ROBERTA MOONEY

v. **Docket No. 94-27-582**

MERCER COUNTY BOARD OF EDUCATION

DECISION

The grievant, Roberta Mooney, is employed by the Mercer County Board of Education (Board) as a bus operator. She initiated this grievance at Level I July 13, 1994, alleging that she had been improperly denied three days of summer employment in the Governor's Summer Youth Program (GSYP). Her supervisor was without authority to grant relief, and the grievance was denied at Level II following a hearing held September 13, 1994. The Board, at Level III, waived participation in the matter and appeal to Level IV was made September 29, 1994. A hearing was held March 27, 1995, (See footnote 1) and the parties declined to submit proposed findings of fact and conclusions of law.

Much of the factual background of the case is not in dispute. The GSYP is a program in which the Governor's Office provides funds to county boards of education for the purpose of hiring minor students to perform various tasks during the summer months such as mowing, landscaping, cleaning, and minor building repairs. County boards submit grant proposals to the Governor's Office each spring which set forth the amount of funds requested and the manner in which they will be used. The Governor's Office apparently disburses the funds with directions on how they are to be used, i.e., certain portions are allocated to wages, transportation and supplies.

The Board received approval and funds to operate the program in Mercer County from July 5, 1994, through August 4, 1994. The Board was authorized to hire a bus operator to transport participating students and program supervisors to and from various work sites from July 11 to July 22 only. The students and supervisors were to provide their own transportation on the remaining days.

The grievant has been employed as a bus operator for the GSYP every summer since 1987. She applied for and was awarded the July 11 to July 22 position for the summer of 1994. While it is unclear whether the posting for the position set forth those dates, the grievant does not dispute that she was aware of the term of the post at the time or shortly after she made application. (See footnote 2)

In early July, Superintendent of Schools Deborah Akers decided to utilize students in the program to help move furniture and materials from several schools which had been closed effective the end of the 1993-94 school year. She directed that substitute bus operators be used to transport the students on July 6, 7, and 8 and that the operators' wages be charged to Board funds rather than those allocated for the program. A different substitute was hired for each of the three days. It is not disputed that the students and supervisors who worked from July 6 to July 8 were those who participated in the program from July 11 to July 22 and that the tasks performed during the two periods were substantially similar. No bus operators were used from July 22 to August 4.

On or about July 15, 1994, the grievant learned that substitute bus operators had been used to transport students during the first week of the program. Believing that she should have been allowed to work the additional three days, she filed this complaint.

The grievant bases her claim on W.Va. Code §18-5-39 which, in pertinent part, provides,

> Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during anysucceeding summer. If such employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code.

The parties' legal positions are straightforward. The grievant asserts that the transportation duties performed on July 6, 7 and 8 were part of the summer position to which she was appointed and that, by virtue of the hiring preference granted her by the statute, she should have been employed on those dates. The Board simply contends that the work performed by substitutes was not a part of the position to which the grievant was appointed and the undersigned agrees.

It is significant that the decision to provide any transportation for participants in the program on the dates in dispute was not made prior to receipt of approval of the Board's grant proposal and that the approval placed restrictions on the amount which could be expended on transportation. It is clear from Superintendent Akers' Level IV testimony that the decision was prompted by her desire to save costs associated with moving materials from the closed facilities and that there was no attempt to deprive the grievant of additional employment.

It is also significant and perhaps dispositive of the case that the substitutes' wages were not

drawn from GSYP funds. In short, the record supports that the grievant was hired for a period defined by the Governor's Office and that the substitutes were hired impromptu to fill a need and save a small portion of moving costs. For these reasons the undersigned concludes that while the participants and tasks were the same, the transportation dutiesperformed on July 6, 7, and 8 were not part of the assignment to which the grievant was appointed. Although the grievant does not make the assertion, at least not explicitly, the undersigned also finds that these duties did not constitute a separate and distinct job or position within the meaning of Code §18-5-39.

In addition to the foregoing, the undersigned makes the following conclusions of law.

CONCLUSIONS OF LAW

1) A grievant must prove the allegations contained in his complaint by a preponderance of the evidence. Black v. Cabell Co. Bd. of Educ., Docket No. 89-06-707 (March 23, 1990).

2) The grievant has failed to prove by a preponderance of the evidence that the Board violated the provisions of W.Va. Code §18-5-39.

3) The grievant has also failed to demonstrate that the Board acted arbitrarily or violated any policy or regulation in hiring substitutes on the dates in question.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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 theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: July 31, 1995

Footnote: 1Several earlier hearings were continued upon the grievant's request and upon the representations of counsel

that the matter would be submitted for decision at Level IV on stipulations of fact and written legal argument. It was not until early March 1995 that counsel advised that efforts to stipulate had been unsuccessful.

Footnote: 2The parties were to submit a copy of the posting for the position, but did not. The evidence of record at least suggeststhat the posting announced that the term of the position would be from July 11 to July 22.