DONALD ARBOGAST,

Grievant,

v. DOCKET NO. 94-42-1093

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance filed by Donald Arbogast ("Grievant") against the Randolph County Board of Education ("RBOE"), alleges the following:

> **Grievant, a substitute bus operator, held an identical seniority date as a substitute bus operator with another substitute bus driver. The Respondent conducted a random drawing in order to break the seniority tie between the Grievant and the other bus operator on August 22, 1994 without the Grievant's knowledge and or participation. Grievant alleges a violation of West Virginia Code §18A-4-8g and requests the performance of another drawing, and if Grievant prevails, instatement into the "Coalton area" bus run formerly held by Bill Shaw, and wages, benefits and seniority retroactive to August 22, 1994.**

Grievant appealed to Level IV of the grievance procedure on December 1, 1994. (See footnote 1) **The parties subsequently asked that a decisionbe rendered on the Level II record, and this matter became mature for decision on April 7, 1995, with the parties' submission of proposed findings of fact and conclusions of law, and responses thereto.**

Grievant believes that a second drawing should be held to break a tie in seniority between Jesse Williams and himself, because he did not receive notice of the date a random selection (drawing) would take place, and did not attend the drawing. Grievant does not allege any bias, wrongdoing or bad faith in the random selection, or that the outcome of the drawing would have been different had he received notice of the date and been present for the drawing. The undisputed facts, as set forth in the following findings, establish that RBOE made every effort to contact Grievant, and when it was unsuccessful in reaching him, conducted a fair random

selection, which Grievant lost. Had Grievant's name been drawn, he surely would not be complaining that he did not have notice of the date of the drawing. RBOE substantially complied with W. Va. Code §18A-4-8g and RBOE's "Policy EBA" when it, in good faith and with good cause, conducted the random selection in Grievant's absence. Accordingly, the grievance must be denied.

Findings of Fact

1. Grievant is a substitute bus operator for RBOE. Grievant and Jesse Williams began working for RBOE as substitute bus operators on the same day, and their seniority was identical. Grievant has been aware since he began his employment with RBOE in 1988, that he was tied in seniority with Mr. Williams. Grievant had never asked that the tie be broken.

2. From August 9, 1994, through August 15, 1994, RBOE posted a vacancy for School Bus Operator for the Coalton area of Randolph County.

3. Applicants for the posted vacancy were a regular bus operator, Tommy Bodkins, and substitute bus operators Jesse Williams and Grievant.

4. Mr. Bodkins was the successful applicant; however, on August 18, 1994, he withdrew his application.

5. Policy EBA, approved by the employees and adopted by RBOE, sets out the manner in which seniority ties among service personnel are to be broken.

6. RBOE was scheduled to meet on August 22, 1995, and held its meeting as scheduled. The next RBOE meeting was scheduled for two weeks later, after school had begun.

7. Training and meetings for regular bus operators for the 1994-1995 school year began August 24, 1995. Substitute bus operators are not required to attend the training and meetings, and are not paid for attendance. The pay period began August 22, 1995.

8. RBOE Director of Personnel Dr. Shannon Bennett attempted six times to contact Grievant over a period of four days to notify him a random drawing would be held to break the seniority tie with Mr. Williams. Dr. Bennett's attempts to contact Grievant were made by telephone calls to his residence on Friday, August 19, 1995, on Saturday, August 20, 1995, on Sunday, August 21, 1995, and on Monday, August 22, 1995. Dr. Bennett was unable to reach Grievant and was likewise unable to leave a message at his home, because no one was there,

and Grievant did not have an answering machine. Dr. Bennett did not know of any other way to reach Grievant, and did not know when she would be able to reach him at his residence telephone number.

9. Grievant was out of town from August 18, 1995, through 2:00 p.m., August 22, 1995. Grievant did not inform RBOE of his departure or return, or of an alternate way to contact him in his absence.

10. On August 22, 1995, Dr. Bennett asked a secretary in the RBOE office, Margaret Gutshall, to wait outside her office door, and, with the only persons in her office being Dr. Bennett, Jesse Williams' wife and son, and another secretary in the RBOE office, Sara Daniels, Dr. Bennett wrote Grievant's name on one slip of paper and Jesse Williams' name on another slip of paper, and showed both slips of paper to Mrs. Williams and Ms. Daniels. Dr. Bennett folded the two slips of paper and placed them in a container. Mrs. Williams, her son, and Ms. Daniels each mixed the two names in the container. Ms. Daniels then left the room, and Dr. Bennett calledMs. Gutshall into her office, held the container over Ms. Gutshall's head, and Ms. Gutshall drew a paper from the container and handed it to Dr. Bennett. Ms. Gutshall did not see the name. The name drawn was Mr. Williams.

