PATSY PRATER,

Grievant,

v. **Docket No. 97-15-021**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant is employed as a bus operator by Respondent Hancock County Board of Education. Her statement of grievance (See footnote 1) states "(b)y not permitting me to exercise my seniority over a substitute driver for a full day position is in violation of 18-A-4-8A, 18-A-4-8B and 18-A-4-15 [sic] also in violation of past practice. Full compensation for 3 hrs. per day that I am not permitted to exercise my seniority." Adverse decisions were received at levels one and two (November 13, 1996, and January 7, 1997, respectively). A level four hearing was held on February 13, 1997. A date of March 13, 1997, was set for the parties to submit proposed findings of fact and conclusions of law. None were submitted and the case became mature for decision on that date. The facts as established by documentary evidence and through testimony taken at Level II and Level IV hearings are as follows.

FINDINGS OF FACT

1. Grievant was a substitute bus operator for Respondent at the beginning of 1996-1997 school year.

2. On or about September 24, 1996, Grievant contracted with Respondent to operate a full-time bus run during the leave of absence of the regular driver, Betty Colvin.

3. On or about October 29, 1997, Grievant entered into a second contract, a permanent contract with Respondent for a two and three quarter hour per day or half-time bus run, to commence October 30, 1996. This was based upon her belief that Betty Colvin, whom Grievant was replacing, would return, displace her, causing Grievant's return to the substitute list.

4. Betty Colvin, for whom Grievant was substituting, was not available to return to work until November 15, 1996.

5. Grievant was directed by Respondent to begin operation of the half-day bus run and did so on October 30, 1996.

6. Grievant was replaced on the full day run by a substitute.

7. For the period of October 30, 1996 through November 15, 1996, Grievant received wages for a half-time contract instead of a full day contract.

DISCUSSION

___Grievant entered into a leave of absence contract for a 5 3/4 hours per day bus run. The contract was for the duration of the absence of the permanent driver, Betty Colvin. In the meantime, anticipating eventual displacement by Betty Colvin, Grievant bid for and was awarded another contract to operate a 2 3/4 hours per day bus run on a permanent basis. Betty Colvin was operating bus number 50 on a temporary basis until the return of the regular driver, Carman Tice. Upon Ms. Tice's resumption of duties, Betty Colvin would return to her regular bus run, number 67. Grievant would at that time be displaced, returning to the substitute list. Grievant, anticipated this sequence of events concluding in time for her to begin her new regular half-time run, bus 34. However, Carman Tice was delayed in returning, and this in turn delayed the return of Betty Colvin.

Respondent required Grievant to begin the half-time or what is also called a 2 3/4 hours per day run on October 30th. Ms. Colvin was still operating bus number 50 and was not available to return to her permanent run. Grievant began the half day contract as requested on October 30. Betty Colvin returned November 15. Grievant contends that she should not have been required to begin the half-time run until November 15, Betty Colvin's return, and that by doing so, she was denied full-time wages for the period from October 30 to November 15.

The contract of September 25, 1996 should be examined to determine its provisions. (See Level II, Grievant's Ex. No. 1). Its term or the period of employment is designated as “LOA”. This is most certainly an abbreviation for “leave of absence”. There is also a provision, contained within paragraph seven, that the contract may be terminated or modified at any time by the mutual consent of the parties.

Also pertinent is W. Va. Code §18A-4-15.

18A-4-15. Employment of service personnel substitutes.

> The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (1) To fill the temporary absence of another service employee;
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> (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 giveregular 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** (emphasis added) and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position: Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided herein, upon termination of the leave of absence said employee shall be returned to his or her original position....

There is also a proviso contained within this statute. It is as follows:

> Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

It seems clear that Grievant was contractually obligated to continue to serve the full-time contract until such time as the driver on leave of absence, Betty Colvin, returned. Furthermore, paragraph seven of the contract, provides that termination or modification of the contract must be “by the mutual consent of the Board and the Employee.” This language is identical to that within the approved statutory form found in W.Va. Code §18A-2-5.

