SHARON L. MILLER,

Grievant,

v. **Docket No. 98-05-343**

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Sharon Miller (Grievant) is employed as a custodian by the Brooke County Board of Education (BCBOE). She alleges that BCBOE violated the provisions of W. Va. Code § 18A-4-15 on three occasions when it called a substitute, rather than allowing Grievant to fill in for another custodian assigned to the same work location as she. Grievant's immediate supervisor was without authority to provide relief at level one on June 5, 1998. Upon appeal to level two, a hearing was conducted on August 26, 1998, followed by a written denial of the grievance, dated August 27, 1998. Level three consideration was bypassed, and Grievant appealed to level four on September 4, 1998. After two continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on March 1, 1999. Grievant was represented by counsel, John E. Roush, and BCBOE was represented by counsel, David F. Cross. This matter became mature for consideration on April 6, 1999, upon receipt of the parties' fact/law proposals.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence of record.

Findings of Fact

1. Grievant is employed as a full-time custodian, holding two half-time positions. Her daily work is split between Jefferson Primary School and Follansbee Middle School.

2. Grievant's daily work schedule, during the 1997-1998 school year, was Jefferson Primary School from 2:00 p.m. until 5:45 p.m., and Follansbee Middle School from 5:45 p.m. until 10:00 p.m.

3. The only other custodian assigned to Jefferson Primary School during 1997- 1998 was

Evelyn Raineri, who worked from 6:00 a.m. until 2:00 p.m.

4. Ms. Raineri had to leave work after working only two hours on April 20, 1998. She also was absent on April 21, 1998. Ms. Raineri worked only four hours of her shift on May 6, 1998.

5. On April 20, April 21 and May 6, BCBOE called a substitute, Mark McGowan, to fill in for Ms. Raineri, without first offering the work to Grievant.

Discussion

In a non-disciplinary matter, a grievant must prove the allegations of her complaint 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); 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. The provisions of W. Va. Code § 18A-4-15, regarding the employment of substitute service personnel, provide the procedures whereby substitutes are to be assigned. However, the statute also includes what is often referred to as the “step up” provision, which states:

> [I]f there are regular service employees employed in the same building orworking station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position.

Respondent does not dispute that the step up provision applies to the circumstances presented in this case, but contends that the school principal did not offer the work to Grievant, because she had been taking care of her terminally ill husband during this time period and had previously refused extra work because of that situation. Moreover, BCBOE contends that, even if Grievant had been allowed to substitute for Ms. Raineri, she would have received no financial gain, because a substitute would have worked Grievant's normal eight-hour shift in the afternoon and evening, pursuant to the provisions of the statute. Accordingly, pursuant to Respondent's argument, Grievant was better off having worked her normal eight-hour shift on the three days in question and receiving her usual full-time pay.

The pertinent portion of W. Va. Code § 18A-4-15 was interpreted by this Grievance Board in Terek v. Ohio County Board of Education, Docket No. 91-35-160 (Aug. 30, 1991), wherein the administrative law judge stated:

> [T]he proviso gives regular employees an opportunity to fill an absent employee's job and allows for assigning the substitute employee the position of the regular employee who remains on the job. The proviso is applied when these three events occur: One, a regular employee is absent, two, a substitute is necessary for temporary employment, and, three, an existing regular employee moves temporarily to the absent employee's position instead of having the substitute fill it. The end result of applying the proviso is to place the substitute in the position of the regular employee who is filling the absent employee's job.

In the instant case, the three relevant events did, indeed, occur. A regular custodianwas absent, making a substitute necessary, and Grievant was a regular employee in the same classification at the same work location who was available to fill in for the absent regular employee. Grievant's refusal of extra work in the past does not excuse BCBOE from allowing her the opportunity to substitute during Ms. Raineri's absence, because the statute clearly entitles Grievant to that opportunity. Therefore, the undersigned concludes that BCBOE was obligated to ask Grievant to substitute during Ms. Raineri's absences on the three days at issue.

That brings us to the question of whether BCBOE is correct in its allegation that, even if Grievant had substituted for Ms. Raineri, it was obligated to use a substitute to work Grievant's regular eight-hour shift, consisting of the two half-time positions. It is true that the statute states that, when a regular employee fills in for an absent regular employee, a substitute fills the regular employee's position. However, simple logic would dictate that the reason that this proviso was placed in the statute was so that both regular employees' positions would be filled during an absence and all shifts would be covered. There are only a few service personnel positions which involve late afternoon and nighttime shifts. With most regular, daytime school service personnel positions, the placement of a substitute would be necessary, because the substituting regular employee would be unable to fulfill his or her regular duties while filling in for an absent employee who works the same hours.

However, although Grievant would theoretically have been available to work all of Ms. Raineri's shift and both of her own half-time shifts, there is one statutory obstacle to this outcome. W. Va. Code § 18A-4-8h states that “no school service personnel shall be permitted to become employed in more than one regular full-day position, nor more thantwo one-half day positions at the same time.” Accordingly, if Grievant worked two full eight- hour shifts, she would “become employed in more than one regular full-day position.” Even if Grievant were allowed to work Ms. Raineri's shift and only one of her own half-day positions, it would still have violated the statute. In that case, Grievant would be

employed, although temporarily, in "more than two one-half day positions at the same time."

Accordingly, although BCBOE was obligated to allow Grievant the opportunity to substitute for Ms. Raineri, it was also obligated to call a substitute or substitutes to fill Grievant's regular shifts. Any other conclusion would directly violate the provisions of W. Va. Code § 18A-4-8h. Therefore, although BCBOE clearly violated W. Va. Code § 18A-4- 15 by not calling Grievant to fill Ms. Raineri's position, she could only have worked one eight-hour shift on the days in question. Grievant has established no entitlement to monetary relief. (See footnote 1)

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, a grievant must prove the allegations of her complaint 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); Holly v. Logan County Bd. ofEduc., 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. "[I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position." W. Va. Code § 18A-4-15.

3. Grievant established by a preponderance of the evidence that, in accordance with W. Va. Code § 18A-4-15, it was obligated to allow Grievant the opportunity to "step up" into Ms. Raineri's position.

4. "No school service personnel shall be permitted to become employed in more than one regular full-day position, nor more than two one-half day positions at the same time." W. Va. Code § 18A-4-8h.

5. After calling Grievant to step up into Ms. Raineri's position, BCBOE was obligated to call substitutes to fill Grievant's two half-time positions.

6. Although Grievant has established a violation of W. Va. Code § 18A-4-15, she is entitled to

no monetary relief in this grievance.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Brooke 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 andState 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: April 26, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant had argued alternatively that, once she filled Ms. Raineri's position, Grievant could have worked one of her own half-time shifts as an "extra-duty assignment." "Extra-duty" is defined by W. Va. Code § 18A-4-8b as "irregular jobs that occur periodically or occasionally such as . . . field trips, athletic events, proms, banquets and band festival trips." Clearly, Ms. Raineri's remaining two shifts are not extra-duty, because they occur on a regular scheduled basis every day.