CHARLES CARROLL,

Grievant,

v. **Docket No. 00-06-369**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Charles Carroll, Grievant, submitted this grievance under W. Va. Code §§ 18-29-1, et seq., alleging Respondent Cabell County Board of Education (CCBE) incorrectly filled a variety of bus operator positions and denied him his seniority. He also alleges sex and age discrimination. He seeks as relief to receive back pay and placement into one of the positions. (See footnote 1)

Grievant discussed the issues of this grievance with his immediate supervisor on August 22, 2000. He had an informal conference on September 21, 2000, and filed this grievance on September 25, 2000. Following a Level II hearing on October 30, 2000, this grievance was denied on November 20, 2000. Grievant appealed to Level IV on November 29, 2000, and, after multiple attempts to schedule a hearing, a Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on March 6, 2001. At the Level IV hearing, Grievant wanted to expand his grievance, and argue CCBE should have posted vacant positions in April 2000. Respondent objected to Grievant's desire to amend his grievance, and also noted this addition would be untimely. This case becamemature for decision on the hearing date as neither party wished to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant's arguments were difficult to follow or understand, but in essence, he maintained once he achieved regular seniority in a temporary, probationary position posted for the 1999-2000 school year only, he could never be returned to the substitute list. Further, Grievant asserted that once a random drawing was held to established seniority between two bus operator regularly employed on the same

day, the seniority of the two employees, as it related between them, could never change, even if the winner of the random drawing, Grievant, stopped accruing regular seniority. Grievant also argued this random drawing entitled him to "bump" this other bus operator, who continued to hold a regular position, when Grievant's temporary position ended. Grievant also avers he was RIF'd from the temporary position, and CCBE was required to place him on the preferred recall list. Additionally, Grievant asserted Respondent engaged in sex and age discrimination. (See footnote 3)

Respondent maintains the filling of all the positions was in accordance with the appropriate statutes. Respondent does note that for a brief period of approximately a week, there was a misunderstanding as to the type of seniority Grievant achieved during his temporary position, but this was quickly corrected, and Grievant was not harmed. (See footnote 4) In the alternative, Respondent noted Grievant could have received a regular, full-time position and turned it down, so if this grievance were granted, there would be little compensation, as Grievant failed to mitigate his damages.

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 first worked as a substitute bus operator on November 23, 1998.

2. In December, 1999, Grievant, still a substitute, applied for a regular, full-time vacancy. On January 4, 2000, this position was awarded to Victoria Blevins, a regularly employed aide, who was fully certified as a bus operator.

3. In March 2000, Grievant, still a substitute, applied for two vacant positions. One of the positions, Route 534, was a regular, half-time position. The other position was a temporary, full-time position that would end at the close of the school year. (See footnote 5) This information was clearly placed on the posting. 4. D. Shawn Gibson, a substitute with greater seniority, also applied for these two positions. As the most senior applicant, Mr. Gibson was allowed to select the position he wanted. He selected Route 534, the regular, half-time position, as it did not have an ending date, and his regular employee status would continue past the end of the current school year.

5. Grievant received the temporary, full-time position that would end at the close of the school year, Route 618.

6. Since both substitute employees began their regular employment on the same day, a random drawing was held within thirty days, pursuant to W. Va. Code § 18A- 4-8g.

7. Grievant won the random drawing, and he would thereafter have priority over Mr. Gibson in future bidding situations, if their regular seniority remained the same.

8. Grievant received a probationary contract for service personnel which indicated his position was for the reminder of the school year only. He signed this contract.

9. After the end of March, 2000, Respondent did not post any more bus operator positions, but instead filled these positions with substitutes. Respondent did not post any more positions because it was aware that all bus operator routes would be realigned due to a RIF, and Respondent was uncertain how many positions would be available, and how many regular employees would need placement after transfers into positions. Additionally, CCBE would be unable to meet the statutory time limits to inform newly hired employees of a need to RIF them. 10. Grievant was aware in April, 2000, that Respondent had not posted any of the positions he thought were vacant. Grievant presented no proof of any vacant positions that were filled by substitutes, nor did he clearly identify how long these positions were filled by substitutes from the substitute list. (See footnote 6)

11. On April 19, 2000, approximately two weeks after Grievant assumed the temporary position, Sandra Rupert, Manager of Service Personnel, sent Grievant a letter informing him that the names of next year's substitute service personnel were presented to CCBE on April 18, 2000, and if he wished to remain on the substitute list for 2000 - 2001, he " **must**" come to her office no later than May 29, 2000, to sign a new contract or he would forfeit his substitute standing. (Emphasis in the original.)

