ROBERT W. POLING,

Grievant,

v. **Docket No. 02-47-264**

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Robert W. Poling ("Grievant") initiated this proceeding on July 22, 2002, alleging he should have been placed on the preferred recall list at the conclusion of the 2001-2002 school year. Grievant's immediate supervisor lacked authority to grant relief, and Grievant appealed to level two on August 1, 2002. A hearing was held on August 6, 2002, followed by a decision denying the grievance dated August 8, 2002. Level three consideration was bypassed, and Grievant appealed to level four on August 20, 2002. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on October 10, 2002. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Teresa J. Dumire. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on November 13, 2002. (See footnote 1)

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

Findings of Fact

1. Grievant was employed by the Tucker County Board of Education ("TCBOE") as a substitute bus operator from 1999 until April of 2002. 2. On March 22, 2002, TCBOE posted a vacancy for a regular bus operator position which would exist for the remainder of the school year only. The driver who had previously held the position was resigning, and TCBOE decided to eliminate the run for the upcoming school year, because it was no longer needed.

3. Grievant applied for the posted position and was placed in it, effective April 16, 2002. His contract of employment specified that the employment term was from April 16, 2002, through the end

of the school year, or 41½ days.

4. After receiving his last paycheck for the school year on June 27, 2002, Grievant inquired of the transportation supervisor and superintendent whether he would be placed on the preferred recall list as of July 1, 2002.

5. Neither Grievant's supervisor nor the superintendent could give Grievant an affirmative answer regarding whether he would be given preferred recall status, prompting the filing of this grievance.

6. Sometime prior to the end of the 2001-2002 school year, Grievant was offered the opportunity to sign a form stating his desire to be placed on the substitute list for the upcoming school year. He refused to complete the form, believing he was a full- time employee and would be placed on the preferred recall list at the conclusion of the current school year.

7. Grievant does not wish to continue employment with TCBOE as a substitute.

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. LoganCounty 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, after serving in a regular position, he was entitled to placement on the preferred recall list at the conclusion of the school year. Respondent counters that Grievant's contract expired by its own terms, and, since he did not request reemployment as a substitute, Grievant's employment relationship was terminated on June 12, 2002. Not only does TCBOE argue that he is not entitled to placement on preferred recall, but also that Grievant was not an “employee” entitled to file a grievance after the school year concluded.

“Employee” is defined by the grievance statute, W. Va. Code § 18-29-2(c), as “any person hired as a temporary, probationary or permanent employee by an institution either full or part time.” Pursuant to this definition, even under a “temporary” contract, Grievant was still an employee while working as a full-time bus operator for Respondent. However, it has been held by this Grievance Board that, once the employment relationship has ended, the employee is no longer entitled to avail

himself of the grievance process. See Spiroff/Nealis v. W. Va. Schools for the Deaf and Blind, Docket No. 99-DOE-314D (Sept. 30, 1999). Nevertheless, if the termination of the employment relationship is the subject of the grievance, or the employee was still employed at the time of filing the grievance, then the claim is permitted. Id.; Jackson v. W. Va. Div. of Corrections, Docket No. 97- CORR-345 (Jan. 30, 1998). In the instant case, the "termination" of Grievant's employment is the subject of the grievance, since he contends that he was entitled to continuation of that relationship through placement on preferred recall. Nevertheless, Grievant is not entitled to the relief requested, because, as Respondent has contended, his employment contract expired by its own terms at the conclusion of the school year. Employees are placed on preferred recall when they are released from employment due to lack of need, pursuant to the provisions of W. Va. Code § 18A-4-8b. It is well-settled that, in a situation where a probationary employee completes a temporary contract, a reduction in force has not occurred. See Conley/Farley v. Logan County Bd. of Educ., Docket No. 98-23-425 (Feb. 3, 1999). Only when an employee has been RIF'd is he or she entitled to preferred recall status. See Carroll v. Cabell County Bd. of Educ., Docket No. 00-06-369 (Apr. 27, 2001). In the instant case, Grievant's only possible option at the conclusion of his temporary contract was to be returned to his previous status as a substitute. Carroll, supra. He has expressly stated that he does not wish to be returned to the substitute list, so he is entitled to no relief.

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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. Grievant's contract of employment expired by its own terms, as contemplated by the parties, at the conclusion of the 2001-2002 school year. Carroll v. Cabell County Bd. of Educ., Docket No. 00-06-369 (Apr. 27, 2001); Conley/Farley v. Logan County Bd.of Educ., Docket No. 98-23-425 (Feb. 3, 1999); Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

3. Pursuant to the provisions of W. Va. Code § 18A-4-8b, an employee is entitled to preferred recall status when employment is terminated due to lack of need, but not when a temporary contract

expires by its own terms. See Carroll, supra;.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Tucker 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: November 22, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant did not submit fact/law proposals.