KIMBERLY HUGHES,

Grievant,

v. **Docket No. 99-26-185**

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On March 1, 1999, Kimberly Hughes (Grievant) initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Mason County Board of Education (MCBE) violated W. Va. Code §§ 18A-4-15 and 18A-4-8g, by placing a less senior substitute employee into a Bus Operator position for which she applied. The grievance was denied at Level I on March 4, 1999, by the Grievant's immediate supervisor, Gary B. Mitchell. Grievant appealed to Level II on March 10, 1999. Following a Level II evidentiary hearing on March 18, 1999, MCBE Superintendent Larry Parsons denied the grievance on April 9, 1999. Grievant appealed to Level III on April 14, 1999, where MCBE waived consideration of the grievance as authorized by W. Va. Code § 18-29-4(c). Grievant appealed to Level IV on May 5, 1999. After this matter was set for hearing, the parties agreed that this grievance could be decided on the basis of the record developedthrough Level II. The grievance became mature for decision on July 26, 1999, after written arguments were received from each of the parties. (See footnote 1)

Based upon a preponderance of the credible evidence contained in the record established at Level II, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Mason County Board of Education (MCBE) as a substitute Bus Operator, a school service personnel position.

2. Grievant was first employed by MCBE as a substitute Bus Operator on November 22, 1996,

and was credited with substitute seniority from that date.

3. Nina Shobe was similarly employed by MCBE as a substitute Bus Operator, having first worked in that capacity on January 5, 1998, and holding substitute seniority from that date.

4. In late January of 1999, MCBE posted two Bus Operator positions to be filled until the regular employees who held those positions returned to duty.

5. Grievant and Ms. Shobe submitted timely applications for the positions. Because Grievant held greater substitute seniority, she was given first choice of the two vacancies and elected to assume the duties of the regular employee assigned Route 892, Delores Crump. Ms. Shobe was assigned to the other position, Route 913. 6. Grievant was provided a new contract entitled "CONTRACT OF EMPLOYMENT FOR SUBSTITUTE SERVICE PERSONNEL WITH REGULAR EMPLOYEE STATUS." The contract specifically provided: "This contract shall terminate when the absent employee resumes the duties of this position or the position is legally filled." G Ex 6. Ms. Shobe entered into a similar contract for Route 913. HT at 23-24.

7. Grievant and Ms. Shobe entered into the performance of the duties of their respective long-term substitute positions on the same day, February 8, 1999. G Ex 4; HT at 30, 42. Shortly thereafter, MCBE required Grievant and Ms. Shobe to resolve their resulting identical regular seniority through a random selection process. On February 16, 1999, Ms. Shobe won a coin toss and was awarded superior regular seniority. HT at 44- 45.

8. Shortly after Ms. Shobe obtained superior regular seniority, the regular employee assigned to Route 892 was transferred, and the Route 892 Bus Operator position was posted as a regular vacancy.

9. Grievant and Ms. Shobe made timely application for the vacant regular Bus Operator position for Route 892. The position was awarded to Ms. Shobe based upon her superior regular seniority attained through the random selection process.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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.

Ordinarily, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). However, the hiring, assignment, transfer and promotion of school service personnel is governed by a fairly complex series of statutory provisions, pertinent portions of which control the outcome of this grievance.

A county board of education's discretion in filling vacant school service personnel positions is limited by W. Va. Code § 18A-4-8b. See Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 630 (1993). Portions of W. Va. Code § 18A-4-8b pertinent to this grievance provide:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.
>
> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
>
> (4) Substitute service personnel; and
>
> (5) New service personnel.

* * *

> For purposes of determining seniority under this section an employee's seniority begins on the date that he or she enters into his assigned duties.

Employment of substitute service personnel employees is controlled by W. Va. Code § 18A-4-15, pertinent portions of which state:

> 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:
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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 [§ 18A-4-8b] 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 . . . .

Seniority for regular and substitute school service personnel is regulated by W. Va. Code § 18A-4-8g, which contains the following provisions pertinent to this matter:

> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen [§ 18A-4-15(2) and (5)] of this article: Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

> If two or more employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the county board.
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> A board shall conduct the random selection within thirty days upon the employees establishing an identical seniority date. All employees with an identical seniority date within the same class title or classification category shall participate in the random selection. As long as the affected employees hold identical seniority within the same classification category, the initial random selection conducted by the board shall be permanent for the duration of the employment within the same classification category of the employees by the board. This random selection priority shall apply to the filling of vacancies and to the reduction in force of school service personnel: Provided, That if another employee or employees acquire seniority identical to the employees involved in the original random selection, a second random selection shall be held within thirty days to determine the seniority ranking of the new employee or employees within the group.
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> Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose.
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> * * *

In the grievance at issue, MCBE properly posted two temporary vacancies for Bus Operators as required under W. Va. Code § 18A-4-15(2). Grievant and Ms. Shobe wereselected to fill those temporary vacancies as long-term substitutes. As the substitute with the most substitute seniority, Grievant was correctly permitted to select which of the two positions she wanted to fill, ahead of Ms. Shobe. See W. Va. Code § 18A-4-8b. Subsequently, in accordance with W. Va. Code § 18A-4-15(2), MCBE gave regular employee status to Grievant and Ms. Shobe, so long as they held these long-term substitute assignments.

