TERRY L. SPROUSE,

Grievant,

v. **Docket No. 01-21-144**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Terry L. Sprouse ("Grievant") initiated this proceeding on February 20, 2001, challenging Respondent's method of posting vacancies resulting from the filling of leave of absence positions for bus operators. He seeks back pay and benefits, plus interest, for one of the positions he believes he was entitled to. The grievance was denied at level one, and a level two hearing was held on March 2, 2001. A level two decision, denying the grievance, was issued on April 17, 2001. Level three consideration was waived, and the grievance was forwarded to level four on April 26, 2001. A hearing was held in the Grievance Board's office in Westover, West Virginia, on July 18, 2001. Grievant was represented by William White of the West Virginia Education Association, and Respondent was represented by counsel, Kelly Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 22, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent Lewis County Board of Education ("LCBOE") as a substitute bus operator. He is the second most senior substitute driver inthe county.

2. On January 23, 2001, Alan Heckert, a regularly employed bus operator, began a two-month leave of absence.

3. Mr. Heckert's position was not posted. Pursuant to LCBOE's practice, the next senior regular driver, Steve Freda, took Mr. Heckert's position. This is referred to by Lewis County bus

operators as a “slide.”

4. The slide procedure allows all regular bus operators the opportunity to fill temporary vacancies in sequence, as each driver takes a temporary position and his own position becomes temporarily vacant. After all regular bus operators have been given the chance to fill each of the vacancies created by a leave of absence, the last position vacated by a regular driver is posted, so that substitute operators may bid on the temporary position.

5. Because no other regular bus operators were interested in sliding into Mr. Freda's position, it was posted by LCBOE.

___6. Although bus operator positions had traditionally been posted at the bus garage, the Freda position was posted at the central office and at schools throughout the county instead.

7. During the period that the Freda position was posted, it was filled on a temporary basis by Arnett Hurst, the most senior substitute driver. Mr. Hurst did not bid on the temporary vacancy.

8. Grievant's wife, who is employed at one of the schools in the county, informed him of the Freda position posting. Grievant did not bid on the position, because he mistakenly believed that Mr. Hurst was going to receive the position through the slideprocedure.

9. The Freda position was awarded to the only substitute driver who bid on it, Steve Murray. He is the least senior substitute driver in the county.

___10. In early 2001, Doug Stalnaker, a regular bus operator, began a two-month leave of absence. Mr. Stalnaker's position was filled by a regular driver, pursuant to the slide procedure.

11. After all regular drivers had “slid” into the series of vacancies created by Mr. Stalnaker's leave of absence, the remaining position that was posted was Gary Alderman's position.

12. Grievant and Mr. Hurst both bid on the Alderman position, and it was awarded to Mr. Hurst, the more senior driver.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

___Grievant contends that Respondent erred by failing to follow its prior practice and not posting the Freda run at the bus garage. Grievant argues that, if it had been posted per Respondent's prior practice, Mr. Hurst would have received it as the most senior substitute bus operator. (See footnote 1) Consequently, when the Alderman run was subsequently posted,Grievant contends that he would have received it as the next most senior substitute. In essence, Grievant believes that Respondent's alleged improper posting deprived him of the Alderman position.

___W. Va. Code § 18A-4-15 provides, in pertinent part, the following regarding employment of substitute service personnel:

> 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:
>
> (1) To fill the temporary absence of another service employee;
>
> (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 . . . § 18A-4-8b . . . . .

W. Va. Code §§ 18A-4-8b and 18A-4-15 require a county board to post all vacancies which occur as a result of an employee being on a leave of absence for more than 30 days. In turn, W. Va. Code § 18A-4-8b states that service personnel positions must be filled on the basis of seniority, qualifications, and evaluation of past service, with regularly employed personnel receiving hiring preference over substitutes. See Porter v. Lincoln County Bd. of Educ., Docket No. 00-22-010 (May 30, 2000); Hlebiczki v. Ohio County Bd. of Educ.,
Docket No. 97-35-037 (Sept. 30, 1997); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994), aff'd, Civil Action No. 94-C-238 (Cir. Ct. of Mingo County Jan. 21, 1997).

What Grievant's argument fails to note is that Respondent's “slide” practice is, inand of itself, illegal. This exact issue has been previously ruled upon by this Grievance Board in Loy v. Wetzel County Board of Education, Docket No. 96-52-561 (June 8, 1998) and Prater v. Hancock County

Board of Education, Docket No. 98-15-018 (July 15, 1998). In both cases, it was held that the posting and filling requirements of W. Va. Code §§ 18A- 4-8b and 18A-4-15 “apply not only to the original opening created by a designated leave of absence over thirty days, but also to the subsequent opening created when a regular employee fills the vacancy caused by the original leave of absence.” Accordingly, Respondent was required to post Mr. Heckart's and Mr. Stalnaker's positions, along with all openings created as a consequence of those temporary positions being filled.

As to Grievant's contentions regarding the location of the postings at issue, it has been held by the West Virginia Supreme Court of Appeals that, under similar circumstances, posting of a bus operator position at the central office and schools in the county was sufficient to comply with W. Va. Code § 18A-4-8b's requirement that vacancies be posted in “conspicuous working places.” Quintrell v. Lincoln County Bd. of Educ., 195 W. Va. 347, 465 S.E.2d 618 (1995). Nevertheless, Grievant did not apply for first leave of absence position, in spite of his knowledge of the posting, making the location of the posting irrelevant.

In the instant case, Grievant has simply failed to establish any entitlement to relief. Regardless of the location of the postings, it is completely unknown who would have bid upon and received any of the positions. If Respondent had properly posted and filled all vacancies resulting from the leaves of absence of Mr. Heckart and Mr. Stalnaker, it is virtually impossible to determine whether Grievant would have received any of the positions. As discussed above, both regular and substitute employees are eligible to bidupon these positions, so Grievant's entitlement to a position, let alone which position, is at best, speculative. (See footnote 2)

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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-4-8b and 18A-4-15 require a county board to post all vacancies which occur as a result of an employee being on a leave of absence for more than 30 days.

3. The posting and filling requirements of W. Va. Code §§ 18A-4-8b and 18A-4- 15 "apply not only to the original opening created by a designated leave of absence over thirty days, but also to the subsequent opening created when a regular employee fills the vacancy caused by the original leave of absence." Loy v. Wetzel County Board of Education, Docket No. 96-52-561 (June 8, 1998); Prater v. Hancock County Board of Education, Docket No. 98-15-018 (July 15, 1998).

4. Respondent's practice of allowing regular bus operators to "slide" into vacancies created by leave of absence positions violates the requirements of W. Va. Code §§ 18A-4-8b and 18A-4-15. 5. Grievant has failed to prove entitlement to any relief in this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Lewis 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.

Date: September 14, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Since Mr. Hurst did not testify, it is unknown why he did not bid upon the Freda run, especially since he probably knew it was posted, because he was serving in it only duringthe posting period.

Footnote: 2

However, Respondent would be wise to revisit the legality of its "slide" practice, per the discussion in this Decision.