PAMELA ATKINS,

Grievant,

v.

DOCKET NO. 98-03-136

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Pamela Atkins (formerly Skeens), filed this grievance against her employer, the Boone County Board of Education ("Board") on or about February 4, 1998, as follows:

> Grievant is a regularly employed bus operator. Grievant bid upon a regular position. The position was awarded to a substitute serving in a leave of absence position. Grievant seeks instatement in the position with compensation for lost wages, extra travel time to and from her current position, and all other benefits. In addition she seeks revision of her seniority to include regular seniority credit for long term service in positions she held while still a substitute. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b, 18A-4-8g, and 18A-4-15.

A level two hearing was conducted on April 3, 1998, and a decision denying the grievance was issued on April 20, 1998, by the Superintendent's designee, Keith Phipps. (See footnote 1) The matter was by-passed at level three, and a level four hearing was held on June 17, 1998, in the Grievance Board's Charleston, West Virginia, office. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Timothy R. Conaway, Esq. Proposed findings of fact and conclusions of law were to be submitted by July 17, 1998, at which time this case became mature for decision.

SUMMARY OF EVIDENCE

Level Two Exhibits

Jt. Ex. 1 -

Boone County Board of Education Notice of Vacancies, Posting Number 127 97-98, dated January 5, 1998.

Level Four Grievant's Exhibits

Ex. 1 -

Payroll Summaries for Pamela Skeens (Atkins) for school years 1991-92 through 1996-97.

Ex. 2 -

Grievant's handwritten calculations of long-term substitute assignments.

Testimony

Grievant testified in her own behalf. The Board presented the testimony of Shirley Hill.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is currently employed by the Board as a school service personnel and is classified as a regular one-half time bus operator.

2. Grievant was employed by the Board as a substitute bus operator no later than July 1991. She served in a variety of assignments as a substitute bus operator. She served in the following assignments which extended to or beyond twenty consecutive working days:

(a)

10/15/91-12/11/91 for S. Cantley (38 working days).

(b)

5/11/94-6/8/94 for C. Morgan (20 working days).

(c)

10/24/94-12/9/94 for L. Cantley (27 working days).

(d)

3/13/95-4/14/95 for J. Zornes (24 working days).

(e)

4/22/97-6/9/97 for C. Morgan (33 working days).

3. None of the above long-term substitute assignments were posted, and Grievant was not credited with regular seniority for these assignments. 4. In the Spring of 1995, while substituting for Judy Zornes, Grievant suffered on an on-the-job injury. Grievant sought and received Workers' Compensation benefits. Grievant was off work for approximately 1-1/2 years until November 1996. Judy Zornes did not return to work prior to the end of the 1994-95 school year.

5. In the Spring of 1995, another bus operator, Joe Kinder, requested and was granted a medical leave of absence. Mr. Kinder's position was posted as a long-term substitute assignment, and Grievant applied for the position. Grievant was awarded the position, but was unable to take it because she was on Workers' Compensation the entire 1995-96 school year.

6. The Board posted Mr. Kinder's position again in February 1996. Grievant bid on and received the long-term assignment in March 1996. Grievant was still off on Workers' Compensation and unable to take that position.

7. Another bus operator, Mitzi Harless, filed a grievance that year over the awarding of Mr. Kinder's position to Grievant, in which it was determined that Grievant was not qualified to fill Mr. Kinder's position because she had let her bus driver certification lapse while she was off on Workers' Compensation. See Harless v. Boone County Bd. of Educ., Docket No. 96-03-186 (Sept. 20, 1996).

8. During the 1996-97 school year, Dell Cabell was awarded the long-term substitute assignment, filling in for Mr. Kinder. Mr. Cabell accrued 8 months of regular seniority for this assignment.

9.

Grievant returned to work in January 1997.

10. The Board posted Mr. Kinder's position again at the beginning of the 1997-98 school year. Grievant bid on and was awarded the position. In September 1997, she bidon and received a regular half-time regular bus operator position. Grievant accrued 1 month regular seniority for the time she

filled in for Mr. Kinder from August 21, 1997, until September 22, 1997.

