GERALD JARVIS,

Grievant,

v v.

DOCKET NO. 01-23-003

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Gerald Jarvis, on behalf of additional Logan County bus operators who signed onto the grievance, filed this grievance on or about January 5, 2001, against his employer, the Logan County Board of Education ("Board"):

> We the bus operators of Logan County are Grieving that bus runs 9506 and bus run 9206 have not been posted this is in violation of WV Code 18A-4- 15(4) and 18A-4-8b.

Relief sought: That the runs be posted and awarded as soon as possible.

The grievance was denied at level two by Superintendent Ray Woolsey on January 5, 2001. (See footnote 1) Grievant by-passed level three, and appealed to level four on January 8, 2001. After a lengthy period of inaction, prompting an Order to Show Cause, the grievance was heard at level four on October 19, 2001, and became mature at the close of the hearing. Grievant was represented by Donald Jarvis, Amalgamated Transit Union, and the Board was represented by Brian R. Abraham, Esq., Logan County Prosecuting Attorney.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Printed chart of Logan County bus runs, dated February 5, 2001.

Board Exhibits

None.

Testimony

Grievant testified in his own behalf, and the Board presented the testimony of Brenda Skibo.

FINDINGS OF FACT

The material facts of this grievance are not in dispute, and are set forth in the following findings.

1. Effective July 1, 2000, W. Va. Code § 18A-4-15 was amended to change the way boards would fill long-term substitute positions.

2. Prior to July 1, 2000, the Board posted positions after an employee was absent longer than 30 days, and if a substitute received the position, he or she received all the benefits of a regular employee while serving in the long-term substitute position.

3. After July 1, 2000, the Board ceased posting positions requiring a long-term substitute unless the regular employee requested a medical leave of absence. Instead, the Board now fills long-term substitute positions not involving an approved leave of absence through rotation of the substitute seniority roster. 4. Grievant is number 5 on the substitute seniority roster, and has missed opportunities to bid on and receive long-term substitute positions for which he was previously eligible.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The issue is whether W. Va. Code § 18A-4-15(a)(2), as amended, requires long- term substitute positions, or those where the regular employee is absent for more than twenty days, to be posted and filled competitively whether or not there is a request for a medical leave of absence in writing?

W. Va. Code § 18A-4-15, as amended, provides, in pertinent part:

> (a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
>
> (1) To fill the temporary absence of another service employee;
>
> (2) To fill the position of a regular service employee *who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board*: Provided, That if the leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill the position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold the position and regular employee status only until the regular employee returns to the position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to the position: Provided, however, That if a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided in this section, upon termination of the leave of absence the employee shall be returned to his or her original position: Provided further, That no service person may be required to request or to take a leave of absence: And provided further, That no service person shall be deprived of any right or privilege of regular employment status for refusal to request or failure to take a leave of absence; . . .(Amended language in italics).

Grievant argues the amendment to this Section does not change the way long-term substitute positions are to be filled, and that they should continue to be posted and filled competitively pursuant to W. Va. Code § 18A-4-8b. The Board argues that, because of the amendment, county boards are no longer required to post and competitively fill long-term substitute positions *unless* the absent regular employee requests and receives a leave of absence in writing. In the absence of such a

request, the Board maintains the long-term substitute position shall be filled through rotation of substitute personnel.

The effect of the amendment as interpreted by this Grievance Board is significant to all parties. This Grievance Board has previously determined that when a "regular [service] employee has not reported to work for twenty days due to illness or other causes, any further absence will be considered a leave of absence for the purpose of substitute employment under Code 18A-4-15(2) even though a formal request for a leave of absencehas not been filed by the absent employee." Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-250 (Oct. 31, 1991); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987). See Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd Circuit Court of Kanawha County, 93-AA-217 (Feb. 15, 1994); Lasick v. Wetzel County Bd. of Educ., Docket No. 89-52-82 (June 29, 1989). Moreover, in Hensley v. Mingo County Board of Education, Docket No. 93-29-037 (July 6, 1994), this Grievance Board followed Stutler and Ditty, explicitly rejecting a similar argument that an extended absence of an employee does not constitute a "leave of absence" under W. Va. Code 18A-4-15(2), unless the absent employee formally requests such status. See also, Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996).

The amendment clearly serves to change Grievance Board precedent which held that an extended absence automatically converted to a leave of absence with or without a request from the absent employee, triggering the posting provisions of Code Sections 18A-4-15 and 18A-4-8b. “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). Furthermore, it is a basic rule of statutory construction that a specific provision of a statute controls over a general provision. Dalton v. Spieler, 184 W. Va. 471, 401 S.E.2d 216 (1990). Therefore, the first proviso in subsection (a)(2) referring to “the leave of absence” must be read in conjunction with the more limiting language of the first sentence,which refers to “a leave of absence . . . in writing.” Construing subsection (a)(2) in this matter makes it clear that only when a regular employee requests and receives a leave of absence in writing are the posting and selection provisions of Code § 18A-4-8b triggered. In the absence of a leave of absence in writing, a regular employee's absence will be treated as a “temporary absence” under subsection (a)(1).

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2.

Effective July 1, 2000, W. Va. Code § 18A-4-15 was amended as follows:

> (a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
>
> (1) To fill the temporary absence of another service employee;
>
> (2) To fill the position of a regular service employee *who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board*: Provided, That if the leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill the position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold the position and regular employee status only until the regular employee returns to the position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to the position: Provided, however, Thatif a regular or substitute employee fills a vacancy that is related to a leave of absence in any manner as provided in this section, upon termination of the leave of absence the employee shall be returned to his or her original position: Provided further, That no service person may be required to request or to take a leave of absence: And provided further, That no service person shall be deprived of any right or privilege of regular employment status for refusal to request or failure to take a leave of absence; . . . (Emphasis added).

3. "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). Furthermore, it is a basic rule of statutory construction that a

specific provision of a statute controls over a general provision. Dalton v. Spieler, 184 W. Va. 471, 401 S.E.2d 216 (1990).

4. Therefore, the first proviso in subsection (a)(2) referring to “the leave of absence” must be read in conjunction with the more limiting language of the first sentence, which refers to “a leave of absence . . . in writing.” Construing subsection (a)(2) in this matter makes it clear that only when a regular employee requests and receives a leave of absence in writing are the posting and selection provisions of Code § 18A-4-8b triggered. In the absence of a leave of absence in writing, a regular employee's absence will be treated as a “temporary absence” under subsection (a)(1).

5. The amendment overrules Grievance Board precedent which held that an extended absence automatically converted to a leave of absence with or without a request from the absent employee, triggering the posting provisions of Code § 18A-4-8b.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 20, 2001

Footnote: 1

There is no record of what happened at level one, nor does it appear a level two hearing was held in this grievance. Due to the delay in processing this grievance, Grievant was permitted to proceed to level four despite the absence of a lower level record.