12. On April 26, 2000, Grievant signed a probationary contract for substitute service personnel for the 2000 - 2001 school year.

13. In August, 2000, prior to the beginning of the school year, CCBE posted the available bus operator positions. One of these vacancies was a full-time, leave of absence position, Route 571. Grievant applied for this position. Mr. Gibson also applied, and he received the position as he was the most senior, regularly employed applicant. 14. Contrary to his testimony, Grievant did not first learn he was a substitute on August 22, 2000, when he returned for the bidding of the year's positions.

15. Grievant did not received Route 571, vis a vis Mr. Gibson, because Grievant, at the time of

his application, was a substitute, with a few months of regular seniority, and Mr. Gibson was a regularly employed bus operator.

16. Grievant stopped earning regular seniority when his temporary position ended on June 7, 2000. Mr. Gibson did not stop earning regular seniority at that time as his position continued into the next year.

17. Mr. Gibson's half-time, leave of absence position was posted, and Grievant applied and received the position. Grievant also substituted in this position during the posting period.

18. Grievant also applied for a full-time, regular position which he would have received because of his seniority, but he refused this route when it was offered to him. Grievant's rationale was that this position would not be convenient for him. This position would have offered Grievant greater compensation and would have been a more secure position than the one he currently holds. (See footnote 7)

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 § 4.21 (2000); 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

A. Timeliness of the amendment

Grievant's request to amend his grievance will be addressed first. Grievant wishes to amend his original grievance to assert CCBE did not post positions after March 2000. Grievant's argument seems to center around his belief his position could not be cut while there were jobs available, not that he would have applied for these positions, if they had been posted. This argument is not present in his Statement of Grievance. Grievant did allude to positions not being posted during the lower level hearing, but without any routes specified or any evidence to support his contention. He asked Ms.

Rupert to confirm his contention about not posting positions that continued into the next school year, and she testified she did not know of any from her memory. At the close of the Level II hearing, Grievant stated, "the only issue is the fact that I feel you can't cut a more senior employee's wages that are off the payroll, period." Grievant did not explain this statement further. In his post-hearing submissions at Level II, Grievant argued Route 555 should have been posted, was filled by a substitute from the end of March until the end of the school year, and this route would continue on into the next school year. (See footnote 8) During the Level IV hearing, Grievant again argued Route 555 should have been posted in March, 2000, again Ms. Rupert did not support this contention. Grievant did testify that he believed the position was filled by a substitute off the substitute list from March, 2000, till the end of the school year. This testimony was based on "the best of [his] knowledge" and the information had not been checked with the Director of Transportation.

Respondent objected to Grievant making this argument at Level IV on two grounds: 1) timeliness, as the issue of Route 555 was not raised at the lower levels until after the Level II hearing; and 2) seeking amendment of the grievance at Level IV, is prejudicial to Respondent, and constitutes surprise. Respondent did not have the materials available to respond to Grievant's assertions.

In assessing the arguments on this issue, the undersigned Administrative Law Judge finds Grievant's raising of this issue to be untimely. If Grievant believed there were positions that should have been posted in April 2000, and these were positions he wanted, he should have filed a grievance at that time. There is nothing Respondent can do about the possible problem at this late date.

It also appears that even if the argument is considered, it is without merit. Grievant would not have applied for Route 555, even if posted, as this was half-time position, andhe was in a full-time position. However this does not appear to be the basis of Grievant's argument. Grievant argues he was RIF'd during a time when Route 555 was unfilled, and Grievant believes he cannot be RIF'd when there are vacant positions unfilled. Grievant then argues since he cannot be RIF'd he must be placed in Mr. Gibson's position because he is more senior than Mr. Gibson. In essence, the alleged failure to fill Route 555 mandates he bump Mr. Gibson from his position. Grievant then argues he should then be placed into Route 571, the position Mr. Gibson received after the start of the 2000 - 2001 school year.