11. Grievant accrued 4 months of regular seniority from September 22, 1997 until January 20, 1998, when the subject position was posted.

12. The Board posted Mr. Kinder's position again, and Mr. Cabell was awarded that position in October 1997. He served in that position until January 1998. Mr. Cabell accrued 3 months of regular seniority for this assignment.

13. Mr. Cabell had accrued a total of 11 months regular seniority with the Board by January 20, 1998, when the subject position was posted.

14. In January 1998, the Board posted the subject position, a regular one-half time bus operator position in the Scott area. Jt. Ex. 1.

15. Grievant and Mr. Cabell applied for the position. Mr. Cabell received the posted position in the Scott area. At the time he was awarded the position, Mr. Cabell was employed in a long-term substitute position, and Grievant held a regular position with the Board.

DISCUSSION

Grievant makes two arguments. One, that she should have received the posted position before Mr. Cabell because she was a regularly-employed school service personnel, while Mr. Cabell was serving as a long-term substitute. Second, Grievant alleges she had accrued more regular seniority than Mr. Cabell, and therefore, even if he was correctly treated as having regular employee status, she should have received the position before him. Grievant alleges she should have had preference for the posted position because she was a regularly employed school service personnel, while Mr. Cabell was a substitute holding a long-term substitute assignment. 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 be prohibited 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;

. . .

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 absent regular 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 meaningof 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), aff'd, No. 94-C-238 (Mingo County Circuit Court Jan. 21, 1997). 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 with 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 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, supra. See Ferrell, supra.

At the time they competed for the subject position, Grievant was employed as a regular one-half time bus operator, and Mr. Cabell was employed in a long-term substitute position in which he had attained "regular employee status." The Board considered the status of both applicants and correctly followed the guidelines set out above in Messer when it selected Mr. Cabell to fill the vacancy. Thus, in the circumstances present here,W. Va. Code § 18A-4-15(2) required the Board to treat Mr. Cabell as holding regular employee status. Meadows v. Logan County Bd. of Educ., Docket No. 98-23-112 (June 16, 1998).

The next issue to decide is whether Grievant or Mr. Cabell had accrued the most regular seniority for purposes of selection under W. Va. Code § 18A-4-8b. The Board credited Mr. Cabell with 11 months regular seniority, which included 8 months during school year 1996-97 when he filled in for Mr. Kinder, and 3 months during school year 1997-98, when he again filled in for Mr. Kinder. The Board credited Grievant with 5 months regular seniority, including 1 month in 1997-98 when she filled in for Mr. Kinder, and 4 months for her regular one-half time position. There is no dispute that these calculations were correct, and that the positions Mr. Cabell and Grievant held filling in for Mr. Kinder were posted.

Grievant alleges, however, that she should receive additional regular seniority credit for all of the long-term substitute assignments exceeding 20 days she held, as set forward in Finding of Fact No. 2, none of which were posted. Had she received regular seniority credit for those assignments, she contends she would have accrued more regular seniority than Mr. Cabell. (See footnote 2) If Grievant were entitled to all of the regular seniority credit she claims for those long-term assignments, the total of those assignments would amount to approximately 6 months and 5 days. Added to her 5 months regular seniority during the 1997-98 school year, she would have accumulated approximately 11 months and 5 daysof regular seniority to Mr. Cabell's approximately 11 months, at the time of the subject posting. (See footnote 3)

Grievant also alleges she should receive regular seniority credit for the time she was off on Workers' Compensation at the end of the 1995-96 school year. Grievant was serving in a long-term substitute assignment for Judy Zornes when she had a bus accident on April 14, 1996. Grievant was on Workers' Compensation from that date through the end of the 1995-96 school year. Ms. Zornes did not return to work by the end of the 1995-96 school year. Grievant contends that, but for her accident, she would have finished out the 1995-96 school year serving in Ms. Zornes' position, and

should be credited with regular seniority for that time period. If Grievant is correct, that would add approximately 2 more months to her regular seniority, for a total of 13 months to Mr. Cabell's 11 months.