Grievant and Respondent then entered into the 2 3/4 hour contract. The contract itself, is not in evidence. However, testimony at the Level II hearing indicates that the contract was bid upon by Grievant in October, but not approved by the Respondent until its Board meeting of October 29, 1996. At that time, Grievant was advised that she was to begin the next day, October 30, 1996. Grievant learned at that Board meeting, that Carman Tice would be delayed in returning to her run. That would in turn delay the return of Betty Colvin for whom Grievant was substituting under the LOA contract. Grievant then knowing that the LOA contract was still in effect, told her supervisor that she did not want to leave her full-time position. (Level II Transcript, P. 9). However, she wasdirected to commence the new 2 3/4 hour contract the next day.

Grievant further alleges that a policy was formulated in which Respondent, in the past, has allowed bus drivers under a half-time contract to bid for full-time contracts. After the driver assumed the full-time bus run, a substitute would then assume the half-time bus run.

At the Level II hearing, Judy Teller, also a bus driver for Respondent testified that a policy was established by Superintendent Daniel D. Curry through his memorandum of April 29, 1992. (See Level II, Grievant's Ex. No. 2). The memorandum seems to provide regular bus drivers with the opportunity to bid upon other openings as they occur. The memo was purportedly based upon the advice of counsel and was for the purpose of making policy conform to state law.

W.Va. Code §18A-4-8b also allows open positions to be awarded to qualified persons subject to seniority. Persons already under contract and filling a position are not prevented from undertaking a new position, despite existing obligations. The existing contract, of necessity, is to be terminated or modified to allow the employee to undertake the new. The undersigned regards this be mutual consent to modify the existing contract by implication if not expressly stated.

The instant case is unusual. Ideally, the employee bids upon a position to better himself. There is no question that the employee desires to move to the more lucrative position as soon as possible. The statutes above seemingly facilitate this employee flexibility. They provide for a process whereby the employee can exit ongoing contracts and undertake new ones. Grievant was attempting to improve her situation by arranging to have work at the conclusion of the leave of absence contract. There was no thought that the contracts would conflict or overlap, or that the new contract would result in a reduction of income because of fewer hours.

The record does not indicate that she at any time rejected the 2 3/4 hours contract. She merely wished to continue under the full-time contract until the return of the regular driver. Fromthe wording of her grievance, she is of the opinion that she should have continued on as the most senior substitute. She would, in effect, have been in the unusual position of substituting for herself. All that aside, Grievant would not be on the substitute list. She was a regular employee under the LOA contract. W.Va. Code §18A-4-8g in the second paragraph states in pertinent part,

The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter.

An analysis of the LOA contract, Grievant's Ex. No. 1, at Level IV, indicates that it was based

upon and in fact duplicates the statutory form presented at W.Va. Code §18A-2-5. It is therefore to be regarded as a regular contract. Additionally, by the operation of W.Va. Code §18A-4- 15, the length of absence of Betty Colvin, in excess of twenty working days, was sufficient to grant regular employee status to Grievant. Therefore, Grievant's seniority as a substitute was not material. She was a regular employee. It does appear that the proviso quoted above from W.Va. Code §18A- 4-15 would allow Grievant as a regular service employee to have priority over a substitute. However, there has been no evidence presented to indicate that she would have sufficient seniority to have been awarded the position as a regular employee. Nor is there evidence to show that she, as a regular employee, has suffered harm and is due the remedy she seeks.

Accordingly, the following Conclusions of Law are appropriate.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, Grievant has the burden of proving each element of her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993).

2. In order to prevail in a matter before this Grievance Board, Grievant must show that she has suffered harm or has incurred damages as a result of Respondents grievable actions. Zirkle/Teller v. Hancock County Bd. of Educ., Docket No. 96-15-289 (Feb. 13, 1997).

3. Grievant has not shown by a preponderance of the evidence any violation of law, or that she was entitled to retain the full-time contract.

Accordingly, this 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 §18-29-7. 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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JAMES D. TERRY

Administrative Law Judge

DATE: October 6, 1997

Footnote: 1

The level four appeal form was received in our Charleston office on January 14, 1997.