JUDY TELLER,

Grievant,

v. **Docket No. 96-15-257**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

The grievant is employed as a bus operator for the respondent, Hancock County Board of Education (Board). On April 10, 1996, the grievant's supervisor advised her that she would have to relinquish her bus run to Robert Froats, the former holder of the route. In response, on April 16, 1996, she filed the above-styled grievance alleging that:

> By displacing me from the regular position that I had bid upon and received by seniority is in violation of WV Codes 18A-2-5, 18A-2-6, 18A-2-7, 18A-4-8a, and 18A-4-8b: West Virginia Board of Education Policy 5300 section 2,7 [sic] and past practices of Hancock County Board of Education.

The grievance was denied at the lower levels. An appeal to Level IV was made on or about June 21, 1996. For administrative reasons, the case was transferred to the undersigned. A scheduled hearing was conducted on November 22, 1996, at which time the parties agreed to supplement the level four record with proposed findings of fact and conclusions of law. The case became mature for decision on December 24, 1996.

Discussion

This grievance was filed after the Froats decision was issued by ALJ Keller wherein the grievant alleged that the Board acted in an arbitrary and capricious manner when it failed to renew his probationary contract. (See footnote 1) The ALJ cited Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991), that when a probationary service employee's contract is not renewed, mandates of W.Va. Code §18A-2-8a must be met. In Froats, she ruled that the grievant had established by a preponderance of the evidence that he had been exonerated on three of the four

reasons given for the non-renewal of his probationary contract, and that he had presented evidence to disprove the fourth. The grievance was granted and the board was ordered to reinstate the grievant to resume his employment as a probationary employee. The board appealed that decision to the Circuit Court of Hancock County whereupon the ALJ was affirmed. (See footnote 2)

In the instant case, the grievant claims that when Mr. Froats was reinstated, the Grievance Board's ALJ acted arbitrarily and capriciously because she did not designate the position to which he was to be reinstated. It is to be understood that when a grievant prevails, that person shall be put into the same situation as existed before the grievable event took place.

What Grievant Teller requests is for the Froats decision to be set aside. It should be noted that she had the right of intervention throughout the case. She did not do so then, and she cannot do so now. The Froats decision is final. Since it cannot be attacked directly, the grievant does so collaterally through the filing of a new action. The case of Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990), addressed legal issues which appear to be identical to those of the instant case. The grievant, Janet Epling, applied for, and was awarded a Secretary II position at Ashford- Rumble School. She was asked by the Boone County Board of Education to delay taking her post for a few months, which she did. Meanwhile, Carol Courtney, an unsuccessful candidate for the same job, filed a grievance, challenging Epling's selection. Courtney was successful when it was determined that she was currently holding the position, that it was not vacant and should not have been posted. As a result of this grievance procedure, Epling was displaced by Courtney. Epling did not intervene in the Courtney grievance, and instead, filed her own grievance challenging the decision of the Grievance Board. The grievance was denied. The ALJ in Epling held that, “an employee who is selected for a position but whose appointment is rescinded due to a county board of education's ruling in a grievance to which he is not a party or intervenor, and to which he has not sought to become either, despite awareness of that grievance and its substance, has no remedy at a higher level of the education employee's grievance procedure.”

A companion and related issue raised in Epling is that of the dual function of the Board of Education in grievance matters. As the Board of Education, it makes the original personnel decision which is grieved, and then in the grievance process, sits in judgement reviewing the decision. The personnel decisions are grievable, but the decisions made as part of the grievance system are not grievable. Regarding this issue, Epling held, “[t]he actions of a board of education as employer on the

one hand, and as grievance evaluator on the other are separate and distinct."

A more recent case, Dalton v. Mercer County Bd. of Educ., Docket No. 96-27-044(July 29, 1996), also with an attempt by the grievant to grieve in a subsequent proceeding, a separate decision, denied the grievance, citing Epling as its authority.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate in this matter.

Findings of Fact

1. Robert Froats was a probationary employee whose contract was not renewed, thus creating an open position for his route known as Bus Number 6.
2. In October of 1992, the grievant applied for and was awarded by the Board a contract for Bus Number 6, replacing Robert Froats.
3. Robert Froats grieved the non-renewal of his employment contract and prevailed.
4. The Board, pursuant to the decision of the grievance board, reassigned Froats to his former bus and route and on April 15, 1996, the grievant was bumped.
5. The grievant, Ms. Teller, was aware of Froats' grievance and its meaning during its pendency, but took no action to intervene.

Conclusions of Law

1. An employee whose employment rights are potentially affected by another's grievance has the right to intervene. W.Va. Code §18-29-3(u).
2. "An employee who is selected for a position but whose appointment is rescinded due to a county board of education's ruling in a grievance to which he is not a party or intervenor, and to which he has not sought to become either despite awarenessof that grievance and its substance, has no remedy at a higher level of the education employees' grievance procedure." Epling v. Boone County Bd. of Educ., Docket No. 89- 03-563 (Feb. 28, 1990). See also, Dalton v. Mercer County Bd. of Educ., Docket No. 96- 27-044 (July 29, 1996).
3. The decisions of a grievance evaluator can only be challenged by a party to the action through the appeal process contained within the W.Va. Code and are not to be the subject to a

separate grievance.

4. The grievant, having chosen not to intervene in Froats, has no remedy.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-27-7. 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.

-

JAMES D. TERRY

Administrative Law Judge

DATE: April 18, 1997

Footnote: 1

Froats v. Hancock County Bd. of Educ., Docket No. 91-15-512 (Jan. 29, 1993).

Footnote: 2

The case style of that appeal was Hancock County Bd. of Educ. v. Robert Froats, Civil Action No. 93-P-19 (July 7, 1995).