ARTHUR CLARK and PATRICIA MELTON,

Grievants,

v.

DOCKET NO. 96-40-504

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Arthur Clark and Patricia Melton, filed the following grievance on or about May 23, 1996:

> Violation of WV Code 18A-4-15 section 5 and 6 in regard to substitute assigned to the position for more than thirty days being afforded all rights, privileges and benefits pertaining to said position.
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> Relief sought is granting of benefits due to include personnel rights of insurance and personal leave (sick) days.

Following adverse decisions at the lower levels, Grievants appealed to level four on November 22, 1996, requesting that this matter be submitted on the record. This case became mature on December 30, 1996, the deadline for submission of proposed findings of fact and conclusions of law.

The material facts in this grievance are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievants are employed as substitute bus operators with the Putnam County Board of Education ("Board").

2. During the months of February through April, 1996, Grievant Clark filled in for Roy Cole, a regular bus operator, for a period of 51 working days, while Mr. Cole was on sick leave.

3. During the months of April through September, 1996, Grievant Melton filled in for Robert Anthony, a regular bus operator, for a period of 44 working days, while Mr. Anthony was on sick leave.

4. Grievants were selected for these positions on the rotating basis by which substitutes are normally selected.

5. Grievants did not receive any benefits, such as insurance, personal leave, or retirement benefits, while working in these positions.

6. Mr. Cole and Mr. Anthony represented to the Board that they would be returning to work. When it became apparent to the Board that the two regular drivers would not be returning to work, as had been anticipated, the long-term substitute jobs were posted in accordance with W. Va. Code § 18A-4-8b.

7. Grievants were not the most senior substitutes and did not receive the long- term substitute positions after they were posted.

Discussion

Grievants argue they should have been afforded all the rights, privileges, and benefits of regular service employment while they held the subject substitute positions, in accordance with W. Va. Code § 18A-4-15. The Board argues that, because Grievants didnot gain those positions as the result of a competitive bidding process, they are not entitled to the benefits afforded by that Code Section.

W. Va. Code § 18A-4-15(1996) provides, in pertinent part:

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

> Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided herein, upon termination of the leave of absence said employee shall be returned to his or her original position;
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> . . .
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> (4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight, article two of this chapter, or death of the regular service employee who had been assigned to fill such position: Provided, That within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b of this article and section five, article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;
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> . . .
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> 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 under the procedures set out in section eight-b of this article. Allsubstitutes 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: . . .

Grievants rely on the provision of Code § 18A-4-15 which provides, in part, "that if [a] 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. . . and the substitute shall be accorded all rights, privileges and benefits pertaining to such position." Grievants cite Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996), in support of their position, which follows this Grievance Board's precedent in holding that "[a]ny absence beyond twenty days, due to illness or other causes, will be considered a leave of absence for the purpose of substitute employment under W. Va. Code § 18A-4-15(2) even though a formal request for a leave of absence has not been filed by the absent employee." Trickett, supra; see also, Hensley v. Mingo County Bd. of Educ., 93-29-037 (July 6, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). Grievants assert that, because they were employed as substitutes in their respective positions for greater than thirty days, they should be

afforded all the rights, privileges and benefits of a regular employee.

The Board relies on Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995), which held that "[i]n order for a substitute employee to gain entitlement to the rights, privileges and benefits of a regular employment position, consistent with the mandates of W. Va. Code § 18A-4-15(2), the substitute must be hired by competitive bid, according to W. Va. Code § 18A-4-8b, for the remainder of the regular employee's leave of absence lasting over twenty-five days. As explained in Bays:

> Under this Code subsection [18A-4-15(2)], a board is authorized to assign an employee (hereinafter short-term substitute) to fill-in for an absent employee on leave of absence. Consistent with this Grievance Board's prior rulings, the Board was correct in treating both Mr. Sargent's and Mr. Beckett's absences as leaves of absence. However, once it was determined that these regular employees' leaves of absence were to be greater than thirty days, the Board was obligated to post and fill those vacancies with employees (hereinafter long-term substitutes) pursuant to Code § 18A-4-8b. Thereafter, the long-term substitutes were to remain in the positions, receiving all of the rights, privileges and benefits of those positions, until the regular employees returned. Only such long-term substitutes may receive said rights, privileges and benefits. See Lambert v. Lincoln Co. Bd. of Educ., Docket No. 93-22-547 (Sep. 29, 1994). The language in Code § 18A-4- 15(2), along with the phrase, "[t]he substitute shall hold such position and regular employment status", refers to a long-term substitute and not a short- term substitute. . . .

As in Bays, the record in the instant case establishes that neither Grievant received his or her substitute position by competitive bid pursuant to Code § 18A-4-8b. These employees never legally changed status from short-term to long-term substitutes, and are thus not entitled to any rights, privileges or benefits of regular employment status for the time they held their respective substitute positions.

Further, it must be noted that the grievant in Trickett, supra, in challenging the Board's failure to post the subject position after thirty days, proved by a preponderance of the evidence that she would have received the position had it been properly posted according to Code §§ 18A-4-15(2) and 18A-4-8b. Here, the Grievants conceded they were not the most senior substitutes, and were not eligible to receive the positions once posted.

Conclusions of Law

1. County boards of education are authorized to hire substitute service employees pursuant to W. Va. Code § 18A-4-15. Further, this statutory provision detailsspecifically when these substitutes

may be assigned to fill-in for absent, regular, service employees.

2. In order for a substitute to gain entitlement to the rights, privileges and benefits of a regular employment position, consistent with the mandates of W. Va. Code § 18A-4-15(2), the substitute must be hired by competitive bid, according to W. Va. Code § 18A-4-8b, for the remainder of the regular employee's leave of absence lasting over twenty-five days. Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995).

3. Grievants bear the burden of proving their claims by a preponderance of the evidence. W. Va. Code § 18-29-6.

4. Pursuant to the clear and unambiguous language of W. Va. Code § 18A-4- 15(2), Grievants did not legally obtain the status of long-term substitutes in the positions in question. Therefore, they could not have obtained entitled to the rights, privileges and benefits of these positions. See Bays, supra.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 12, 1997