It is well-settled by this Board that "[i]n order for a substitute to gain entitlement to the rights, privileges and benefits of a regular employment position, consistent with the mandates of W. Va. Code § 18A-4-15(2), the substitute must be hired by competitive bid, according to W. Va. Code § 18A-4-8b, for the remainder of the regular employee's leave of absence lasting over twenty-five days." 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). Pursuant to the clear and unambiguous language of W. Va. Code § 18A-4-15(2), Grievant did not legally obtain the status of long-term substitute in the positions in question. Therefore, she could not have obtained entitlementto the rights, privileges and benefits of those positions. See Bays, supra. See also Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-547 (Sept. 29, 1994).

While this holding may seem harsh, it is a result of an attempt to balance the interests of both employees and county boards. It appears unfair to penalize Grievant, in this instance, for the failure of the Board to properly post and fill long-term substitute assignments in the past. However, to allow Grievant to claim entitlement to regular employee benefits and seniority for those assignments serves to penalize those other employees with more seniority who may have applied for the positions had they been posted. Generally, the employee is found to have received some benefit from their service in the long-term substitute assignment, even if he or she does not accrue regular seniority. The record in this case is not clear whether Grievant received any regular benefits other than seniority while she served in those positions. Of course, the employee continues to accrue substitute seniority for those assignments.

Finally, with regard to Grievant's claims that she should have continued to accrue regular seniority while she was on Workers' Compensation from April14, 1996 through the end of that school year, the time she would have continued to perform a long-term substitute assignment for Judy Zornes, the above holding renders that issue moot. Furthermore, Grievant is also not entitled to regular seniority for the 1995-96 school year when she bid on and was awarded Mr. Kinder's posted position, but could not perform those duties because she was on Workers' Compensation. W. Va. Code § 18A-4-8b states that "an employee's seniority begins on the date he or she enters into his assigned duties."

Grievant never entered into her assigned duties in school year 1995-96. To hold that an employee who is awarded a position, but does not show up for work is entitled toseniority merely because he or she was hired for the position would produce a ludicrous result.

In conclusion, because Grievant is not entitled to regular seniority benefits for the long-term substitute assignments she received without competitive bid, she has not proven by a preponderance of the evidence that she had more regular seniority than Mr. Cabell at the time of his selection for the subject position.

CONCLUSIONS OF LAW

1. 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 that individual. Meadows v. Logan County Bd. of Educ., Docket No. 98-23-112 (June 16, 1998); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-497 (Aug. 1, 1994).

2. Grievant did not prove that the Board violated the provisions of W. Va. Code §§ 18A-4-8b and 18A-4-15 when it considered Mr. Cabell, a long-term substitute employee, as a regular employee for the purposes of bidding for a regular position.

3. In order for a substitute to gain entitlement to the rights, privileges and benefits of a regular employment position, consistent with the mandates of W. Va. Code § 18A-4-15(2), the substitute must be hired by competitive bid, according to W. Va. Code § 18A-4-8b, for the remainder of the regular employee's leave of absence lasting over twenty-five days. 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). 4. Grievant did not receive any of the long-term substitute assignments set forth in Finding of Fact No. 2 by competitive bid, and therefore, is not entitled to any regular benefits or seniority for those assignments.

5. An employee's seniority begins on the date that he or she enters into his assigned duties. W. Va. Code § 18A-4-8b.

6. Grievant never entered into the long-term substitute assignment she was awarded through competitive bid for the 1995-96 school year because she was on Workers' Compensation. Therefore, she is not entitled to any of the regular benefits or seniority for that position.

7. 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.

8. Grievant has not proven by a preponderance of the evidence that she had more regular seniority than Mr. Cabell for the subject position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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: September 1, 1998

Footnote: 1

There is no level two transcript due to an apparent tape equipment malfunction.

Footnote: 2

The Board did not raise a timeliness defense with regard to Grievant's claims for regular seniority for her past long-term substitute assignments.

Footnote: 3

Mr. Cabell's employment records were not made part of the record, and his figures were arrived at and testified to by Shirley Hill, Personnel Secretary.