WILLIAM K. HALL,

Grievant,

v. **Docket No. 97-29-420**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

RON MATNEY, JOE HOWARD, and JOEL T. CRUM,

Intervenors.

D E C I S I O N

William K. Hall (Grievant) submitted this grievance under W. Va. Code §§ 18-29-1, et seq., on or about August 26, 1997, alleging that Respondent Mingo County Board of Education (MCBE) failed to offer him a substitute bus operator's assignment in violation of W. Va. Code §§ 18A-4-15 and 18-29-2(p), (m) and (o). After his grievance was denied at Level I, Grievant appealed to Level II where a hearing was conducted on September 11, 1997. Ron Matney, Joe Howard, and Joel T. Crum (Intervenors) were permitted to intervene in this matter at Level II pursuant to W. Va. Code § 18-29-3(u). On September 18, 1997, a Level II decision denying the grievance was issued by the Superintendent's designee, Johnny Fullen. As authorized by W. Va. Code § 18-29-4(c), Grievant bypassed Level III, appealing to Level IV on September 23, 1997. Thereafter, a Level IV hearing wasconducted in this Grievance Board's office in Charleston, West Virginia, on October 29, 1997. The parties were provided an opportunity to file proposed findings of fact and conclusions of law. Grievant's written submission was received on November 17, 1997, and this matter became mature for decision upon expiration of the agreed time limit for written submissions on November 21, 1997.

As the facts in this matter are essentially undisputed, the following findings of fact are made from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant is employed by Respondent Mingo County Board of Education (MCBE) as a substitute Bus Operator.

2. Grievant was employed by MCBE as a regular Bus Operator during the 1996- 97 school year and was reduced in force at the end of that school year. In accordance with W. Va. Code § 18A-4-8b, Grievant holds preferred recall status with MCBE in the Bus Operator classification. See G Ex A.

3. MCBE, in accordance with a majority vote of substitute service personnel in the Bus Operator classification, assigns and calls out substitute Bus Operators according to the geographic area for which the substitute expresses a preference, according to seniority of the Bus Operators assigned to each area. For these purposes, MCBE has organized its bus operations into five geographic areas, Tug Valley, Matewan, Williamson, Delbarton and Gilbert. See G Ex C. In the event no substitute is available to work in one geographic area, substitutes are called from other areas.

4. Grievant is assigned to the Tug Valley area and is the most senior substitute Bus Operator assigned to that area. See G Ex C. 5. As a result of a significant realignment of bus routes, there were three vacant Bus Operator positions in the Tug Valley area as of August 26, 1997, the beginning of the 1997-98 school year.

6. Joel Crum, Ron Matney, and Joe Howard, previously employed by MCBE in the service personnel classification of Bus Operator, are on MCBE's preferred recall list. Each of these employees has greater seniority on MCBE's preferred recall list than Grievant. See G Ex A.

7. Each employee described in Finding of Fact Number 6 is also on MCBE's substitute list for Bus Operators. In accordance with the arrangement described in Finding of Fact Number 3, Mr. Crum is assigned to the Delbarton area. Similarly, Mr. Howard and Mr. Matney are assigned to the Williamson area.

8. MCBE determined that, until the vacant positions could be posted and filled in accordance with W. Va. Code § 18A-4-8b, the positions would be assigned on a temporary basis to the most senior Bus Operators on MCBE's preferred recall list, Mr. Matney, Mr. Crum, and Mr. Howard.

9. The three Tug Valley area positions in question were posted on or about September 12, 1997, and timely filled in accordance with W. Va. Code § 18A-4-8b.

10. Between the start of the 1997-98 school year and the point in time when the three Tug Valley Bus Operator positions were posted and filled, Grievant was called to substitute on one occasion when he declined the assignment due to illness. Otherwise, Grievant was available to substitute in the Tug Valley area from August 26, 1997, until the point in late September 1997 when the Bus Operator positions were permanently filled.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Resolution of this grievance requires application and analysis of provisions in W. Va. Code §§ 18A-4-15 and 18A-4-8b. W. Va. Code § 18A-4-15 provides, in pertinent part, as follows.

> 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:
>
> (4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability 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 [§ 18A-4-8b] of this article and section five [§ 18A-2-5], article two of this chapter....
>
> (6) To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis....

Also pertinent to this grievance are the following portions of W. Va. Code § 18A-4- 8b addressing seniority rights of school service personnel.

> All employees whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the basis of seniority.

