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**WEST VIRGINIA EDUCATION AND  
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DREMA FINNIE, et al.

v.

Docket No. 89-23-314

LOGAN COUNTY BOARD OF EDUCATION

DECISION

Grievants<sup>1</sup> are employed by the Logan County Board of Education (Board) as substitute bus operators. They initiated a grievance at Level I on April 14, 1989, alleging:

Ronald Cross left bus run 813 on November 3, 1988. He neglected his duties as a bus driver because he did not document the leave. He was allowed to return in the same seniority position and received a bus run 8206 that will give him the same benefits and privileges previously held.

Grievants' supervisor was without authority to grant relief and the grievance was denied at Level II following hearing held May 17, 1989. The Board waived proceedings at Level III and appeal to Level IV was made July 7, 1989, where hearing was held September 6, 1989. The parties agreed to submit proposed

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<sup>1</sup>Drema Finnie, Dorren Morris, Aaron Bryant, Christine Kimbler, Johnny Craddock, Arnold Kelley, Donald Jarvis and Charlene Bailey.

findings of fact and conclusions of law by October 5, 1989, but only grievants submitted such.

There is essentially no dispute over the facts giving rise to the grievance. At the beginning of the 1988-89 school term, Mr. Ronald Cross, a substitute bus operator, was assigned bus run 813 due to the expected long-term absence of the regular bus operator.<sup>2</sup> On November 3, 1988, Mr. Cross informed his supervisor, Mr. Jeff Swainer, that he would no longer be available for afternoon runs because he had accepted employment with the Logan County Commission and that "the others" could have his run. Mr. Swainer subsequently informed Mr. Willie Akers, Assistant Superintendent of Schools in charge of transportation, that Mr. Cross desired to take some time off. Mr. Akers instructed Mr. Swainer to direct Mr. Cross to come to the central office to discuss the matter. Mr. Cross was so advised but did not respond. Several calls to Mr. Cross from Mr. Akers' secretary also went unheeded, as did a registered letter. Shortly before a March 1989 Board meeting Mr. Cross was sent another letter advising him that he would be dismissed at the meeting if he did not respond. He reported to the Board office the day before the meeting and was allowed to remain on the Board's substitute list, with no loss of seniority. Because of his position on the substitute bus operators seniority lists, he was given another long-term assignment.

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<sup>2</sup>The record does not reveal the reason for the absence or the location of the run.

It is undisputed that Mr. Cross never substituted between November 3, 1988 and the date he accepted this assignment.

Grievants contend Mr. Cross should not be credited for seniority purposes for the period of time he was working for the Logan County Commission. They assert his abandonment of his duties should have prompted the Board to dismiss him for willful neglect of duty.

The Board's position is somewhat unclear but it appears to maintain that, since Mr. Cross' employment had never been terminated pursuant to W.Va. Code §18A-2-8, he was an employee accruing seniority during the months in question. According to Mr. Akers, a dismissal action was started but due to Mr. Cross' appearance at the Board office, it "never went through." Other than grievants' reference to W.Va. Code §18A-2-8, the parties offer no statutory provisions or case law in support of their positions.

Arbitrators, when faced with factual situations similar to the present one, have generally held that employees with unexcused absences lose their seniority rights for those periods of time. See Arbitrator Devino in 79 LA 1012; Bickner in 76 LA 1258; Roumell in 72 LA 1262. It has also been held that when an employee's actions are such as to lead the employer to reasonably conclude that he was resigning, those actions may be considered a resignation even though the employee does not give formal notice that he is quitting. Arbitrator High in 53 LA 1103; Stouffer in 50 LA 46 (employee did tell other employees she was quitting); Scheib in 49 LA 540.

When these principles are applied to the present case, it is clear that Mr. Cross should not have been credited for the period of time. Grievant Morris testified that he was present on the morning of November 3, 1988, when Mr. Cross informed Mr. Swainer that he could not complete his evening duties because of his acceptance of other employment which would occupy his time during the afternoons. He further stated that Mr. Cross told Mr. Swainer that "the others could have the run." Mr. Cross apparently attempted to take some sort of a leave of absence, prompting Mr. Swainer's calls to Mr. Akers, but the permission to do so was never granted. Ms. Betty Yaeger, another substitute driver, testified that she had a conversation with Mr. Cross on the same date during which he stated that he had taken a full-time job with greater pay. Regardless of the fact that he did not tender a resignation, those statements and his refusal to accept assignments for over three months constituted such.

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

#### FINDINGS OF FACT

1. Grievants, substitute bus operators employed by the Board, receive their assignments according to the length of time they have been so employed on a rotating basis pursuant to W.Va. Code §18A-4-15.

2. Mr. Ronald Cross, another substitute bus operator, accepted other employment on November 3, 1988. Mr. Cross did not

tender a formal resignation but surrendered a long term bus assignment and made statements to another bus operator that he had another job.

3. Mr. Cross did not accept substitute assignments for a period of over three months but, upon reporting to the Board's central office, was credited with this period of time for seniority purposes. He was subsequently given a long-term assignment due to his position on the Board's seniority lists.

#### CONCLUSIONS OF LAW

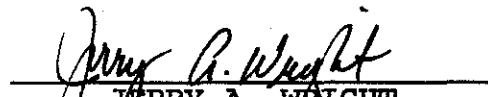
1. An employee, through his actions and oral representations to his employer or others, may resign a position without tendering official written notice. Elkouri & Elkouri, How Arbitration Works at 655 (1985); Scheeb in 49 LA 450; Stouffer in 50 LA 46. Thompson v. ALD, New York, Inc., 121 S.E.2d 554 (N.C. 1961).

2. Mr. Cross resigned his substitute bus operator position effective November 3, 1988, and was, therefore, not an employee of the Board until he accepted an assignment on March 28, 1989. By allowing him to accept assignments, the Board, in effect, had rehired him.

Accordingly, the grievance is **GRANTED** to the extent that the Logan County Board of Education is hereby **ORDERED** to deduct from

Mr. Ronald Cross' seniority, the period of time from November 3, 1988 through March 28, 1989.

Either party may appeal this decision to the Circuit Court of Logan 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.

  
JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: March 30, 1990