JOANN MEADOWS,

Grievant,

v. **Docket No. 98-23-112**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

JoAnn Meadows' Statement of Grievance reads:

> I am grieving that a Sub with less seniority was placed in a position that I bid on in violation of (18A-4-8b). Redress I want all seniority and lossed (sic) wages and rights and privileges I would a[c]quire. I would also like all attorney and legal fees.

This grievance was denied at Level II, waived at Level III, and appealed to Level IV on April 8, 1998. The parties agreed at Level IV to submit the case on the record below. This case became mature for decision on May 15, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1)

The record in this case is very sparse, and is conflicting on some factual points. Additionally, Mr. Jarvis, Grievant's Representative, submitted attachments to his proposals, and the data they contain is unclear, the source of the data is unknown, the Logan County Board of Education's ("LCBOE") agreement to the submission is not specified, and the information is conflicting with Grievant's proposed findings of fact. Accordingly, the undersigned Administrative Law Judge has not utilized this data in rendering her decision.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a substitute bus operator by LCBOE.

2. Shannon Bailey Bryant is also employed as a substitute bus operator by LCBOE.

3. Grievant has more substitute seniority than Ms. Bryant.

4. Bus Run # 9180, a long-term substitute position, was posted, and both Grievant and Ms. Bryant bid on the position.

5. At the time of posting and bidding on Run # 9180, Ms. Bryant was employed in a long-term substitute position pursuant to W. Va. Code § 18A-4-8b, and was receiving all the rights and privileges of a regular employee pursuant to W. Va. Code § 18A-4-15 (2).

6. Because Grievant had previously filled long-term substitute positions pursuant to W. Va. Code § 18A-4-8b, she has more regular seniority than Ms. Bryant.

7. Grievant was employed as a substitute at the time of the posting.

8. LCBOE awarded the position to Ms. Bryant because it considered her a regular employee at the time of the posting pursuant to W. Va. Code §§ 18A-4-8g & 18A-4- 14(2).

Issue

The issue presented by this case is a legal one. Whether a substitute employee, in a long-term substitute position pursuant to bidding under W. Va. Code § 18A-4-15, is entitled to be considered as a regular employee, with preference, for a posted position?

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Although Grievant only alleged a violation of W. Va. Code §18A-4-8b, multiple Code Sections dealing with substitutes, selection, and seniority must be examined to resolve this grievance. First, W. Va. Code §18A-4-8b states that regular positions are to be filled on the basis of seniority, qualifications and evaluations of past service. Applicants for 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 who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty- two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

Id.

W. Va. Code §18A-4-8g states in pertinent part:

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; Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not beprohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

Thus, a substitute may acquire regular employment status and seniority if the requirements of W. Va. Code §§ 18A-4-15(2) or (5) are followed.

W. Va. Code §18A-4-15 states 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;

. . .

(5) To fill the vacancy created by a regular employees' suspension:

The issue of what "regular employee status" actually means and what actions that status requires of school boards has been discussed in several Grievance Board cases. In Bushko v. Marion County Board of Education, Docket No. 92-24-089 (Aug. 6, 1992), this Board held that a service employee who is selected to fill a long-term substitute position pursuant to W. Va. Code § 18A-4-15 "is a regular employee for the time he or she serves in the position." Bushko, supra, at 4. Previously, this Board recognized that W. Va. Code § 18A-4-15 requires that a substitute service employee, who fills the position of an absentregular employee, be given regular employee status "when the tenure of employment extends beyond twenty days." Miller v. Wood County Bd. of Educ., Docket No. 54-86-298- 3 (May 13, 1987). Likewise, in Stutler v. Wood County Board of Education, Docket No. 54- 86-333-3 (Aug. 20, 1987), this Board determined that it was the intent of W. Va. Code § 18A-4-15 "to provide full-time benefits to substitute personnel who remain at a specific job site and work in an ongoing capacity for an extended period of time."

The issue of whether the provisions of W. Va. Code § 18A-4-15(2), conferring "regular employee status" on certain substitute service personnel, constructively elevates such employees to the status of "regularly employed service personnel" within the meaning of W. Va. Code § 18A-4-8b, thereby entitling such a person to a higher priority in competing for posted school service personnel positions, has been previously addressed in Messer v. Mingo County Board of Education, Docket No. 93-29-497 (Aug. 1, 1994). Although the rights conferred by W. Va. Code § 18A-4-15(2) are of limited duration ("only until the regular employee is returned to such position"), the scope of the term "regular employee status" is not restricted by the statute. Messer, supra. Clearly, "regular employee status" requires the school board to extend the same pay, benefits, and seniority to the substitute employees in such positions. Id.; Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd, No. 93-AA-217 (Kanawha County Cir. Ct. Feb. 15, 1994) In addition to this Board's rulings on

"regular employee status" in Bushko and Ferrell, supra, the Legislature reinforced those conclusions in 1994 when the provision in W. Va. Code §18A-4-8g stating: "A substitute school service employee may acquire regular employment status and seniority . . . " was changed to "shall acquire regular employment status and seniority . . . ." (Emphasis added). Thus, "[w]hen an individual iscompetitively selected under [W. Va. Code] § 18A-4-8b procedures to fill the position of a school service employee on leave of absence, W. Va. Code § 18A-4-15(2) requires the school board 'to give regular employee status' to such individual." Messer, supra. See Ferrell, supra.

This grievance can be resolved by determining Grievant's and the successful applicant's status at the time they competed for the vacancy. Grievant was employed as a substitute, and Ms. Bryant was employed in a long term substitute position in which she had attained "regular employee status." LCBOE considered the status of both applicants and correctly followed the guidelines set out above in Messer when it selected Ms. Bryant to fill the vacancy in Bus Run # 9180. Thus, in the circumstances present here, W. Va. Code § 18A-4-15(2) required LCBOE to treat Ms. Bryant as holding regular employee status, and W. Va. Code § 18A-4-8b gives her preference over Grievant for the position at issue. See Hlebiczki v. Ohio Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997): See also Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance of this nature, alleging improper selection, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with "regularlyemployed service personnel" receiving preference over substitute service personnel. See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987).

3. "When an individual is competitively selected under [W. Va. Code] § 18A-4-8b procedures to fill the position of a school service employee on leave of absence, W. Va. Code § 18A-4-15(2) requires

the school board to give 'regular employee status' to such individual." Messer v. Mingo County Bd. of Educ., Docket No. 93-29-497 (Aug. 1, 1994). See Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug 4, 1993), aff'd, No. 93-AA-217 (Kanawha County Cir. Ct. Feb. 15, 1994); Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992). See W. Va. Code § 18A-4-8g.

4. A substitute school service employee selected to fill a position under W. Va. Code §18A-4-15(2) "is a regular employee for the time he or she serves in the position." Bushko, supra.

5. Under the circumstances present here, Ms. Bryant was entitled to preference under W. Va. Code § 18A-4-8b, as she was considered to be a regular employee at the time of the selection. Messer, supra. See Ferrell supra; Bushko, supra; W. Va. Code § 18A-4-15(2). See also Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331, 189 W. Va. 273 (1993); Hlebiczki v. Ohio Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997).

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 16, 1998

Footnote: 1

Grievant was represented by Donald Jarvis, a Representative of the Amalgamated Transit Union, and the Logan County Board of Education was represented by Attorney Brian Abraham.