DAVID SHELTON, et al.,

Grievants,

v. Docket No. 04-01-181

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent,

and

STEVE KAUFMAN,

Intervenor.

DECISION

David Shelton, Robert Stafford, Robert Golden, and Terry Tusing ("Grievants") initiated this proceeding on March 4, 2004, challenging Respondent's failure to post a bus run in which Intervenor substituted for a lengthy period of time, along with Respondent's treatment of Intervenor as a regular employee when he was ultimately selected to fill the same position. On March 18, 2004, Grievants' immediate supervisor advised that he was without authority to grant the relief requested. A level two hearing was held on March 31, 2004, and the grievance was denied at that level on April 21, 2004. Level three consideration was bypassed, and Grievants appealed to level four on May 11, 2004. A hearing was held in Westover, West Virginia, on July 19, 2004. Grievants represented themselves; Respondent was represented by counsel, Kimberly Croyle; and Intervenor was represented by counsel, John E. Roush of the School Service Personnel Association. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 30, 2004. The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed by Respondent as substitute bus operators.

2. On September 9, 2002, bus operator Glen Fisher was suspended from his employment; he had been assigned to bus 104.

3. Substitutes in the rotation were called by Respondent to fill Mr. Fisher's position. Grievant Robert Golden was not home, and a message was left on his answering machine on the evening of September 9, 2002; a similar message was left for Intervenor, who was also a substitute bus operator.

4. The other Grievants were working in other substitute positions on September 9, and they were not called to fill Mr. Fisher's position. Grievant Stafford was not called because he was on sick leave.

5. No substitute had accepted the Fisher assignment by the following morning. Intervenor visited the central office at approximately 9:30 a.m. and inquired whether the run had been filled. Since it had not, he was assigned to the position.

6. Mr. Fisher remained on suspension throughout the remainder of 2002 and the entirety of 2003. Grievants knew Mr. Fisher's position had not been posted for bid, and they inquired of their supervisor on at least one occasion as to why this had not occurred. Grievants knew there was no posting throughout 2003.

7. At a Board meeting held on January 12, 2004, the agenda contained the following item: “Approve the resolution of the employment issue with Ernest Glen Fisher.” Respondent has not explained what occurred at that meeting regarding Mr. Fisher. 8. Mr. Fisher never returned to his position as operator for bus 104. He did work for Respondent on January 22 and 23, 2004, but it is unknown what position he was working in at that time.

9. Mr. Fisher's position as operator for bus 104 was posted on January 20, 2004.

10. Grievants and Intervenor applied for the position. Intervenor also applied for a regular custodian position at the same time.

11. Initially, Intervenor was hired for the custodian position, and Grievant Stafford was selected to fill the bus operator position.

12. Due to a mistake regarding the filling of the custodian position, Intervenor could not be placed in it. Therefore, Respondent placed Intervenor in the bus operator position, and Grievant Stafford was returned to substitute status.

13. Intervenor was given preference over Grievant Stafford in filling the bus operator position,

because he was deemed to be a regular employee at the time, since he was still serving in Mr. Fisher's position.

14. All Grievants are more senior than Intervenor as substitutes, with Grievant Stafford being the most senior.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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.

Grievants contend that Mr. Fisher's position should have been posted, so that all bus operators could have had the opportunity to accept this long-term assignment. They also dispute Respondent's treatment of Intervenor as a regular employee while serving in the position, which ultimately led to his receipt of the position on a permanent basis.

However, as a preliminary issue, Respondent contends that Grievants' claim that the position should have been posted is untimely. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based. West Virginia Code § 18-29-4(a) provides, in pertinent part:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v.Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Grievants' response to Respondent's argument is that they filed the grievance when they first became aware that Intervenor was being treated as a regular employee, rather than as a substitute, while serving in the Fisher position. However, as pointed out by Respondent, Grievants are now claiming that the position should have been posted when Mr. Fisher was first suspended, which occurred approximately a year and a half prior to the filing of this grievance. Intervenor's status during the time he served in the position is also being challenged, but as to the posting issue, the evidence establishes that Grievants knew shortly after Intervenor received the position that it had not been posted. Further, Grievants inquired regarding the situation sometime in 2003. Accordingly, as to the posting of the position, Grievants' claims are untimely.

Nevertheless, Grievants' claim in this regard would not succeed on the merits. West Virginia Code § 18A-4-15 governs the employment of substitutes, providing that substitutes are to be assigned on the basis of seniority in a variety of situations, including “to fill the vacancy created by a regular employee's suspension.” Further, in such situations, the statute states in subsection (a)(5):

> Provided, That if the suspension is for more than thirty working days the substitute service employee shall be assigned to fill the vacancy on a regular basis and shall have and be accorded all rights, privileges and benefitspertaining to the position until the termination by the county board becomes final. If the suspended employee is not returned to his or her job, the board shall fill the vacancy under the procedures set out in [18A-4-8b] and [18A-2- 5]. (See footnote 1)

This provision is unambiguous in its requirement that a position is not to be posted when an employee is temporarily absent due to a suspension. “When a statute is clear and unambiguous and the legislative intent is plain, it is the duty of the courts to apply the statute in accordance with the legislative intent therein clearly expressed.” Collins v. Wayne County Bd. of Educ., Docket No. 99-50-535 (Feb. 22, 2000), citing Gant v. Waggy, 180 W. Va. 481, 377 S.E.2d 473 (1988). Under the clear

language of the statute, a suspended employee's position is not to be posted and competitively filled until the suspension issue has been resolved, and the employee is not being returned to his or her position. Therefore, Respondent acted appropriately in not posting Mr. Fisher's position and placing the next available substitute in the position during his suspension.

