



**Members**  
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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

**GASTON CAPERTON**  
Governor

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**ELOISE ROBERTS**

v.

**Docket No. 89-22-584**

**LINCOLN COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant Eloise Roberts is a bus operator in the employ of Respondent Lincoln County Board of Education. On August 7, 1989, she filed the following complaint at Level I:

The Board of Education has denied [G]rievant two years of regular seniority as a Bus Operator. Grievant requests that she be credited with these two years of seniority and all benefits associated with the two additional years.

After denials there<sup>1</sup> and Level II<sup>2</sup> and waiver at Level III, Grievant advanced her claim to Level IV on October 2, 1989, where it was heard October 23. The parties agreed to submit

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<sup>1</sup> The Level I response apparently was a denial due to lack of authority to grant the relief requested. It reads, "In answer to your grievance. . . , this was an administrative decision not made in this office."

<sup>2</sup> The Level II hearing transcript and decision are part of the record at Level IV. At Level II, Grievant dropped an allegation that she was wrongfully denied a certain bus run for which she had applied.

fact-law proposals by November 22, if at all, and the case is thus mature for disposition.<sup>3</sup>

The single issue in this case is Grievant's status, as regular or substitute employee, from September 26, 1978, through the end of the 1979-80 school year.<sup>4</sup> It is uncontroverted that Respondent's minutes of November 7, 1977, and August 21, 1978, reveal Grievant to have been hired as a substitute, respectively, for 1977-78 and 1978-79;<sup>5</sup> also, its May 5, 1980, minutes record that she was first formally selected as a regular employee for school year 1980-81. Gr. Ex. 2. She was given her first contract of employment, a continuing one, on May 13, 1980, effective August 25 of that year. Gr. Ex. 1.

However, according to Grievant, she was, in September 1978, called by Johnie Adkins, Respondent's Transportation Director, and asked if she wanted to assume a run involving special education students.<sup>6</sup> Mr. Adkins explained that

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<sup>3</sup> Grievant presented proposals November 22; Respondent has waived its right to submit.

<sup>4</sup> Grievant's claim is thus altered, from its original request for a full two years' seniority, to one seeking regular-employee status back to September 26, 1978, only.

<sup>5</sup> Although Grievant worked as a substitute prior to September 26, 1978, she does not make any related claim herein and therefore, the pre-September 26, 1978, period is not in issue.

<sup>6</sup> Interestingly, Mr. Adkins, who has continuously served as Transportation Director to the present, was not offered as a witness by either party.

none of the then-current regular drivers wanted the assignment because it required morning and evening, or full-time, duties, but would only provide half-time pay until certain monies could be transferred into the appropriate accounts.<sup>7</sup> Grievant agreed to accept the run on those terms. Although at first she was classified on payroll and perhaps other records as "substitute," Gr. Ex. 3-A, 3-B, Resp. Ex. 1, as early as February 1979 that categorization changed to the more general one of "transportation." She also accrued leave time, a benefit for regular employees, perhaps commencing September 26, 1978, although it is not certain that this was continuous. She did not, however, participate in any personnel retirement plan or have the opportunity to bid on extra-duty or extracurricular assignments.<sup>8</sup>

Respondent's Assistant Superintendent of Schools Tom Miller appeared at Level IV and testified that, to the best of his knowledge, substitutes were not given written employment contracts in the late 1970's. He admitted that this situation with Grievant was "jumbled" and that he did not understand why she was offered a continuing employment contract in May 1980. His only explanation of why, on March 27, 1980, she was sent a letter by then-Superintendent

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<sup>7</sup> Apparently, the run was underwritten by governmental funds outside Respondent's normal budget. Grievant was paid only half-time wages for more than fifty work days.

<sup>8</sup> With regard to the latter, see W.Va. Code §§18A-4-8b(b), 18A-4-16.

Charles S. McCann, Gr. Ex. 4, advising her that she was being considered for W.Va. Code §18A-2-7 administrative transfer for the 1980-81 term, was that it was an error, since substitute staff are not permanently assigned to one worksite and thus would not appropriately ever receive a transfer notice.

