PATRICIA DYER,

Grievant,

v.

DOCKET NO. 97-22-056

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Patricia Dyer, a substitute bus operator for Lincoln County Board of Education ("Board"), filed the following grievance on October 29, 1996:

> Violations of WV Code 18A-4-8b, 18A-4-15 and 18-29-2, sections a, m, & n and(sic) regard to the temporary bus run postings not being filled. (See footnote 1)

> Relief sought is to be awarded one of the posted runs and any compensation due.

Following adverse decisions at the lower levels, Grievant appealed to level four on January 30, 1997. Hearing was held on May 27, 1997, and this case became mature fordecision on June 16, 1997, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 2)

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant has been employed by the Board as a substitute bus operator since September 1992.

2. Robert Kirk, a regular bus operator for the Board, was off on Workers' Compensation from March 1996 through January 1997.

3. Julia Quintrell, a regular bus operator for the Board, was also off on Workers' Compensation from August 20 through November 20, 1996.

4. These bus runs were filled by rotating substitutes, and Mr. Wendel Williamson began driving Robert Kirk's run in March 1996.

5. In August 1996, the Board posted these two runs as Temporary Service Positions, pending the return of Ms. Quintrell and Mr. Kirk. G. Ex. 1.

6. Jeff Dyer, the most senior substitute driver bid on the Quintrell run. G. Ex. 2.

7. Grievant, the third most senior substitute driver bid on the Robert Kirk run. G. Ex. 2. (See footnote 3) 8. At the September 1996 Board meeting, Superintendent Dallas Kelley placed these postings on “hold”.

9. Subsequently, the Quintrell run was filled by Jeff Dyer.

10. The Kirk run was never filled through the posting, and Mr. Williamson continued to drive that run until Mr. Kirk returned in January 1997.

11. Grievant was also employed by the Wayne County Board of Education as a substitute driver.

12. Grievant's substitute time sheets indicate she substituted in Wayne County on September 5 and 10, and from September 13 through November 1, 1996. R. Ex. 1.

13. During the time she was substituting in Wayne County, the Board attempted to contact Grievant to substitute on other bus runs, but she was not available because of her work in Wayne County. (See footnote 4)

DISCUSSION

W. Va. Code § 18A-4-15, provides, 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:
>
> (1) To fill the temporary absence of another service employee;
>
> (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 . . .§ 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 shallhave and shall be accorded all rights, privileges and benefits pertaining to such position; . . .

W. Va. Code § 18A-4-15 requires the position of an employee on leave of absence beyond thirty days to be filled pursuant to the requirements of W. Va. Code § 18A-4-8b. A service employee will be considered to be on a leave of absence if his or her temporary absence lasts greater than twenty days, even though a formal request for a leave of absence has not been filed by the absent employee. Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). Only such long-term substitutes who have been selected to fill these temporary vacancies in accordance with the provisions of Code §§ 18A-4-15 and 18A-4- 8b, are entitled to the rights, privileges and benefits of those regular positions. See Bays, supra; Lambert, supra.

In this case, Mr. Kirk was absent from his position for longer than twenty days; therefore, his position should have been filled pursuant to competitive bidding under Code § 18A-4-15(2). There is no dispute this was not done, or that Grievant would have been the bus operator selected for the position.

The Board argued, however, that because Grievant had a long-term substitute position in Wayne County for a majority of the Fall of 1996, she would not have been available to work the Robert Kirk run. This argument is speculative. There is no evidence to dispute Grievant's assertion that, had she been offered the Robert Kirk run, which was in her specified area of preference (G. Ex. 2), she would have accepted that run over the Wayne County run. Further, the Board's argument is based on evidence acquired after-the-fact. It was only after the position had not been filled that Grievant accepted the Wayne County run, which turned out to be a long-term substitute run. There is no evidence that the Board had knowledge of the status of the Wayne County run at the time it decided not to fill the Robert Kirk run in accordance with the statute.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant has the burden of proving her case by a preponderance of the evidence.

2. W. Va. Code § 18A-4-15 requires the position of an employee on leave of absence beyond thirty days to be filled pursuant to the bidding requirements of W. Va. Code § 18A-4-8b.

3. A service employee will be considered to be on a leave of absence if his or her temporary absence lasts greater than twenty days, even though a formal request for a leave of absence has not been filed by the absent employee. Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995); Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987).

4. Grievant has proven by a preponderance of the evidence that the Board violated the posting provisions set forth in W. Va. Code §§ 18A-4-15 and 18A-4-8b, in not filling the Robert Kirk position following the August 29, 1996 posting.

5. Grievant has further proven by a preponderance of the evidence that she bid on, and would have received, the Robert Kirk run had it been properly filled following the posting.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to compensate Grievant in the amount she would have received as a substitute bus operator for the Robert Kirk bus run from the date the Julia Quintrell run was filled to the date Mr. Kirk returned to his regular run in January 1997, along with all privileges, benefits, and seniority she would have acquired pursuant to W. Va. Code § 18A-4-15. Provided, however, that the Board is entitled to offset the amount of compensation due to Grievant by the amount she received while substituting in Wayne County, as Grievant would not have been able to work those days had she properly been awarded the Kirk run.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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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MARY JO SWARTZ

Administrative Law Judge

Dated: September 15, 1997

Footnote: 1

No evidence was presented to substantiate the discrimination and favoritism claims, and Grievant did not address these claims in her proposed findings of fact and conclusions of law. Therefore, these claims are deemed to have been abandoned.

Footnote: 2

The level two transcript has never been provided by the Board. However, I find the evidence presented at the level four hearing sufficient to render a decision in this case.

Footnote: 3

No argument was made that Grievant would not have been entitled to the run had it been properly filled following the posting.

Footnote: 4

Grievant's unavailability for work was the subject of another grievance styled Dyer v. Lincoln County Bd. of Educ., Docket No. 97-22-246 (Sept. 11, 1997).