**WALTER STANSBURY, III,**

**Grievant,**

**v.** **DOCKET NO. 97-32-577**

**MORGAN COUNTY BOARD OF EDUCATION,**

**Respondent.**

## DECISION

___Grievant, Walter Stansbury, III, challenges his non-selection for a full-time bus operator position by the Morgan County Board of Education ("MCBOE"). He seeks instatement to the position, along with back wages, seniority, benefits and interest on all monetary sums. The grievance was denied at level one by Grievant's immediate supervisor on December 1, 1997. Appeal to level two was filed on December 2, 1997, and a hearing was held on December 5, 1997. The grievance was denied by April L. Dowler, Hearing Examiner, on December 19, 1997. Consideration at level three was bypassed, pursuant to W. Va. Code §18-29-4(c), and Grievant appealed to level four on December 23, 1997. For administrative reasons, this matter was reassigned to the undersigned on March 24, 1998. After several continuances for good cause shown, a level four hearing was conducted on May 27, 1998, in the Grievance Board's office in Morgantown, West Virginia. This matter became mature for consideration upon receipt of the parties' written arguments on July 1, 1998. (See footnote 1)

The following findings of fact are made from a preponderance of all documentaryand testimonial evidence introduced at levels two and four.

## Findings of Fact

1. Grievant has been employed by Respondent as a substitute bus operator since December 8, 1994.

2. From January 12, 1995, until the end of the 1994-1995 school year, Grievant was employed as a long-term substitute for another bus operator on leave of absence. Grievant received this

position through posting and bid.

3. MCBOE required Grievant to sign a probationary employment contract of employment for the long-term substitute position. The contract specified that Grievant would serve in the position for the remainder of the school year.

4. Near the end of the 1994-1995 school year, the regular bus operator assigned to the position referred to above resigned from employment with MCBOE. Therefore, Grievant was notified by Superintendent Jerry Jones that his probationary contract would not be renewed. The position was subsequently posted and filled on a permanent basis. (See footnote 2)

5. The letter from Superintendent Jones, notifying Grievant of the recommendation for non-renewal of the probationary contract, stated that the reason was “lack of need.” Grievant did not seek a hearing with the Board regarding this decision, nor did he initiate any grievance because of it.

6. Throughout the period during which Grievant served as a long-term substitute, he retained his contract as a substitute bus operator. He received a contractfor employment as a substitute for the following school year, 1995-1996.

7. Grievant was not placed on the preferred recall list at the end of the 1994- 1995 school year, when his probationary contract was not renewed.

8. Robin Fleece has been employed by MCBOE as a substitute bus operator since May 1, 1992.

9. MCBOE's policy “GDHA” provides that, if a substitute refuses work five times in a row, a letter is to be sent asking the employee if he or she wishes to remain on the substitute list. If the employee responds that they want to remain on the roster, they will continue to be called in the normal rotation for substitute service. If no response is received, the employee is automatically removed from the substitute list.

10. Ms. Fleece substituted for MCBOE on a regular basis from April of 1992 through November of 1994. After five refusals for substitute jobs, she was notified on February 12, 1996, that she would have to inform the Board whether she wished to remain on the list. Ms. Fleece responded that she wanted to continue employment as a substitute bus operator. She bid on several full-time positions during the 1996-1997 school year, and she substituted as a bus operator during 1997-1998.

11. Ms. Fleece maintained current bus operator certifications for all school years between 1992 and 1998.

12. On October 22, 1997, MCBOE posted a vacancy for a bus operator/custodian position. Grievant and Ms. Fleece applied, and Ms. Fleece was selected, because she had the greatest substitute seniority. (See footnote 3)

## Discussion

Grievant contends that the selection of Ms. Fleece for the bus operator's position at issue was flawed for two alternative reasons. First, he believed he was automatically placed on preferred recall after the termination of his probationary contract in the spring of 1995, which would give him superior rights to a full-time position, pursuant to the selection process set forth in Code §18A-4-8b. Second, Grievant argues that Ms. Fleece “abandoned” her substitute employment for the period of time between November of 1994 and August of 1997, so that she should not have accrued any substitute seniority during that time. Consequently, with the break in her seniority accrual, Grievant would move up on the substitute seniority roster. Grievant contends that Policy GDHA was not properly followed in this regard.

There are several statutes regarding school personnel which are applicable to the instant case. Code §18A-4-8b sets forth the procedure to be followed in filling vacancies in service personnel positions, and states in pertinent part as follows:

> 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, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
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> 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 beconsidered in the following order:
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> (1) Regularly employed service personnel;
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> (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;
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> (4) Substitute service personnel; and
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> (5) New service personnel.

Respondent contends that it properly followed the mandates of this provision, selecting the substitute applicant (implying that all applicants were substitutes) with the most seniority, Ms. Fleece. However, if Grievant is correct that he was automatically placed on preferred recall at the end of the 1994-1995 school year at the conclusion of his probationary contract in a long-term substitute position, then he would fall into category (2) of the above-cited statute, giving him priority over substitutes such as Ms. Fleece. Unfortunately, Grievant was not placed on preferred recall, and MCBOE had no obligation to give him that status.

There is no dispute that the position Grievant served in from January through June of 1995 was as a substitute for a regular employee on extended leave of absence. Code §18A-4-15 addresses the employment of service personnel substitutes, and provides in part 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:
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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 give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selectedunder the procedure set forth in section eight-b 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: 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[.]

The parties agree that the position Grievant held in the spring semester of 1995 fell into the second numbered paragraph of Code §18a-4-15. The only provision of the statute which discusses the status of a long-term substitute at the end of such an assignment is the final proviso, which states that, when a substitute fills in during a long-term leave of absence, “upon termination of the leave of absence said employee shall be returned to his or her original position.” In Grievant's case, he would

have been returned to the substitute list, and, in fact, he retained his substitute contract of employment throughout the assignment. He received another substitute contract for the following school year of 1995- 1996. Therefore, MCBOE complied with the provision requiring that a long-term substitute be returned to his original position.

