PHYLLIS BAYS, .

Grievant, .

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v. .

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.

PUTNAM COUNTY BOARD OF EDUCATION, . Docket Number: 95-40-096

Respondent, .

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and .

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KAREN RICHARDSON and .

DARRELL RICHARDSON, .

Intervenors. .

D E C I S I O N

Phyllis Bays (hereinafter Grievant) filed this grievance against her employer, the Putnam County Board of Education (hereinafter Board), on November 4, 1994, pursuant to the provisions of West Virginia Code §§18-29-1, et seq. She contends that the Board has illegally allowed substitute bus operators who have been assigned to fill-in for regular bus operators to accept extra-duty assignments in violation of W. Va. Code §18A-4-8b. Her grievance was denied at levels one and two, and level three was by-passed pursuant to Code §18-29-4. Karen and Darrell Richardsonrequested

to intervene at level two, by letter dated February 15, 1995, and said request was granted. This appeal was received on March 3, 1995, and subsequently, the parties agreed that this decision could be based upon the evidence developed at level two. The case became mature for decision on July 10, 1995, the date the Undersigned received the transcript of the level two hearing.

The material facts of the case are not in dispute and shall be set forth below as appropriately made findings of fact.

Findings of Fact

1. Johnny Sargent, James McClure, Charles Beckett, and Grievant are all employed by the Board as bus operators. Grievant also functions as a "coordinator" within the Hurricane area of Putnam County and is responsible, in part, for obtaining substitute drivers for absent, regular bus drivers within that area.

2. Karen and Darrell Richardson are employed by the Board as substitute bus operators. Karen Richardson works in the Hurricane area and her husband, Darrell, works in the Poca area.

3. At all pertinent times hereto, both James McClure and Charles Beckett have been off work for more than thirty days due to an injury.

4. Johnny Sargent has been assigned to fill-in for James McClure.

5. Karen Richardson has been assigned to fill-in for Johnny Sargent. Ms. Richardson was not hired for this long-term, substitute position pursuant to the filling of vacancy provisions in W. Va. Code §18A-4-8b.

6. Darrell Richardson has been assigned to fill-in for Charles Beckett. Mr. Richardson was not hired for this long-term, substitute position pursuant to W. Va. Code §18A-4-8b.

7. Both Karen and Darrell Richardson, since being assigned to substitute in the positions discussed above, have been allowed to perform extra-duty assignments (identified by the board as sporting event trips, band trips, etc.) within their respective areas, on a rotating basis, with other regularly employed bus operators.

8. The Board does not allow substitute bus operators to accept extra-duty assignments unless they have been assigned to fill-in for regular employees who have been absent from their positions for greater than thirty days.

Discussion

Grievant contends that substitute employees, regardless of whether they have been assigned to fill-in for a regular employee for more than twenty days, may not be awarded extra-duty assignments because they are not regular employees. She contends that only regular employees of the Board, i.e., those employees hired pursuant to the provisions of W. Va. Code §18A-4-8b, are entitled to accept extra-duty assignments. She avers that the Board has misinterpreted and misapplied W. Va. Code §§18A-4-8b and 18A-4-15. Grievant also cites to a State Superintendent of Schools Opinion in support of her position. As relief, Grievant seeks that the Board's practice of awarding extra-duty assignments to substitute employees cease.

Both the Board and Intervenors contend that no violation of the law has been established. They rely upon an interpretation of W. Va. Code §18A-4-15(2), and assert that substitute employees who fill-in for regular employees absent from work for greater than thirty days are entitled to regular employee status; therefore, they contend that such substitutes are eligible for extra-duty assignments. The Board maintains that it must only resort to W. Va. Code §18A-4-8b, when hiring service personnel for permanent positions; however, substitutes may be granted regular employee status under W. Va. Code §18A-4-15, while serving in a position temporarily vacated by a regular employee.

