



**Members**  
James Paul Geary  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
GASTON CAPERTON  
Governor

**REPLY TO:**  
407 Neville Street, Suite 120  
Beckley, WV 25801  
Telephone: 256-6855  
ON NET: 557-6855

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

BILL CURRY

v.

Docket No. 89-29-567

MINGO COUNTY BOARD OF EDUCATION

DECISION

Grievant, Bill Curry, is employed by the Mingo County Board of Education (Board) as a substitute bus operator. He initiated a grievance at Level I August 29, 1989, alleging:

18A-4-8b was violated because substitute bus operators should be called on a rotating basis and I was passed over for a regular position, therefore a bus operator that was hired was placed in a regular position before me.

Grievant's supervisor was without authority to grant relief and, upon appeal to Level II, the grievance was denied following hearing held sometime in early September. The Board waived Level III proceedings and appeal to Level IV was made September 21, 1989, where hearing was held November 15, 1989.<sup>1</sup> Proposed findings of fact and conclusions of law were submitted by the parties by December 15, 1989.

---

<sup>1</sup>An October 19, 1989, hearing was continued on the motion of grievant's counsel.

There is no dispute over the facts giving rise to the grievance. Grievant was first "hired" by the Board on January 9, 1986. At that time he had not taken the required test for bus operators which is administered by the West Virginia Department of Public Safety (DPS).<sup>2</sup> Mr. John Messer was "hired" as a substitute bus operator on March 13, 1986. The record does not reveal the date but at some point he became fully certified and, upon being assigned to the Kermit area, substituted for the first time on June 5, 1986. Grievant eventually achieved certification and was assigned to the Williamson area. His first day of service was September 24, 1986.

On August 15, 1989 a bus operator position was posted and both grievant and Mr. Messer made application. The Board

---

<sup>2</sup>W.Va. Department of Education School Transportation Regulations provide:

No person shall be qualified for employment by any county board of education to drive any school bus or motor vehicle used in the transportation of school children who has not been certified by the Department of Public Safety and State Department of Education. West Virginia Board of Education, "School Bus Operator's Certification" is obtained through satisfactorily passing special examinations which include a physical examination and also a written examination. All school bus operator applicants (new and/or experienced) shall complete these examinations prior to the time they report for the performance of such service.

concluded Mr. Messer had the earlier date and awarded him the position.<sup>3</sup>

Grievant's legal position is difficult to discern. He proposes as a conclusion of law:

Substitute school service personnel are called to substitute on a rotating basis according to seniority with the most senior substitute receiving first opportunity and other substitutes being called in descending seniority order until all substitutes have received an opportunity for employment. W.Va. Code §18A-4-15.

As grievant was hired several months prior to Messer, he should have been offered the first opportunity to substitute and to establish his seniority date. Because of the delay in giving grievant the test and the delay in offering grievant the opportunity to substitute, Messer was allowed to move ahead of grievant in seniority. This happened through no fault or lack of diligence on the part of grievant.

The Board generally disavows any responsibility for grievant's testing and maintains the position in question was properly filled in accordance with W.Va. Code §18A-4-8b(b). The Board also contends its actions were in keeping with a local policy established January 19, 1987.<sup>4</sup>

---

<sup>3</sup>It is assumed that no regularly-employed bus operators or operators on a preferred recall list made application for the job. See W.Va. Code §18A-4-8b(b).

<sup>4</sup>This policy is embodied in a memorandum from W.L. Bostic, Administrative Assistant, and Bill Kirk, Transportation Director, to Principals, regular and substitute bus operators. It is essentially a restatement of pertinent portions of W.Va. Code §18A-4-15, but certain disciplinary measures for substitutes who consistently turn down assignments are also included. The memorandum was signed by Mr. Bostic, Mr. Kirk and two representatives of the West Virginia School Service Personnel Association.

Mr. Kirk testified that persons wishing to be substitute drivers in Mingo County are initially given a hire date but are not placed on lists until they have completed the WVDE and DPS requirements. He further stated that once these requirements are met, the person's name is given to the principal in charge of calling substitutes in the area to which he or she is assigned. According to Mr. Kirk, the principal then calls on the substitutes as needed on a rotating basis until all substitutes in that area have had an opportunity to accept assignments. He speculated that Mr. Messer may have been called upon sooner than grievant because there were fewer substitutes available in the Kermit area and Mr. Messer would have reached the top of the list sooner. Mr. Kirk also expressed an opinion that strikes by the United Mine Workers during 1986 most likely occupied state police officers and delayed the scheduling of the test grievant needed for placement on the substitute list. He stated that some of the substitutes went into Logan County to take the tests rather than wait for the detachment in Williamson to schedule them.

