TRACI CONLEY and TEMPLE FARLEY,

Grievants,

v. DOCKET NO. 98-23-425

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance was filed by Grievants Traci Conley and Temple Farley against the Logan County Board of Education ("LBOE"), alleging two bus operators with less seniority than Grievants should have been reduced in force as Grievants were, or were improperly hired into temporary positions extending beyond the end of the school year, and were able to bid into positions ahead of Grievants because they were still considered employees. They requested as relief that all seniority involved be adjusted, the bus runs held by those two less senior bus operators be re-bid, and backpay and other benefits. (See footnote 1) The following findings of facts pertinent to the resolution of this matter have been made from the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant Farley became employed as a regular bus operator by LBOE in December 1997. She had been employed by LBOE as a substitute bus operator since 1993, and had held some long-term temporary positions prior to December 1997. While serving in her regular bus operator position in early 1998, she also bid into a long-term temporary position.

2. Grievant Conley was employed as a substitute bus operator by LBOE during the 1997-98 school year, and worked in one or more long-term temporary positions.

3. In February and March 1998, Grievants were employed in long-term temporary positions, and Grievant Farley also held her regular bus operator position to which she would return when her long-term temporary position ended. On March 26, 1998, Grievants were reduced in force as long-

term temporaries, as were all bus operators employed in long-term temporary positions, and some regular bus operators. Grievant Farley was also reduced in force as a regular bus operator. This action was not grieved.

4. In March 1998, LBOE posted two long-term temporary bus operator positions, for bus runs 8806 and 9716. Both postings stated the positions were to last "until regular employee returns, or the remainder of the current school term."

5. Joann Meadows and Yvonne Reed bid on these positions, and each was awarded one of the positions by action of LBOE on March 26, 1998, the same night LBOE approved the reduction in force of Grievants. LBOE's minutes from March 26, 1998, reflect that both were hired, "until end of current school term, from substitute list, effective March30, 1998." Grievant's Level IV Exhibit 1. Neither Ms. Meadows nor Ms. Reed received a notice that they would be reduced in force, nor did LBOE vote to reduce them in force, as neither was employed either in a regular or long-term temporary bus operator position at the time the notices were sent.

6. Grievants did not bid on the positions discussed in the preceding findings of fact. Grievant Farley decided not to bid on these positions because the posting stated they would terminate at the end of the school term and offered her no benefit.

7. Ms. Reed signed a continuing contract of employment for substitute service personnel on September 5, 1997, for the school year 1997-98. She signed a probationary contract of employment on April 2, 1998, which provided for employment as a temporary bus operator "for the school year or remaining part thereof commencing Aug. 19, 1997. The period of employment of <u>to be determined</u> days . . .." LBOE's Employee Data Form for Ms. Reed, dated March 27, 1998, indicates a change in her work location as approved by LBOE on March 26, 1998, and states in the comments field, "employ temp bus operator, bus 8806 until end of term or reg. returns, eff 3/30/98."

8. Ms. Meadows signed a probationary contract of employment on February 3, 1998, which provided for employment as a temporary bus operator "for the school year or remaining part thereof commencing Aug. 19, 1997. The period of employment of <u>to be determined</u> days . . .." LBOE's Employee Data Form for Ms. Meadows, dated March 27, 1998, indicates a change in her work location as approved by LBOE on March 26, 1998, and states in the comments field, "employ temp bus operator, bus 9716 until end of term, effective 3/30/98 or reg. returns." 9. Grievant Farley had more regular seniority than either Ms. Meadows or Ms. Reed. Grievant Conley had more regular

seniority than Ms. Reed, but Ms. Meadows was more senior than Grievant Conley.

10. Notwithstanding the fact that Ms. Meadows and Ms. Reed were hired by LBOE action only until the end of the school term, both were considered regular employees throughout the summer of 1998, and at the beginning of the 1998-99 school year. The reason for this was they had not been reduced in force, and had been allowed to remain in the long-term temporary positions they had been awarded in March, as LBOE's attorney had advised that Ms. Meadows and Ms. Reed could not, by law, be employed in long-term temporary positions only through the end of the school year. Grievants were not considered regular employees at the beginning of the 1998-99 school year, because they had been reduced in force.

