MICHELLE MARSHALL,

Grievant,

v. **Docket No. 00-30-276**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Michelle Marshall, employed by the Monongalia County Board of Education (MCBOE) as a bus operator, filed a level one grievance on June 29, 2000, in which she alleged violations of W. Va. Code §§18-5-39 and 18A-4-8b when a summer position located at Cass Elementary School was improperly filled. For relief, Grievant requests priority for the assignment if it exists in 2001, and travel expenses she incurred during Summer 2000.

The record does not include a level one decision. The matter was denied at level two, and Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). Appeal to level four was made on August 21, 2000, and a level four hearing was conducted on October 26, 2000, at which time Grievant was represented by John E. Roush, Esq., of WVSSPA, and MCBOE was represented by Harry M. Rubenstein, Esq. The matter became mature for decision on December 4, 2000, the due date for final post-hearing submissions.

The following findings are derived from the record in its entirety, including the level two transcript and exhibits, and the level four proceedings.

Findings of Fact

1. Grievant has been employed by MCBOE since October 13, 1993, and has held the classification of bus operator since that time. 2. Grievant's spouse, Gerald Marshall, is also employed by MCBOE as a bus operator, with a seniority date of February 1, 1988.

3. Beginning May 19, 1999, and ending May 27, 1999, MCBOE posted a bus operator position for a summer, Title I assignment at Cass Elementary School. Mr. Marshall was awarded the position based upon his holding the assignment the previous summer.

4. Mr. Marshall resigned from the Cass position to accept another assignment beginning on July 14, 1999.

5. Upon Mr. Marshall's resignation, MCBOE reposted the Cass position from July 22, 2000, to July 30, 1999. MCBOE records include two applications from Grievant for this posting. The position was never filled since the assignment concluded on July 30, 1999.

6. During the second posting period, MCBOE assigned John Carpenter, a regularly-employed school bus operator with a seniority date of October 23, 1993, as a substitute for the run. Mr. Carpenter had been the applicant with the second highest seniority. Due to the duration of the assignment, Mr. Carpenter held the position until it concluded.

7. Grievant filed a grievance in 1999 contesting the placement of Mr. Carpenter in the assignment. While the grievance was denied at level two, the hearing officer also ruled that the assignment of Mr. Carpenter as a substitute employee was improper, as regular employees are not to be used as substitutes. 8. Based upon this ruling, and her understanding that the position would be re- posted in Summer 2000, if it was needed, Grievant did not pursue the grievance beyond level two.

9. MCBOE posted the Cass run from June 7, 2000, through June 13, 2000. The assignment was stated to be effective from June19, 2000, through July 20, 2000.

10. The assignment was again awarded to Mr. Carpenter based on his holding the position in 1999.

11. Grievant was not the most senior applicant for the Cass position in Summer 2000.

12. Grievant was awarded a “Kaleidoscope” run during Summer 2000. This assignment required her to complete an approximate fifty-mile round trip in her personal vehicle, while the Cass position required only a six mile trip. The Kaleidoscope run was significantly longer in duration causing Grievant to realize a substantially greater salary than that paid for the Cass run.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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); 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 argues that MCBOE violated W. Va. Code §18-5-39, when it failed to fill the Cass position in Summer 2000 pursuant to W. Va. Code §18A-4-8b. Specifically, she claims that she

should have been awarded the position since she had greater senioritythan Mr. Carpenter. Grievant also requests compensation for the travel expenses to and from the summer position she held which were beyond those she would have incurred had she held the Cass assignment.

MCBOE asserts that Grievant did not pursue her Summer 1999 grievance, and subsequently, Mr. Carpenter was properly placed in the position for Summer 2000, in accordance with W. Va. Code §18-5-39. MCBOE also argues that Grievant is not entitled to travel expenses because they were incurred as the result of her decision to accept the Kaleidoscope run, not as the result of a transfer, or other action, by the employer.

