ROBERT PORTER,

Grievant,

v. **DOCKET NO. 97-24-473**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Robert Porter, challenges his non-selection for a supplemental bus run for the 1997-1998 school year by the Marion County Board of Education (MCBOE). (See footnote 1) This grievance was initiated at level one on August 12, 1997, where Grievant's immediate supervisor was unable to grant relief. Grievant appealed to level two, where a hearing was held on September 30, 1997, (See footnote 2) followed by a denial of the grievance dated October 30, 1997. Consideration at level three was waived, pursuant to W. Va. Code § 18-29-4. Grievant appealed to level four on October 28, 1997, (See footnote 3) where a hearing was conducted in the Grievance Board's office in Morgantown, West Virginia, on February 9, 1998. Grievant was represented by Tom Bowman, and MCBOE was represented by counsel, Daniel Oliver. The parties submitted written proposals on March 11, 1998, at which time this matter became mature for decision. The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been regularly employed as a bus operator by MCBOE since March 3, 1971.

2. Nancy Vincent has been regularly employed by MCBOE as a bus operator since March 9, 1979.

3. Prior to 1991, Ms. Vincent held the “nurses' run,” which was a mid-day, supplemental bus run, which took vocational nursing students to external clinics for training.

4. By correspondence dated September 10, 1991, Ms. Vincent was notified that there

would no longer be a need for a nurses' run during the 1991-1992 school year.

5. Ms. Vincent threatened to file a grievance, because MCBOE had allegedly not given her timely notification of the lack of need for the supplemental run. Accordingly, she reached an agreement with Dennis Edge, Assistant Superintendent, that she would not file a grievance, if he would promise her the nurses' run would be hers if the need arose in the future.

6. Mr. Edge memorialized the agreement with Ms. Vincent in a writing dated September 27, 1991, which stated: "Ms. Vincent, If the a.m. nurses' aides bus run is re- activated in the future the assignment shall be yours."

7. On April 18, 1997, MCBOE posted a vacancy announcement for a mid-day supplemental bus run (the same "nurses' run") for the 1997-1998 school year. 8. Grievant, Ms. Vincent, and one other bus operator applied for the vacancy.

9. Ms. Vincent was awarded the position, due to the agreement between her and Mr. Edge in 1991.

10. Grievant had the most seniority of the three applicants.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

The position in question is a supplemental or extracurricular assignment, as described in Code § 18A-4-16. That statute specifies that such vacancies are to be filled in accordance with the provisions of Code § 18A-4-8b, which provides, in part:

> **A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.**
>
> **Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position**

for which he applies.

This statute further provides that boards of education must "post and date notices of all job vacancies of established existing or newly created positions." Grievant contends that, although it correctly posted the position, as required by Code § 18A-4-8b, MCBOE failed to comply with the statute's requirement that all vacant positions be filled on the basis of seniority, qualifications, and past service.

MCBOE does not dispute that Grievant was the most senior applicant for the position, nor does it contest that, pursuant to the statutory requirements alone, he would have been entitled to the position. However, MCBOE believes that it was bound to honor the prior agreement made with Ms. Vincent, which is its only justification for awarding her the supplemental run. In that regard, MCBOE relies upon the Grievance Board's decision in Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995), holding that one cannot use the grievance procedure to attack a final decision rendered in a prior grievance. However, that is not the case here, there being no prior final decision.

Nevertheless, this Grievance Board has recognized the principle that grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23- 190 (Mar. 15, 1996). Similarly, the West Virginia Supreme Court of Appeals has observed that "the law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation." McDowell County Bd. of Educ. v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994).

In Dawson v. Cabell County Bd. of Educ., Docket No. 97-06-072 (Oct. 14, 1997), the Grievance Board ruled in favor of the grievant, where the board placed an employee in a newly created position in order to settle a grievance, without posting the position asrequired by Code § 18A-4-8b. The administrative law judge found that, in spite of its settlement with an employee, the board was required by law to post the newly created position, noting that grievants had no knowledge of nor an opportunity to intervene in the prior grievance. The board of education was ordered to post and fill the position in accordance with the

requirements of the statute.

However, Dawson can be distinguished from the instant case. In Dawson, the board of education "settled a grievance by awarding a grievant a vacant position which was not the subject of the grievance." It was this action that was deemed by the administrative law judge to be contrary to the legislative mandate requiring posting of vacant service personnel positions. In the instant case, the position which could have been grieved by Ms. Vincent is the same position she was given at a later time. Moreover, there was never an actual "vacancy" in Ms. Vincent's position. MCBOE never eliminated the position, but reached an agreement with Ms. Vincent that, when the supplemental run was needed again, she would perform it. Thus, MCBOE erred in posting the position in 1997, posting only being required by Code § 18A-4-8b for "vacant" positions.

Grievant has not established that MCBOE's settlement with Ms. Vincent was unfair or in contravention of law or public policy. MCBOE was neither required to post nor fill the supplemental run in accordance with the provisions of Code § 18A-4-8b.

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, Grievant bears the burden of proving eachelement of his grievance by a preponderance of the evidence. See W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. W. Va. Code § 18A-4-8b requires that vacancies in service personnel positions be posted, and that they be filled based upon seniority, qualifications and past service.

3. Grievance settlements can only be challenged in later grievances when it is proven by a preponderance of the evidence that the settlement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23- 190 (Mar. 15, 1996).

4. Grievant has not established that MCBOE's settlement agreement with Ms. Vincent was unfair or contrary to law or public policy.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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.

Date: June 11, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Although not specifically articulated, it is assumed that, as relief, Grievant seeks instatement to the position.

Footnote: 2

A transcript of the level two hearing was unavailable, due to an equipment failure. The parties agreed to proceed to level four, rather than reconvene the level two hearing.

Footnote: 3

It appears that the October 30, 1997, date on the written level two decision was an error, and it was probably issued on September 30, 1997.