

**JAMES ROACH,**

**Grievant,**

**v.**

**DOCKET NO. 95-26-158**

**MASON COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, James Roach, states the Mason County Board of Education ("MCBOE") violated W. Va. Code §18A-4-15 when it terminated him from his substitute position in maintenance. ([See footnote 1](#)) He states he should have been retained in the position until the absent employee returned. He requests backpay with all rights and benefits as required by the above-cited Code Section. This grievance was denied at Levels I and II and waived by MCBOE at Level III. A Level IV hearing was scheduled on December 7, 1995, after several continuances . This case became mature for decision on January 26, 1996, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

The facts of this case are not in dispute and will be set out below.

**Findings of Fact**

\_\_\_\_ 1. Grievant was placed on the substitute maintenance list on May 24, 1994, and he worked his first day for MCBOE on August 22, 1994.

2. Grievant was called from the substitute list to work for Mr. Willard Jeffers on November 1, 1994. Mr. Jeffers, who had a back problem, never requested a leave of absence and was unsure when he would be able to return to work.

3. In order to maintain Mr. Jeffers' medical insurance, MCBOE allowed him to take vacation days during part of the time he was off and Grievant worked in his place. When Mr. Jeffers was off on vacation time, Grievant was not allowed to substitute for him because substitutes are not allowed to fill in for vacationing employees.

4. While Grievant was substituting for Mr. Jeffers, MCBOE realized there was

going to be a short-fall in the substitute budget if the Board did not take precautionary measures and curtail the use of substitute employees. As the result of a discussion on this issue in early December with Assistant Superintendent George Miller, the Board decided to limit the hiring of substitutes to essential personnel only, and to situations directly affecting students.

5. On December 19, 1994, Mr. Miller sent a memo to Mr. Gary Mitchell, the Director of the Maintenance Department. This memo stated that as of this date "there will be no substitutes called until further notice. This will include not only short term but long term substitutes." This restriction on substitutes applied to all service personnel.

6. Mr. Mitchell continued to call Grievant out to work for Mr. Jeffers in spite of the memo. His reason for this action was that he was confused as to whether the memo applied to Mr. Jeffers' position.

7. When Mr. Miller discovered Mr. Mitchell was continuing to employ Grievant, he called him and told him this practice must stop immediately. Grievant was sent home that day and has not been called out since.

8. No substitute personnel were called out in maintenance for the rest of that school year.

9. Mr. Jeffers' position was never posted. [\(See footnote 2\)](#)

10. In August 1993, MCBOE hired two temporary maintenance employees, Jeffrey Clendenin and Sam Beckner, to correct citations issued by the State Department of Education.

11. Mr. Beckner originally worked as a bus operator, but had been RIF'd. He worked in the Maintenance Department for about a month during the summer, but was able to return to a bus operator position early in the 1993-1994 school year.

12. Mr. Paul Wood, another applicant for the temporary maintenance positions, and MCBOE's second choice, replaced Mr. Beckner.

13. MCBOE never acted to change the temporary, as needed, status of Mr. Beckner or Mr. Clendenin, but subsequent to their hiring MCBOE gave them regular pay, certain extended benefits, and called them in to work on a daily basis.

14. MCBOE never acted to change Mr. Wood's status from a permanent

substitute to a "temporary" worker. This failure to act was an oversight by the Board.

15. The method of posting and upgrading Mr. Wood's and Mr. Clendenin's positions was challenged through the grievance process in Weaver v. Mason County Board of Education, Docket No. 94-26-129 (Nov. 22, 1994). Mr. Weaver argued these positions were improperly posted and if they had been posted as permanent he would have applied. This Grievance Board agreed these positions were improperly posted and ordered MCBOE to repost the positions with the proper information.

16. These positions were posted and were awarded in January 1995 to Mr. Frank Jones and Mr. Gary Jones. The Board did not remove Mr. Clendenin and Mr. Wood from their positions after hiring these new employees, but instead elected to keep them on the payroll until the end of the school year because it had made a commitment to them.

