**ROBERT McCLUNG,**

**Grievant,**

**v. Docket No. 99-34-376**

**NICHOLAS COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Robert McClung (Grievant) is a bus operator employed by Respondent Nicholas County Board of Education (NCBE). He seeks instatement into a summer bus run.

This grievance was denied at Level I, on June 30, 1999, by Immediate Supervisor Bernard Lindsey. This grievance was denied at Level II, on September 3, 1999, by Superintendent's designee Jerry A. Wright, Esq. As authorized by W. Va. Code § 18-29-4(c), NCBE waived participation at Level III. A Level IV hearing was held before the undersigned Administrative Law Judge at the Grievance Board's Beckley, West Virginia office on October 27, 1999. Grievant was represented by John Roush, Esq., and NCBE was represented by Erwin Conrad, Esq. The parties were given until December 3, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

## FINDINGS OF FACT

1. Grievant is a full-time, regularly employed bus operator for NCBE.

2. John O'Dell (O'Dell) is a substitute bus operator for NCBE who previously had retired as a full-time, regularly employed bus operator.

3. O'Dell was a substitute bus operator for NCBE when he applied for one of four summer bus operator positions posted by NCBE on June 9, 1999.

4. O'Dell was hired for one of the positions.

5. O'Dell had served in that position during previous summers, but had since retired as a regular employee and accepted assignment as a substitute employee.

6. Grievant had never served in that position during previous summers.

7. Had O'Dell not received this position, Grievant would have, based upon his greater seniority.

**DISCUSSION**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant seeks instatement into a summer bus run, arguing that he is entitled to the position because he has more seniority than the bus operator selected for it, O'Dell. Grievant's position is based on his interpretation of W. Va. Code § 18-5-39, which states:

Notwithstanding any other provision of this code to the contrary, the county board is authorized to employ school service personnel to perform any related duties out side the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. (Emphasis added)

Grievant contends that, for the purposes of this section, a substitute such as O'Dell is not an employee of NCBE. Grievant bases this argument on the fact that O'Dell has retired as a full-time, regular employee, and is now a substitute. NCBE argues that a substitute is an employee for the purposes of W. Va. Code § 18-5-39. It appears that this is a matter of first impression for this Grievance Board. See Gibson v. Wayne County Bd. of Educ., Docket No. 98-50-374 (Dec. 3, 1998); Cooke & Lawson v. Logan County Bd. of Educ., Docket No. 92-93-031/032 (Oct. 9, 1992). For the reasons set forth below, the undersigned concludes that there is ample authority for the conclusion that a substitute is an employee for the purposes of W. Va. Code § 18-5-39.

This Grievance Board has interpreted the definition of "employee" broadly. Phillips v. Webster

County Bd. of Educ., Docket No. 93-51-073 (May 27, 1993)(person serving in a contract position entirely funded by an outside source is an employee); Ramey v. Cabell County Bd. of Educ., Docket No. 89-06-177 (June 21,1989)(substitute employee may file grievance regarding his non-selection to a permanent position).

Numerous statutes also treat substitutes as employees. W. Va. Code § 18A-4-15 states "[b]efore any substitute service employee enters upon his or her duties, he [sic] shall execute with the county board a written contract. . . ." It seems clear that the legislature intended that such a contract establish an employer/employee relationship between the substitute service employee and a county board of education.

W. Va. Code § 18A-2-5 states "[t]he board is authorized to employ such service personnel, including substitutes, as is deemed necessary for meeting the needs of the county school system[.]" (Emphasis added). There is no language in this statute to suggest that a substitute is something other than an employee of a county board of education.

Other examples include Code § 18A-2-4 (requirement of commercial driver's license for certain employees contains no exception for substitutes); Code § 18A-2-12 (performance evaluation procedure for education employees contains no exception for substitutes); Code § 18A-4-8d (competency testing of service personnel contains no exception for substitutes); Code § 18A-4-8b (substitute employees given certain preferences over new employees); Code § 18A-4-8g (substitute employees accrue seniority); and Code §§ 18-29-1 et seq. (substitute employees entitled to utilize grievance procedure; non-employees are not).

All of this authority is consistent with the view that substitute employees are just that: employees. To hold otherwise would also require some theory by which O'Dell would have lost his right to his summer run when his employment status changed frompermanent to substitute, a result not contemplated by W. Va. Code § 18-5-39.

Accordingly, O'Dell, as an employee within the meaning of W. Va. Code § 18-5-39, was entitled, under that Code section, to retain his position when it existed during any succeeding summer, and Grievant's claim must fail.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

## CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, a grievant has the burden of proving 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. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. W. Va. Code § 18-5-39.

___3.___A substitute employee is an employee within the meaning of W. Va. Code § 18-5-39.

4. Grievant failed to establish, by a preponderance of the evidence, that he was entitled to one of the four summer bus operator positions posted by NCBE on June 9, 1999.

Accordingly this grievance is hereby **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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**ANDREW MAIER**

**ADMINISTRATIVE LAW JUDGE**

**Dated December 17, 1999**