Additionally, Grievants question Respondent's treatment of Intervenor as a regular employee while he was serving in the position. Respondent was, indeed, correct in doing so, pursuant to the portion of W. Va. Code § 18A-4-15(a)(5) which provides that the substitute serving in such a position is to be assigned “on a regular basis” with all applicable rights and benefits. However, it appears that the substitute is only entitled to regular status *while the suspension is still in place*. Note the following portion of W. Va. Code § 18A-4-8g:

> (e) A substitute school service employee shall acquire regular employment status and seniority if the employee receives a position pursuant to [18A-4-15(a)(5)] . . . . Provided, however, **That upon termination of . . . . a suspension, the employee shall return to the status previously held.** If the employee returns to substitute status, the employee shall retain any regular employee seniority accrued, however, this seniority may not be used in the bidding process for regular positions unless the employee again attains regular employee status or has attained preferred recall status.

(Emphasis added.)

Grievants contest Respondent's continued treatment of Intervenor as a regular employee once Mr. Fisher's position was posted. According to Respondent, Mr. Fisher did not return to employment with the Board *as a bus operator* until early February of 2004, and he never returned to bus 104, so Intervenor was still serving in the position pursuant to the suspension when the job was posted. However, Respondent has not explained what occurred at the January 12, 2004, Board meeting, where the “employment issue” of Mr. Fisher was to have been resolved. Apparently, since his position was posted for a permanent replacement one week later on January 20, Mr. Fisher's suspension must have been resolved by the Board at the January 12 meeting. Similarly, it is not explained what type of work Mr. Fisher was doing on January 22 and 23, 2004, when he clearly worked and received pay from Respondent. Obviously, Mr. Fisher was no longer suspended and was not being returned to his position. Accordingly, Respondent was obligated by the explicit language of W. Va. Code § 18A-4-8g to return Intervenor to his previous status as a substitute when it determined that the suspension was to end.

As Grievants have contended, if a substitute serving in a suspended employee's position is allowed continued treatment as a regular employee even after the position has been posted, it results in unfair situations such as this one, where the “lucky” substitutewho got the call on that fateful night gets an advantage over other substitutes when the position is permanently filled. The undersigned agrees that this is clearly not the purpose of the statutory provisions discussed above.

Respondent contends that it hired Intervenor over Grievants for the bus operator position, pursuant to the hiring priority set forth in W. Va. Code § 18A-4-8b, which does, in fact, state that qualified regular employees are to be given preference over substitutes when service personnel positions are filled. Nevertheless, as set forth above, Intervenor should have returned to substitute status by the time the position was posted. Therefore, all of the applicants were substitutes, and W. Va. Code § 18A-4-8b requires that positions be filled on the basis of “seniority, qualifications, and evaluations of past service,” and, if requested, “the board must show valid cause” if the most senior employee is not selected. The record does not contain any evidence regarding the evaluations of Grievants or Intervenor. However, absent any unsatisfactory evaluations or other pertinent justifications, it is clear that all Grievants were more senior, qualified applicants and were entitled to placement in the position over Intervenor. Accordingly, Respondent must place Grievant Stafford in the bus 104 position with all applicable back pay and benefits, and, if he is no longer interested, it must then be offered to the next most senior Grievant. The following conclusions of law support the decision in this grievance.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & StateEmployees 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. The grievance process must be initiated within fifteen days following the occurrence of the event upon which the grievance is based, by scheduling a conference with the grievant's immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when

the employee is unequivocally notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). *See* Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

3. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

4. Respondent has proven by a preponderance of the evidence that Grievants' claims regarding the posting of Glen Fisher's position are untimely.

5. Intervenor was entitled to regular employee status and seniority while serving in the position of an employee who had been suspended for over thirty days. W. Va. Code §§ 18A-4-15(a)(5) and 18A-4-8g.

6. Upon the termination of the absent employee's suspension, in mid-January, 2004, Intervenor should have been returned to his status as a substitute. See W. Va. Code § 18A-4-8g.

7. Pursuant to the provisions of W. Va. Code § 18A-4-8b, Glen Fisher's position should have been given to the most senior, qualified applicant with satisfactory evaluations.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is directed to place the most senior Grievant in the position at issue, with back pay and benefits, in accordance with the provisions of this Decision. All further relief is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour 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: August 25, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Effective March 10, 2004, the legislature amended this statute to require that, if the suspension is for more than twenty days, the position must be posted. Clearly, the events giving rise to this grievance occurred prior to the amendment, so the previous version of the statute governs.