WILLIAM HALL,

Grievant,

v. DOCKET NO. 97-29-364

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and,

JOEL CRUM,

Intervenor.

DECISION

This grievance was filed by Grievant William Hall against Respondent Mingo County Board of Education ("MBOE"), alleging a violation of W. Va. Code §§ 18A-4-8g, 18A-4-8b, and 18A-4- 15, and that MBOE had engaged in arbitrary and capricious conduct when it determined that Intervenor Joel Crum had more seniority than he. As relief, Grievant seeks back pay plus interest, and all regular employment benefits, regular employment seniority, and attorney fees.

The events leading to this grievance occurred in the fall of 1994 when MBOE posted and filled several bus runs. Grievant was not selected for any of the positions, and filed a grievance. A Level IV Decision was issued styled, Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995) ("Hall I"). One issue in that case was whether MBOE should have credited Grievant, in determining his substitute employment date, with time he was employed as a substitute bus operator in 1972 and 1973. Because MBOE had credited Grievant with this employment time,his substitute employment date was calculated upon his re-employment to be September 1, 1990, rather than his actual hire date of September 16, 1991. Mr. Crum's substitute employment date is February 7, 1991.

The Decision states that after bus operators questioned why Grievant had received several positions, MBOE reevaluated whether Grievant should have been credited with his previous employment in determining his substitute employment date, and determined he should not have been credited with previous work time, and changed his substitute employment date to September 16,

1991. The Decision determined that Grievant's employment was voluntarily severed in 1973, that Grievant did not prove he had been employed during that period as a regular employee, and he could not be credited with the time he was employed during 1972 and 1973 in determining his seniority.

The ordering paragraph of that Decision set in motion the events leading to this grievance, when MBOE was ordered to:

> calculate the regular seniority of Grievant and Intervenor Crum and to award Ms. Dingess' position, if it is still available, to the individual with the most regular seniority. Back pay and all other benefits of the successful employee are to be adjusted accordingly.

The Level IV Decision was appealed to the Circuit Court of Mingo County, which affirmed the Level IV Decision in 1997. MBOE then looked at the seniority issue, and determined that Mr. Crum had greater regular seniority than Grievant, and it is that determination which is at issue in this grievance. (See footnote 1) The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings. (See footnote 2)

Findings of Fact

1. Grievant is employed by MBOE as a substitute bus operator, and began his employment September 16, 1991.

2. Grievant had previously been employed by MBOE as a substitute bus operator in the 1970's. MBOE credited Grievant with this employment in determining his substitute seniority. This changed Grievant's substitute employment date from September 16, 1991, to September 1, 1990.

3. The Administrative Law Judge ruled in Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995), that Grievant should not have received credit for his employment in the 1970's in determining his substitute employment date. Grievant's substitute employment date should have been September 16, 1991. 4. Joel Crum's substitute employment date is February 7, 1991. He was first employed in a posted temporary position earning regular seniority on February 21, 1994, and worked in that position for three months and 15.5 days.

5. During the 1993-1994 school year, Grievant applied for and was placed in three posted temporary vacancies, to fill in for bus operators off work for longer than 30 days, beginning with a position posted September 27, 1993. Mr. Crum also applied for these positions. Grievant was placed in the first of these positions because his starting date of employment had been erroneously

calculated by MBOE to be September 1, 1990. He filled the second temporary vacancy for two weeks beginning February 7, 1994, and began work in the third temporary vacancy immediately after the second and through the end of the school year. Grievant was in the temporary vacancies eight months and 19 days during school year 1993-94.

Discussion

The issue in this case is whether Grievant should have received regular seniority during the time he worked in the three temporary vacancies during the 1993-94 school year. Grievant believes he should have received regular seniority, relying upon W. Va. Code §§ 18A-4-8g and 18A-4-15, and Spaulding v. Mingo County Bd. of Educ., Docket No. 91-29-492 (Aug. 31, 1992). Respondent argues Grievant accrued no regular seniority when he worked in the three temporary vacancies, because he received these positions as the result of a mistake in the calculation of his substitute employment date.

Grievant bears the burden of proving the allegations of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). The first Code Section cited by Grievant, W. Va. Code § 18A-4-15(2), provides, in pertinent part:

> 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: . . . (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 . . ..

The three temporary positions held by Grievant during the 1993-94 school year were to be posted and filled as provided by this Code Section. Code § 18A-4-8b provides that the selection is to be made based upon seniority, qualifications and evaluation of past service. W. Va. Code § 18A-4-8g ¶ 7 provides:

> A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen [§ 18A-4-15(2) and (5)] of this article . . ..

Days worked as a substitute are not counted towards regular seniority. However, when a temporary

vacancy is properly posted and filled, days worked as a substitute for the employee on leave of absence are counted towards regular seniority, pursuant to W. Va. Code § 18A-4-8g.

In Spaulding, supra, the grievant was awarded regular seniority for the period of time she worked in a temporary vacancy for an employee on leave of absence, even though it was determined in another grievance that she should not have been selected for that position. The Administrative Law Judge relied upon the language of W. Va. Code § 18A-4-8b ¶ 9, defining seniority for the purposes of reduction in force and recall actions as "`the length of time the employee has been employed by the county board of education within a particular job classification.'" The Decision states:

> Clearly, Grievant worked as an aide during the 1988-89 school year from December 8, 1988, until the end of the semester regardless of how she was awarded the job. Therefore, Grievant should be granted regular-employment seniority for that period of time she actually worked consistent with the language of this Code section and despite the holding in [the other grievance]. Grievant received knowledge and experience from working in the aide position and her seniority calculation should reflect that time period actually worked.

