

**FRANK BRUMFIELD,**

**Grievant,**

**v.**

**DOCKET NO. 00-50-023**

**WAYNE COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **D E C I S I O N**

Grievant, Frank "Earl" Brumfield, filed a grievance against his employer, the Wayne County Board of Education ("Board") on September 27, 1999, as follows:

Violations of WV Code 18A-4-8b with regard to grievants reduction-in-force and the delayed posting of runs from which they were RIFFed. Delay has caused grievants loss of compensation for night runs not afforded substitutes.

Relief sought is to compensate grievants for times they were skipped in night run rotation and/or day run rotation. [\(See footnote 1\)](#)

The grievance was denied at level one by Grievant's supervisor, King Queen, on October 7, 1990. A level two hearing was held on October 29, 1999, and a decision denying the grievance was issued by the Superintendent's designee, Michael E. Ferguson, on December 17, 1999. Grievant appealed to level four on January 19, 2000, and a level four hearing was held on March 28, 2000, in the Grievance Board's Charleston, West Virginia, office. This matter became mature for decision on April 14, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented at all levels by Susan E. Hubbard, West Virginia Education Association, and the Board was represented at level two by James Ross, and at level four by David Lycan, Esq.

### **SUMMARY OF EVIDENCE**

### Level Two Joint Exhibits

Ex. A -

Grievance forms.

Ex. B -

October 19, 1999 letter setting level two hearing.

### Level Four Grievant's Exhibits

None.

### Level Four Board Exhibits

Ex. 1 -

Agreement Between Wayne County, West Virginia Board of Education and West Virginia Education Support Personnel, West Virginia Education Association, and West Virginia School Service Personnel Association, dated June 23, 1997.

### Testimony

Grievant testified in his own behalf, and presented the testimony of King Queen, Dale Stephens, and David Crisel. The Board presented the testimony of David Adkins, David Crisel, James Dyer, William Gibson, Arnold Justice, Dale Stephens, Diana Sturgill, Daniel Webster, Douglas Ramey, and James Ross.

### FINDINGS OF FACT

The material facts in this grievance are not in dispute, and are set forth in the following findings.

1. Grievant is employed by the Board as a bus operator.
2. Grievant was the most senior of seven bus operators reduced in force ("RIF") in the Spring of 1999.
3. In accordance with an Agreement reached between two-thirds (2/3) majority of the bus

operators and the Board, Grievant and the six other bus operators who were RIF'd were placed on the substitute roster. LIV R. Ex. 1.

4. Specifically, the Agreement provides, with regard to reductions in force, as follows:

A.

When runs are reduced, the junior drivers in seniority shall be classified as substitute drivers. A regular driver who has been classified as substitute driver may elect to stay on as a substitute driver or he/she may elect to exercise his/her seniority within thirty (30) days and bid on any vacancy for which he qualifies. If he/she remains a substitute driver he/she shall be called back in seniority order when additional forces are needed.

LIV R. Ex. 1.

5. At the beginning of the 1999-2000 school year, six of the seven bus runs which resulted in the RIF's were retained. 6. Grievant, being the most senior of the RIF'd bus operators, was given the opportunity to pick which of the six bus runs he wanted. Grievant chose his old bus route, number 9018. Grievant began working in that position, as a substitute, in accordance with the Agreement, on the first day of school.

7. While driving bus route 9018, Grievant attempted to sign up for the night run roster. He was told he could not sign up for night runs because he was a substitute.

8. The Agreement specifically provides that substitute drivers are not eligible to sign up for night runs, unless no other regular driver wants the trip. LIV R. Ex. 1.

9. Approximately nine days after school started, or early September 1999, the Board posted bus route 9018. Grievant applied for the route, but a regularly employed bus operator also applied and was awarded the route.

10. Grievant subsequently bid on another regular bus route and was awarded that position in mid-September, 1999.

### DISCUSSION

Grievant has the burden of proving his 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.