W. Va. Code §18A-4-15, states, in pertinent part,

> 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 employee;
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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; . . .

With regard to whether subsection 1 or 2 above should govern the assignment of substitute personnel, this Grievance Board held in 1987 that a service employee will be considered to be on a leave ofabsence if his/her temporary absence lasts greater than twenty days. Stutler v. Wood Co. Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). Therefore, a temporary absence is recognized as an absence less than twenty days, and any longer absence (except for the causes specifically mentioned in subsections 4 and 5) brings into play the assignment of substitutes under the provisions of subsection 2.

In the instant case, both Mr. Beckett and Mr. Sargent have been absent from their positions for longer than twenty days; therefore, the assignment of substitutes to their positions must have been made pursuant to subsection 2. The Board does not dispute this conclusion. In direct issue is the following language of this subsection:

> 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;

The Board, in essence, argues that because a substitute assigned to a position under subsection 2 is to be "accorded all the rights, privileges and benefits pertaining to such position" (emphasis added), the substitute is entitled to accept an extra-duty assignment because the regular employee who holds that position is entitled to same.

Grievant cites to the following language of W. Va. Code §18A-4-8b, for the proposition that only regularly employed, service employees are entitled to accept extra-duty assignments:

> Notwithstanding any other provisions of this chapter to the contrary, decisions affecting such personnel withrespect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments.

Further, she argues that substitute employees may only gain regular employee status two ways: First, by being hired pursuant to W. Va. Code §18A-4-8b; Second, by substituting for an employee who has been suspended from employment for more than thirty days according to Code §18A-4-15(5).

Grievant also relies upon a State Superintendent of Schools Opinion from Dr. Henry Marockie,

dated March 5, 1993, which answered the following questions:

> A local county board of education has established the practice of granting various benefits to substitute employees who hold the same position for more than twenty working days. These benefits include accumulation of personnel leave, holiday pay, and insurance. These benefits are granted to the substitute employees even if the absent regular employee is on personnel leave or on workers' compensation. In short, the absent regular employee has not requested nor has the board of education approved a leave of absence.
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> (1)
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> Assuming the substitute employee in question was granted benefits as described above rather than as a result of establishing regular employee status pursuant to West Virginia Code §18A-4-15(2), would said substitute be entitled to a place on the rotating list of regular employees for extra-duty assignments pursuant to West Virginia Code §18A-4-8b?

The Superintendent answered this question in the negative and stated "the employee is not a regular employee or even a temporary regular employee, for these regular statuses can be acquired only in accordance with W.Va. Code 18A-4-8b and Code 18A-4-15."

The Superintendent was then asked,

> (2)
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> If the answer to question #1 is no, would this answer change if the substitute had received benefits as a result of establishing regular employment status pursuant to West Virginia Code §18A-4-15(2)? In other words, would the answer change if the absent regular employee had taken a board approved leave of absence and the substitute had received the position as a result of the position being posted and filled pursuant to West Virginia Code §18A-4-8b?

The Superintendent opined that his answer to the first question would change, "however, formal agreement between an absent, regular service employee and the county board of education for a leave of absence does not always appear to be necessary. Please refer to my footnote." In the footnote, the Superintendent stated that "Whether or not the regular service employee goes on leave of absence either formally or informally or, instead by operation of law, the substitute employee cannot gain (temporary) regular employment without following the hiring procedure of W.Va. Code 18A-4-8b. Cf. Code 18A-4-15(2)."

