

JOHN CROWDER,
Grievant,

v v.

Docket No. 00-20-178

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, John Crowder, employed by the Kanawha County Board of Education ("KCBOE" or "Board"), filed the following grievance on or about January 21, 2000: "I was improperly denied the carpenter job at Crede." Grievant sought instatement into the position, and the right to take the Carpenter competency examination.

At Level I, Grievant's supervisor denied the grievance on February 11, 2000. A Level II hearing was held on May 3, 2000, and a Decision denying the grievance, in part, and granting the grievance, in part, was issued on May 18, 2000. [\(See footnote 1\)](#) Although unclear from the record, it appears Level III was waived by KCBOE. The parties agreed to submit the case on the record, and this case became mature for decision on September 7, 2000, the date proposed findings of fact and conclusions of law were due. [\(See footnote 2\)](#)

Issues and Arguments

Grievant made multiple arguments. First, Grievant alleged a procedural due process argument, and asserted he had a protected property interest in his former position. Grievant also argued he should have received regular seniority for the substitute position he held for nine years. Additionally, Grievant argued he was promised he would receive regular employment. Further, Grievant continued to argue he should be given the competency examination, even though this relief was granted after the Level II hearing. [\(See footnote 3\)](#) Respondent asserted that pursuant to statutory and case law, Grievant cannot receive regular seniority for the time he served as a substitute because he did not

receive the position pursuant to posting. Respondent noted any promises made to Grievant would be ultra vires, as the Board is required to follow the mandates of the Code Sections which govern the employment of service personnel, and final approval for hiring is within the authority of the Board. [\(See footnote 4\)](#)

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 was employed by KCBOE as a substitute General Maintenance worker on December 13, 1990.
2. Grievant was hired to fill the position of Gene Hall, who was off on a leave of absence. This position was not posted. [\(See footnote 5\)](#)
3. Although Grievant served in this position for nine years, it was never posted. At the time Grievant originally received this position, KCBOE was not posting these positions unless an employee had officially requested and was granted a leave of absence.
4. At a later date, KCBOE learned the Grievance Board had ruled that any absence of a regular position that lasted longer than 30 days must be posted.
5. KCBOE then posted all positions that had a leave of absence of greater than thirty days as they occurred, but did not go back and post the prior positions that were already filled. As Grievant held one of these positions, his General Maintenance position was not posted.
6. Grievant was aware KCBOE had decided not to post his position and to only post the new leave of absence positions. Grievant's Test. Level II Hearing, at 16, 21-22.
7. Grievant was issued yearly substitute contracts. These contracts usually listed Grievant as a "General Maintenance", but also listed Grievant as a "Custodian", "Service Substitute", and "Multi-class G".
8. Grievant has taken and passed the custodian competency examination. He received his classification in General Maintenance before competency examinations were required. [\(See footnote 6\)](#)
9. The employee Grievant was subbing for received total disability and resigned from his position. This position was posted on January 3, 2000, and Grievant applied.
10. Many employees applied for the position, and some of the applicants were regularly

employed service personnel. [\(See footnote 7\)](#)

11. Because so many regular employees applied, the Carpenter competency examination was first offered only to regular employees, as they would have preference in hiring pursuant to W. Va. Code § 18A-4-8(b). See Hlebiczk v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997). If one of these regular employees had not passed the exam, then substitute applicants would have been given the competency examination.

12. Grievant had applied for other 261 day regular positions in the past and had not received them because more senior, regular employees had applied and received them.

13. Grievant knew that he did not have regular seniority, had not received his position pursuant to posting, and had continued to keep his substitute position after KCBOE's decision to post all new leave of absence positions.

14. The successful applicant for the position, Jeff Carver, was a regular employee whose date of hire as a regular employee was March 3, 1987. For the majority of his time as a employee he had served as a Custodian III. At the time of his application for the Carpenter II position he was serving as a Carpenter II in a posted, leave of absence position; thus, he was a regular employee at the time of the hire. [\(See footnote 8\)](#)

15. Grievant took and passed the classified-exempt competency examination after the Level II hearing.

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. [\(See footnote 9\)](#)

A. Whether Grievant should receive regular seniority for the time he worked in a position that was not posted or competitively bid?

