# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**JACK MCGUIRE,**

**Grievant,**

**v.** **Docket No. 06-10-220**

**FAYETTE COUNTY**
**BOARD OF EDUCATION,**

**Respondent.**

## DECISION

Grievant, Jack McGuire, filed a grievance on April 7, 2006, against his employer alleging:

I was wronged due to the fact Fayette County B.O.E. has violated Section "18A-4-15" which states regular employees shall be given within [sic] 20 working days the status to fill this job until [sic] regular employee returns to work or the job is to be filled.

After a substitute has been assigned this position he shall remain on that job until the full time employee returns to work of the job is to be filled.

I was assigned this job bus number 981 on November 9, 2005 [sic] and remained until the Director informed me this job would be announced to full time employees. According to Section "18A-4-15" this was supposed to have been done within 20 working days. I was removed from bus 981 on 3- 20-06 and reassigned to bus 960.

For relief Grievant seeks:

Be returned to bus 981 with full time status with all benefits, until regular employee returns to work or vacancy be filled by posting position according to State Law to fill full time position.

This grievance was denied at the lower levels. On appeal to Level IV the parties agreed to submit this case for decision based on the record established at Level II. Grievant has at all times appeared *pro se*, and Respondent has been represented by ErwinL. Conrad, Esq. This case became mature for decision on September 18, 2006, upon the parties' submissions of proposed findings of fact and conclusions of law. (See footnote 1)

**Issues and Arguments**

Grievant asserts he should be placed back on Bus 981 and receive regular employee status and benefits. He contends he is entitled by law to have all the benefits and privileges of a full-time driver until the employee regularly assigned that route returns to work.

Respondent argues the employee regularly assigned that bus route was unable to return to work. As a result, the position was posted and filled by the most senior full-time bus operator.

Therefore, based on a preponderance of the evidence, I find the following material facts have been proven:

**Findings of Fact**

1. Grievant is employed by Respondent as a substitute bus operator under a substitute contract. He has been a substitute bus operator since 2004.

2. In April 2005, Tammy Sullivan, a regular bus operator took an approved short-term leave of absence. That leave of absence expired. Prior to returning, Ms. Sullivan was in an automobile accident and remained absent from her position. She was
not on an approved leave of absence, nor was she off work pursuant to Workers' Compensation. (See footnote 2)

3. During Ms. Sullivan's leave of absence, her bus was covered by a substitute driver.

4. Following the expiration of her approved leave of absence, and during the time of her non-approved, non-Workers' Compensation related absence, her bus was driven by Mike McGuire, Grievant's son.

5. On or about November 9, 2005, Mike McGuire received a regular full time bus assignment to another bus run, which he accepted.

6. Upon Mike McGuire's acceptance of the full time position driving another bus, Grievant was then assigned as a substitute bus operator on Bus 981.

7. Respondent received information on or about March 27, 2006, that other regularly employed bus drivers were prepared to file a grievance because they were not given the opportunity to "step up" into the position on Bus 981. (See footnote 3) 8. Respondent interprets *W. Va. Code* § 18A-4-15(b) to mean that all bus operators are considered to work in the same building, and regardless of their physical location, they can step up into a vacant position. (See footnote 4)

9. On March 27, 2006, Mike McGuire, the most senior regular employee, was allowed to “step up” an operate Bus 981.

10. Grievant was then assigned as a substitute for his son on Bus 960, so as to permit him to drive in the same district.

**Discussion**

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Grievant argues because he drove Bus 981 for approximately four months he should be entitled to regular employee status and benefits based on the language of *W. Va. Code* § 18A-4-15(a) which states:

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 who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board, and to fill the position of a regular service employee who is on workers' compensation and absent: Provided, that if the absence is to extend beyond thirty working days, the county board shall post the position of the absent employee under the procedures set forth in section eight-b of this article. If a substitute

service employee is employed to fill the position of the absent employee and is employed in the position for twenty or more working days, the substitute service personnel shall have regular employment status and be accorded all rights, priviledges, and benefits pertaining to the position until the regular employee returns to the position or ceases to be employed by the county board.

First, it should be noted that Respondent failed to abide by the *W. Va. Code* when it did not post the position for Bus 981 after it became apparent Ms. Sullivan would be absent beyond thirty working days. Instead, Respondent used Grievant to continually fill the position until Respondent became concerned other bus operators were going to file a grievance. Respondent should be more careful in the future and post positions within the time frame set forth in the *Code*.

Grievant argues he was employed under *W. Va. Code* § 18A-4-15(a)(2), which provides that "if a substitute service employee is employed to fill a position of the absent employee and is employed in the position for twenty or more working days, the substitute service employee shall have the regular employment status and shall be accorded all rights, privileges and benefits pertaining to the position until the regular employee returns to the position or ceases to be employed by the County Board." The employment referenced in the *Code* refers to a substitute obtaining the position as a result of the position being posted. This position was not posted, and therefore, the job was anunposted, temporary assignment which Grievant filled. Grievant could have filed a grievance requesting the position be posted, but he did not. Instead, he continued to operate the bus as a substitute driver.

*W. Va. Code* § 18A-4-15(a) also requires that the substitute employee be filling the position of a regular employee who is either on a leave of absence or on Workers' Compensation. Clearly, Grievant has been unable to carry his burden of proof to show Ms. Sullivan was absent as the result of an approved leave of absence. From the lower level record it is quite confusing as to the exact status of Ms. Sullivan's employment. The only clear indication is that her approved leave of absence expired. Because Grievant has been unable to sustain his burden of proof, this grievance must be denied. (See footnote 5)

The following conclusions of law will supplement this discussion.

## Conclusions of Law

1.

Since this grievance is not about discipline, Grievant must prove all of his claims

by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2.

> *W. Va. Code* § 18A-4-15(a) states: 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 who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board, and to fill the position of a regular service employee who is on workers' compensation and absent: Provided, that if the absence is to extend beyond thirty working days, the county board shall post the position of the absent employee under the procedures set forth in section eight-b of this article. If a substitute service employee is employed to fill the position of the absent employee and is employed in the position for twenty or more working days, the substitute service personnel shall have regular employment status and be accorded all rights, privileges, and benefits pertaining to the position until the regular employee returns to the position or ceases to be employed by the county board.

3.

To be considered employed under *W. Va. Code* § 18A-4-15, a service employee must have applied to a posted position and been selected the qualified applicant to fill that position.

4.

Grievant did not meet his burden by showing the conditions required in *W. Va. Code* § 18A-4-15 were met, thus entitling him to benefits.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County. Any such appeal must be filed within thirty 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: December 15, 2006**

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**Wendy A. Campbell**

**Administrative Law Judge**

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Footnote: 1

*Proposed findings of fact and conclusions of law were only received from Respondent.*

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Footnote: 2

*David Seay, Transportation Director, testified on direct examination that Ms. Sullivan was "out for a doctor's excuse and she's on excess _ well, she's run out of days of sick leave but her status hasn't changed." The specific dates have not been provided.*

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Footnote: 3

*W. Va. Code § 18A-4-15(b) provides, "[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 first offered 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." This is what is referred to as "stepping up."*

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Footnote: 4

*This was put to a vote with all the bus operators in the county, and majority decided to have it administered this way.*

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Footnote: 5

*Because it appears from the record that the bus operator position for Bus 981 was posted and filled by Mike McGuire, Grievant's son, this issue will not be addressed further.*