TAMMY ANTONIEWICZ,

Grievant,

v. **DOCKET NO. 03-50-019**

WAYNE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Tammy Antoniewicz filed this grievance on November 26, 2002, stating: “Violations of WV Code 18A-4-8b and 18A-4-8g with regard to grievant driving a posted temporary run for a period of time for which she applied. Driving said run gave her regular status and benefits.” Grievant stated the relief sought as: “Grievant seeks to establish her seniority and benefits and regular employment that she has been denied. Grievant seeks all compensation and benefits due.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on March 6, 2003. Grievant was represented by WVEA UniServ Consultant Susan E. Hubbard, and Respondent was represented by attorney David Lycan, Esq. This matter became mature for decision upon the filing of the parties' proposed findings of fact and conclusions of law on March 21, 2003.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a substitute Bus Operator.

2. Dale Stephens drove bus 9134, and took an extended leave of absence to attend a legislative session.

3. Tom Michaels, a regular bus operator, was assigned the 9134 run, leaving his run, 9350 open until Mr. Stephens returned.

4. The 9350 run was then posted as a regular temporary run, and seven people applied, including Grievant. Although a regular employee applied, a janitor, he did not possess the minimum qualifications. Grievant was the third-most senior, qualified applicant, behind Don Stamper and Roger Smith, both of whom were also substitute bus operators.

5. Mr. Stamper was awarded the job, but did not actually drive it after speaking with King Queen, then-director of transportation. Mr. Queen told Mr. Stamper that he was to be awarded the job, but there was only a week or two left on the run, and he wanted Mr. Stamper to stay in the Dunlow area to drive as a substitute. Mr. Stamper never drove the 9350 run, but understood from his conversation with Mr. Queen the job would be filled with substitutes and he would get seniority for it anyway.

6. Roger Smith was then offered the run, and he began driving it in January as a substitute. Mr. Smith drove the run for 17 or 18 days before deciding he did not have time to work as a substitute driver, and so he quit.

7. Mr. Queen then assigned Grievant to drive the run although she was not the next employee on the substitute rotation roster, but was instead the next most senior applicant for the posted position. She began driving the 5350 run on February 18, 2002. 8. Grievant asked Mr. Queen about getting regular seniority for the run a couple days after she started driving it. He told her it was a dropped bid and would not be awarded. He also told her to shut her mouth and drive the run or he would call Mr. Stamper and make him drive it.

9. Grievant drove the 9350 run for 18½ days before Mr. Stephens returned from his leave of absence and Mr. Michaels returned to Bus 9350. She was told by Mr. Queen the Board had decided not to fill the job from the posting.

10. The Board met on March 5, 2002, and awarded the run to Mr. Stamper with an effective date of February 21, 2002, despite the fact that he had never driven the run and Grievant was driving the run at the time.

11. Mr. Stamper's regular seniority start date is listed on the seniority roster as “Temporary Bus Driver 2/21/02.”

DISCUSSION

In non-disciplinary grievances such as this, Grievant must prove her claims by a preponderance

of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4 (2000). Grievant's claim is that she should receive regular employment seniority and benefits for the time she spent driving Bus 9350,a posted temporary regular run. Respondent contends that Grievant held the position as a substitute and not as a regular employee because she was not hired into the position by the Board pursuant to a posting. Respondent's position is not supported by the facts.

Grievant was temporarily filling a regular run that was posted and on which she timely bid. She was offered the position after the more senior applicants, for all practical purposes, declined it, and she was not called off the substitute list to fill the vacancy although that would have been the appropriate way to fill what should have been a“dropped bid.” Although the Board at its March meeting voted to place another applicant in the position, it did so after and despite the fact that employee never drove it. At the time it voted, Grievant was driving the position as the next most senior applicant who wanted the job.

“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).” Hughes v. Mason County Bd. of Educ., Docket No. 99-26-185 (Aug. 11, 1999). *See also* Cisco v. Mingo County Bd. of Educ., Docket No. 00-29-087 (July 20, 2000). “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).” Hughes, *supra*.

Despite the fact the Board voted to hire Mr. Stamper for the position in question, he never performed the job. Instead, Grievant was placed in the position. She was not placed in the position as a substitute because she was not the next available substitute on the rotation - instead, she was the next qualified applicant from the posting. When the Board met to retroactively fill the posting, Grievant was the employee in the position and if, as Mr. Queen had told Grievant, it did not intend to fill the posting, it should not have voted to do so. It is apparent Mr. Queen operated with very little regard to proper personnel procedures or the rights of his employees. Respondent relies heavily on the contention that Mr. Queen characterized the posting as a “dropped bid,” and made that

representation to Grievant when she began the job. This contention ignores the salient fact that Mr.Queen's representation different from reality - he knew it was not a dropped bid but that instead the senior applicant had been told by him both that he was selected for the job and that he wouldn't be actually driving it. The job should have been considered a “dropped bid,” and then filled with a substitute off the substitute rotation roster, but that never happened. In fact, the position was open until it was filled, and it was not filled until after Grievant was placed in the position. When the Board did vote, it should have been cognizant that Mr. Stamper, for whatever reason, did not do the job. While Mr. Stamper was legally entitled to the job and the seniority he would accrue under it, Mr. Queen interfered with this entitlement by persuading him not to actually do the work. However, Grievant applied for the position pursuant to a posting, and filled the position pursuant to the competitive bid process despite the significant irregularities in the entire transaction, and deserves regular employee seniority from the time she began driving the run. (See footnote 1)

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). *See* W. Va. Code § 18-29-6.

2. West Virginia Code § 18A-4-15 provides, in part:

> 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 [W. Va. Code § 18A-4-8b]. 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.

3. West Virginia Code § 18A-4-8b states, in pertinent part:

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 [W. Va. Code § 18A-4-8], on the basis of seniority, qualifications and evaluation of past service.

. . .

Applicants shall be considered in the following order:

(1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section;

(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;

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 suchindividual. 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)." Hughes v. Mason County Bd. of Educ., Docket No. 99-26-185 (Aug. 11, 1999). *See*

also Cisco v. Mingo County Bd. of Educ., Docket No. 00-29-087 (July 20, 2000).

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)." Hughes, *supra*.

6. Grievant was hired to fill a position under W. Va. Code § 18A-4-15(2) and should have been afforded regular employee status for the time she spent in the position.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent must award Grievant regular seniority from the date she began driving the 5350 run, and any benefits that accrued to her therefrom.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: March 26, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Mr. Stamper ended up not driving the run through no fault of his own, when his employer told him not to. The fact that his seniority will predate Grievant's through this error is not seen as being harmful, in that had Mr. Stamper, who was properly first in line for the job, actually driven the run, Grievant would not have any seniority from the job since she would never have driven it.