

SHIRLEY LOUK,

Grievant,

v. DOCKET NO. 95-01-386

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Ms. Shirley Louk (Grievant) filed this grievance against the Barbour County Board of Education (Respondent) on May 5, 1995. Grievant alleges:

Grievant is currently employed as a teacher's aide by the Respondent. Grievant was employed, pursuant to posting, in an aide's position from approximately January 6, 1992 until June 8, 1992. Grievant asserts that she should be credited with regular employment seniority for the time that she was employed from January 1992 through June 1992. Grievant also asserts that the random drawing conducted by the Respondent on or about July 24, 1995 between the Grievant and another employee is void. Grievant alleges violation of West Virginia Code §18A-4- 8b and §18A-4-8g and requests seniority credit for the 1992 assignment, adjustment of her current seniority date to reflect the accrual of seniority as a result of her employment in the 1992 assignment, and the nullification of the random drawing conducted on or about July 24, 1995. Grievant was denied relief at Levels I and II. Pursuant to W. Va. Code § 18-29-4(c), Grievant bypassed Level III by appealing the Level II decision to Level IV. At Level IV, the parties agreed to submit the case on the record developed at the lower levels of the grievance procedure, with the right to file proposed findings of fact and conclusions of law. The case became mature on May 8, 1996, after counsel for Respondent verbally informed the Grievance Board that he had no objections to the "corrected" transcript. [\(See footnote 1\)](#)

FINDINGS OF FACT

1. During the 1991-92, 1992-93, and 1993-94 academic school years, Grievant was employed as a half-time regular secretary at Philip Barbour High School.
2. During the 1991-92 school year, Respondent posted the newly created position of "Special

Education\Bus Aide - Bus #63". 3. The posting or "Notice of Vacancy" stated that the employment term was "[u]p to 3 1/2 Hours Total on Need Basis or for Remainder of the 1991-92 School Year."

4. Grievant was awarded the bus aide position through a competitive bidding process. After Grievant was awarded this position, her classification remained the same; secretary. She was not multi-classified.

5. Grievant never received a contract for the "Special Education\Bus Aide - Bus #63" position.

6. Grievant was able to rearrange her regular half-time secretary schedule at Philip Barbour High School to enable her to also work during the specified hours in this newly created position.

7. According to Respondent's official monthly time sheets, Grievant worked approximately three and a half hours a day in the bus aide position from January 6, 1992, until June 8, 1992, the end of the school year.

8. On August 25, 1994, Grievant transferred to Philippi Elementary School and assumed the duties of a full-time aide. She remains in that position.

DISCUSSION

The issue is whether Grievant should be awarded regular employment seniority credit for the time she spent working from January 6, 1992, until June 8, 1992, the end of the school year, in the "Special Education\Bus Aide - Bus #63" position. W. Va. Code § 18A-4-8b addresses the posting of vacant service employee positions. This Code section provides in pertinent part:

Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and the benefits and any other information that is helpful to the employees to understand the particulars of the job. (Emphasis added).

This statutory language implies that newly created positions may involve varied lengths of employment. Respondent asserted [\(See footnote 2\)](#) that this grievance should be denied because the position in question was a "part-time" position, and because the grievance was not filed timely. Timeliness is an affirmative defense and must be proven by a preponderance of the evidence by the party asserting the defense. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Respondent failed to elicit any testimony directly pertaining to the timeliness issue. W. Va. Code § 18-29-4(a)(1) states, in pertinent part:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Respondent failed to prove when Grievant became aware of the fact that Respondent had not credited her with regular seniority. Therefore, Respondent's affirmative defense fails.

Respondent's theory that Grievant should not receive regular seniority status because the bus aide position was only a "part- time" position also fails. Respondent's counsel failed to explain, and the Undersigned fails to see, any difference between what he termed a "part-time" position and the half-time secretary position in which Grievant accumulated regular seniority while at PhilipBarbour High School for three academic school years. The Grievance Board has addressed this issue before in Vance v. Logan County Bd. of Educ., Docket No 92-23-045 (May 21, 1992).

In Vance, the sole legal issue was whether the grievant should have been awarded regular employment seniority credit for that time he spent working in a temporary one-half day bus run position during the second semester of the 1990-1991 school year. One of the Board's arguments was that the position was posted as a temporary position as opposed to a regular position, and that only substitute employees applied for the position. Therefore, the Board argued the grievant did not met the definition of a regular employee because he was awarded only a temporary position. After a careful analysis of the Code, the Administrative Law Judge concluded that "[b]y merely creating a vacant position and posting it as a temporary vacancy, a county board of education can not classify that position for seniority purposes as temporary or substitute".

The issue in this case is also similar to one of the issues in Miller v. Lincoln County Bd. of Educ., Docket No. 91-22-463 (Apr. 14, 1992). The issue in Miller was the calculation of the grievant's seniority for hiring purposes. The grievant was a substitute employee who held a temporary contract of employment which was created by the board in order to hire him under the auspices of W. Va. Code §18A-4-15(4). It was determined in Miller that the grievant should have accumulated regular employment seniority for the period of time she worked in the vacant position according to W. Va. Code §18A-4-15. The analysis in Miller is also controlling in this case. Therefore, in the instant case, Grievant should have been issued a temporary contract and credited with seniority from January 6, 1992, to June 8, 1992, for the time she worked in the "Special Education\Bus Aide - Bus #63"

position.

Grievant's second issue concerning the random drawing need not be addressed because the above ruling is dispositive of this grievance since it eliminates the tie in seniority. Any further discussion of this issue would be solely advisory and the Grievance Board does not issue advisory opinions. Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 20, 1996); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987).

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. County boards of education have discretion to establish vacant positions and also have the ability to establish the time periods for those newly created positions. W. Va. Code § 18A-4-8b. However, temporary positions are also regular employment positions for purposes of calculating seniority. See, Vance v. Logan County Bd. of Educ., Docket No 92-23-045 (May 21, 1992); Miller v. Lincoln County Bd. of Educ., Docket No. 91-22-463 (Apr. 14, 1992).

3. Grievant proved by a preponderance of the evidence that she should be credited with seniority from January 6, 1992, to June 8, 1992, for the time she worked in the "Special Education\Bus Aide - Bus #63" position.

Accordingly, the grievance is **GRANTED**. It is therefore **ORDERED** that Grievant be credited with regular seniority from January 6, 1992, to June 8, 1992, for the time she worked in the "Special Education\Bus Aide - Bus #63" position.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Barbour 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.

DATED: May 23, 1996_____

JEFFREY N. WEATHERHOLT
ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

Grievant's counsel noted errors in the original transcript and corrected those errors.

[Footnote: 2](#)

The Undersigned did not consider any theories that were only argued at Level II. Theories raised at Level II but not reasserted by counsel in their proposed findings of fact and conclusions of law at Level IV were considered abandoned.