Grievant contends the Board unlawfully prohibited him from signing up for the night duty roster because he was not a substitute, but a regular employee when he returned to work in the Fall of 1999. The Board argues Grievant was classified as a substitute following his RIF in accordance with the terms of the Agreement, and therefore, he was a substitute when he returned to work in the Fall, and was ineligible for night duty trips.

The following Code provisions are pertinent to resolution of this grievance. W. Va. Code § 18A-4-8b provides, with regard to the assignment of extra-duty runs, the following:

Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment. For the purpose of this section, "extra-duty assignments" are defined as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.

There is no doubt that an alternative procedure for making extra-duty assignments was approved by the county board and a two-thirds majority of the bus operators in Wayne County. Thus, the provision in the Agreement prohibiting substitutes from being awarded extra-duty night runs is enforceable.

The remaining issue is Grievant's status at the time he began working on the first day of school in the Fall of 1999: Substitute or regular employee.

W. Va. Code § 18A-4-8b provides with regard to reductions-in-force, as follows:

All employees whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the basis of seniority.

Employees placed upon the preferred recall list shall be recalled to any position openings by the county board within the classification(s), where they had previously been employed, or to any lateral position for which the employee is qualified or to a lateral area for which an employee has certification and/or licensure.

No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment. As noted in Finding of Fact No. 4, the Agreement provides, with regard to reductions in force, that RIF'd employees will be "classified" as substitute employees following their RIF, until they bid on and are awarded a regular position.

Although not clear, Grievant appears to claim that, as an employee on preferred recall, he should have been immediately recalled to reemployment for the vacant bus run, rather than having to bid on the position following posting. This issue has been decided by this Grievance Board, and consistent with those decisions, I find that Grievant was reemployed as a substitute in the beginning of the Fall 1999 school year, and subsequently, not eligible for extra-duty night trips.

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 regularly employed personnel receiving preference over service personnel who have been awarded preferred recall status as a result of their employment being discontinued. Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). In each of the above-cited decisions, the Board posted vacant positions, requiring employees on preferred recall to apply for them, along with all other regularly employed school personnel, substitutes, and new candidates. While the provision of W. Va. Code § 18A-4-8b providing that, "[n]o position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment", could be interpreted to mean that employees on preferred recall must be given priority over all other school service personnel when filling vacancies, this Board has declined to find that a board of education's practice of posting all vacancies and requiring all personnel to apply is clearly wrong, or contrary to law.

Therefore, it was not unlawful for the Board to employ Grievant as a substitute at the beginning of the Fall 1999 school year in accordance with the provisions of the Agreement, until it posted and selected an employee to fill the position on a regular permanent basis. As a substitute, and further in accordance with the Agreement, Grievant was ineligible to make extra-duty night trips.

#### CONCLUSIONS OF LAW

1. In a non-disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

2. W. Va. Code § 18A-4-8b authorizes school service employees to agree to an alternative method of assigning extra-duty trips, provided a two-thirds (2/3) majority of the employees vote on the alternative method.

3. Two-thirds (2/3) majority of the Wayne County school bus operators voted to alter the method of assigning extra-duty trips in accordance with Code § 18A-4-8b. Pursuant to the Agreement reached, substitute bus operators are not permitted to make extra-duty night trips unless no regularly employed bus operator is available to make the run.

4. Grievant was properly reduced-in-force and placed on the preferred recall list in the Spring of 1999.

5. 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 regularly employed personnel receiving preference over service personnel who have been awarded preferred recall status as a result of their employment being discontinued. Hlebiczk v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997); Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Martin/Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994).

6. It was not clearly wrong or contrary to law for the Board to reemploy Grievant as a substitute bus operator in the beginning of the Fall 1999 school year, pending posting of vacant runs.

7. As a substitute, Grievant was ineligible to make extra-duty night trips, in accordance with the Agreement.

Accordingly, this grievance is **DENIED**.

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

However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: May 11, 2000**

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[Footnote: 1](#)

Mr. Brumfield is the only grievant in this matter.