KENNETH STATLER,

Grievant,

v. **DOCKET NO. 98-33-021**

MONONGALIA COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Kenneth Statler, alleges as follows:

> The Respondent (sic), a regularly employed school bus operator, applied for two summer bus operator's vacancies which were advertised during the summer of 1997. These positions were advertised as a result of the incumbent employees' absences of more than thirty days. The Respondent awarded these positions to substitute school bus operators. Grievant alleges a violation of West Virginia Code §18A-4-8b, §18-5-39, §18A-4-8g, & §18A- 4-15(2). Grievant requests instatement into this position if such exists during the summer of 1998, retroactive wages & benefits, and interest on all monetary sums.

Following a level two hearing, the grievance was denied by Dr. Louis Hlad on January 23, 1998. (See footnote 1) Consideration at level three was bypassed, pursuant to W. Va. Code §18-29-4, and Grievant appealed to level four on January 25, 1998. By correspondence dated March 13, 1998, Grievant's attorney, John Roush, informed the undersigned that the parties had mutually agreed to submit this matter for decision based upon the record developed below. Grievant submitted proposed findings of fact and conclusions of law on April 14, 1998, and Respondent's representative, Assistant Superintendent Jacob Mullett,filed no submission. Although requested by the Grievance Board and required by the provisions of Code §18-29-7, Respondent did not provide the lower level record upon appeal to level four. Finally, counsel for Grievant provided a copy of the level two transcript and exhibits to the undersigned on June 23, 1998, at which time this matter became mature for decision.

The following findings of fact are undisputed by the parties.

Findings of Fact

1. Grievant is regularly employed by the Monongalia County Board of Education (MCBOE) as a bus operator.

2. In June of 1997, MCBOE posted vacancies in two summer bus runs (Bus Nos. 189 and 174), which had become vacant due to long-term leaves of absence by the drivers assigned to them. The term of the positions was for the remainder of the summer school term, from June 26, 1997, through August 5, 1997.

3. Grievant was the most senior regularly employed bus operator who applied for the summer positions.

4. MCBOE officials notified Grievant that he had been selected to fill the vacancy for Bus 189, and he was to begin working in that assignment on July 14, 1997.

5. Prior to July 14, MCBOE notified Grievant that he would not be placed in the Bus 189 run, due to the belief that it was not appropriate to place a regular employee in a long-term substitute position.

Discussion

The issue presented in this grievance is whether MCBOE correctly determined thatit could not place a permanent employee in a long-term substitute position. 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, 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 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 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.

(Emphasis added.) In turn, Code §18A-4-8b provides that all vacant service personnel positions are to be filled on the basis of seniority, qualifications, and past service, with regularly employed personnel receiving priority in consideration over substitutes and non- employees.

Respondent does not dispute that, as discussed in Code §18A-4-15(2), the regularly employed summer bus operators for the two runs at issue were on leaves of absence expected to extend beyond thirty days. Thus, it posted the positions to be filled pursuant to the provisions of that statute. However, MCBOE contends that, although it originally awarded the Bus 189 run to Grievant, based upon his seniority and qualifications, it madea mistake in giving a long-term substitute position to a regular employee.

The record indicates that MCBOE based this decision almost entirely upon its interpretation of this Grievance Board's decision in Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (March 24, 1995). As set forth in Dr. Hlad's level two decision, MCBOE believes that Panrell "held that only substitute[s] could be used to substitute for regular employees." However, MCBOE has obviously misunderstood the holding in Panrell. The issue presented there was whether the board of education could temporarily fill vacant positions with regular employees until they were posted pursuant to Code §18A-4-8b. This, of course, was found to be improper, because Code §18A-4-15 provides that only substitutes are to be placed in positions temporarily until they are filled through the Code §18A-4-8b posting and selection process. This is not analogous to the present situation, where the position was being filled after having been posted, pursuant to the requirements of Code §18A-4-8b. The Panrell decision does not address the filling of advertised vacancies with regular employees.

A second justification presented by MCBOE for its decision in this case involves yet another misinterpretation, this time of a portion of Code §18A-4-15 regarding "job swapping." That provision discusses the manner in which substitutes are to be called to fill temporary vacancies, but allows regular employees in the same building or work station and of the same classification to fill such vacancies, with a substitute filling in for the regular employee. However, as with the provision discussed above, this section of the statute clearly only deals with the filling of positions prior to

posting. It is not necessary to go into further detail regarding how MCBOE feels this provision supports its position,because it is inapplicable to this situation regarding whether a regular employee can be selected through posting to fill in for an employee on a long-term leave of absence.

The Grievance Board recently rendered a decision in a case involving the exact issue presented here. In Tucker v. Putnam County Bd. of Educ., Docket No. 97-40-576 (April 28, 1998), the administrative law judge stated as follows:

> [I]n this instance, the Board posted the long-term substitute assignments, in accordance with [§18A-4-15(2)], and once it posted the positions, anyone was entitled to apply for them, even already regularly employed personnel. . . . Once an employee's leave of absence extends beyond thirty days, the Board is required to post and fill the position in accordance with [§18A-4-8b]. There is nothing in either statute which would prohibit a full-time regular employee from bidding on and receiving the long-term substitute position, once it has been posted. Indeed, the last proviso in [§18A-4-15(2)] clearly instructs what must happen to 'a regular or substitute employee' filling a vacancy for an employee on leave of absence.

Grievant was clearly entitled to apply for and be placed in the Bus 189 summer position. Pursuant to Code §18A-4-8b, as a regular bus operator, he was entitled to the position over any substitute employee, as originally decided by MCBOE. Unfortunately, the position's term was only through August 5, 1997, which is long past. Grievant had requested as relief that he be given the summer run for Bus 189 in 1998, if it still existed. However, this would be contrary to the specific terms of the posting, which only requested a substitute to finish out the 1997 summer term. In addition, Code §18-5-39 provides that “[a]n employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer.” The regular driver for Bus 189 was only on a leave of absence for the summer of 1997, and, pursuant to the same statute, he had not relinquished his right to return to the position. Accordingly, Grievant has not demonstratedany basis for placement into the position for summer 1998.

Since Grievant has proven by a preponderance of the evidence that the summer run at issue was rightfully his, he is entitled to compensation, regular seniority and any other benefits he would have received while serving in the position.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. See W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. W. Va. Code §18A-4-15(2) requires the posting of vacancies caused by the absence of a regular employee for more than 30 days.

3. Regularly employed school service personnel are permitted under W. Va. Code §18A-4-15(2) to apply for and to receive posted temporary vacancies caused by the absence of another regular employee which will extend beyond 30 days. Tucker v. Putnam County Bd. of Educ., Docket No. 97-40-576 (April 28, 1998).

4. Pursuant to W. Va. Code §18A-4-8b, regular school service personnel are given priority in filling posted service personnel positions before substitute school service personnel can be employed.

5. Grievant has proven by a preponderance of the evidence that he was entitled to placement in the long-term substitute position for Bus 189 for the summer school term in 1997.

Accordingly, this grievance is **GRANTED** and MCBOE is **ORDERED** to compensate Grievant in the amount of back wages, regular seniority, and benefits, plus interest, which he would have received if he had served in the summer run for Bus 189 in 1997.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia 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 7, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The record does not reflect the dates upon which proceedings at levels one and two occurred. The level two transcript

indicates that Grievant appealed to level two after not having received a level one response, which does not appear to currently be an issue in this case.