It seems Grievant was paid from funds set aside for other-than-regular staff services from September 26, 1978, through the 1979-80 school year. It is established the run Grievant was asked to take was a new one, not previously or ever assigned to another driver; when Grievant was formally hired as a regular operator, she did not apply for that status or for any position, and her duties did not change for 1980-81 although she was allowed an aide starting then. She still holds the same basic run today.<sup>9</sup>

The source of Grievant's salary is irrelevant. Code §18A-4-8 explains, "each service employee shall. . .be entitled to all service personnel employee rights, privileges and benefits provided under this. . .Code without regard to such employee's. . .methods or sources of compensation." This provision can "be traced. . .to the Legislature's desire to ensure that. . .school employees. . .who receive funds from different funding sources are not

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<sup>9</sup> She testified that there have been revisions to the route over the years. Official notice is taken that bus runs, by their very nature, are constantly subject to at least minor alterations.

automatically excluded from statutory benefits." Bonnell v. Carr, 294 S.E.2d 910, 918 (W.Va. 1982).

Bonnell is pertinent by analogy. Therein, service workers assigned to the Doddridge and Pendleton County school systems, whose salaries originated from federal program<sup>10</sup> monies, lost individual circuit court attempts to have themselves declared tenured employees with procedural protections against termination. Their cases were consolidated for appeal, and the Supreme Court held the Doddridge County group only to be so situated. The distinguishing factor between it and the Pendleton County contingency was that the former's members had all been offered continuing contracts of employment by their board of education after three years of service. Code §18A-2-6 requires county boards of education in West Virginia to offer continuing contracts to service employees who have completed three full years of acceptable employment.<sup>11</sup>

In the instant matter, Grievant was offered a continuing contract, apparently after three years of some sort of work relationship with Respondent. See this Decision at p.

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<sup>10</sup> Specifically, Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§801 et seq.

<sup>11</sup> A county board of education presumably could offer a continuing contract to an employee prior to this three-year period's expiration; however, it is accepted that this is generally not done.

2 and n. 4.<sup>12</sup> Furthermore, since late September 1978, Grievant has been afforded many of the accoutrements of regular personnel status, including leave accumulation and formal notice of transfer prior to the 1980-81 school year. Finally, and perhaps most telling, was Mr. Miller's candid statement at Level IV that Grievant "probably should have been" hired as a regular bus operator effective September 26, 1978.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. Grievant has been employed as a bus operator for Respondent since at least 1977-78. She has worked full-time, in essence, since September 26, 1978, covering the same basic special education run until the present.

2. The route Grievant assumed in late September 1978 was a new one and has never been assigned to another driver.

3. Officially, Grievant was hired as a substitute driver until May 1980, when she was offered a continuing contract of employment effective the 1980-81 term. She did not request this change of status, apply for a position, or

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<sup>12</sup> It is not clear from the record how much work Grievant actually performed in 1977-78 or prior to September 26 in school term 1978-79.

experience significant alteration of her duties at any time after September 26, 1978.

4. Commencing September 26, 1978, Grievant was afforded certain of the benefits of regular employment, including the accumulation of leave. Also, in March 1980, she was notified that she was being considered for administrative transfer per W.Va. Code §18A-2-7, a personnel action reserved for regular staff members.

5. Before school year 1980-81, Grievant did not participate in any retirement plan through Respondent and was not permitted to bid on extra-duty or extracurricular assignments.

#### CONCLUSIONS OF LAW

1. A service employee is entitled to a continuing contract of employment after three years of acceptable service. W.Va. Code §18A-2-6.

2. Regularly-employed service personnel being considered for administrative transfer to another assignment must be advised of this possibility "on or before the first Monday in April" and advised of the right to a hearing. Code §18A-2-7.

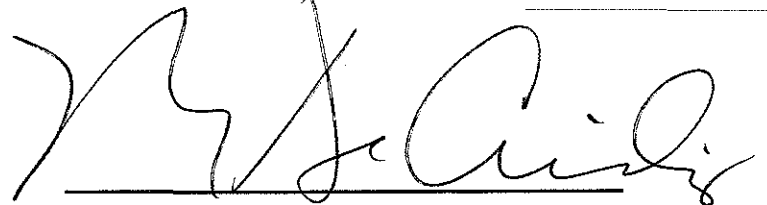
3. Even though Grievant did not enjoy all benefits of regular employment prior to school year 1980-81, her accrual of leave, her receipt of a transfer notice, her awarding of a continuing contract for 1980-81, her assumption of a bus

route never before or since held by another driver, and other factors, indicate rather clearly that she was treated and considered a regular employee, for practical purposes, by Respondent starting at least September 26, 1978.

4. Respondent, in effect, is estopped from categorizing Grievant as other than a regularly-employed bus operator for the period in question.

Accordingly, this grievance is **GRANTED**, and Respondent is ordered to amend Grievant's personnel records to reflect a regular-employment starting date of September 26, 1978, with all benefits attendant thereto.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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 Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



**M. DREW CRISLIP  
HEARING EXAMINER**

**Dated: November 22, 1989**