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HARRIETT GIBSON  
and  
KATHY BRADFORD

V.

DOCKET NO. 55-87-060-4

WYOMING COUNTY BOARD OF EDUCATION

DECISION

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a level three hearing and decision which affirmed the decision denying the grievance rendered by the county superintendent at level two. A level four hearing was held before John M. Richardson, Hearing Examiner, and the record was closed and submitted for decision upon the filing of the grievants' proposed findings of fact and conclusions of law on April 15, 1987.

For their grievance the grievants, Harriett Gibson and Kathy Bradford, who are substitute bus operators, complain that they applied for the position of a regular bus operator and were denied the job. They further complain that Sue Poindexter, a substitute bus operator with less seniority than either of the grievants, was hired in violation of WV Code §18A-4-8b(b).

In denying any violation of WV Code §18A-4-8b(b), the respondent board asserts that, pursuant to WV Code §18A-4-15(2), they admittedly filled the position with a less senior substitute bus operator because that person (Sue Poindexter) had achieved "regular employee status" by substituting in the position for a period in excess of thirty days, and was therefore, accorded the preferential treatment of a regular employee under WV Code §18A-4-8b(b).

The record reveals that in November 1985, a regular bus operator (Jess Cook) who drove the East Pineville run requested a leave of absence due to illness. At that time, another regular bus operator (name unknown) who drove the Skin Fork run applied for the vacancy created by Jess Cook's leave of absence, thereby leaving the Skin Fork run vacant. At that time, Sue Poindexter was selected to temporarily fill the vacancy as per WV Code §18A-4-15(2) and (6).

In January 1986, Jess Cook resigned; however, the vacancy was not filled as required by WV Code ,18A-4-15(4). In fact, the record reveals that the opening was not posted until August 1986, at which time Anita Sizemore, a regular bus operator driving the Turkey Creek run, applied for and was awarded the position. This in turn created a vacancy for the Turkey Creek run, which was posted and during the period of its posting, Anita Sizemore decided to return to her original position and applied for her old run. Ms. Sizemore was awarded the position and returned to her Turkey Creek run requiring the respondent board to post the Skin Fork run again.

This second posting of the Skin Fork run occurred in November 1986, and was awarded to Sue Poindexter who had been filling

the position, since its opening the previous November (1985).

The grievants contend and the respondent admits that they were more senior than Sue Poindexter. The respondent, on the other hand, asserts that Sue Poindexter had been working in the position for more than thirty days, and therefore, was entitled to regular employee status which in turn put her in a preferential position for selection under WV Code §18A-4-8b(b).

It is apparent that the position taken by the respondent board is contrary to WV Code §18A-4-15(4) which, in pertinent part, provides:

To temporarily fill a vacancy in a permanent position caused by severance of employment, by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position: Provided, that within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section [§18A-4-8b], of this article and section five [§18A-2-5], article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

This board held in the grievance of Cline v. Mingo County Board of Education, Docket No. 29-86-287-4, that the clear meaning of WV Code §18A-4-15(5) relating to the regular employee status was that such status only exists until the termination of the former employee becomes final and until the position is filled by the procedure provided in WV Code §18A-4-8b and WV Code §18A-2-5. To otherwise interpret WV Code §18A-4-15(4) would render the proviso in that

section meaningless, in that there would be no need to post and fill the position as it would have been filled by a regularly employed person, namely, Sue Poindexter.

In effect, Sue Poindexter was appointed to fill the vacancy under WV Code §18A-4-15(2) when Jess Cook requested a leave of absence. Later when the position was vacated by Mr. Cook's resignation, it required that the respondent board fill the position pursuant to WV Code §18A-4-15(4) and WV Code §18A-4-8b(b).

Notably, the grievants have not provided evidence that they were the persons who would have been chosen, as a matter of law, over all of the other applicants for the position. They have only shown that they were more senior than Sue Poindexter and that grievant Kathy Bradford was more senior than grievant Harriett Gibson.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

#### FINDINGS OF FACT

1. Grievants, Kathy Bradford and Harriett Gibson, are substitute bus operators employed by the respondent board, the Wyoming County Board of Education.

2. The grievants applied for the position of regular bus operator driving the Skin Fork run. They were not hired.

3. Sue Poindexter is a substitute bus operator who was selected to fill the vacancy created by the resignation of Jess Cook, and the transfer of an unnamed bus operator.

4. The grievants were more senior than Sue Poindexter.

5. Sue Poindexter was selected to permanently fill the vacancy because she had achieved temporary regular employee status under WV Code §18A-4-15(2).

6. The grievants provided no evidence that they were the most senior applicants for the position, and would therefore, be entitled to instatement to the position.

7. Grievant Bradford is more senior than grievant Gibson.

#### CONCLUSIONS OF LAW

1. Pursuant to WV Code §18A-4-15(4), the board shall fill a vacancy created by resignation within twenty days of commencement of creation of that vacancy and that position shall be filled in accordance with WV Code §18A-4-8b and WV Code §18A-2-5.

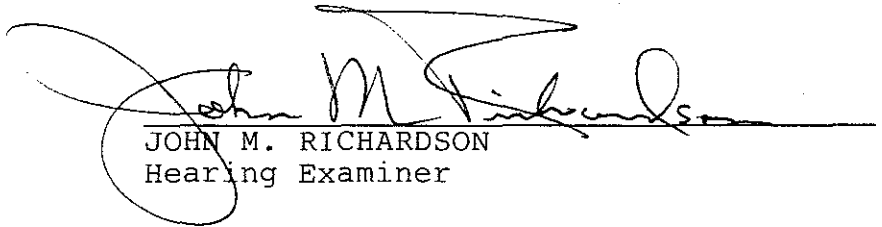
2. The grievants have failed to prove by a matter of law that either of them were entitled to instatement to the position they sought.

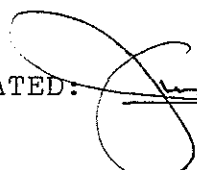
3. The grievants have proven by a preponderance of the evidence that the respondent board failed to fill the vacancy pursuant to the provisions of WV Code §18A-4-15(4) and WV Code §18A-4-8b(b).

Accordingly, the relief sought by the grievants in their grievance requesting instatement and back pay is DENIED; however, to the extent that the position was filled in the violation of WV Code §18A-4-15(4) and WV Code §18A-4-8b(b), the filling of that position

is null and void. The respondent board is hereby directed to post and fill the position in accordance with WV Code §18A-4-8b(b) and WV Code §18A-2-5.

Either party may appeal this decision to the Circuit Court of Wyoming County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (WV Code §18-29-7) Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

  
JOHN M. RICHARDSON  
Hearing Examiner

DATED:  June 10, 1987