

JIMMY CISCO,
Grievant,

v v.

Docket No. 00-29-087

MINGO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jimmy Cisco, employed by the Mingo County Board of Education ("MCBOE" or "Board"), filed the following two grievances on or about January 4 and February 1, 2000:

STATEMENT OF GRIEVANCE: Grievant is currently a regularly employed Custodian III at Matewan Middle School. Grievant has filed two separate grievances (which have been consolidated) grieving his non-selection for custodial vacancies at Varney Grade School and Gilbert Grade School, respectively. The Grievant contends that these positions were awarded to less senior applicants and alleges a violation of West Virginia Code §§ 18A- 4-8b and 18A-4-8g.

RELIEF SOUGHT: Grievant seeks reinstatement into one of the vacancies of his choice, wages, benefits, and regular employment and seniority retroactive to the date(s) of filling the vacancy(ies) (sic). Grievant also seeks interest on all monetary sums and retroactive regular seniority.

At Level I, Grievant's supervisor did not have authority to resolve these grievances. A Level II hearing was held on February 10, 2000, and the grievances were consolidated at that point. A Level II decision denying the grievances was issued on February 25, 2000. Grievant bypassed Level III and appealed to Level IV on March 6, 2000. A Level IV hearing was held on May 8, 2000. The deadline for the parties' proposed findings of fact and conclusions of law was June 19, 2000, at which time these grievances became mature for decision. ([See footnote 1](#))

Issues and Arguments

Grievant made multiple arguments. Grievant argued he should have received regular seniority from August 9, 1999, to October 11, 1999; he should have received regular seniority for three positions he held from 1995 to 1998; and he was improperly notified his position as a long-term substitute was to be terminated. Grievant also notes it is unfair for another employee, who had less substitute seniority than he, to now have greater regular seniority than he, due to a stroke of fate.

Respondent asserts Grievant's regular seniority was properly calculated according to statutory requirements; Grievant cannot receive seniority for the prior positions because they were not posted for bid; and the notice received by Grievant was the type required by statute.

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 has been employed as a substitute Custodian III by MCBOE since January 3, 1995.
2. Between January 3, 1995, and November 9, 1998, Grievant was called off of the substitute list three times for positions in which he stayed long enough to receive regular status. These were not posted positions, and Grievant did not bid competitively on any of these positions. One of these positions was Grievant's first substitute assignment.
3. Both Grievant and Bruce Gibson applied for two posted leave of absence positions in late October or early November of 1998. Since neither applicant had any regular seniority, and Grievant had the earlier substitute date, Grievant was offered his choice of the two positions. He selected the eight hour, full-time position at Gilbert Grade School ("GGG"). Mr. Gibson received the half-time position.
4. As the result of these positions both Grievant and Mr. Gibson had a regular seniority date of November 9, 1998.
4. Grievant worked in the position at GGS from November 9, 1998, until August 9, 1999, at which time the regular employee returned to work.
5. Grievant was notified by letter dated August 4, 1999, that he would be returned to his position on the substitute list.
6. Mr. Gibson continued to work in his regular, posted, part-time, leave of absence position.
7. Grievant worked regularly as a substitute, from the substitute list, from early August until he

received a posted, leave of absence position on October 11, 1999. 8. Grievant's regular seniority date was then adjusted from November 9, 1998, to January 13, 1999, due his break in regular seniority.

9. On December 3, 1999, and January 18, 2000, the half-time positions at issue in this grievance were posted for Varney Grade School ("VGS") and GGS, respectively. Both Grievant and Mr. Gibson applied for both positions, and both applicants had regular status at the time of their applications because they were in posted, leave of absence positions. Both positions were awarded to Mr. Gibson because he had the greater amount of regular seniority as his seniority date was November 9, 1998, and Grievant's was January 13, 1999.

10. The VGS position was a vacancy, and the GGS position was a leave of absence position.

Discussion

As this grievance does not involve a disciplinary matter, 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

The issues raised by Grievant will be discussed separately.

A. Whether Grievant received proper notice of the termination of his leave of absence position in August 1999?

Grievant was in a posted, leave of absence position in August 1999 when he received notice that he would be returned to the substitute list. Pursuant to W. Va. Code § 18A-4 15(2), Grievant received the notice of the termination of this employment to which he was entitled. This Code Section states:

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: Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided herein, upon termination of the leave of absence said employee shall be returned to his or her original position; . . .

(Emphasis added.)

Grievant was aware he was filling a leave of absence vacancy, and he knew at the time he received the position that it would end when the regular employee entitled to the position returned. After the return of the absent employee, Grievant was returned to his original position on the substitute list. This is what this Code Section envisions, and this is what happened. No other notice is required in this situation. It should be noted that to require a board of education to give notice in April of the prior year to an employee in Grievant's position would be impossible, as a board of education does not know when an employee who is on a leave of absence will return.

B. Whether Grievant should receive regular seniority for the time he in worked in positions that were not posted or competitively bid?

This question has already been answered by this Grievance Board in the negative. The reasoning behind this determination requires a review of various Code Sections and Grievance Board decisions. W. Va. Code §18A-4-15 requires the position of an employee on leave of absence beyond thirty days to be filled pursuant to the requirements of W. Va. Code §18A-4-8b. W. Va. Code § 18A-4-8b states:

A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

. . .

Applicants 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.

