TERESA LOY,

Grievant,

v. DOCKET NO. 97-52-561

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Teresa Loy, Grievant, filed a grievance against her employer, the Wetzel County Board of Education, Respondent, on October 28, 1997, stating:

> She is regularly employed by Respondent as a school bus operator. Respondent advertised a temporary vacancy of a bus operator's position (Bus #22) held by Melvin Longwell, due to Mr. Longwell's absence of more than 30 days from employment. This position was awarded to Delbert Lasure, another of Respondent's regularly employed school bus operators. Respondent then filled Mr. Lasure's former position (Bus #6) with a substitute school bus operator. Grievant is seeking the posting of Mr. Lasure's former assignment (Bus #6) on a temporary basis pending Mr. Lasure's return to Bus #6. She alleges a violation of W.Va. Code §18A-4-8b and §18A-4-15.

Grievant was denied relief at Level I on October 30, 1997. Grievant filed her Level II appeal on November 3, 1997, and the parties agreed to extend the deadline for a hearing at Level II until a mutually agreeable date could be set. A Level II hearing was held on November 25, 1997, before Level II Hearing Examiner, Dr. Martha Dean. After the grievance was denied at Level II on December 18, 1997, Grievant elected to bypass consideration at Level III, as is permitted by W. Va. Code § 18A-29-4(d), and advanced her claim to Level IV. Grievant is represented by counsel,John Roush and Kimberly Levy, and Respondent is represented by counsel, Larry Blalock.

On December 29, 1997, the Grievance Board received Respondent's appeal of the Level II decision. A hearing of the matter was scheduled for January 21, 1998. On January 20, 1998, the parties, by counsel, agreed to submit the grievance on the record as developed at Levels I and II of the grievance procedure and waive the Level IV hearing.

The case was reassigned to this Administrative Law Judge for administrative reasons on May 1, 1998. This matter became mature for decision on May 11, 1998 with receipt of a copy of both the

Grievant's and the Respondent's proposed findings of fact and conclusions of law.

The following findings of fact are derived from the record in this matter. (See footnote 1)

FINDINGS OF FACT

1. Grievant is employed by Respondent as a regular bus operator and has been so employed since at least April 17, 1996.

2. Respondent divides Wetzel County into three areas for transportation purposes. They are the Riverfront, Hundred and Short Line areas.

3. Grievant is currently assigned to a bus route in the Riverfront area. 4. Delbert Lasure is a bus operator employed by Respondent who, prior to the 1997-98 school year, had been assigned to Bus No.6, which also runs in the Riverfront area.

5. Respondent also has a continuing contract with Melvin Longwell as a bus operator. Mr. Longwell was assigned Bus No. 22 for the 1997-98 school year.

6. During the summer of 1997, Mr. Longwell advised Jay Yeager, Director of Transportation for Wetzel County Schools, that he would be unavailable for work due to illness, for an indefinite period, but for at least 30 days, at the beginning of the 1997-98 school year.

7. Respondent posted Mr. Longwell's vacancy for bid by qualified personnel on August 12, 1997.

8. On August 19, 1997, after the requisite bid period, Delbert Lasure was selected as the senior qualified bidder, and was assigned to Mr. Longwell's vacated bus operator position driving Bus No. 22.

9. Respondent did not post the position created by Mr. Lasure's assignment to Mr. Longwell's position, but filled that position with an available qualified substitute bus operator.

10. Grievant is currently required to use two school buses and maintain two private vehicles as her morning run starts in Wileyville and ends in New Martinsville, and the afternoon assignment begins in New Martinsville and terminates in Wileyville.

11. Grievant seeks the position of Bus No. 6, the position vacated by Mr. Lasure, as she believes it to be a more desirablerun than her current assignment, primarily for the reasons stated in Finding of Fact No.10, and asks that the position be posted.

12. The parties stipulated into evidence the following exhibits:

Jt. Ex.1 Level I Grievance Form

Jt. Ex.2

Level I Grievance Decision

Jt. Ex.3

Level II Appeal Form

Jt. Ex.4

Consolidated Grievance Form-Levels I-IV

Jt. Ex.5

Job Posting dated August 12, 1997

Jt. Ex.6

Wetzel County File: GCDA (Job Posting)

Jt. Ex.7

Wetzel County File: GDE (Employment Service Personnel Substitutes)

DISCUSSION

In a non-disciplinary matter, the burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30,1997); Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). See W. Va. Code § 18-29-6.