This question has already been answered repeatedly 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. See Hlebiczki, supra. 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 10) 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). See Cisco v. Mingo County Bd. of Educ., Docket No. 00-29- 087 (July 20, 2000). In Lambert, the employee also wanted to receive regular seniority for the many 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 regular seniority for the years he served in a non-posted position. He did not have to bid or compete to receive this position, and was indeed lucky to serve in such a sought after position for so many years. Lambert, supra.

Grievant knew at the time he was hired he was serving in a substitute position. Id. He also knew he had not received the job through a posting and selection process as required by statute, if an employee is to receive seniority. Id. Further, it is clear KCBOE decided to post only new leave of absence positions, and it informed Grievant of this decision. Grievant could have grieved KCBOE's failure to post this position, at the time this event occurred. Grievant raised no questions about his employment status while in this position until he did not receive it. He also did not question his status when he was denied prior positions for the same reasons he was denied this position. Grievant knew his status, was aware he had no regular seniority, knew he had not received prior positions because of the status, and did not grieve until he lost his "plum" 261-day position. This failure to grieve before this time is certainly understandable, but cannot now be used in his favor.

Because of KCBOE's failure to post these positions, Grievant was able to receive and maintain a position for nine years without going through the selection process. The testimony is clear that these positions are sought after, and filled with regular employees when they are posted. Here, Grievant kept this 261-day position, and also received all the other rights and benefits of a regular employee, with the exception of regular seniority and payment into retirement. He did, of course, accrue substitute seniority. This position was his first substitute position, and if this position had been posted, it is very likely Grievant would not have received it due to his total lack of seniority. Id. Thus, based on a review of the statutes and this Grievance Board's case law, Grievant cannot receive retroactive, regular seniority for a position he held which was not posted. Id.; Cisco, supra.

B. Whether the selection of Mr. Carver was correctly and properly done?

At the time the position at issue was posted and bid, Mr. Carver was a regular, long term

employee. Grievant was a substitute employee. As previously stated, W. Va. Code § 18A-4-8b grants preference to regular employees, with substitute employees being fourth in line. It should also be noted that even if Grievant were to receive regular seniority for all the years he served as a substitute, he still would not have more seniority than Mr. Carver who was hired as a regular employee in 1987.

C. Detrimental reliance

Grievant alleges he was promised he would receive a regular position. It is unclear when these promises were made, by whom, and exactly what was said. Even if someone promised Grievant he would receive a regular position, they would not be in a position to make this promise as final authority on hiring is for a board of education. This promise would be seen as an ultra vires act. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

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-4-8g, Grievant cannot receive regular seniority for the period of time he worked in a substitute position that was not posted and competitively bid. Lambert v. Lincoln County Bd. of Educ., Docket No. 93-22-549 (Sept. 29, 1994).

3. Grievant did not prove a due process violation.

4. Grievant did not prove he had an entitlement or property interest in the position at issue. 5. "Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such

acts." Roncaglione v. Dep't of Health and Human Resources, Docket No. 99-BEP-498 (Apr. 28, 2000; Franz v. Dep't of Health and Human Resources, Docket No. 99-HHR-228 (Nov. 30, 1998). See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

6. Grievant did not prove he was promised he would receive employment by anyone with the authority to make such a promise.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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: September 15, 2000

[Footnote: 1](#)

KCBOE was directed to allow Grievant to take the Carpenter competency examination the next time it was offered.

[Footnote: 2](#)

Grievant was represented by Attorney Hoyt Glazer, and Respondent was represented by its attorney, James Withrow.

[Footnote: 3](#)

This issue is considered moot since Grievant was given and passed the exam, and no further discussion on this issue is necessary.