11. At the beginning of the 1998-99 school year several temporary positions were posted in succession. Ms. Reed and Ms. Meadows bid on positions which Grievants also bid upon, and Ms. Reed and Ms. Meadows were awarded various positions over other applicants because of their regular employee status.

12. Even if Ms. Reed or Ms. Meadows had not been awarded any of the positions they bid upon in the fall of 1998, Grievant Conley would not necessarily have been awarded any of these positions either, because there were many other bus operators on the preferred recall list with more seniority than her who bid on these positions. At least one other bus operator with more seniority than Grievant Farley bid all of these positions, except one, but she was off work on workers' compensation. Except for Ms. Reed and Ms.Meadows, Grievant Farley was the most senior employee to bid on the run served by Bus 9005, posted as a temporary position on September 30, 1998.

Discussion

This grievance is a result of a unique statutory provision, and LBOE's inconsistent efforts to avoid the results of that provision: less senior bus operators obtaining a hiring preference over more senior bus operators, due to their employment in long-term temporary positions. Although seniority plays a major role in the statutory scheme governing selection of service personnel for positions, Grievants' seniority could not be considered. This Grievance Board has determined that the language of W. Va. Code §§ 18A-4-8b and 18A-4-15(2) requires that any employee who is properly employed in a long-term temporary position be considered "regularly employed service personnel," and becomes entitled

to a preference in hiring over those on the preferred recall list, and those on the substitute list, regardless of seniority. Meadows v. Logan County Bd. of Educ., Docket No. 98-23-112 (June 16, 1998); Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-497 (Aug. 1, 1994).

Thus, whether someone is selected for a posted bus operator position may depend entirely upon timing, and a substitute employee with little regular seniority who happens to be employed in a long-term temporary position at the time another position is posted, may receive that position over a regular employee with ten years seniority who has been reduced in force and is therefore not considered a regular employee at the time of the posting. It was apparently with this inequity in mind that LBOE made the decision to reduce in force all employees holding long-term temporary positions because someemployees holding regular positions were being reduced in force. By reducing in force all employees holding long-term temporary positions, LBOE could assure that those employees with the most seniority would be employed in the fall.

This good intention was thwarted to some extent by allowing Ms. Meadows and Ms. Reed to slip through the cracks. Grievants first argued that LBOE should have tracked down Ms. Meadows and Ms. Reed between March 26 and April 1 (the statutory deadline for notification of reduction in force), and handed them a notice of reduction in force, and held a hearing. Grievants cited no law which would require this, and the undersigned is aware of none. As LBOE argued, Grievants' suggestion simply is not practical, nor is it reasonable to expect this. (See footnote 2)

Grievants next pointed out that the posting said the positions were only until the end of the school term, or until the regular employee returns. They argued Ms. Meadows and Ms. Reed were therefore on notice that their positions would end at the end of the school term; and that their contracts should have been written so that they terminated at the end of the school term. Grievant Farley further specifically stated that she did not bid on either of the positions because the posting stated the positions would exist only until the end of the school term at the latest, and she had already been reduced in force as of the end of the school term, so these positions offered her no benefit. LBOE argued that it could not, by law, so limit the contracts, regardless of what the posting said. LBOE's position on this issue is supported by previous decisions issued by this Grievance Board. "A board of education may not, through contract, contravene the requirements of a statute." Hinerman v. Hancock County Bd. of Educ., Docket No. 93-15- 03 (Jan. 31, 1994), Conclusion of Law Number

Four. It has previously been held that a board of education may not post and fill a long-term temporary position so that it is filled by the successful applicant only until the end of the school year, rather than until the employee on leave of absence returns, when there is no legitimate reason for doing so. Simpson v. Mingo County Bd. of Educ., Docket No. 96-29-431 (May 28, 1997). In that case, the board of education did not know when the regular employee would return from a leave of absence, so it was posting the position for one school year at a time, and reposting it annually. This holding was based upon the language of W. Va. Code § 18A-4- 15, which provides 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:
>
> . . .
>
> (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; . . . (Emphasis added.)It was found that the language, "until the regular employee shall be returned to such position," precluded the board of education from limiting the period of employment to a shorter term, and the school board's action was arbitrary and capricious.