Grievant further contends that he automatically attained preferred recall status at the end of his service in the long-term substitute position, because he was granted regular employee status, pursuant to Code §18A-4-15(2). However, the statute only provides that such substitutes hold regular employee status "until the regular employee shall be returned to such position." There is no basis in this Code Section for placing a long-term substitute on preferred recall status at the end of service in the position. Indeed, employees are only placed on the preferred recall list when there is a reduction in force, pursuant to Code §18A-4-8g, which was not the case here. While Code §18A-4-8g "does not prevent countyboards of education from granting preferred recall status to substitute service personnel who achieve regular employment status pursuant to W. Va. Code §18A-4-15(2)," this is certainly not required by any statutory provision. Davis v. Mingo County Bd. of Educ., Docket No. 94-29-1082 (June 29, 1995) (emphasis added). (See footnote 4) Moreover, the Grievance Board has routinely upheld a board of education's decision to completely terminate an employee at the expiration of his or her probationary contract, and no right to preferred recall status was implicated. See Baker v. Hancock County Bd. of Educ., Docket No. 97- 15-447 (May 5, 1998); Toler v. Wyoming County Bd. of Educ., Docket No. 94-55-306 (May 4, 1995). Accordingly, Grievant's contention that he was to be automatically placed on preferred recall is without merit.

Grievant was a substitute employee at the time he applied for the bus operator/custodian position in 1997, so he was not entitled to any preference in consideration over other substitutes, pursuant to Code §18A-4-8b.

Grievant's second argument involves his contention that MCBOE did not properly follow the provisions of its internal policy regarding substitutes, Policy GDHA. He maintains that Ms. Fleece was not available for work as a substitute for a period of years, and that she should not have accrued any substitute seniority during that time. Code § 18A-4-8g provides that substitute seniority begins to accrue when the employee first begins working as a substitute, and seniority continues to accumulate until employment is severed or the employee attains regular employment status. Grievant called as witnesses three otherMCBOE bus operators to prove his point. All of these individuals testified that

they had not seen Ms. Fleece around the bus garage between 1994 and 1997, so they had concluded that she was no longer employed. Two of these witnesses testified that, sometime around 1994, Ms. Fleece had told them she had a full-time job at night working at a plant in a nearby community.

Ms. Fleece's work at another place of employment is irrelevant to her status as a substitute employee for MCBOE. This is not a case in which there is any evidence that Ms. Fleece's other position would have prevented her from working as a substitute bus operator, which can lead an employer to the reasonable conclusion that the employee has resigned. See Finnie v. Logan County Bd. of Educ., Docket No. 89-23-314 (March 30, 1990). There is no evidence that Ms. Fleece was called for substitute work and refused it after she responded to MCBOE's 1996 inquiry about her status. In fact, the record contains several applications from Ms. Fleece for positions during the 1996-1997 school year, and she actively substituted in 1997-1998.

MCBOE followed the provisions of Policy GDHA by contacting Ms. Fleece in 1996 after five refusals of work. After her indication of a desire to remain on the substitute roster, she remained there and continued employment with MCBOE. There is no indication that she resigned her position. Therefore, Ms. Fleece rightfully continued to accumulate substitute seniority between 1994 and 1997.

As the most senior substitute applicant, Ms. Fleece was entitled to the bus operator position at issue in this case. The following conclusions of law support the decision reached.

## Conclusions of Law

1. In a selection grievance, the grievant bears the burden of proving his allegations by a preponderance of the evidence. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

2. W. Va. Code §18A-4-8b requires county boards of education to fill vacant school service personnel positions on the basis of seniority, qualifications, and evaluations of past service, with employees on preferred recall status having priority of consideration over substitute service personnel.

3. When an employee is selected to serve in a long-term substitute position pursuant to W. Va. Code §18A-4-15(2), such employee is to be returned to his original position upon termination of the leave of absence.

4. Boards of education are not required to place employees on preferred recall status at the

conclusion of service in a long-term substitute position pursuant to W. Va. Code §18A-4-15(2) or at the end of a probationary contract. See Davis v. Mingo County Bd. of Educ., Docket No. 94-29-1082 (June 29, 1995).

5. Grievant did not prove by a preponderance of the evidence that he was placed on or entitled to preferred recall status at the time he applied for a bus operator/custodian position in October of 1997.

6. Respondent properly followed the provisions of Policy GDHA regarding Robin Fleece's status as a substitute bus operator.

7. Respondent selected the most senior substitute to fill the bus operator/custodian in October of 1997, and properly followed all applicable statutory requirements.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Morgan 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.

**Date: July 24, 1998** _____

**V. DENISE MANNING**

**Administrative Law Judge**

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*Footnote: 1*

*Grievant was represented by Kimberly Levy, Esquire, and the Morgan County Board of Education was represented by attorney Kimberly S. Croyle.*

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*Footnote: 2*

*Grievant applied for the position, but was not selected. He did not contest this decision, as the successful applicant undisputedly had greater seniority than Grievant.*

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*Footnote: 3*

*Although not specified in the record, it is assumed that no regular service personnel or employees on preferred recall applied for the position, so only substitutes wereconsidered. See Code §18A-4-8b.*

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*Footnote: 4*

*In Davis, the board of education believed it was required to place employees on preferred recall once selected to fill long-term substitute positions. While the administrative law judge did not comment on whether the board's belief was correct, she did conclude that the applicable statutes do not necessarily prohibit such a practice.*