[Footnote: 4](#)

As the procedural due process issue was not raised below, it was not addressed by KCBOE in its submissions. This issue and situation is discussed in note 9.

[Footnote: 5](#)

It is unclear if Grievant was actually on the substitute list when he received the substitute position. It is possible he

received the position because he was related to a Board member. If this were true, Grievant would have been incorrectly placed in the position.

[Footnote: 6](#)

Grievant alleged during the Level II hearing that he was multi-classified. It was unclear what other competency examinations Grievant had taken and passed. Grievant was employed in General Maintenance prior to the competency examination requirement; and thus, would be considered to hold this classification. He also worked as a Glazier as he had prior training in this craft, but it was unclear from the record whether this position was before or after the competency examination requirement. It appears from the record that Grievant's actual classification during the majority of this time did not change although the duties he performed did. The testimony also revealed Grievant performed the duties of a Carpenter I, as he assisted and helped in the building of various objects. It does not appear Grievant functioned as a Carpenter II.

[Footnote: 7](#)

It was noted in the record that the craft positions at Crede were considered the "best" service personnel positions as they were for 261 days and were paid on an F-3 scale. As such, these positions were highly sought and had many applications from regular employees. Many regular employees who had contracts for a lesser term applied for these positions, especially so they could improve their retirement benefits.

[Footnote: 8](#)

It would appear that Mr. Carver had not taken the Carpenter competency examination at the time he was serving in this Carpenter II position. Only employees who are qualified for the classification should be serving in a position, unless some type of temporary, emergency situation exists. Accordingly, in the future, KCBOE should make sure all positions are filled with employees who have passed the competency examination, whether they are substitute or regular employees.

[Footnote: 9](#)

Because the due process argument was not raised below, KCBOE did not have an opportunity to respond; however, the undersigned Administrative Law Judge will briefly address this issue.

Grievant alleges he had a property interest in his continued employment, and KCBOE's continuing renewal of his yearly, substitute contract was an undertaking by the employer which gave rise to an objective expectation on the part of Grievant of continued, regular employment. Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983). Grievant cites West Virginia University v. Sauvageot, 185 W. Va. 534, 408 S.E.2d 286 (1991)(per curiam) as support for this argument contending the situations are exactly the same.

A review of the facts and holdings in Sauvageot find the situations of the two employees are not similar. Additionally, there are education employment statutes that must be applied to this grievance, and Sauvageot and Grievant were in different positions. It should also be noted that Sauvageot's relief was limited, and the "peculiar circumstances" of this case were stressed. Further, no personnel were to be displaced to grant her continued employment. Id. at 538.

Here, Grievant was not serving in a position of his own, and he was well aware his position was that of a substitute in a non-posted position. This information was reinforced with Grievant in a variety of ways throughout the years. He received yearly contracts which noted his employment as a substitute; he was not allowed to participate in the retirement program; he was informed that the policy was changing about posting positions, but that this would apply to new positions and his position would not be posted; he applied for positions and was told he would not receive them because senior, regular employees had preference; and he was also informed when he applied for these positions that he did not received them because he had no regular seniority. Accordingly, there was no due process violation.

*Further, unlike the situation in Sauvageot, numerous Code Sections clarify and mandate that regular employees have preference in hiring, [\(See footnote 11\)](#) and a substitute employee cannot receive regular seniority unless he is placed in a position pursuant to posting. Even then this regular, "substitute" seniority is of a very limited nature. See W. Va. Code § 18A-4-8g. Grievant had no property interest here as he had no legitimate claim of entitlement under the existing Code Sections and Grievance Board Decisions. To grant this grievance would go against the statutorily mandated entitlement of a regular employee. See Hlebiczk*i*, supra.*

[Footnote: 10](#)

This portion of the Code Section was amended, effective July 1, 2000. A new portion was added 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." Grievant had not earned any regular seniority.

[Footnote: 11](#)

These Code Sections will be quoted in a later portion of this Decision.