Obviously, W. Va. Code § 18A-4-15 cannot preclude a board of education from ever removing an employee from a long-term temporary position. A board of education may still terminate a continuing contract for cause pursuant to the provisions of W. Va. Code § 18A- 2-6, terminate a probationary contract pursuant to the provisions of W. Va. Code § 18A-2- 8a, or reduce in force the least senior employees, as was done here, pursuant to the provisions of W. Va. Code § 18A-4-8g, even if the affected employees are employed in long-term temporary positions.

The facts here are different from those in Simpson, supra. Here, there was a legitimate reason for limiting the term of temporary employment to the end of the school year. LBOE had placed all its employees in long-term temporary positions on reduction in force, in order to avoid exactly what occurred here. By posting the two positions in March as positions which would end at the end of the school term, it would have achieved the same result as if it had timely placed Ms. Reed and Ms.

Meadows on notice that they would be reduced in force, and would have effectively accomplished its goal of avoiding the undesirable effects of W. Va. Code § 18A-4-15.

"The Legislature's intention is to emphasize seniority as the determinative factor in decisions affecting the filling of school service personnel positions. Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993)." Bell v. Kanawha County Bd. of Educ., Docket No. 95-20-169 (Aug. 31, 1995). As long as those in long-term temporary positions are accorded all the benefits of regular employment, includingpreferred status in the selection process, and are allowed to leave these positions before they end in favor of other positions they prefer, they should also be subject to the same drawbacks of regular employment as a less senior employee, and subject to being removed from these positions when there is a valid reason for doing so.

It was not unlawful in these circumstances to hire Ms. Reed and Ms. Meadows only through the end of the school term, and that is, in fact, what LBOE did on March 26, 1998. Ms. Reed and Ms. Meadows were clearly on notice of these conditions when the positions were posted and when their hiring into the positions was approved. Further, once LBOE posted the positions as positions which would end at the end of the school term, it was bound by that condition, or bound to repost the positions correctly so that other school service personnel would not be misled, and could make an informed decision as to whether to bid on these positions. (See footnote 3) Ms. Reed and Ms. Meadows were therefore not regular employees in August of 1998, and were not entitled to preference over more senior employees. (See footnote 4)

However, with one exception, it is impossible to determine what positions, if any, they would have received if this had not occurred. Grievant Farley pointed to several different postings in the Fall of 1998 which were filled by Ms. Meadows or Ms. Reed which she also bid on; however, except for one of these positions, she was not the next mostsenior employee applicant. Debra Robinson, who is more senior than Grievants, bid on all but one of the positions Grievants bid upon, and two other more senior employees bid on two of the positions. Grievant Farley indicated that Ms. Robinson is on a leave of absence, and any position she had accepted would have then been rebid. Of course, it is unknown whether Ms. Robinson would have bid on all the positions Grievants bid upon had she been awarded any one of the positions, and it is unknown who would have bid upon any of the positions had they been rebid to acknowledge Ms. Robinson's leave of absence, or when someone would have begun filling in for her on a long-term temporary basis. It is not equitable to engage in speculation as

to what might have happened and award relief based upon such speculation.

Grievant Farley has proven that she would have received the temporary position served by Bus 9005. Her regular seniority must be adjusted as though she had actually served in that position from the date Ms. Meadows began serving in that position to the date the regular employee returned or the date Grievant Farley began earning regular seniority in another temporary position, whichever is earlier, and she must receive backpay for that period, offset by any pay she received for substituting during that period, and any other benefits she would have received. Ms. Farley stated that she became employed in a temporary position in January 1999. If the temporary position served by Bus 9005 is still available, she is to be moved to that position if she so chooses.

