

**NORMAN LILLY,**

**Grievant,**

**v.**

**Docket No. 96-10-481**

**FAYETTE COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **DECISION**

Grievant Norman Lilly, a regularly employed bus operator applied for two summer vacancies and did not receive either one of them. He alleges the Fayette County Board of Education ("FCBOE") violated W. Va Code §§ 18-5-39, 18A-4-8b, and 18A-4-8 in the filling of these positions. [\(See footnote 1\)](#) Grievant requests back wages, benefits, and priority in filling one of these positions, if such exists, during the summer of 1997. This grievance was waived at Levels I and III and denied at Level II. Grievant appealed to Level IV, and a hearing was held on May 21, 1997. This case became mature for decision on June 4, 1997, the date of the parties' final submissions. After a review of the complete record, the Undersigned makes the following Findings of Fact.

### **Findings of Fact**

1. Grievant has been employed by FCBOE since August 25, 1982. He is currently employed as a Bus Operator and, during the regular school year, works out of the Fayetteville High School ("FHS") bus center.

2. During the regular school year, bus operators are divided into assignment areas for the purpose of making extra-duty assignments. The assignment areas are based at each of FCBOE's seven high schools. During the summers, these assignment areas are not used.

3. Each summer since 1991, FCBOE has provided a Special Education Extended Year Program ("SEEYP"). The purpose of this program is to prevent special education students from regressing in key skills over the summer vacation.

4. The location of the program has changed during the years. The program was placed at Beckwith Elementary in the Summers of 1991, 1992, 1993, and 1994. During the Summer of 1995,

the program was held at Oak Hill Elementary/High School and Valley Elementary/High School. For the 1996 school year, the program was conducted at Fayette High School and Valley High School. Level II, Respond. Exh. 1.

5. The students from this program come from all over the county, and SEEYP site selection has nothing to do with the location of the students' regular year home schools. No student from FHS attended the SEEYP in 1996.

6. Site selection for the program varies based on a number of factors. These factors are: the cooperation of the building principal; the facilities needed, such as air conditioning; the unavailability of certain facilities because of summer work or programs; and other aspects of the building's physical plant.

7. In 1991, Grievant applied for and received one of the SEEYP summer bus operator positions.

8. In 1992, 1993, 1994, and 1995, Grievant did not apply for the bus operator positions in the extended summer program, but chose instead to obtain a higher paying or longer term summer position with FCBOE.

9. During the Summer of 1995, Lewis Gordon, Paulette James, and Tim Coleman applied for and received the extended summer bus operators positions. [\(See footnote 2\)](#) Mr. Gordon and Ms. James drove for the SEEYP during 1992, 1993, 1994 school years. Mr. Gordon also drove during SEEYP's first year, 1991.

10. On June 18, 1996, the SEEYP bus operator positions were posted. [\(See footnote 3\)](#) Mr. Gordon applied for the positions in Areas I and II, Ms. James applied for the position in Area II, Mr. Coleman applied for the position in Area III, and Grievant applied for the positions in Areas II and III. [\(See footnote 4\)](#)

11. In his application letter, Grievant stated "[s]ince this is a new program at F.H.S., I feel that I am the most senior driver for the Hilton village run since I worked this run in 1991 at Beckwith. I was the only full time driver that summer. I should therefore have an earlier seniority date than any other driver for this program in the county since this is a new job posting. All previous summer seniority must now be considered for this position."

12. FCBOE awarded the positions to the bus operators who had held the positions the prior summer; Mr. Gordon, Ms. James, and Mr. Coleman.

13. Grievant has more regular seniority than Mr. Gordon, Ms. James, and Mr. Coleman.

### **Issue**

Grievant alleges FCBOE violated W. Va. Code §§ 18-5-39 and 18A-5-8b when it did not award him one of these "newly created" positions. FCBOE argues the positions were not newly created, and that it correctly followed W. Va. Code § 18-5-39 by assigning the summer positions to the employees who had the positions the previous summer.

### **Discussion**

W. Va. Code § 18-4-39 [1996] states in pertinent part: [\(See footnote 5\)](#)

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 the position is newly created, the position shall be filled under the procedure set forth in section-b, article four, chapter eighteen-a of this code.

Grievant's argument that the summer positions, at issue, are newly created must fail. Clearly, the program has remained the same since 1991. [\(See footnote 6\)](#) The fact that the location of the program has moved from school to school does not make the program or the positions newly created. *Miller v. Kanawha County Bd. of Educ.*, Docket No. 20-86-351-1 (Dec. 18, 1986). There are still three bus operators, from three areas, driving three bus loads of students to the extended summer program. See *Tuttle v. Marion County Bd. of Educ.*, Docket No. 96-24-412 (Feb. 28, 1997). See also *Mullins v. Logan County Bd. of Educ.*, Docket No. 94--23-283 (Sept. 25, 1995). Accord *Francis v. Logan County Bd. of Educ.*, Docket No. 93-23-346 (Dec. 29, 1993)(when three positions were reduced to two, the resulting positions were considered newly created).