Grievant was not RIF'd, he was a probationary employee serving in a temporary contract which

expired on its own terms. A RIF did not occur in this situation. (See footnote 9) See Conley/Farley v. Logan County Bd. of Educ., Docket No. 98-23-425 (Feb. 3, 1999).

B. Merits

As for Grievant questions about what his status and seniority should be at the end of June, 2000, this question is answered by the terms of the contracts he signed. Grievant's assertion that he believed he was a regular employee and not a substitute inAugust 2000, is not credible. Grievant applied for a position that was posted as temporary, until the end of the school year. He signed a contract in March 2000, saying he would serve in a regular, full-time position until the end of the school year. Grievant received a letter dated April 19, 2000, stating he had been approved as a substitute for the 2000-2001 school year, and if he wanted to continue as a substitute he must sign a contact. He signed this contract entitled "Probationary Contract for Employment for Substitute Personnel" on April 26, 2000. This substitute contract stated it would began in August 2000. If Grievant had any concerns about his status or believed he should have been placed of the RIF list, the time to question or grieve this issue was when it occurred, in April, 2000.

Grievant's contract ended according to its own terms on June 7, 2000. The starting and ending dates of the contract were known on the date the contract was issued and signed. As previously held by this Grievance Board, when a contract "entered into pursuant [to statute] ceases to exist and that cessation is expressly provided for in the terms of the contract, the contract comes to an end by its own terms and is not subject to the procedural requirements of [W. Va. Code §18A-2-8a]." Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994). Grievant's contract came to an end by its own term; thus, no violation of statute occurred.

This situation is analogous to the events in Conley, supra, and Hudson v. Kanawha County Board of Education, Docket No. 00-20-234 (September 27, 2000). In both those cases, the employees applied for and received temporary positions for the school year only. This information was clearly placed on the postings. The administrative law judgein Conley held that "once [the board of education] posted the positions as positions which would end at the end of the school term, it was bound by that condition. . . ." (See footnote 10) See Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995). Here, Grievant was not RIF'd, and he was returned to his former position as a substitute.

As for Grievant's argument that the random drawing allowed him later to "bump" Mr. Gibson, the language of the statute does not support this contention. W. Va. Code § 18A- 4-8g(f) states:

> If two or more employees accumulate identical seniority, the priority shall be determined by a random selection system established by the employees and approved by the county board. A board shall conduct the random selection within thirty days upon the employees establishing an identical seniority date. All employees with an identical seniority date within the same class title or classification category shall participate in the random selection. As long as the affected employees hold identical seniority within the same classification category, the initial random selection conducted by the board shall be permanent for the duration of the employment within the same classification category of the employees by the board. This random selection priority applies to the filling of vacancies and to the reduction in force of school service personnel. . . .

(Emphasis Added.)

Grievant misinterprets this Code Section. The results of the random drawing apply "to the filling of vacancies". Mr. Gibson still holds a regular position which he achieved by his greater seniority. There has been no vacancy which requires filling. (See footnote 11) Again, Grievantwas not RIF'd, he was not placed on the preferred recall list, and he has no bumping rights.

As for Grievant's seniority, he, of course, retains the regular seniority he received while he was in the temporary position, and it can be utilized in applying for future positions since it was not received in a leave of absence vacancy. See W. Va. Code § 18A-4-8g(e). However, at this point in time, Grievant is no longer more senior than Mr. Gibson, because Grievant's position terminated, and there a period of time when Mr. Gibson continued to earn regular seniority, and Grievant did not.

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 § 4.21 (2000); 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 preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't

of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. Grievant's contract of employment expired under its own terms as contemplated by the parties when the 1999 - 2000 school year ended. Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994). See Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995).