17. As of January, 1995, with the new hires, MCBOE did not need Grievant to perform Mr. Jeffers' maintenance duties.

### Discussion

The outcome in this case is controlled by Eagle v. Marion County Board of Education, Docket No. 94-24-226 (Nov. 23, 1994). In that case, the grievant, as here, was called in as a substitute service personnel employee from the rotating call list. The position was never posted as required by W. Va. Code §18a-4-15(2), even though Ms. Eagle maintained the position for several months. The principal of her school then recommended her position be eliminated for lack of need. Administrative Law Judge Nedra Koval stated that even though a long-term substitute could attain regular employment status within twenty days, such status was "essentially temporary employment." Id. at 11. Judge Koval ruled "[t]here is no statute which places restrictions on the removal of a substitute from a particular position, regardless of the length of service of the employee in a particular assignment, and such actions are within the discretion of the county superintendent of schools per W. Va. Code §18A- 4-15." Id. at 18. Thus, Ms. Eagle, who was filling in for an absent worker, failed to establish she had attained regular employee status as contemplated by W. Va. Code §§18A-4-8g and 18A-4-15(2), and had no right to remain in the position when it was

eliminated for lack of need. Id.

That holding applies here. Grievant had not applied for and received his position pursuant to a posting. He was called in from the substitute list. It is also likely he would not have received the position if it had been posted because of his short tenure with the Board as a substitute. Although the Board was required by W. Va. Code §18A-4-15(2) to treat Grievant as a regular employee in some ways, because of the length of time he held the position, he still held the position at the discretion of the Board. Eagle, supra.

Additionally, although Grievant's working in the position for over thirty days gave him "all rights pertaining to suspension, dismissal, and contract renewal", those rights do not apply here as Grievant was not suspended, dismissed, or subjected to contract non-renewal in conjunction with his employment as a substitute maintenance employee. Grievant is still on the substitute maintenance list. W. Va. Code §18A-4-15; Eagle, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

#### Conclusions of Law

1. A grievant has the burden of proving his case by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (Jun. 29, 1990).

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 Code §18A-4-15(2)[,] even though a formal request for a leave of absence has not been filed by the absent employee." Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987); Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 Nov. 23, 1994).

3. "While a board of education may bestow various employee benefits upon its substitute workers, W. Va. Code §§18A-4-8g and 18A-4-15(2) specify that a substitute filling in for an employee on an extended leave can attain regular employee status, including due process job protections and seniority rights, only as the result of

a posting and competitive bidding process as outlined in Code §18A-4-8b." Eagle, supra.

4. Grievant had not attained regular employee status as contemplated by W. Va. Code §§18A-4-8g and 18A-4-15(2) since he had not obtained the position through a bidding process. Accord, Eagle, supra.

5. "There is no statute which places restrictions on the removal of a substitute from a particular position, regardless of the length of service of the employee in a particular assignment, and such actions are within the discretion of the county superintendent of schools per W. Va. Code §18A-4-15." Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).

6. Grievant has failed to prove MCBOE violated W. Va. Code §18A-4-15 when its removed Grievant from his substitute position. See Eagle, supra; Rose, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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: April 29, 1996**

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[Footnote: 1](#)

*The Level II Decision found that Grievant, after he had completed 20 days of employment as a substitute, on December 5, 1994, should have been granted "regular status as a substitute" for the days he worked from December 6, 1994, to January 23,*

*1995, and granted Grievant four additional days of compensation. Grievant did not contest that lower level ruling.*

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[Footnote: 2](#)

*Although somewhat unclear from the testimony, the position was probably not posted because MCBOE expected Mr. Jeffers to return shortly, and because Mr. Jeffers was still using his vacation time in order to maintain his medical insurance; thus, his position might not have been considered truly vacant.*