PATSY PRATER, et al.,

Grievants,

v. **Docket No. 98-15-018**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Patsy Prater, Patricia Wade, and Richard Hixenbaugh, employed by the Hancock County Board of Education (HCBE) as substitute bus operators, requested an informal conference on November 4, 1997, at which time they alleged a violation of W. Va. Code §18A-4-8b when HCBE did not post vacant positions, thereby depriving them the opportunity to attain the rights, privileges, and benefits provided by W. Va. Code §18A-4- 15. The matter was not resolved at levels one or two. Grievants elected to bypass consideration at level three as is permitted by W. Va. Code §18-29-4(d). The grievance was advanced to level four on January 21, 1998. An evidentiary hearing was conducted on April 16, 1998, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law on or before May 18, 1998. (See footnote 1)

Findings of Fact

1. Grievants were previously employed by HCBE as regular, full-time bus operators during the 1996-97 school year. As a result of a reduction in force, Grievants' employment was terminated at the end of the year, and they are now on the preferredrecall list, and work as substitute employees.

2. All three Grievants received long-term substitute assignments filling vacancies of regular bus operators who had bid into other vacancies created by leaves-of- absence, beginning the 1997-98 school term.

3. Prior to the 1997-98 school year, whenever a leave-of-absence created a long-term vacancy, HCBE allowed full-time regular employees to bid on the position, with a series of bids following in sequence to fill the positions.

4. Effective the 1997-98 school year, HCBE changed its practice, posting the position created by the leave-of-absence, and allowing regular employees to bid on it, but filling the position vacated as a result of that personnel action off the substitute rotation list with the next available substitute

employee.

5. Approximately eight (8) long-term positions were filled with substitute employees during the 1997-98 school year.

6. Working as substitutes under the practice used by HCBE in 1997-98, Grievants received less compensation, and were not eligible for full benefits, including insurance, sick leave, paid holidays, and annual leave.

Discussion

Grievants argue that HCBE is required to post the positions vacated by regular employees who bid into other temporary, long-term positions created when leaves-of- absence are granted. HCBE argues that the practice was chaotic, and a hardship on the Transportation and Personnel Departments. It asserts that the present practice also provides stability for the students by having a regular driver. Citing Clark and Melton v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997), HCBE argues thatGrievants were not assigned pursuant to competitive bid, and did not legally achieve “regular employee status”; therefore, they are not entitled to any relief.

The assignment of regular and substitute employees to positions vacant due to leaves-of-absence, was recently ruled on in Loy v. Wetzel County Bd. of Educ., Docket No. 97-52-561 (June 8, 1998). In Loy it was held that the provisions of W. Va. Code §§18A-4- 8b and 18A-4-15 “apply not only to the original opening created by a designated leave of absence over thirty (30) days, but also to the subsequent opening created when a regular employee fills the vacancy caused by the original leave of absence.”

The only remaining issue is what, if any, relief Grievants are entitled for the 1997-98 school year. Grievants request back pay, and all benefits they would have enjoyed as regular bus operators. HCBE must prevail on this issue. Not only were Grievants not given an assignment by competitive bid, there is no evidence they would have received, or accepted, any specific positions had they been posted. The uncertain nature of these matters was perfectly illustrated by Grievant Hixenbaugh, who testified that he had refused one assignment in deference to Grievant Wade, whom he believed had a greater need for the work. At best, Grievants suggest “they would have had a high probability of receiving the positions”. Because it would be speculative in nature, Grievants have failed to prove by a preponderance of the evidence that they are entitled to any relief for the 1997-98 school year. Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (Apr. 30, 1998).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. In non-disciplinary actions, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Tucker v. Putnam County Bd. of Educ., Docket No. 97-40-576 (Apr. 28, 1998). See W. Va. Code §18-29-6.

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.

3. W. Va. Code §18A-4-8b provides that regular school service personnel hold a priority in filling posted service personnel positions before service personnel whose employment has been discontinued as part of a reduction in force.

4. The provisions of W. Va. Code §§18A-4-8b and 18A-4-15 apply not only to the original vacancy created by a designated leave of absence of more than thirty (30) days, but also to the subsequent opening created when a regular employee fills the vacancy caused by the original leave of absence. Loy v. Wetzel County Bd. of Educ., Docket No. 97-52-561 (June 8, 1998).

5. Grievants have failed to prove they are entitled to any relief for the 1997-98 school year.

Accordingly, the grievance is **GRANTED** in part, and **DENIED** in part.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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 andtransmitted to the appropriate Court.

Date: July 15, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievants were represented by WVEA representative Owens Brown; HCBE was represented by Assistant Prosecuting Attorney William Fahey.

Upon appeal to level four, a related grievance filed by Christine Zirkle and Judy Teller, Docket No. 98-15-049, was consolidated with the present matter. Following the level four hearing, both Ms. Zirkle and Ms. Teller withdrew their complaints.