> Employees placed upon the preferred recall list shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to any lateral position for which the employee is qualified or to a lateral area for which an employee has certification and/or licensure.
>
> Employees on the preferred recall list shall not forfeit their right to recall by the county board if compelling reasons require an employee to refuse an offer of reemployment by the county board.
>
> The county board shall be required to notify all employees on the preferred recall list of all position openings that from time to time exist. Such notice shall be sent by certified mail to the last known address of the employee; it shall be the duty of each such employee to notify the county board of any change in the address of such employee.
>
> No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

MCBE contends that because three permanent Bus Operator positions in the Tug Valley area were vacant at the beginning of the school year, it was obligated by the foregoing language in W. Va. Code § 18A-4-8b to offer these "job opportunities" to the most senior Bus Operators on its preferred recall list on a county-wide basis. Grievant contends that, until the positions were properly posted and filled in accordance with W. Va. Code § 18A-4-8b, these "job opportunities" represented temporary vacancies as contemplated by W. Va. Code § 18A-4-15, to be filled by substitute service personnel in accordance with the provisions in that statute.

This Grievance Board has previously addressed substantially the same issue in Byers v. Marion County Board of Education, Docket No. 94-24-388 (Dec. 29, 1995). In Byers, the county board had adopted a policy whereby essentially any service personnel position that was projected to be vacant for five days or more, whether due to thetemporary or permanent absence of the regular employee, would be offered to service personnel in the appropriate classification holding preferred recall status. Byers specifically determined that this policy was not permissible because W. Va. Code § 18A-4-15 requires that substitutes be called to fill "true vacancies," whether those vacancies result from the resignation, transfer, retirement, permanent disability, or death of a regular employee, or the creation of an entirely new position. Byers, supra. See W. Va. Code §§ 18A-4-15(4) & (6).

In the instant case, MCBE properly filled the Tug Valley positions on a permanent basis in accordance with W. Va. Code § 18A-4-8b. It is these posted position vacancies which represent the "job openings" where MCBE is required by the previously quoted language in § 18A-4-8b to extend preference to employees holding preferred recall status over all applicants excepting employees who hold regular employment status. See Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331, 189 W. Va. 273 (1993). See also Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). However, as previously concluded in Byers, until these positions are properly filled on a permanent basis, W. Va. Code § 18A-4-15 states that the county board shall employ substitute service personnel to perform these duties. See Weimer-Godwin v. Bd. of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988).

Grievant established that, as the senior substitute Bus Operator in MCBE's Tug Valley area, he should have been offered at least one of the positions at issue in accordance with W. Va. Code § 18A-4-15(6), until the position was permanently filled asrequired by W. Va. Code § 18A-4-8b. (See footnote 1) Accordingly, Grievant is entitled to compensation for those days for which MCBE employed another employee to fill the positions in question on a temporary basis, until the positions were permanently filled, less the one day when Grievant declined employment due to illness, and any other days in the pertinent time frame during which Grievant was actually employed and compensated by MCBE as a substitute Bus Operator.

In addition to the foregoing discussion, the following conclusions of law are appropriate to disposition of this matter:

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code §§ 18A-4-15 and 18A-4-8b do not authorize a county board of education, absent proper posting, to offer substitute assignments to employees holding preferred recall status before offering such assignments to substitute personnel on a rotating basis according to their

seniority. Byers v. Marion County Bd. of Educ., Docket No. 94-24-388 (Dec. 29, 1995).

3. Grievant established by a preponderance of the evidence that, as the most senior substitute Bus Operator employed by MCBE in the Tug Valley area, he should havebeen offered an opportunity to substitute until a newly established Bus Operator position was posted and filled in accordance with W. Va. Code § 18A-4-8b. See W. Va. Code § 18A-4-15(6); Byers, supra.

Accordingly, this Grievance is **GRANTED**. Respondent Mingo County Board of Education is hereby **ORDERED** to compensate Grievant for those days during the 1997-98 school year on which he should have been called as a substitute Bus Operator in the Tug Valley area until the point in time when the position was filled on a permanent basis in accordance with W. Va. Code § 18A-4-8b, less one day where Grievant declined substitute employment due to illness, and less any other days, during the time period in question, when Grievant was employed and compensated by the Mingo County Board of Education as a substitute Bus Operator.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 21, 1998

Footnote: 1

Inasmuch as Grievant has prevailed on his claim under W. Va. Code § 18A-4-15, it is not necessary to address Grievant's claims under W. Va. Code §§ 18-29-2(m), (o), & (p).