Grievant asserts that the position absented by Mr. Lasure was required to be posted in the same manner as the position vacated by Mr. Longwell and alleges that Respondent's failure to post the vacancy created by Mr. Lasure's transfer to temporarily fill Mr. Longwell's position violates W. Va. Code §§ 18A-4-15 and 18A-4-8b. 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 countyboard, 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 30 days, the board, . . . , 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; ... .
>
> (4) to temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal . . . , or death of the regular service employee who had been assigned to such position: Provided, That within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b of this article . . .

The Grievance Board has previously held, and the parties herein agree, that W. Va. Code § 18A-4-15 requires the position of an employee on leave of absence beyond thirty (30) days to be posted and filled pursuant to the requirements of W.Va. Code § 18A- 4-8b. (See footnote 2) Tucker v. Putnam County Bd. of Educ., Docket No. 97-40-576(Apr. 28, 1998); Livengood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996).

Further, it is undisputed that the posting and hiring provisions outlined in W. Va. Code § 18A-4-8b control many of the personnel decisions involving education service employees. The section requires that decisions affecting the "promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year . . . " be made "on the basis of seniority, qualifications and evaluation of past service," with priority being given to regular employees over substitute employees. Id. The West Virginia Supreme Court of Appeals has affirmed this position stating that seniority rights are of great importance to education service employees and that the legislature intended to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions when it enacted this section. Hazelwood v. Mercer County Bd. of Educ., 200 W.Va. 205, 488 S.E.2d 480 (1997); Harrison County Bd. of Educ. v. Coffman, 189 W.Va. 272, 430 S.E.2d 331 (1993).

The parties also agree that Respondent took the proper action under W. Va. Code §§ 18A-4-15 and 18A-4-8b when it posted for bid by qualified personnel the vacancy created by Mr. Longwell's

leave of absence which was to last over thirty (30) days. The issue here, however, is whether the provisions of W. Va. Code §§ 18A-4-8b and 18A-4-15(2) apply not only to the original opening created by a designated leave of absence of over thirty (30) days, but also tothe subsequent opening created when a regular employee fills the vacancy caused by the original leave of absence.

Respondent contends that W. Va. Code § 18A-4-15 provides for service personnel substitutes to be used to fill all “temporary” vacancies except in the instance where a regular employee is on leave of absence which is to extend beyond thirty days, in which case the vacancy must be posted and filled pursuant to the requirements of W. Va. Code § 18A-4-8b. Respondent also asserts that, since Mr. Lasure is not the one on leave of absence, his position is just a ”temporary absence” as prescribed in Code § 18A- 4-15(1), regardless of the amount of time he is away from the position, and the requirements of W. Va. Code § 18A-4-15(2), and subsequently § 18A-4-8b, do not apply.

Respondent takes the position that since Mr. Lasure's vacant position does not neatly fit into any of the categories outlined in W. Va. Code § 18A-4-15(2-6), i.e., it is technically not a “leave of absence,” transfer, suspension, resignation, disability or dismissal, it must be a “temporary absence” and W. Va. Code § 18A- 4-15(1) would control and require that a substitute be assigned to the position. Respondent also asserts that Mr. Lasure's vacated position belongs under W. Va. Code § 18A-4-15(1), because it is not a true “vacancy” since Mr. Lasure is still employed as a bus operator and working for the Wetzel County School System, therefore, the requirements of W. Va. Code § 18A-4-8b do not apply. This particular reasoning is flawed. If one used Respondent's logic, anytime a school employee, professional or service, wastransferred or promoted within the system, no vacancy would ever exist since he or she was still an employee of the board of education. Common sense would dictate that if Mr. Lasure is not there to drive his bus, he is absent and the position is vacant. The question is whether Mr. Lasure's absence should be considered a “temporary absence” or a “leave of absence” for the purpose of filling his position under W. Va. Code § 18A-4-15.

___ A close examination of W. Va. Code § 18A-4-15 indicates the statute was clearly meant to provide for the employment of service personnel substitutes for temporary absences only. While there is no clear definition of the phrase “temporary absence” contained in the statute, the legislature determined that any absence anticipated to last for more than thirty (30) days, whether by leave of absence, suspension, resignation, transfer, dismissal, retirement or death, should trigger the posting and selection provisions of W. Va. Code § 18A-4-8b, and, therefore, could not be a temporary

absence as defined in subsection (1). This Grievance Board has affirmed as much in prior decisions. For example, in a recent case we held that W. Va. Code § 18A-4-15 requires the posting of vacancies caused by the absence of a regular employee for more than thirty (30) days. Tucker, supra.