As in this case, the position had been properly posted, but the selection was flawed.

Contrary to the rationale espoused in Spaulding, this Grievance Board has held, however, that when a temporary vacancy is not posted for competitive bid as required by W. Va. Code § 18A-4-15, and the short-term substitute called into the position off the substitute rotation list remains in the position more than 30 days, that employee's legal status never changes to a long-term substitute, and the employee is not entitled to regular seniority. Clark and Melton v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997); Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995). This line of cases is not dispositive here, because the position was properly posted and was filled in accordance with the statutory requirements. It was the facts used in applying the statutory requirements which were wrong, and which flawed the selection process.

Based upon the events in dispute as presented by the parties, it appears that none of the applicants for the temporary vacancy posted September 27, 1993, and filled by Grievant, had acquired any regular seniority, and thus the position was to be filled based upon which of the applicants had the earliest substitute starting date. Respondent properly followed W. Va. Code § 18A-4-15, and Grievant was selected in accordance with the procedure set forth in Code § 18A-4-8b. Had Grievant's seniority been properly calculated, however, he would not have been selected for the position posted September 27, 1993. There is no way to determine whether he would have receivedeither of the other two positions, or whether the successful applicant for the first position

would have remained in that position.

MBOE determined the best way to deal with its error was to eliminate the regular seniority earned by Grievant while he worked in these three positions during the 1993-1994 school year. The undersigned finds that W. Va. Code § 18A-4-8a ¶ 7 does not require this result, nor does it require that Grievant be allowed to retain his regular seniority acquired as a result of an error. To the extent the holding in Spaulding, supra, found that this Code Section requires a grievant in this situation to be credited with regular seniority, it is overruled. A county board of education decision on whether to credit an employee with regular seniority for the time he worked in a temporary vacancy should be upheld unless found to be arbitrary and capricious.

As between Grievant and Mr. Crum, the ultimate outcome is correct. Mr. Crum's substitute seniority date was earlier than Grievant's, he applied for the three positions posted during the 199394 school year, and should have been selected for a position before Grievant was. Mr. Crum should have more regular seniority than Grievant. MBOE's decision that Grievant should not have earned regular seniority during the 1993-94 school year was not arbitrary and capricious.

The undersigned is disturbed by the fact that MBOE's decision results in Grievant receiving no regular seniority for the time he worked during the 1993-94 school year in temporary vacancies, which may adversely impact him in future postings, due to no fault of his own. That is, he may have earned regular seniority for some portion of the 1993-94 school year even with his correct substitute starting date. This is particularly troubling given that no employee grieved Grievant's selection for any of the positions during the 1993-94 school year. The undersigned may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .." W. Va. Code §18-29-5(b). Accordingly, under the facts of this case, Grievant should be allowed to retain that portion of the regular seniority he earned during the 1993-94 school year which places him immediately behind Mr. Crum in regular seniority. Given that so much time has elapsed since this issue first arose in 1994, it is possible that if this ruling were applied retroactively it would affect many personnel decisions which have long come and gone, the outcome of which would be speculative. Accordingly, this ruling is prospective only. That is, MBOE is to adjust Grievant's regular seniority to reflect that, from the date of this Decision, he has earned additional regular seniority for the period from February 22, 1994, through the last day he worked in a temporary vacancy during the 1993-94 school year.

As to Grievant's request for attorney fees, the undersigned has no authority to award them, nor

would they be appropriate in this case. Chafin v. Boone County Health Dept. and Div. of Personnel, Docket No. 95-BCHD-362 (June 21, 1996); Smarr v. Wood County Bd. of Educ., Docket No. 54-86-362 (June 21, 1986).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

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

2. Grievant failed to prove the Mingo County Board of Education violated any statute, rule or regulation, or acted in an arbitrary and capricious manner, in eliminating from his regular seniority the period he worked in temporary vacancies from the time he filled the vacancy posted September 27, 1993, through February 21, 1994.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. Grievant's request for back pay, interest and attorney fees is **DENIED**. The Mingo County Board of Education is **ORDERED** to adjust Grievant's regular seniority to reflect that, from the date of this Decision, he has earned additional regular seniority for the period from February 22, 1994, through the last day he worked in a temporary vacancy during the 1993-94 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 29, 1998

Footnote: 1

Mr. Crum was not awarded back pay or any benefits, including regular seniority, although it is not clear why. Respondent at one point explained it was because he had not applied for the position filled by Ms. Dingess, and at another point stated it was because Respondent determined that Ms. Dingess was properly in the long-term substitute position, because of her seniority. Respondent disputed that the Decision in Hall I ruled that either Grievant or Mr. Crum should havebeen placed in the position rather than Ms. Dingess, and likewise disputed that the Decision ruled that Ms. Dingess had been employed as a contract employee. The language quoted in the text from Hall I makes it clear that Respondent has misunderstood the plain language of Hall I. The Decision further specifically stated at page 6:

> *[Ms. Dingess] was not a bus operator or a regular employee, but more on the order of an independent contractor. W. Va. Code §18A-4-8.*

> *Given Ms. Dingess' status, and lack of regular employment, Grievant has proven one of the four positions was filled improperly.*

Footnote: 2

This grievance was filed on or about August 13, 1997. Grievant's supervisor was without authority to act on the grievance. A Level II hearing was held on August 21, 1997, and the grievance was denied at Level II on August 28, 1997. Grievant waived Level III, appealing to Level IV on August 29, 1997. A Level IV hearing was held before the undersigned Administrative Law Judge on October 8, 1997, and this grievance became mature for decision on November 17, 1997, upon receipt of the Grievant's written argument. Respondent declined to submit written argument, relying upon the evidence presented and its Level II decision.