JOHN SHOWALTER IV,

Grievant,

v. **Docket No. 97-15-250**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, John Showalter IV, employed by Respondent as a substitute bus driver, filed this grievance on October 23, 1996 alleging that:
Respondent has violated W.Va. Code §18A-4-15 by its failure to call in rotating seniority order. Grievant requests reimbursement for substitute assignments missed and interest on all monetary sums.

No relief was granted at Level I, and Grievant appealed to Level II on October 23, 1996. A hearing was held at Level II on May 7, 1997, with an adverse decision issued on May 12, 1997. The matter was appealed to Level IV where a hearing was held June 25, 1997. With the submission of briefs by both parties, this grievance was mature for decision on July 28, 1997.

DISCUSSION

Grievant is employed by Respondent as a substitute bus driver. Work assignments are made from a call-up list of substitute bus drivers, ranked in the order of their seniority dates. The substitute driver with the earliest starting date would be listed first and would be the first called on the first day. That would begin the rotation through the entire list until his name was reached again. It would be difficult to predict when that would happen, because one wouldn't know whether each operator on the list was available. The rotation would move more quickly if there were some who were not available and were passed by on the list.

Prior to the 1996-1997 school year, the notifications were done manually. An employee would call substitutes on the list until the positions were filled. For the 1996- 1997 school year, Respondent instituted a computer-controlled, automated system. The employee's name and date of seniority were placed into the computer, which was to notify substitutes of available vacancies automatically. The

computer was to make notifications in the order of seniority. However, instead it called substitutes in the order of their social security numbers. (Level II Transcript, p. 18). The system was programmed and operated by a private company which apparently represented to Respondent that the order of rotation was based on seniority and not social security numbers. Once Respondent determined that seniority was not the basis, they stopped using the system, and reverted to the old call-out system.

At the Level II hearing, it was established that this grievance was concerned only with the period from September 3 to September 11, 1996. It was during that time thatGrievant although available (See footnote 1) , did not receive any assignments as a substitute bus driver. However, Grievant did not file a grievance regarding this until October 23, 1996. The issue of timeliness was not raised by Respondent at any time during this procedure, and as a result, was waived.

However, a grievance may be filed within fifteen days after the date "on which the event became known to the grievant." (See footnote 2) This appears to have been Grievant's situation. The chief questions under consideration are:

1. Is it necessary that the call-up of substitutes be based upon seniority,

and if so,

2. Were the assignments of substitute bus drivers from September 3, 1996 to September 11, 1996, made upon criteria other than seniority, and if so,

3. Was Grievant adversely affected?

Number one is answered simply by W.Va Code §18A-4-15 which reads as follows:

The county board shall employ and the county superintendent, subject to the approval of the county board, 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. (emphasis added).

Therefore, seniority is, by law, required to be used.

It is conceded that the criterion used by the computer program for selecting substitute bus drivers was the employee's social security number. There was no evidencepresented regarding the correlation between the sequential order of social security numbers and seniority dates. The

undersigned cannot imagine any other relationship than mere chance. Thus, W.Va. Code §18A-4-15 was not followed. The first two questions are answered yes.

The third is more difficult. A determination must be made as to whether Grievant was affected. Should he have been selected and if so, when? An examination of exhibits one and two is necessary. Exhibit number one, the seniority order, indicates that five employees are senior to Grievant. Page two of the exhibit adds two more drivers to the list. They were laid off in a reduction in force and were placed upon the substitute list as well as the preferred recall list. Both were senior to Grievant, thus lowering him to eighth place on the list. Exhibit number two is a list of the assignments actually made during the time in question and beyond. Drivers senior to Grievant were selected beginning September 3, 1996 to and including September 6. Somehow, driver Patricia Wade, senior to grievant, was selected twice, September 4th and 6th, before Grievant's selection on September 11th. Her seniority should not have entitled her to two selections before Grievant's one. Richard Hixenbaugh, also senior to Grievant, received his second selection on September 9th. Furthermore, on September 9th, Joseph Ramsey, Charles Pugh and Robert Hans, all junior to Grievant were selected. Taking into account the number of selections made, the exhibits indicate that Robert Neptune, one position above Grievant should have been called on September 6th, instead of Wade for her second selection. Hence, Grievant should have been in line to be selected on September 9th instead of Joseph Ramsey. Beyond that point, it becomes very difficult to predict. Remembering that the period in question is September 3rd through the 11th, it is possible that Grievant was eligible onSeptember 10th, however, this is balanced by his selection on September 11th. If he had been called September 10th, he more than likely would not have been called on September 11th.

Based upon the foregoing discussion and other matters of record, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant was employed by Respondent as a substitute bus driver during the 1996-1997 school year.

2. Respondent for that year, instituted an new automated computer call out system for the purpose of notifying substitute bus drivers of work assignments.

3. The computer was to be programmed to select substitutes for work assignments from a list,

based upon seniority.

4. The computer erroneously made selections on another basis, in the order of the substitutes' social security numbers.

5. As a consequence of the computer error, Grievant, although available, was not selected for any substitute assignments during the period from September 3, 1996 until September 11, 1996.

6. Grievant, by a rotation based upon seniority, should have been called for work on September 6, 1996.

CONCLUSIONS OF LAW

1. Under W.Va. Code §18-29-4(a)(1), Grievant's filing of this grievance wastimely.

2. The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to fill the temporary absence of another service employee. W.Va. Code §18A-4- 15(1).

3. During the period from September 3rd until September 11, 1996, substitute bus drivers were called on a basis other than seniority, an infraction of W.Va. Code §18A- 4-15(1).

4. As a result of this infraction, Grievant was not called out to substitute work on September 9, 1996 and therefore suffered damages amounting to one day's loss of wages.

5. Further losses of work through the end of the period of September 3rd through September 11, 1996, would be speculative.

6. In a grievance involving a non-disciplinary action, Grievant must prove his case by a preponderance of the evidence. Procedural Rules of the W.Va. Educ. & State Employees Grievance Bd. 156 C.S.R 1 §4.19 (1996).

Accordingly, this grievance is hereby **GRANTED in part, and DENIED in part .** Respondent is hereby **ORDERED** to compensate Grievant for his loss of wages from September 6, 1996.

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 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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JAMES D. TERRY

Administrative Law Judge

DATE: December 4, 1997

Footnote: 1

Level II Transcript, P. 12.

Footnote: 2

W.Va. Code §18-29-4(a)(1) Before a grievance is filed and within fifteen days following the 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, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. (Emphasis added).*