**MELINDA J. BAILEY**

**v.** **Docket No. 94-40-429**

**PUTNAM COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

Grievant, Melinda J. Bailey, is a substitute bus operator with the Putnam County Board of Education ("PCBOE"). She grieves the fact that she no longer has a certain long-term substitute bus run. Grievant states PCBOE violated W. Va. Code §18A-4-15. (See footnote 1) This grievance was denied at Levels I and II and waived at Level III. A Level IV hearing was held on October 25, 1994 and became mature for decision on November 30, 1994.

Findings of Fact

The facts surrounding this grievance are not in dispute.

1. In September 1993 Johnny Sargent, a part-time regular bus operator who drove Route 823, was given first opportunity to fill the full-time position of Mr. Jim McClure, who was on a leave of absence receiving Workers' Compensation. Mr. McClure drove Route 842.

2. Grievant, a substitute, was called to fill the vacancy in Mr. Sargent's 823 Route while he drove Mr. McClure's route. While he was "filling in" for Mr. McClure, Mr. Sargent successfully bid on a full-time position, Route 853. He accepted this position.

3. Although now having a full-time run of his own, Mr. Sargent elected to remain in Mr. McClure's position until Mr. McClure returned. The parties agreed this decision was allowed by the language in W. Va. Code §18A-4-15, which states "[a] regular employee assigned to fill a position of an absent employee shall be given the opportunity to hold that position throughout such absence."

4. PCBOE posted Mr. Sargent's vacated position, Route 823. Grievant bid on the position, but was not selected as she was not the most senior applicant. Grievant did not grieve this nonselection.

5. The substitute called to fill vacant Route 853 prior to Mr. Sargent's selection remains in this position.

## Argument

Grievant argues that since she was called to drive Mr. Sargent's run based on Mr. McClure's absence she should be allowed to remain on Mr. Sargent's run whether it be Route 823 or 853 until Mr. McClure returns to work. Grievant argues a substitute would not have been called if Mr. McClure had not been absent, and since he is still absent, she should fill any position "caused" by his absence. Thus, she should have either run 823, or 853, unless Mr. Sargent decides to assume 853 prior to Mr. McClure's return. Inthat instance she believes she should have Mr. McClure's Route 842 until he returns. Grievant avers this argument is supported by W. Va. Code §18A-4-15 which states "a substitute . . . shall be given priority in accepting [Mr. Sargent's] assignment throughout the period of the regular employee's absence . . . ." Grievant states the fact Mr. Sargent now has another run is unimportant, and that she should be assigned to perform any run Mr. Sargent is not performing as a result of Mr. McClure's absence. Respondent argues that once Mr. Sargent successfully bid on Route 853 his prior route, 823 was vacant and PCBOE was required to post and fill the position pursuant to W. Va. Code §18A-4-8b. Grievant filled Mr. Sargent's run, 823, as long as it was his.

## Discussion

W. Va. Code §18A-4-15 deals with the employment and subsequent assignments of substitute service personnel. It states:

> The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (1) To fill the temporary absence of another service personnel;
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> (2) To fill the position of a regular service employee on leave of absence; Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

(3) To perform the service of a service employee who is authorized to be absent from duties without loss of pay;

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position: Provided, that within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b [§ 18A-4-8b] of this article and section five [§ 18A-2-5], article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

(5) To fill the vacancy created by a regular employee's suspension: Provided, that if the suspension is for more than thirty working days the substitute service employee shall be assigned to fill the vacancy on a regular basis and shall have and be accorded all rights, privileges and benefits pertaining to such position until such termination by the county board of education becomes final. If the suspended employee is not returned to his job, the board shall fill the vacancy under the procedures set out in section eight-b [§ 18A-4-8b] of this article and section five [§ 18A-2-5], article two of this chapter; and

(6) To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis under the procedure set forth in section eight-b [§ 18A-4-8b] of this article.

Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he began his assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 18A-4-8b] of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

**(Emphasis Added)**

Grievant's argument must fail. She was called to substitute based on W. Va. Code §18A-4-15(6). Mr. Sargent, as a regular employee, was given the opportunity to fill the position of the absent Mr. McClure, and then Grievant was called to fill Mr. Sargent's position. Once Mr. Sargent successfully bid on another run and accepted it, Route 823 was no longer his and PCBOE was required to put it up for bid.

Grievant is incorrect that she was called to substitute based on Mr. McClure's absence. Pursuant to W. Va. Code §18A-4-15(6) she was called to fill Mr. Sargent's vacancy when Mr. Sargent was offered the opportunity to fill Mr. McClure's full-time run. Since Mr. McClure's continued absence has nothing to do with Grievant's position, Grievant's attempt to retain a substitute position through his absence is incorrect. The above discussion is supplemented by the following conclusions of law.

## Conclusions of Law

1. In a nondisciplinary grievance, the Grievant has the burden of proving her case by a preponderance of the evidence.
2. Grievant failed to demonstrate a violation of W. Va. Code §18A-4-15.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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.

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**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: January 31, 1995**

*Footnote: 1Grievant also stated W. Va. Code §18A-4-8b was violated, but the language utilized to substantiate this violation was taken from W. Va. Code §18A-4-15.*