Grievant also testified that a strike may have been the reason for the delay in testing. He further stated that he finally achieved certification in April 1986 and was only "signed up" on the Williamson area list for that term but, at the beginning of the 1987-88 term, he placed his name on several other area lists.<sup>5</sup> Grievant stated he was not aware of the calculation

---

<sup>5</sup>It appears that during 1986-87 there were five  
(Footnote Continued)

of Mr. Messer's seniority until he learned of his appointment to the position in question.

Although not explicitly stated, grievant asserts the Board had some responsibility to see that he was given the test and, thus, the opportunity to substitute before those with later "hire dates". There is, however, no legal basis for this contention. The WVDE regulations, see n.2, generally speak in terms of what a candidate for a bus operator position must do and, to the extent that county boards of education are prohibited from allowing a person who has not achieved DPS certification to operate a bus, an employer-employee relationship does not exist until such is achieved.<sup>6</sup> Moreover, the Board has no control over DPS and therefore could not dictate the times for scheduling of examinations, even if it were concluded that some duty on its part did exist. It was unfortunate for grievant that circumstances beyond his and the Board's control delayed his certification, but it cannot be concluded that the Board must rectify the ill effects of the delay by recalculating his seniority and instating him to a regular full-time position.

---

(Footnote Continued)

identified assignment areas for Mingo County bus operators, namely, Gilbert, Matewan, Delbarton, Williamson and Kermit. At the beginning of the 1987-88 term, Kermit High School and Lenore High School were consolidated into what is now Tug Valley High School.

<sup>6</sup>The record does not reflect the reason why the Board would give the candidates a hire date before they had completed the requisite tests. It is surmised that by doing so applicants were afforded some financial assistance, with part or all of the various physical examinations and other needed tests.

Further, even if it were conceded that the Board breached some duty as far as the tests were concerned, grievant has not established that he would have otherwise achieved an earlier seniority date. A substitute's first day of service is necessarily dependent upon the absence of a regular employee. Grievant has not shown that he would have been in a position to fill in for an absent employee any earlier had there been no delay on the part of DPS in administering the test. See Gillenwater v. Lincoln County Board of Education, Docket No. 22-86-289-1 (April 30, 1987); Hale v. Lincoln County Board of Education, Docket No. 22-86-241-1 (April 27, 1987). Further, it appears, from the testimony of Mr. Kirk, that some employees, perhaps even Mr. Messer, did not wait until testing resumed in Williamson but went to Logan County for the test and, thus, achieved earlier certification. While grievant was not called upon to do so, he did not offer an explanation as to why he did not avail himself of this opportunity.

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

#### FINDINGS OF FACT

1. Grievant was given a "hire" date of January 9, 1986 by the Board. Mr. John Messer's "hire" date was March 13, 1986. Their employment as substitute bus operators was contingent upon the successful completion of requirements of the West Virginia Department of Education and the West Virginia Department of Public Safety.

2. Grievant did not pass the DPS examination until April 1986, at which time he was assigned to the Williamson area. He was not called upon to substitute until September 24, 1986. The record does not reflect the exact date, but Mr. Messer passed the examination prior to June 5, 1986, the day on which he first served as a substitute.

3. Both grievant and Mr. Messer applied for a regular full-time position in the Tug Valley area and the Board, after determining Mr. Messer to have more seniority due to his earlier starting date, awarded him the position.

#### CONCLUSIONS OF LAW

1. For purposes of determining the seniority of school service employees, the seniority begins on the date that he or she enters into his or her assigned duties. W.Va. Code §18A-4-8b.

2. Absent any evidence that a county board of education manipulated the starting dates of substitute school service employees or otherwise exhibited favoritism toward one or more such employees, those dates are determinative of their seniority and may be used for hiring purposes.

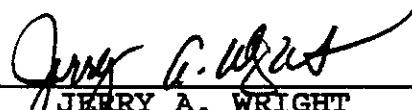
3. Grievant failed to establish any duty, legal or otherwise, on the part of the Board to see that he achieved DPS

certification prior to Mr. Messer or that the Board contravened any statute or policy when Mr. Messer was allowed to enter upon his duties on June 5, 1986.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Mingo County or the Circuit Court of Kanawha 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.

Dated: March 30, 1990

  
\_\_\_\_\_  
JERRY A. WRIGHT  
Chief Hearing Examiner