

RANDOLPH LIVINGOOD, .

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Grievant, .

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v. . Docket No. 95-29-525

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MINGO COUNTY BOARD OF EDUCATION, .

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Respondent. .

DECISION

This is a grievance by Randolph Livingood (Grievant) alleging a violation of W. Va. Code §§ 18A-4-15(2) and 18A-4-8b, in regard to the failure of Respondent Mingo County Board of Education (MCBE) to post a bus operator position for competitive bid when the incumbent was off due to injury for more than 30 days. This grievance was initiated on or about September 8, 1995. After the grievance was denied at Level I, Grievant appealed to Level II and a hearing was held on November 7, 1995. John Fullen, the Superintendent's designee, denied the grievance at Level II on November 16, 1995. Grievant elected to waive Level III in accordance with W. Va. Code § 18-29-4(c) and appealed to Level IV on November 28, 1995. Following a continuance which was granted for good cause, a Level IV hearing was conducted in the Charleston office of this Grievance Board on April 4, 1996. The parties elected to waive written post-hearing arguments and this matter became mature for decision at the conclusion of that hearing.

Because the facts in this matter are essentially undisputed, the following Findings of Fact are appropriately derived from the record developed through Level IV.

FINDINGS OF FACT

1. Grievant is a substitute bus operator employed by MCBE during the 1994-95 school year to fill the position of a regular bus operator, Ronnie Mounts, who was off work due to injury.

2. The September 19, 1994, posting under which Grievant was hired stated: "Long-Term Substitute ONLY (Position will be filled until the status of the regular employee is determined or until

6- 9-95.)." MCBE Ex 1 at L II.

3. At the end of the 1994-95 school year, Grievant was terminated and placed on the preferred recall list.

4. Mr. Mounts did not return to duty at the beginning of the 1995-96 school year, remaining off work due to an injury. Mr. Mounts has filed a claim for workers compensation but has never requested a medical leave of absence.

5. On September 1, 1995, MCBE employed Patsy Dingess, another substitute bus operator who similarly held preferred recall status, to drive Mr. Mounts' bus route during the 1995-96 school year until Mr. Mounts either returned, resigned, or formally requested a leave of absence for more than 30 days.

6. Mr. Mounts' bus route was not posted as a temporary vacancy to be filled competitively by a long-term substitute due to a change in MCBE policy to replace such employees in the manner described in Finding of Fact Number 5.

7. Ms. Dingess has greater seniority than Grievant as a substitute bus operator. The record does not conclusively establish which employee, Ms. Dingess or Grievant, had greater seniority as a regular employee.

8. This grievance was initiated at Level I on September 8, 1995.

DISCUSSION

In grievances of this nature, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29- 481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

Respondent contends that this grievance was not initiated within the time limits set forth in W. Va. Code § 18-29-4(a)(1):

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.

So far as Grievant claims any entitlement to the position presently held by Ms. Dingess based upon his status during the 1994-95 school year, Respondent's assertion that the grievance is untimely is

correct. See e.g., Parsley v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996); Adkins v. W. Va. Dept. of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). However, to the extent that this grievance contests MCBE's decision not to post the position presently held by Ms. Dingess, Grievant could not have been aware of the event giving rise to this grievance until September 1, 1995, when Ms. Dingess began driving Mr. Mounts' bus route. Accordingly, that issue was raised by Grievant within the 15-day limit set forth in W. Va. Code § 18-29-4(a)(1). See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990); Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992).

Resolution of the merits of this grievance requires application of W. Va. Code § 18A-4-8b, pertinent portions of which are quoted below:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;
- (2) Service personnel whose employment has been discontinued in accordance with this section;
- (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
- (4) Substitute service personnel; and
- (5) New service personnel.

* * *

All employees whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the

basis of seniority.

Employees placed upon the preferred list shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to any lateral position for which the employee is qualified or to a lateral area for which an employee has certification and/or licensure.

* * *

No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

Also pertinent to this grievance is W. Va. Code § 18A-4-15 which provides as follows:

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:

* * *

(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.

This Grievance Board has previously determined that when a "regular [service] employee has not reported to work for twenty days due to illness or other causes, any further absence will be considered a leave of absence for the purpose of substitute employment under Code § 18A-4-15(2) even though a formal request for a leave of absence has not been filed by the absent employee." Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). See Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd Circuit Court of Kanawha County, 93-AA-217 (Feb. 15, 1994); Lasick v. Wetzel County Bd. of Educ., Docket No. 89-52-82 (June 29, 1989). Moreover, in Hensley v. Mingo County Board of Education, Docket No. 93-29-037 (July 6, 1994), this Grievance Board followed Stutler and Ditty, explicitly rejecting a similar argument by MCBE that an extended

absence of an employee does not constitute a "leave of absence" under W. Va. Code § 18A-4-15(2), unless the absent employee formally requests such status.

Accordingly, consistent with this Grievance Board's interpretation of W. Va. Code § 18A-4-15(2), as set forth in Ditty and Stutler, MCBE should have posted the long-term substitute vacancy created by Mr. Mounts' continued absence at the beginning of the 1995-96 school year. While Grievant has not demonstrated an entitlement to the position at issue, his status as a bus operator on preferred recall places him in a category where he clearly has standing to challenge MCBE's actions. Therefore, MCBE will be directed to post the position to be filled competitively under W. Va. Code § 18A-4-8b, as required by W. Va. Code § 18A-4-15(2).

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance of this nature, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. When a regular service employee has not reported to work for twenty days due to illness or other causes, any further absence will be considered a leave of absence for the purpose of substitute employment under W. Va. Code § 18A-4-15(2), even though a formal request for a leave of absence has not been filed by the absent employee. Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). See Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd Circuit Court of Kanawha County, 93-AA-217 (Feb. 15, 1994); Lasick v. Wetzel County Bd. of Educ., Docket No. 89-52-82 (June 29, 1989).

Accordingly, this Grievance is hereby **GRANTED** and MCBE is **ORDERED** to post the long-term substitute position created by the absence of Ronnie Mounts to be filled competitively as provided in W. Va. Code §§ 18A-4-15(2) and 18A-4-8b. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: May 29, 1996