DANETTE TUCKER,

Grievant,

v.

DOCKET NO. 97-40-576

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Danette Tucker, filed the following grievance against her employer, the Putnam County Board of Education ("Board"), on October 24, 1997:

> Grievant is a regularly employed school bus operator. At the beginning of the 1997-98 school year, Grievant was assigned as a full-time school bus operator to Bus #934 in the Poca area. Grievant was removed from this assignment on or about September 2, 1997 and she subsequently used her seniority to apply and receive Bus #872 in the Poca area which is a half-time position. The Respondent readvertised Bus #934 by posting dated September 18, 1997. Grievant applied for this position, but it was awarded to Kenny Vance, a substitute school bus operator. Grievant alleges a violation of West Virginia Code § 18A-4-8b, § 18A-4-8g, § 18A-4-15 and requests instatement into this position if it is still available, back wages, including the salary for an extracurricular assignment that is performed by the employee assigned to Bus #934, benefits, and interest on all monetary sums. (See footnote 1)

A level two hearing was held on November 19, 1997, and a decision denying the grievance was issued by the Superintendent's designee Jack Welton, on December 17, 1997. Grievant appealed to level four on December 24, 1997. A hearing was held onFebruary 23, 1998, and this case became mature for decision on March 10, 1998, the deadline for the parties' submissions of proposed findings of fact and conclusions of law. (See footnote 2)

SUMMARY OF EVIDENCE

LII Hearing Examiner's Exhibits

Ex. 1 -

Grievance documents.

LII Grievant's Exhibits

Ex. 1 -

September 18, 1997 posting for Bus #934.

Ex. 2 -

October 15, 1997 Substitute Bus Operators Seniority List.

LIV Grievant's Exhibits

Ex. 3 -

List of Applicants for Posting VB151-97/98 (Bus #934).

Testimony

Grievant testified in her own behalf and presented the testimony of Harold Hatfield. The Board presented the testimony of Harold Hatfield and Paul Callahan.

FINDINGS OF FACT

1. Grievant is a regularly employed bus operator for the Board.

2. Grievant was originally employed by the Board on February 18, 1997, and was assigned Bus 850, a half-time position, in the Hurricane area.

3. Prior to the 1997-98 school year, it was the practice of the Board to permit regularly employed bus operators to bid on and accept long-term substitute assignments for employees on leave of absence, in accordance with W. Va. Code § 18A-4-15(2). 4. On or about March 3,

1997, in accordance with this practice, Grievant bid on a long-term substitute position for Bus 934, a full-time position, in the Poca area, including an extracurricular run for which she received $5.60/day.

5. The regular operator of Bus 934, Rick Cobb, was on leave of absence, and the position was posted as a temporary position until the return of the regular driver.

6. Grievant remained in that position through the end of the 1996-97 school year, and for the first week of the 1997-98 school year.

7. At the beginning of the 1997-98 school year, the Board decided, in the interests of safety, stability, and continuity to the students, to discontinue its practice of allowing regular bus operators to apply for long-term substitute positions, and limit those positions to substitute bus operators.

8. On or about August 31, 1997, Grievant was informed she would be removed from Bus 934, and returned to her original bus, Bus 850. (See footnote 3)

9. Rather than return to Bus 850, Grievant applied for and received another half- time bus operator position, Bus 872 in the Poca area, which she began driving on September 3, 1997.

10. Subsequently, on September 18, 1997, the Board posted a long-term substitute vacancy for Bus 934 in the Poca area, the same bus Grievant had driven the year before.

11. Grievant applied for, but was not awarded, the Bus 934 position.

12. Kenny Vance, a substitute bus operator, was awarded Bus 934. 13. Rick Cobb, Bus 934's regular bus operator, had returned to work, but was assigned to another position with the Board, pending the outcome of litigation. (See footnote 4)

14. On November 4, 1997, Grievant bid a full-time bus operator position, Bus 964 in the Winfield area.

ISSUE

The issue is whether regularly employed service personnel may apply for and receive long-term substitute positions for employees on leave of absence to extend beyond 30 days, in accordance with W. Va. Code §§ 18A-4-15(2) and 18A-4-8b.

DISCUSSION

Grievant alleges it was a violation of W. Va. Code §§ 18A-4-8b and 18A-4-15(2) to prohibit her from being considered for the posted Bus 934 position in September 1997, and to fill that position

with a substitute bus operator.

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 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 asprovided herein, upon termination of the leave of absence said employee shall be returned to his or her original position; . . . (See footnote 5)

Grievant contends the pertinent provisions of this Code Section do not prohibit the Board from hiring existing regular service personnel to fill the absence of other regular service personnel on leave of absence to extend beyond 30 days. Further, following the re-posting of Bus 934 in September 1997, Code § 18A-4-8b dictates that she, a regular employee, should have received the posted Bus 934 position before Kenny Vance, a substitute employee.

The Board argues the pertinent provisions of this Code Section pertain strictly to hiring substitute personnel to fill the absence of regularly employed service personnel on leave of absence, and that its practice of allowing regular employees to fill these absences was in error, and disruptive to the safety, stability and continuity of the students needing public school transportation. Thus, its decision to change its practice was not in violation of the statute, nor was it arbitrary and capricious, and it correctly followed the provisions of the statute when it posted and filled Bus 934 with a substitute bus operator.