The only way to truly place Grievants in the same position they would have been in had these events not occurred is to adjust the regular seniority of Ms. Meadows and Ms. Reed. To the extent Ms. Meadows and Ms. Reed gained any regular seniority over Grievant Farley during the 1998-99 school year, that regular seniority must be removedfrom their records. Once this adjustment is made, to the extent that Ms. Reed has still gained any regular seniority over Grievant Conley during the 1998-99 school year, that regular seniority must also be removed from her record. The end result of these changes should be that, to the extent possible, Grievants, Ms. Reed and Ms. Meadows are in the same position on the seniority roster in relation to each other as they were at the end of the 1997-98 school year. Ms. Reed and Ms. Meadows benefitted from receiving wages to which they were not entitled from the beginning of the 1998-99 school year, and receiving regular seniority during the 1997-98 school year which they would not have received had the positions not been posted in March to end at the end of the school term. Further, this relief is consistent with this Grievance Board's holdings on the regular seniority rights of employees who are not legally in positions. Hall v. Mingo County Bd. of Educ., Docket No. 97-29-364 (Jan. 29, 1998); Adkins v. Lincoln County Bd. of Educ., Docket No. 97-22-272 (Aug. 25, 1997); Clark and Melton v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997); Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving the allegations of their grievance by a preponderance

of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. The language of W. Va. Code §§ 18A-4-8b and 18A-4-15(2) requires that any employee who is properly employed in a long-term temporary position be considered "regularly employed service personnel," and become entitled to a preference in hiring overthose on the preferred recall list, regardless of seniority. Meadows v. Logan County Bd. of Educ., Docket No. 98-23-112 (June 16, 1998); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-497 (Aug. 1, 1994).

3. "The Legislature's intention is to emphasize seniority as the determinative factor in decisions affecting the filling of school service personnel positions. Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993)." Bell v. Kanawha County Bd. of Educ., Docket No. 95-20-169 (Aug. 31, 1995).

4. Under the facts of this case, where LBOE reduced in force all bus operators employed in long-term temporary positions, along with some regular bus operators, in order to retain priority status for those employees with more seniority, it was not unlawful for LBOE to post long-term temporary bus operator positions so they ended at the end of the school term.

5. Grievants proved it was contrary to the posting and contrary to LBOE's actions at its March 26, 1998 meeting, to hire Joann Meadows and Yvonne Reed into two long-term temporary positions beyond the end of the school year. LBOE was bound by the conditions of the posting, in this instance, to hire Ms. Meadows and Ms. Reed only until the end of the school year.

Accordingly, this grievance is **GRANTED**. Respondent Lincoln County Board of Education is **ORDERED** to adjust the regular seniority of Joann Meadows and Yvonne Reed so that, to the extent possible, they are in the same position on the seniority roster in relation to Grievants as they were at the end of the 1997-98 school year; and to adjustGrievant Farley's regular seniority as though she had actually served in the temporary position posted September 30, 1998, served by Bus 9005, from the date Ms. Meadows began serving in that position to the date the regular employee returned or the date Grievant Farley began earning regular seniority in another temporary position, whichever is earlier, to pay her backpay for that period, offset by any pay she received for substituting during that period, and to award her any other benefits which she would have received had she been awarded that position. If the temporary position served by Bus 9005 still exists, Grievant Farley is to be placed in that position if she chooses to move to it.

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

_____

BRENDA L. GOULD

Administrative Law Judge

Dated: February 3, 1999

Footnote: 1

The record does not reflect when this grievance was filed or what occurred at Level I. A Level II hearing was held on September 25, 1998, and a decision denying the grievance at Level II was issued on October 5, 1998. Grievants waived Level III and appealed to Level IV on October 23, 1998. A Level IV hearing was held on December 21, 1998. Grievant Conley appeared pro se, and Grievant Farley was represented by John Roush, Esquire. Respondent was represented by Brian Abraham, Esquire. This matter became mature for decision on January 7, 1999, upon receipt of Grievant Farley's Proposed Findings of Fact and Conclusions of Law. Grievant Conley and Respondent declined to submit written argument.

Footnote: 2

Ms. Meadows and Ms. Reed were not employed at the time notices were sent to employees that they would be reduced in force; and were, in fact, employed by LBOE in the positions at the same meeting where reductions in force were approved. Were Grievants' argument to be analyzed as a discrimination argument, Grievants would not be similarly situated to Ms. Reed and Ms. Meadows, and the argument would fail.

Footnote: 3

It could be argued, in fact, that Ms. Reed and Ms. Meadows were not properly employed in the positions due to the misleading posting; and, therefore, were not entitled to earn any regular seniority while employed in these positions.

Footnote: 4

The undersigned will not address the status of Ms. Reed and Ms. Meadows further, but would refer Respondent to McCallister v. Lincoln County Board of Education, Docket No. 90-22-494 (February 15, 1991).