JOANNA COSTELLO,

Grievant,

v. **DOCKET NO. 98-33-388**

MONONGALIA COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Joanna Costello, is employed as a transportation aide by the Monongalia County Board of Education (MCBOE). She initiated this grievance on March 9, 1998, alleging that she was entitled to substitute for another regularly employed transportation aide. After denial at level one, Grievant appealed to level two on March 20, 1998. A level two hearing was held on August 13, 1998. (See footnote 1) Level three consideration was bypassed, and Grievant appealed to level four on October 7, 1998. A hearing was held in the Grievance Board's office in Morgantown, West Virginia, on December 7, 1998. This grievance became mature for consideration upon receipt of the parties' post-hearing arguments on December 28, 1998.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is regularly employed as a Transportation Aide for MCBOE. She is contracted to serve as an aide on a daily special education bus run, along with an extracurricular midday run.

2. Prior to the 1997-1998 school year, MCBOE had a practice of calling regular aides to substitute for absent transportation aides.

3. Because it questioned the legality of its past practice, beginning with the 1997-1998 school year, MCBOE began calling substitute aides to fill in for absent transportation aides.

4. On two occasions in early 1998, substitute aides were used to substitute for Aida Meredith, a

regularly employed transportation aide.

Discussion

As this grievance does not involve a disciplinary matter, Grievant must prove her claims 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. Grievant contends that she is entitled to "step up" into the absent employee's position, pursuant to the provisions of W. Va. Code § 18A-4-15(6), which provides, in pertinent part:

> All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to performsimilar assignments: Provided, **That if 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.**

(Emphasis added). Grievant argues that, as a regular transportation aide, she was entitled to substitute for the absent regular transportation aide, in accordance with this subsection.

This Grievance Board has previously held that bus operators are not entitled to the benefits of the "step up" provision. In Terek v. Ohio County Bd. of Educ., Docket No. 91- 35-366 (Mar. 6, 1992), the administrative law judge found that bus operators, each of whom have their own buses to service and individual bus routes to drive, do not share a common work site, i.e. "the same building or working station" as other bus operators. Thus, while a board of education may offer "step up" privileges to its bus operators, there is no statutory requirement for it. Messer v. Mingo County Bd. of Educ., Docket No. 96-29- 513 (July 31, 1997).

The same logic obviously applies to transportation aides, who are exclusively assigned to render services on regular and extracurricular bus runs. As with the bus operators, these aides do not share a common work site with any other aides, and are not entitled to "step up" when another aide is absent. Therefore, when a transportation aide is absent, it is appropriate for MCBOE to follow the normal rotation of substitutes in order to fill the position, pursuant to W. Va. Code § 18A-4-15. Grievant had no statutory right to be called as a substitute for Ms. Meredith.

Grievant contends that the Grievance Board's decision in Willcoxen v. MasonCounty Bd. of Educ., Docket No. 26-88-231 (Jan. 10, 1989), also supports her position. In that decision, it was held that "W. Va. Code § 18A-4-15(6) requires that regularly- employed service personnel in the same classification category of employment shall be offered first opportunity to fill an absent staff member's position." Willcoxen, supra, also involved bus operators, so it is obvious that this holding is directly inconsistent with Terek, supra, and its progeny. Accordingly, Willcoxen, supra, is hereby overruled.

Grievant also argues that Respondent could not change its practice without providing employees an opportunity for notice and hearing, pursuant to W. Va. Code § 18A-2-6, which addresses the continuing contract status of service employees. Virtually identical arguments were made in Vincent v. Marion County Bd. of Educ., Docket No. 93- 24-077 (Oct. 18, 1993). There, as in the instant case, upon reviewing the legal basis for its "step up" practice, the board of education discovered that it was not obligated to offer this option to its bus operators. The administrative law judge held that it was entirely within the board's discretion to eliminate the practice. In addition, it was held that the grievant's argument that his continuing contract status was altered by elimination of the program was without merit:

> In this case, Grievant's regular contract was not affected by the initiation or revocation of the step-up program, a transportation department procedure which only applied in the event of an unpredictable absence or an emergency situation. That program merely established a protocol for unexpected absences or emergency situations and did not provide an ongoing or contractual employee benefit. Thus, . . . Grievant has failed to prove a statutory violation.

Id. Accordingly, the undersigned finds no violation of W. Va. Code § 18A-2-6 in the instant case.

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

Conclusions of Law

1. In non-disciplinary matters, the grievant must prove her claims 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.

2. Transportation aides do not share a common working site with other employees, so they are not entitled to “step up” and substitute for an absent employee, pursuant to W. Va. Code § 18A-4-15(6). See Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993); Terek v. Ohio County Bd. of Educ., Docket No. 91- 35-366 (Mar. 6, 1992).

3. Grievant's continuing contract status, as contemplated by W. Va. Code § 18A-2-6, was not disturbed by MCBOE's elimination of the “step up” program for transportation aides. Vincent, supra.

4. With regard to its finding that regularly employed bus operators are allowed to step up into absent employees' positions, pursuant to W. Va. Code § 18A-4-15(6), Willcoxen v. Mason County Bd. of Educ., Docket No. 26-88-231 (Jan. 10, 1989), is overruled.

Accordingly, this grievance is **DENIED**.

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

Date: January 22, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

There is no written level two decision in the record, but it is presumed that the grievance was denied at that level.