The Supreme Court of Appeals of West Virginia also recently examined what constitutes a "temporary" absence versus a "vacancy" or "opening" which is required to be posted, in a decision analogous to the instant case. In State ex. rel. Serdich v. Preston County Board of Education, 200 W.Va. 34, 488 S.E.2d 34 (1997), theCourt examined the definition of an "opening" or "open position" within the meaning of an education statute, W. Va. Code § 18A-4-7a, which addresses seniority and the posting of positions for professional education employees similar to what W. Va. Code § 18A- 4-8b does for education service personnel. In Serdich, the board of education did not consider the position of a teacher, who had informed the board she would likely be absent for approximately ninety (90) days on personal leave, to be "vacant" or "open" and sought to have a substitute fill the position until the original teacher returned. The board's decision was upheld by the circuit court. On appeal, the Supreme Court found that "(w)hen a board of education receives information which leads it to know, or reasonably expect, that a teacher's 'absence' will prospectively extend for twenty (20) consecutive employment days, or more, there is an 'opening' . . . " under the statute. Id.

If Mr. Lasure's vacated position is not a temporary absence under W. Va. Code § 18A-4-15, then what would it be? This Grievance Board has previously concluded that "when a regular employee is absent for a period of greater than thirty (30) days, that absence will be considered a 'leave of absence' for the employment of substitute personnel under W. Va. Code § 18A-4-15(2)." Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993); Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991), citing Stutler v. Wood County Bd. of Educ., Docket No. 54- 86-333-3 (Aug. 20, 1987).

It appears the legislature even tried to clarify the issueslightly when its 1996 amendment to W. Va. Code § 18A-4-15(2) added language which seemed to broaden the applicability of W. Va. Code § 18A-4-8b to "a vacancy that is related to a leave of absence in any manner ." Such an amendment seems to indicate that the legislature anticipated there would be regular employees filling the vacancies related to a leave of absence, but not necessarily the one originally caused by the actual leave of absence.

It is clear that once an employee's absence for any reason extends beyond thirty (30) days, the Board is required to post and fill the position in accordance with W. Va. Code § 18A-4-8b, with a regular employee having preference over a substitute employee as provided for in the statute. This does not mean, however, that regular employees may simply be placed into a long-term substitute assignment before the posting period. Clearly, W. Va. Code § 18A-4-15 provides that substitute employees shall be assigned to all temporary vacancies until the absence is determined to extend beyond thirty (30) days and is then posted in accordance with W. Va. Code § 18A-4-8b. Tucker, supra. In this instance, however, Respondent knew Mr. Lasure would be unavailable for more than thirty (30) days to drive Bus No. 6, therefore, it was not a temporary absence as intended by W. Va. Code § 18A-4-15(1) and the vacated position should have been posted pursuant to W. Va. Code § 18A-4-8b.

In addition to the foregoing narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, the burden of proof is upon the Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. W. Va. Code § 18A-4-15(2) requires the posting of vacancies caused by the absence of a regular employee for more than thirty (30) days. Tucker v. Putnam County Bd. of Educ., Docket No. 97-40-576 (April 28, 1998); Livengood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996).

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 to extend beyond thirty (30) days. Tucker, supra.

4. W. Va. Code § 18A-4-8b recognizes that regular school service personnel hold a priority in filling service personnel positions before substitute school service personnel can be employed. Tucker, supra.

5. Seniority rights are of great importance to education service employees and the legislature intended to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel. Hazelwood v. Mercer County Bd. of Educ., 200 W.Va. 205, 488 S.E.2d 480 (1997); Harrison County Bd. of Educ. v. Coffman, 189 W.Va. 272, 430 S.E.2d 331 (1993).

6. When a regular employee is absent for a period of greater than thirty (30) days, that absence will be considered a 'leave ofabsence' for the employment of substitute personnel under W.Va. Code § 18A-4-15(2). Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993); Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991) (citing Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987)).

7. Grievant has proven by a preponderance of the evidence that Respondent violated the posting provisions set forth in W. Va. Code §§ 18-A-4-15 and 18A-4-8b, in not posting the Delbert Lasure opening on Bus No. 6.

Accordingly, this grievance is hereby **GRANTED** and the Wetzel County Board of Education is **ORDERED** to post Mr. Lasure's former assignment (Bus #6) as a long-term temporary position, if still available, pursuant to W. Va. Code § 18A-4-8b pending Mr. Lasure's return to Bus No. 6.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Wetzel 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.

DATED: June 8, 1998

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RANDY K. MILLER

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The parties agree there are no material facts in dispute and have stipulated to these Findings of Facts.

Footnote: 2

W. Va. Code § 18A-4-8b provides that applicants for school service personnel positions shall be considered in the

following order:

2 (1)

Regularly employed service personnel;

3 (2)

Service personnel whose employment has been discontinued in accordance with this section;

4 (3)

Professional personnel...;

5 (4)

Substitute service personnel; and

6 (5)

New service personnel.