Because Grievant did not pursue the grievance she filed in 1999, she is not entitled to any relief regarding the initial placement of Mr. Carpenter into the Cass position. However, Grievant's present claim arises from the level two decision issued by MCBOE on October 22, 1999, which held that Mr. Carpenter had been improperly assigned to the run in 1999. The ruling regarding Mr. Carpenter's employment as a substitute was in error. W. Va. Code §18-5-39(f) provides, in part:

An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [§18A-4-8b], article four, chapter eighteen-a of this code. When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

Although Mr. Carpenter was properly employed by MCBOE to substitute on the Cass run in 1999, Code §18-5-39 does not grant substitute employees the option to retaina position the subsequent summer. When the position was posted in May 2000, MCBOE should have filled the vacancy pursuant to W. Va. Code §18A-4-8b.

W. Va. Code §18A-4-8b sets forth the procedure to be followed in filling vacancies in service personnel positions, and states in pertinent part as follows:

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.

It is well-settled by this Grievance Board that when filling service personnel positions under the provisions of W. Va. Code §18A-4-8b, the amount of regular seniority the applicants possess must be utilized to award the position, if such seniority is present. Tomblin v. Lincoln County Bd. of Educ., Docket No. 00-22-106 (July 14, 2000); Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (Mar. 16, 2000); Brunty v. Lincoln County Bd. of Educ., Docket No. 99-22-069 (July 13, 1999); Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).

Grievant has established that the selection process was contrary to the requirements of W. Va. Code §18A-4-8b, and that she has more regular seniority than Mr. Carpenter. However, Grievant failed to prove that she would have been awarded the Cass position in Summer 2000, had not the selection process been flawed. In a previous matter with a similar fact pattern, the Grievance Board has determined that the appropriate relief is for the employer to post and fill the position in accordance with W. Va. Code §18A-4-8b. Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987), aff'd, Circuit Court of Nicholas County, Civil Action No. 87-C-275 (Aug. 29, 1989). (See footnote 1)

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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); 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.

2. W. Va. Code §18-5-39(f) provides that “an employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer.” If the employee is unavailable the position shall be filled pursuant to W. Va. Code §18A-4- 8b.

3. Because the employee who has held the Title I run at Cass Elementary School in Summer 1999 was unavailable, and the substitute employee was not to be given priority for the position in Summer 2000, the position was to be filled pursuant to W. Va. Code §18A-4-8b.

4. Under the provision of W. Va. Code §18A-4-8b, service personnel positions are to be filled on the basis of seniority, qualifications and evaluations of past service. Edmonds v. Kanawha County Bd. of Educ., Docket No. 99-20-023 (Mar. 31, 1999). 5. When filling service personnel positions, the amount of regular seniority the applicants possess must be utilized to award the position, if such seniority is present. Ellis v.Lincoln County Bd. of Educ. , Docket No. 00-23-196 (Sept. 13,2000); Tomblin v. Lincoln County Bd. of Educ., Docket No. 00-22-106 (July 14, 2000); Griffith v. Boone County Bd. of Educ., Docket No. 99-03-172 (Mar. 16, 2000); Brunty v. Lincoln County Bd. of Educ., Docket No. 99-22-069 (July 13, 1999); Hall v. Mingo County Bd. of Educ., Docket No. 94-29-1110 (Sept. 29, 1995); Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993).

6. Grievant has proven by a preponderance of the evidence that the selection process was contrary to the requirements of W. Va. Code §18A-4-8b, and therefore, the position was unlawfully filled in Summer 2000.

7. Grievant failed to prove as a matter of law that she would have been employed in the Cass position for Summer 2000, had not the selection process been flawed. Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987), aff'd, Circuit Court of Nicholas County, Civil Action No. 87-C-275 (Aug. 29, 1989).

Accordingly, this grievance is **GRANTED**, and the Monongalia County Board of Education is hereby ORDERED to post and fill the Cass Elementary School Title I bus run, if it exists in Summer 2001, in accordance with W. Va. Code §18A-4-8b.

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

Date: January 12, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The foregoing conclusions make it unnecessary to address the issue of travel expense reimbursement.