11. Mr. Williams was awarded the posted position by RBOE at the August 22nd meeting.

Discussion

The pertinent language of the cited statute, W. Va. Code §18A-4-8g [1993], provides:

> **If two or more [school service personnel] employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the county board.**
>
> **A board of education shall conduct such random selection within thirty days upon said employees establishing an identical seniority date. All employees with an identical seniority date within the same class title or classification category shall participate in the random selection. (Emphasis added.)**

Grievant argues that, because the statute states all affected employees "shall participate in the random selection," Grievant had to be notified of the date the random selection would be

held, and, apparently, if Grievant could not be contacted, RBOE would have to wait until Grievant could be found. Grievant's representative admitted in argument, however, that Grievant could have chosen not to attend the drawing, or could have designated someone else to appear at the drawing for him. Grievant further asserts in support of his request for another drawing, a violation of the requirementthat the random selection be conducted within thirty days of the time identical seniority dates are established.

Grievant's representative stated in the Level II hearing closing arguments that there are "very sound and logical reasons why the employees are to participate and it is to prevent any suspicion and since that is a rule, I think that that should be followed. The fact that their [sic] was no harm done here should not make any difference... ." However, Grievant does not assert that the drawing was conducted unfairly, in bad faith, or otherwise in a manner which prejudiced Grievant's chances, or that he is suspicious of the circumstances under which this particular drawing occurred. Grievant in fact states in his grievance that the drawing was random. Grievant does not assert that the outcome would have been different had he been in attendance, or had it been held within the thirty day period, as indeed he cannot, and acknowledges that there "was no harm done". Grievant seeks merely a second chance at the lottery by arguing a technicality, even though he does not assert any shenanigans. The error here is harmless.

As required by Code §18A-4-8g, a random selection system was established by the employees and approved by RBOE. That policy (Policy EBA) provides:

> **When any two or more Service Personnel Employees are tied in official service time seniority, a tiebreaker shall be held and conducted in the following manner:**
>
> 1. **Each employee shall place their name on a sheet of paper.**
>
> 2. **The paper sheets will be folded and the employee will place the paper in a box.**

3.
The Director of Personnel will select an independent person to pull one of the papers from the box. The box will be held so that the individual making the selection cannot see the papers.

4.
The paper pulled from the box first will receive first seniority placement of those tied, and so on.

When this determination has been made, the information will be forwarded to the Certification Officer in writing and appropriate adjustments will be made to the official Seniority List. Confirmation will also be forwarded to each employee with copies placed in their records for verification purposes.

Except for Grievant's absence, Respondent conducted the random selection exactly as is required by Policy EBA. From the actions taken by RBOE, it can be concluded that the practice of RBOE is to notify all the employees who are tied in seniority prior to a random selection. RBOE made every effort to contact Grievant so he could be present for the drawing. However, Grievant made no effort to assure he could be contacted, even though he knew he was tied in seniority with Mr. Williams, and the new school year was at hand. RBOE had no idea when Grievant would be available. In Grievant's absence, RBOE did everything possible to conduct the drawing in a random and fair manner, which was, of course, the intent of the statute and of Policy EBA. RBOE did not intentionally schedule the drawing at a time when Grievant would not be present. RBOE acted reasonably in conducting the drawing when it did.

Clearly the purpose of Grievant being present for the drawing is to assure the drawing is conducted just as was described by Respondent's witnesses. Grievant did not have a fundamental right to be present at the drawing. Grievant's interests were not prejudiced by the actions of RBOE. See, McFarlane v. W. Va. Dept. of Educ., Docket No. DOE-87-132-1 (Nov. 30, 1987); Duruttya v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40 (W. Va. 1989). To award Grievant a second drawing would be to exalt form over substance. Grievant had what was required: a fair chance. He is entitled to nothing more. RBOE complied with the spirit and intent of the statute and Policy EBA, and therefore, substantially complied with the

requirements.

Conclusions of Law

1. RBOE protected Grievant's interests by conducting the random selection in accordance with Policy EBA.

2. RBOE, in attempting, without success, to contact Grievant, and in his absence, in good faith conducting the random selection in a fair and unbiased manner in accordance with Policy EBA, substantially complied with W. Va. Code §18A-4-8g and RBOE's Policy EBA.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Randolph 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 12, 1995

Footnote: 1 ***The record does not reflect the exact date between August 22, 1994, and September 14, 1994, that the grievance was initiated. Grievant was notified by letter dated September 14, 1994, that hisimmediate supervisor was without authority to rule at Level I, and he appealed to Level II. The Level II hearing was held October 21, 1994, and a Level II decision denying the grievance was rendered November 22, 1994. Level III was bypassed by Grievant.***