Up to this point, Grievant has no quarrel with MCBE's actions. However, Grievant takes exception to MCBE's requirement that she and Ms. Shobe were required to settle their “regular seniority” by a random selection process, contending she and Ms. Shobe were still substitutes, and their substitute seniority should continue to control MCBE's employment decisions, until one or both of them was selected to fill a permanent regular position. Unfortunately for Grievant, the statutory scheme governing school service personnel employment required MCBE to take the actions it did.

Once Grievant and Ms. Shobe were each competitively selected to fill posted long- term

substitute positions, they became entitled to regular employment status, including the right to compete for posted vacancies as if they were "regularly employed service personnel" in the highest preferred category under W. Va. Code § 18A-4-8b. W. Va. Code §§ 18A-4-15; 18A-4-8g. See Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Mingo County Cir. Ct., No. 94-C-238 (Jan. 21, 1997); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd, Kanawha County Cir. Ct., No. 93-AA-217 (Feb. 15, 1994); Bushko v. Marion County Bd. of Educ., Docket No. 92-24- 089 (Aug. 6, 1992). Because Grievant and Ms. Shobe entered into this status on the sameday, they held identical regular seniority for purposes of competing for any regular vacancies, and W. Va. Code § 18A-4-8g mandated that MCBE establish priority between them within thirty days. (See footnote 2)

Grievant argues that MCBE violated the provision in W. Va. Code § 18A-4-8g which states: "County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority." Under the in para materia rule of statutory construction, statutes which relate to the same subject matter must be read and applied together so that the Legislature's intent can be discerned from the whole of the enactment. Manchin v. Dunfee, 174 W. Va. 532, 327 S.E.2d 710 (1984); Farley v. Zapata Coal Corp., 167 W. Va. 630, 281 S.E.2d 238 (1981); Eastham v. Cabell County Bd. of Educ., Docket No. 92-06-397 (Apr. 16, 1993). When the quoted provision is read in context with the immediately preceding language in W. Va. Code § 18A-4-8g, which specifies that "[a] substitute school service employee shall acquire regular employment status and seniority" when the employee obtains a position pursuant to W. Va. Code § 18A-4-15(2), as well as the explicit language in § 18A-4-15(2), it is clear that MCBE did not exercise its discretion to extend benefits to substitute service personnel in this situation. Rather, MCBE awarded statutorily mandated regular seniority to a substitute who temporarily attained regular status by being hired to fill an extended vacancy created by the absence of a regular employee. See Messer, supra. Once Ms. Shobe attained superior seniority over Grievant as a long-term substitute enjoying regular employment status, MCBE complied with W. Va. Code § 18A-4-8b when it awarded the posted regular vacancy for Route 892 to Ms. Shobe, as each of the applicants held the appropriate classification of Bus Operator, and each apparently had satisfactory evaluations, (See footnote 3) but Ms. Shobe held greater "regular" seniority. Although Grievant had greater substitute seniority than Ms. Shobe, which also meant she had more experience

driving a school bus, W. Va. Code § 18A-4-8g prohibits the school board from combining an employee's regular and substitute seniority “for any purpose.” Accordingly, MCBE strictly complied with the applicable statutes in making the employment decisions which adversely affected Grievant.

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

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

> 3. 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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> * * *
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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 [§ 18A-4-8b] 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.

W. Va. Code § 18A-4-15.

4. When an individual is competitively selected under W. Va. Code § 18A-4-8b procedures to

fill the position of a school service employee on leave of absence, W. Va. Code § 18A-4-15(2) requires the school board to give "regular employee status" to such individual. Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug 4, 1993), aff'd, Kanawha County Cir. Ct., No. 93-AA-217 (Feb. 15, 1994). 5. A school service employee selected to fill a position under W. Va. Code §18A-4-15(2) is a regular employee for the time he or she serves in the position. Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992).

6. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with regularly employed service personnel receiving preference over service personnel in lesser categories, including substitute service personnel. See Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996).

7. W. Va. Code § 18A-4-8g requires county boards of education to calculate an employee's regular and substitute seniority separately, and prohibits them from combining an employee's regular and substitute seniority for any purpose.

8. Grievant failed to establish by a preponderance of the evidence that her employer violated W. Va. Code §§ 18A-4-15, 18A-4-8g, 18A-4-8b, or any other statute, policy, rule, regulation or written agreement applicable to her employment situation, by the manner in which it filled the vacant school service personnel Bus Operator position at issue in this grievance.

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: August 11, 1999

Footnote: 1

Grievant was represented by a fellow employee, Larry Willcoxen. MCBE was represented by counsel, Gregory W. Bailey, with Bowles Rice McDavid Graff and Love.

Footnote: 2

Grievant does not take exception to the methodology of the random selection process, acknowledging that she concurred with the coin toss arrangement.

Footnote: 3

Neither party argued that evaluations were a factor in the decision to hire Ms. Shobe over Grievant.