of school.

3. On September 19, 1994, a regular bus operator position was posted at Matewan High School ("MHS"). Intervenor Crum applied and was chosen for the position based on his seniority as a substitute. He began these duties on October 10, 1994.

4. Grievant was then called to perform Ms. Copley's Delbarton run, beginning October 10,

1994.

5. Ron Mathney grieved Intervenor's selection for the MHS position. In the Mathney Level II Decision the parties agreed Mr. Mathney was more senior, Mr. Crum's placement was in error and Mr. Mathney should be placed into the MHS position.

6. MCBOE directed Mr. Bill Kirk, Director of Transportation, to place Mr. Mathney in the MHS position and to return Intervenor to Ms. Copley's position in the Delbarton area.

7. On December 6, 1994, Intervenor resumed his duties in Ms. Copley's position.

8. Grievant served in the Copley position for approximately forty days. On December 6, 1994, she was again placed on the substitute list.

9. Intervenor's first day worked as a substitute is February 7, 1991. Grievant's first day worked as a substitute is March 13, 1992.

10. The position at issue was never posted.

Issue

Grievant alleges MCBOE violated W. Va. Code §18A-4-15 when Intervenor was placed back into the Copley position. Intervenor counters with two arguments. First, W. Va. Code §18A-4-15 does not apply because the position was not posted and filled pursuant to W. Va. Code §18A-4-8b, and second, an employee cannot grieve the actions of a county board of education taken to implement a grievance decision's order. MCBOE argues it has substantial discretion in matters relating to hiring, and its action to correct its prior error was reasonable and not arbitrary and capricious.

Discussion

W. Va. Code §18A-4-15 states:

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:

(1) To fill the temporary absence of another service employee;

(2) To fill the position of a regular service employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the

commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position:

Additionally, W. Va. Code §18A-4-15 states:

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 asubstitute 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 under the procedures set out in section eight-b [§ 18A-4-8b] of this article.

MCBOE followed W. Va. Code §18A-4-15 both times it filled Ms. Copley's position with a substitute. The substitute with the "greatest length of service time" was given priority to accept the position each time. After accepting the position, Intervenor had the right to the position until the regular employee, Ms. Copley, returned or the position was posted and filled. But for MCBOE's error in selecting Intervenor for the MHS position, he would have remained in the position, and Grievant would never have held the Copley position the two months she did.

The Grievance Board has previously ruled that "[a]n employee cannot successfully grieve a county board of education's actions in reasonably and correctly implementing an earlier grievance decision's order." Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991); Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990). The Level II grievance decision in Mathney v. Mingo County Bd. of Educ., (Dec. 2, 1994), issued by Superintendent Everett Conn, stated Intervenor "had been erroneously placed in [the] vacant position." Furthermore, Mr. Kirk's unrebutted testimony was MCBOE directed him to place Mr. Mathney in the MHS position and to return Intervenor to the Copley position. This action returns the employees to the positions they should have had, but for the error. This correction is reasonable and can in no way be seen as an arbitrary and capricious act or anabuse of discretion. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986). Additionally, Intervenor has been an innocent victim of Respondent's action and should not be penalized for Respondent's errors. Keatley v. Mercer County Bd. of Educ., Docket

No. 94-27-641 (Apr. 26, 1995).

The remainder of this decision will be stated as conclusions of law.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

2. MCBOE followed the requirements of W. Va. Code §18A-4-15 both when it filled Ms. Copley's position with Intervenor, and when Intervenor was returned to the position.

3. Grievant failed to demonstrate a violation of W. Va. Code §18A-4-15.

4. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

5. "An employee cannot successfully grieve a county board of education's actions in reasonably and correctly implementing an earlier grievance decision order." Gillman v. Logan County Bd. of Educ., Docket No. 91-23-196 (Nov. 7, 1991). MCBOE's decision toreturn Intervenor to the Copley position was reasonable and the correct implementation of an earlier grievance decision order.

6. Failure to return Intervenor to the Copley position would penalize an innocent victim for the actions of Respondent, and reward a party who has no entitlement to the position. Accord, Keatley v. Mercer County Bd. of Educ., Docket No. 94-27-641 (Apr. 26, 1995).

Accordingly, this grievance is **DENIED**.

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: July 26, 1995