3. Once CCBE posted the position held by Grievant as a one year position,"it was bound by that condition, or bound to repost the [position] correctly so that other school service personnel would not be misled, and could make an informed decision as to whether to bid on [this position]." Conley/Farley v. Logan County Bd. of Educ., Docket No. 98-23-425 (Feb. 3, 1999). See Hudson v. Kanawha County Bd. of Educ., Docket No. 00- 20-234 (Sept. 27, 2000); Underwood, supra.

4. The random drawing required by W. Va. Code § 18A-4-g(f) does not entitle the winner to retain greater seniority over the other employee indefinitely. If the other employee remains regularly employed while winner does not, the seniority between the two must be adjusted.

5. The seniority received by Grievant in the temporary position can be utilized in applying for positions even while his status is that of a substitute because the seniority was not earned in a leave of absence position. W. Va. Code § 18A-4-8g(e).

6. Grievant has not met his burden of proof and demonstrated CCBE violated any statutes, incorrectly filled any positions, or failed to credit him with the correct amount of seniority.

Accordingly, this grievance is **DENIED**.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 27, 2001

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

Footnote: 1

Grievant also requested attorney fees, but was at no time represented by an attorney.

Footnote: 2

Grievant represented himself, and Respondent was represented by attorney Howard Seufer.

Footnote: 3

Grievant presented no evidence on these issues at Level IV, and very limited evidence on this issue at Level II. Grievant's age is unknown, although the parties appeared to believe the bus operator at issue was younger than Grievant. The sexual discrimination issue was briefly discussed in Grievant's Level II Proposed Findings of Fact and Conclusions of Law. He believed it was incorrect to hire a female, regular aide, who was certified as a bus operator, into position in January, 2000, when Grievant was employed as a substitute. Grievant did not grieve this hiring until August 2000. Given the dearth of evidence on these issues they need not be addressed further as Grievant has failed to make a prima facie case of discrimination.

Footnote: 4

Grievant also testified this situation was quickly corrected without harm.

Footnote: 5

The temporary position Grievant filled was not a leave of absence position, but was a vacancy created by retirement. It was posted as a temporary position as it was not expected to continue the following year..

Footnote: 6

Grievant did place into evidence at Level IV, over the objection of Respondent, a list of five positions he believed went unposted past the statutory time. He developed this list from his memory, and it was based on what he though was true. He had no information to support his beliefs, and Ms. Rupert was unable to testify this list was accurate. She did say there were positions that she did not post at the end of the school year. Grievant stated that he believed four of the five positions terminated at the end of the 1999 - 2000 school year. Grievant was really only interested in one of the positions, Route 555. This position was posted at the beginning of the 2000 - 2001 school year, and Grievant did not receive it, as a regularly employed bus operator with greater seniority applied for and received the position.

Footnote: 7

This was the position filled by Tim Wentz, that Grievant referred to in his affidavit. It is unclear how Grievant could maintain he should receive full-time pay because Mr. Wentz held this position, after Grievant had turned it down.

Footnote: 8

It should be noted that Route 555 was posted in August, 2000, and Grievant applied for, but did not receive the position because a more senior, regular bus operator received the position. Grievant did not argue this position was improperly awarded in August, 2000.

Footnote: 9

It should be noted that the results differ in cases where the positions are not identified as temporary. See Knotts v. Preston County Bd. of Educ., Docket No. 00-39-387 (Apr. 9, 2001); Dakon v. Preston County Bd. of Educ., Docket No. 00-39-390 (Mar. 27, 2001). In those instances the board of education is required to place probationary employees on the preferred recall list when employment is terminated due to lack of need. However, even if Grievant had been placed on the preferred recall list, he would not be entitled to Mr. Gibson's position because W. Va. Code § 18A-4-8b grants preference to regular employees over employees on the preferred recall list.

Footnote: 10

The administrative law judge noted it would be unfair to other possible candidates who may have applied for these positions if they had been aware they would continue.

Footnote: 11

Additionally, it should be noted that Mr. Gibson received his choice of positions at the time they were originally filled because of his greater seniority. He intentionally selected the permanent position. It would be incorrect to reverse this outcome, specifically based on the seniority at the time of this choice.