"This Board has previously noted that §18-5-39 is a narrowly drafted exception to the more general provision in §18A-4-8b requiring competitive posting for the school service personnel positions." *McCoy v. Wayne County Bd. of Educ.*, Docket No. 93-50- 475 (Mar. 1, 1994). Obviously, this legislation provides a specific manner for filling summer positions upon which employees and employers can rely in making their employment decisions. Additionally, the process identified in W. Va. Code § 18-5-39 is similar to the treatment afforded employees during the regular school year; allowing them to remain in the same positions they filled the prior summer. Indeed, if Grievant had

wanted, he could have retained his bus operator position from the Summer of 1991 to the present, merely by applying for and accepting the position each succeeding year. He chose not to do so because he was able to make more money in another position. This choice surely makes good fiscal sense, but given that Grievant made his decision, he is now stuck with it and should not be allowed to replace an employee who worked in the position the preceding summer.

Grievant's argument that the 1996 Summer assignment for FHS must go to him because he works out of FHS during the regular school term does not apply to this situation. A board of education must fill summer positions in accordance with the requirements of W. Va Code § 18-5-39. Grievant's argument would require FCBOE to violate this statute. The high school assignment sites are obviously not used as such during the summer. There are only three SEEYP assignment areas to cover and serve the students throughout the county.

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

### **Conclusions of Law**

1. In a nondisciplinary grievance, a grievant has the burden of proving his case by a preponderance of the evidence. *Rupich v. Ohio County Bd. of Educ.*, Docket No. 89-35-719 (June 29, 1990).
2. Merely because a summer program moves its location from year to year, does not mean that the program is a different one or that the positions within that program are newly created. *Miller v. Kanawha County Bd. of Educ.*, Docket No. 20-86-351-1 (Dec. 18, 1986).
3. The bus operators' positions posted for the Summer of 1996 were not newly created positions within the meaning of W. Va. Code § 18-5-39.
4. W. Va. Code § 18-5-39 operates to provide a specific manner for filling summer positions upon which employees and employers can rely in making their employment decisions. This process is similar to the treatment afforded employees during the regular school year; allowing them to remain in the same positions they filled the prior summer.
5. "This Board has previously noted that §18-5-39 is a narrowly drafted exception to the more general provision in §18A-4-8b requiring competitive posting for the school service personnel positions." *McCoy v. Wayne County Bd. of Educ.*, Docket No. 93-50- 475 (Mar. 1, 1994).
6. Because these positions were not newly created, FCBOE properly followed W. Va. Code §

18-5-39 in filling them with the employees who had held the positions the previous year.

Accordingly, this grievance is **DENIED**.

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

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**JANIS I. REYNOLDS**

**Administrative Law Judge**

**Dated: September 15, 1997**

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[Footnote: 1](#)

As Grievant did not identify any specific violations of W. Va. Code § 18A-4-8, this Code Section will not be addressed individually.

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[Footnote: 2](#)

Mr. Coleman received the 1995 Summer position after Mr. Harold Treadway, who had held the position the prior summer, resigned and took another summer position. The position was reposted, and Mr. Coleman received the position. Level II. Respond. Exh. 2.

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[Footnote: 3](#)

Although these positions did not have to be posted until the employees from the summer before informed FCBOE that they did not want the positions, the posting of the positions was not incorrect. At Level IV, FCBOE's attorney stated FCBOE did not want to assume that the employees from the year before wanted the positions, and thus, posted them.

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[Footnote: 4](#)

The record does not reflect if other bus operators applied for the positions.

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[Footnote: 5](#)

W. Va. Code § 18-5-39 was amended effective July 1, 1996. The parties did not indicate when the positions were filled, but it is noted the deadline for applications was June 26, 1996, and the recommendations from the Director of Special

Education for filling the positions was dated July 1, 1996, thus, it is assumed the positions were filled after the changes were in effect. The minor change in the statute did not effect the outcome of this Decision, as the result would have been the same under either version.

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[Footnote: 6](#)

Grievant's application appeared to agree the summer assignments were the same, when he stated in his application letter: "I feel that I am the most senior driver for the Hilton village run since I worked this run in 1991 at Beckwith. I was the only full time driver that summer." (emphasis added).