CHARLENE MCMILLEN,

Grievant,

v. **Docket No. 99-30-024**

MONONGALIA COUNTY BOARD
OF EDUCATION,

Respondent.

DECISION

Charlene McMillen (Grievant), employed as a bus operator by the Monongalia County Board of Education (MCBOE), challenges MCBOE's selection of a less senior, regularly-employed bus operator to substitute in a summer position for three days until it was filled on a permanent basis. She seeks compensation for the three days of pay she would have received if she had been placed in the substitute position. The record does not reflect what proceedings occurred at level one. A level two hearing was held on December 10, 1998, followed by a decision denying the grievance dated January 14, 1999. Level three consideration was waived, and Grievant appealed to level four on January 25, 1999. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on May 17, 1999. Grievant was represented by counsel, John E. Roush, and MCBOE was represented by Assistant Superintendent Jacob Mullett. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 8, 1999.

The following findings of fact are made from a preponderance of the evidence submitted at levels two and four.

Findings of Fact

1. Grievant is employed by MCBOE as a bus operator.

2. MCBOE posted six new summer bus runs for the summer of 1998.

3. Because MCBOE had not completed the selection process for all the summer runs at the time they were scheduled to begin on June 28, 1998, substitutes were used to fill some of the positions until final selections were made.

4. David Gerrard, a regularly employed bus operator, was allowed to substitute in one of the positions on July 1, 2, and 6, 1998.

5. Grievant was selected to fill one of the summer bus runs, beginning on July 7, 1998.

6. Grievant has more seniority as a bus operator than David Gerrard.

Discussion

Pursuant to the provisions of W. Va. Code § 18A-4-15, a county board of education is required to "assign substitute service personnel . . . [t]o temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis." Accordingly, as regular employees, neither Grievant nor Mr. Gerrard should have been called as substitutes for the summer positions during the selection process. Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (March 24, 1995).

However, Grievant argues that she was entitled to "step up" into the substitute position given to Mr. Gerrard, by virtue of a further provision of the same statute, which states:

> [I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be firstoffered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

A very similar situation was recently addressed by this Grievance Board in Meredith v. Monongalia County Board of Education, Docket No. 98-33-383 (Jan. 27, 1999), where it was held that the "step up" provision of W. Va. Code § 18A-4-15 does not apply to newly created positions. The administrative law judge in that case stated:

> In Panrell/Marsh, [supra], the Board held that the 'step up' provision of Code §18A-4-15 was clearly inapplicable to a newly created position. Citing Terek v. Ohio County Bd. of Educ., Docket No. 91-35-160 (Aug. 30, 1991), it was noted that the 'step up' provision of Code §18A-4-15 gives regular employees an opportunity to fill an absent employee's job, with the assignment of a substitute employee to the position of the regular employee who remains on the job, when three events occur. One, a regular employee is absent. Two, a substitute is necessary for temporary employment. Three, an existing regular employee moves temporarily to the absent employee's position instead of having the substitute fill it. Because the position in the present grievance was newly created, there was no absent employee for whom Grievant could substitute.

Accordingly, pursuant to this line of decisions, regularly employed bus operators, including Grievant and Mr. Gerrard, should not have been allowed to work as substitutes in the newly created summer positions. MCBOE concedes that it erred in allowing Mr. Gerrard to substitute in one of the positions. Likewise, Grievant was also ineligible to work as a substitute in this situation, and is not entitled to relief in this grievance. (See footnote 1) The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. W. Va. Code §18A-4-15(6) requires a county board of education to assign substitute service personnel to temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis.

3. Grievant was not entitled to "step up" into a summer position during the posting and selection period, because there was no absent regular employee. See W. Va. Code §18A-4-15; Meredith v. Monongalia County Board of Education, Docket No. 98-33- 383 (Jan. 27, 1999); Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995); Terek v. Ohio County Bd. of Educ., Docket No. 91-35-160 (Aug. 30, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia County, and such appeal must be filed within thirty (30) daysof 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.

Date: July 22, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It has also been held by this Grievance Board that bus drivers are not entitled to the benefits of the provision, because they do not share a "common workplace" with other employees. Terek, supra; Panrell/Marsh, supra. However, this issue is not relevant to the outcome of the instant grievance, because the "step up" provision did not apply in the circumstances presented here.