This Code Section requires the position must be posted, and then outlines how the position must be filled, with substitute employees fourth in line for consideration. Once a position is filled in the prescribed manner, the substitute holding the position "shall be accorded all rights, privileges and benefits pertaining to such a position." W. Va. Code §18A-4-15.

W. Va. Code §18A-4-8g clarifies the seniority issue stating:

The seniority for service personnel shall be determined in the following manner:

Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5], article two of this chapter and continues until the employee's employment as a regular employee is severed with the county board. . . . Seniority accumulation for a substitute employee shall begin upon the date the employee enters upon the duties of a substitute as provided in section fifteen [§ 18A-4-15] of this article, The seniority of a substitute employee, once established, shall continue until such employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter or employment as a substitute with the county board is severed. . . .

For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e [§ 18A-4-8e] of this article: . .

. .

The county board shall establish the number of calendar days between the date the employee left the class title or category of employment in question and the date of return to the class title or classification category of employment. This number of days shall be added to the employee's initial seniority date to establish a new beginning seniority date within the class title or classification category. The employee shall then be considered as having held uninterrupted service within the class title or classification category from the newly established seniority date. . . .

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. (See footnote 2) 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.

. . .

Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose. . . .

(Emphasis added.)

W. Va. Code § 18A-4-8g is clear, and this portion of the grievance is very similar to the issues raised in Lambert v. Lincoln County Board of Education, Docket No. 93-22- 547 (September 29, 1994). In that grievance, the employee also wanted to receive regular seniority for the years she was in a leave of absence, non-posted position. The ruling here must be the same as in Lambert. Grievant cannot be awarded any seniority for the three positions in which he served prior to November 1998. He was called off the substitute list and did not have to bid or compete to receive these positions. Id.

Grievant knew at the time he was hired he was serving in substitute positions. Id. He also knew

he had not received the jobs through a posting and selection process as required by statute, if an employee is to receive seniority. Id. Further, it is clear MCBOE should have posted at least some of these positions, and Grievant could have grieved MCBOE's failure to post these positions, at the time these events occurred. Grievant raised no questions about his employment status in those positions until he did not receive either of the positions posted in December 1999 and January 2000.

Because of MCBOE's failure to post these positions, Grievant was able to receive and maintain three positions without going through the selection process. While he kept these positions he received all the other rights and benefits of a regular employee, with the exception of regular seniority. He did, of course, accrue substitute seniority. One of these positions was his first substitute position, and he was able to serve in this position for over five months. If this position had been posted, it is likely Grievant would not have received it due to his lack of seniority. Id. These positions ended years ago, and MCBOE cannot correct the situation now. Id. Thus, based on a review of the statutes and this Grievance Board's case law, Grievant cannot receive retroactive, regular seniority for positions he held which were not posted. Id.

Grievant's argument that regular seniority should be granted after August 9, 1999, must also fail. Again, W. Va. Code §18A-4-8g clearly states an employee shall acquire regular employment status and seniority only if the position is filled pursuant to the statutory requirements. None of the positions Grievant held from August 9, 1999, to October 11, 1999, when he again received a regular, posted, leave of absence position, were posted, nor was there any evidence presented that they should have been. Benefits not available to substitute employees by statute are regular employment status and seniority. W. Va. Code § 18A-4-8g; Lambert, supra.

C. Whether the selection of Mr. Gibson was correctly and properly done?

At the time the two positions at issue were posted and bid, both Grievant and Mr. Gibson had achieved "regular employee status", as they held posted leave of absence positions. 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 (August 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.

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 (August 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, supra, 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 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.

Since both employees had "regular seniority status" at the time of the selection, and both candidates were qualified for the positions, the positions were awarded to Mr. Gibson, as he had the most regular seniority. [\(See footnote 3\)](#) See Hlebiczk 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).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va.

Code § 18-29-6.

2. Pursuant to W. Va. Code § 18A-4-15, Grievant received the notice to which he was entitled after his leave of absence position ended in August 1999, and he was returned to his former position.

3. Pursuant to W. Va. Code § 18A-4-8g, Grievant cannot receive regular seniority for the period of time he worked in substitute positions that were not posted and competitively bid. Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-549 (Sept. 29, 1994).

4. "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.

5. 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.

6. When Grievant was once again employed as a regular employee, his regular seniority date was properly adjusted and recalculated pursuant to W. Va. Code § 18A-4-8g to reflect the time he did not work as a regular employee. 7. Since both applicants were regularly employed at the time the positions were filled, Mr. Gibson was correctly chosen to fill the positions as he had the most regular seniority. W. Va. Code § 18A-4-8g; Messer, supra.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 20, 2000

[Footnote: 1](#)

Grievant was represented by Attorney John E. Roush, of the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Hannah Curry.

[Footnote: 2](#)

This portion of the Code Section was amended effective July 1, 2000. A new portion was added after the footnote which states: "Provided, however, That upon termination of a leave of absence or a suspension, the employee shall return to the status previously held. If the employee returns to substitute status, the employee shall retain any regular status accrued, however, this seniority may not be used in the bidding process for regular positions unless the employee again attains regular status or has attained preferred recall status."

[Footnote: 3](#)

W. Va. Code § 18A-4-7b(d) allows for the proration of seniority for professional personnel in half-time versus full-time positions. There is no such provision for the proration of the seniority of service personnel.