It appears the Board is confusing two different provisions of W. Va. Code § 18A-4- 15 in arguing it could discontinue its practice of allowing regular employees to fill in for other employees of leave of absence. There are instances where regular employees can fill in for other regular employees on leave of absence to extend beyond 30 days without posting the temporary position. Paragraph 8 of W. Va. Code § 18A-4-15 provides the following in that regard:

> Substitutes shall be assigned in the following manner: . . . All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: 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.

The Grievance Board has held that this “step up” provision does not apply to bus operators, as they are not considered to be employed in the same building or working station as other bus operators. Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992). However, the Grievance Board has also held that if a county board of education wishes to offer the practice of stepping up to its bus operators, there is nothing in the statute which would prevent it from doing so, as long as it is done fairly. Conversely, if a board of education decides to discontinue the practice of stepping up, there is nothing in the statute which would prevent that, either. Messer v. Mingo County Bd. of Educ., Docket No. 96-29-513 (July 31, 1997); Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (July 8, 1994).

It appears that is what the Board thought it was doing when it decided to discontinue its practice of allowing regular operators to bid on and receive long-term substitute assignments. However, the Board's practice, as described in this grievance, is not the same as the “step up” provision described above. The “step up” provision is really anexception to the posting requirements of Subsection (2) for leave of absences. Only in the step-up scenario can a regular employee fill in for another employee on a long-term leave of absence without posting after thirty days.

Nevertheless, the Board's argument that Code § 18A-4-15(2) applies only to the hiring of substitutes is not without merit or support. In Byers v. Marion County Bd. of Educ., Docket No. 94-24-388 (Dec. 29, 1995), this Grievance Board held that it was a violation of W. Va. Code § 18A-4-15 for the board of education to take employees on preferred recall and give them hiring priority over substitutes to fill long-term substitute positions. W. Va. Code §§ 18A-4-15 and 18A-4-8b do not authorize a county board of education, absent proper posting, to offer substitute assignments to employees holding preferred recall status before offering such assignments to substitute personnel on a rotating basis according to their seniority. Byers, supra; Hall v. Mingo County Bd. of Educ.,

Docket No. 97-29-420 (Jan. 21, 1998).

Of course, in this instance, the Board posted the long-term substitute assignments, in accordance with W. Va. Code § 18-4-15(2), and once it posted the positions, anyone was entitled to apply for them, even already regularly employed personnel. While this Grievance Board has held that regular employees may not be given preference over substitute employees for those situations described in Code § 18A-4-15, Subsection (2) provides the one instance where a regular employee may apply for and receive a long-term substitute assignment. Once an employee's leave of absence extends beyond thirty days, the Board is required to post and fill the position in accordance with W. Va. Code § 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 Subsection (2) clearly instructs what must happen to “a regular or substitute employee” filling a vacancy for an employee on leave of absence once that leave of absence is over; they are to be returned to their original position. 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(2) provides that substitute employees shall be assigned to those temporary vacancies until the leave of absence is determined to extend beyond 30 days and is posted in accordance with W. Va. Code § 18A-4-8b.

Thus, Grievant was entitled to apply for and be considered for the Bus 934 posting in September 1997, and has proven that she would have received the position over the substitute, Kenny Vance, in accordance with W. Va. Code § 18A-4-8b.

Grievant is entitled to compensation in back wages for the difference between the half-time wages she was making in the Bus 872 run, and the full-time wages she would have made in the Bus 934 run, plus $5.60/day for the extracurricular assignment accompanying that run, between September 3 and November 4, 1997, the date she accepted another full-time position.

CONCLUSIONS OF LAW

1. A grievant, in a non-disciplinary action, has the burden of proving his case by a preponderance of the evidence. Napier v. Logan County Bd. of Educ., Docket No. 94- 23-541 (Apr. 25, 1995).

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 Subsection (2) to apply for and to receive posted temporary vacancies caused by the absence of another regular employee to extend beyond 30 days.

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.

5. Grievant has proven that she, a regularly employed school service personnel, had priority over Kenny Vance, a substitute school service personnel, for the posted Bus 934 temporary vacancy to fill in for a regular employee on leave of absence beyond 30 days.

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to compensate Grievant in the amount of back wages and benefits, plus $5.60/day, she would have received had she remained in the full-time Bus 934 position from September 3 through November 4, 1997, the date she accepted another full-time bus operator position, with interest.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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: April 28, 1998

Footnote: 1

Grievant originally included a vacancy posting for Bus 905 in her grievance, but withdrew that portion of her grievance at level two.

Footnote: 2

Grievant was represented by West Virginia School Service Personnel Association counsel, Kimberly Levy, and the Board was represented by its counsel, James W. Withrow.

Footnote: 3

Grievant's removal from Bus 934 is the subject of a separate grievance.

Footnote: 4

Subsequent to the level four hearing, Mr. Cobb was returned to Bus 934.

Footnote: 5

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

(1) Regularly employed service personnel;

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

(3) Professional personnel . . . ;

(4) Substitute service personnel; and

(5) New service personnel.