SHARLENE LUCEY, et al.,

Grievants,

v. **Docket No. 02-25-087**

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent,

and

DAVID SEALS,

Intervenor.

D E C I S I O N

Grievants, Sharlene Lucey, Wayne McCracken, Larry Kalaskey, and Ruth E. Brown, employed by the Marshall County Board of Education (MCBE) as bus operators, individually filed level one grievances in November 2001, alleging that two positions had been incorrectly posted as extracurricular positions. For relief, Grievants request the opportunity to bid on the positions. Grievants' immediate supervisor lacked authority to grant the requested relief at level one. The matter was denied following an evidentiary hearing at level two, and review at level three was waived by the Grievants. Appeal was made to level four on April 1, 2002, and a supplemental hearing conducted in the Grievance Board's Wheeling office on June 13, 2002. Grievants were represented by Rodney T. Berry, Esq. of Berry, Kessler, Crutchfield & Taylor. MCBE was represented by Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, and Intervenor Seals was represented by Jacob M. Robinson, Esq. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before July 3, 2002.

The essential facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. Grievants McCracken and Kalasky are employed by MCBE as half-time bus operators, with seniority dates of August 19, 1998, and November 29, 1999. Grievants Brown and Lucey are employed as substitute bus operators with seniority dates of September 18, 1997, and September 17, 1997, respectively.

2. MCBE posted two position vacancies September 5-11, 2001, for extra- curricular runs, five days a week, as needed. The first run was from John Marshall High School to Benwood and the Dallas Pike areas, and was scheduled from 3:00 to 5:30 p.m. The second run was from Center McMechan Elementary School to Stacey Crossing - Big Wheeling Creek Road, and was scheduled from 2:30 to 4:30 p.m. None of the Grievants applied for either position.

3. Intervenor David Seals was placed in the John Marshall run, and John Zinn was awarded the Center McMechen run, effective September 24, 2001. Both Mr. Seals and Mr. Zinn had previously been employed as substitute bus operators and had seniority dates of September 3, 1997, and September 18, 1998, respectively. (See footnote 1)

4. Shortly after his appointment, Mr. Zinn requested a leave of absence. This request led to conversations between MCBE administrators and Ken Legg, President of the West Virginia School Service Personnel Association. Mr. Legg advised MCBE that the positions should be regular, half-time positions rather than extra-curricular positions.

5. On January 8, 2002, MCBE approved a recommendation to reclassify the positions held by Mr. Seals and Mr. Zinn as regular, half-time positions, retroactive to theirstarting date of September 24, 2001. The runs were not re-posted before granting regular, half-time status to Mr. Seals and Mr. Zinn.

6. Mr. Seals subsequently bid on, and received, another run. Grievant McCracken was appointed to the John Marshall run, and presently holds that position.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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.

Grievants argue that the positions were incorrectly posted as extra-curricular positions, and had they been posted as regular, half-time positions, they would have bid on them. Further, Grievants claim they had no opportunity to intervene in the proceedings which led to the change in the positions. MCBE asserts that the positions were posted as extra-curricular in anticipation that they would be filled by part-time employees. When no regularly employed bus operators applied, and

substitutes were awarded the runs, it amended the positions to regular, half-time assignments to accurately reflect the status of the incumbent employees. MCBE represents that the change in status was in fact a settlement, since Incumbent and Mr. Zinn had advised they would file a grievance regarding the matter.

Had the positions in question been filled by regular or part-time employees, there would be no question regarding their extracurricular status. W. Va. Code § 18A-4-15 provides that service personnel substitutes may be employed to fill the temporary absenceof another service employee, to fill the position of a regular employee on a leave of absence, to fill in for an employee who is authorized to be absent from duties without loss of pay, to temporarily fill a vacancy caused by the severence of employment of a regular employee, to fill a vacancy created by a regular employee's suspension, or to temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis. Because the vacancies were not the result of any of the above, MCBE could not fill them with substitute employees.

The determination that the positions were to be regular, part-assignments, resulted in the creation of two new positions, to be filled in compliance with W. Va. Code § 18A-4-8b which provides: "Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days." Grievants demonstrated that the new school service personnel positions awarded to Intervenor and Mr. Zinn had not been posted in compliance with the foregoing statute. See Langmyer v. Ohio County Bd. of Educ., Docket No. 95-35-565 (Mar. 12, 1996); Yeager v. Nicholas County Bd. of Educ., Docket No. 34-86-229-4 (Nov. 7, 1986).

Grievants further argue that W. Va. Code § 18A-4-8b requires that vacant school service personnel positions be filled on the basis of seniority, qualifications, and evaluation of past service. In this regard, Grievants established that they each would have had higher qualifications for the position than Intervenor and/or Mr. Zinn, based upon the criteria in W. Va. Code § 18A-4-8b.

Although MCBE correctly asserts that the settlement of personnel matters is encouraged, there had been no grievance filed at the time the positions were changedfrom extracurricular to regular. Further, Grievants have proven by a preponderance of the evidence that the “settlement” was in contravention of W. Va. Code § 18A-4-8b.

Accordingly, the undersigned administrative law judge concludes that changing the status of

Intervenor and Mr. Zinn from substitute employees to regular, half-time employees, without re-posting and filling the positions, was contrary to the legislative mandate in W. Va. Code § 18A-4-8b. As relief, Grievants ask that MCBE be required to post and fill the position in accordance with the statute. Inasmuch as Grievants are more senior than Intervenor and Mr. Zinn, such relief is justified and will be awarded. Should any of the Grievants be successful bidders for these assignments, they will be awarded seniority and benefits, including back pay less any appropriate set off, effective the date the positions were originally filled.

In addition to the foregoing, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance 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. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). 3. Grievants have proven a violation of W. Va. Code § 18A-4-8b, in that MCBE failed to post two-newly created, regular, half-time position vacancies for bus operators. See Dawson v. Cabell County Bd. of Educ., Docket No. 97-06-072 (Oct. 14, 1997); Hardman v. Lewis County Bd. of Educ., Docket No. 97-21-181 (Sept. 30, 1997). See also Webster County Bd. of Educ. v. Johns, 191 W. Va. 664, 447 S.E.2d 599 (1994).

Accordingly, the grievance is **GRANTED**, and MCBE Ordered to repost the positions in question. Should any of the Grievants successfully bid on the positions, they are entitled to seniority, back pay, and benefits, effective the date the runs began.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall 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: August 1, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Although Mr. Zinn and Mr. Brown share the same seniority date, a tiebreaker had determined that Mr. Brown be listed on the substitute seniority roster as more senior than Mr. Zinn.