Neither Code section in issue can be interpreted to stand for the proposition that a substitute is

eligible to be included within the rotational list of regular, service personnel for extra-duty assignments, until said substitute achieves regular employment status and eligibility for the rights and benefits that go along with that status. Only after a substitute employee achieves entitlement to regular employment rights, privileges and benefitsunder either subsection (2), (4), (5) or (6), can he/she be included within the rotational list for extra-duty assignments. (See footnote 1)

In this case, the question becomes whether Mr. and Ms. Richardson achieved regular employment status under Code §18A-4-15(2) by virtue of their respective assignments. Under this Code subsection, a board is authorized to assign an employee (hereinafter short-term substitute) to fill-in for an absent employee on leave of absence. Consistent with this Grievance Board's prior rulings, the Board was correct in treating both Mr. Sargent's and Mr. Beckett's absences as leaves of absence. However, once it was determined that these regular employees' leaves of absence were to be greater than thirty days, the Board was obligated to post and fill those vacancies with employees (hereinafter long-term substitutes) pursuant to Code §18A-4-8b. Thereafter, the long-term substitutes were to remain in the positions, receiving all of the rights, privileges and benefits of those positions, until the regular employees returned. Only such long-term substitutes may receive said rights, privileges and benefits. (See footnote 2) See, Lambert v. Lincoln Co. Bd. of Educ., Docket No. 93-22-547 (Sep. 29, 1994). The language in Code §18A-4-15(2),beginning with the phrase, "[t]he substitute shall hold such position and regular employee status", refers to a long-term substitute and not a short-term susbtitute. This is consistent with Superintendent Marockie's response to the first question asked of him as detailed in his March 6, 1993 opinion.

Here, the record establishes that neither Mr. nor Ms. Richardson received the positions they currently hold by competitive bid pursuant to Code §18A-4-8b. These employees never legally changed status from short-term to long-term substitutes. Therefore, the Board improperly placed them into the rotation for the acceptance of extra-duty runs. Grievant's arguments are persuasive in this case.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. County boards of education are authorized to hire substitute service employees pursuant to

W. Va. Code §18A-4-15. Further, this statutory provision details specifically when these substitutes may be assigned to fill-in for absent regular, service employees.

2. In order for a substitute employee to gain entitlement to the rights, privileges and benefits of a regular employment position, consistent with the mandates of W. Va. Code §18A-4-15(2), the substitute must be hired by competitive bid, according to W. Va. Code §18A-4-8b, for the remainder of the regular employee's leave of absence lasting over twenty-five days.

3. An opinion of the State Superintendent of Schools is entitled to great weight unless shown to be clearly wrong. See, Bright v. Tucker County Bd. of Educ., 399 S.E.2d 176 (W. Va. 1990). The opinion dated March 5, 1993, at issue in this case, is found not to be clearly wrong.

4. Grievant bears the burden of proving the facts supporting her legal claims by a preponderance of the evidence. W. Va. Code §18-29-6.

5. Pursuant to the clear and unambiguous language of W. Va. Code §18A-4-15(2), Intervenors did not legally obtain the status of long-term substitutes in the positions in question. Therefore, they could not have obtained entitlement to the rights, privileges and benefits of these positions.

6. Grievant has met her burden of proof in this case by establishing that the Putnam County Board of Education has misinterpreted and misapplied W. Va. Code §§ 18A-4-15(2) and 18A-4-8b.

Therefore, this grievance is hereby **GRANTED**. The Putnam County Board of Education is hereby **ORDERED** to immediately comply with the provisions of W. Va. Code §18A-4-15(2), in regard to the posting and filling of the two regular employment positions vacated by the incumbents of those positions. Until that time, the Board is ordered to **CEASE AND DESIST** including Karen and Darrell Richardson within the rotational list for extra-duty assignments for regular, service personnel within the County.

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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ALBERT C. DUNN, JR.

Administrative Law Judge

July 21, 1995

Footnote: 1This is not to say that a substitute may not be offered the opportunity to perform an extra-duty assignment if all other regular employees are unavailable; in this circumstance, it could be said that the substitute is actually filling-in for all of the regular employees who are temporarily absent consistent with W. Va. Code §18A-4-15(1).

Footnote: 2It is possible that the short term substitute may be the employee entitled to the long-term substitute position given the hiring requirements of Code §18A-4-8b. However, this may not be assumed.