VANESSA DRAKE,

Grievant,

v. DOCKET NO. 00-03-363

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Vanessa Drake, filed this grievance against her employer, the Boone County Board of Education ("BCBOE") on or about August 21, 2000. Her Statement of Grievance reads:

> **The Grievant, a substitute school bus operator, applied for and received a temporary bus operator's position for the 1999 - 2000 school year as a result of the absence of Lavanice Graley, the regular employee assigned to that position. When it became apparent that Ms. Graley would not be returning to her employment for the current school year, the Respondent posted the position for the 2000 - 01 school year instead of reassigning the Grievant to the position. Grievant alleges a violation of W. Va. Code § 18A-4-15.**
>
> **Relief sought: Grievant seeks instatement into the Graley position, payment of retroactive wages and benefits, regular seniority, and interest on all monetary sums.**

This grievance was denied at Level I. A Level II hearing was held on November 3, 2000, and the grievance was denied at Level II on November 14, 2000. Grievant elected to by-pass Level III. Grievant appealed to Level IV on November 22, 2000, and the parties elected to submit this case on the record developed below. This case became mature for decision on March 12, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant does not contest the non-renewal of her probationary contract in March 2000, for her temporary, leave of absence position. What she does contest is BCBOE's posting and filling of this prior leave of absence position in the 2000 - 2001 school year with another employee instead of reinstating her to the position when another leave of absence was granted to the regular employee who holds the position. Grievant maintains this failure to reinstate her violates W. Va. Code § 18A-4-15.

Respondent argues the regular employee, Lavanice Graley, was granted a leave of absence for one year only. BCBOE only grants leaves of absence for a one year period of time. Ms. Graley's position was then posted for one year only in accordance with the granted leave of absence. At the end of the school year, Grievant's position ended pursuant to contract, and she was replaced on the substitute list. When BCBOE found out in early August, that Ms. Graley was again seeking a medical leave of absence, BCBOE considered this request and the accompanying medical information submitted by Ms. Graley and decided to grant the request. The vacant position was then posted again. Grievant applied, but the position was awarded to a substitute employee with greater seniority. Respondent asserts no violation of any kind occurred. Respondent also argues this grievance is untimely flied as Grievant should have grieved the failure of BCBOE to not renew her contract in March 2000, when she was notified that she would not continue in this position.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Prior to the beginning of the 1999 - 2000 school year, Grievant was employed as a substitute bus operator by BCBOE.

2. In early August, 1999, Ms. Graley requested a medical leave of absence, indicating it would probably be for six months to one year.

3. BCBOE granted this request and posted Ms. Graley's position. At the top of the posting notice was the following statement, "TEMPORARY ASSIGNMENT WHILE THE REGULAR BUS OPERATOR IS ON A MEDICAL LEAVE OF ABSENCE FOR AN UNDETERMINED PERIOD OF TIME IN THE 1999 - 2000 SCHOOL YEAR."

4. Further down in the posting, the following statement appeared, "Temporary assignment in Lavanice Graley's Place while she is on Medical Leave."

5. Grievant applied for and received this temporary assignment, and signed a contract to that effect which indicated the assignment was a "Temporary Assignment" for the "School Year 1999 - 2000."

6. On March 8, 2000, Superintendent Gary Sumpter wrote Grievant informing her that her name had not been on the list of probationary employees recommended for rehire, and her contract would terminate at the end of the current school year. Grievant was informed she had the right to a hearing on this issue.

7. After the end of the 1999 - 2000 school year, in early August 2000, BCBOE received a written request for another medical leave of absence, with accompanying medical data, from Ms. Graley. 8. This request was approved on August 15, 2000, stating the leave of absence was effective from August 23, 2000, through October 30, 2000, or until she obtained a medical release for the 2000 - 2001 school year.

9. Ms. Graley's position was again posted as a temporary assignment, and Grievant applied.

10. Grievant did not receive the position as she was not the most senior applicant.

11. Grievant filed this grievance on or about August 21, 2000.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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.

A. Timeliness The first issue to address is Respondent's timeliness argument. Respondent avers Grievant should have grieved the termination of her temporary contract in March, 2000, when Grievant was placed on notice that her temporary, probationary contract would not be renewed. Respondent maintains that grieving this issue in August 2000, some five months later, is far outside the mandatory timelines.

Grievant argues she did not have a grievance over the non-renewal of her contact, but only knew she had an issue to grieve when Respondent granted Ms. Graley another leave of absence and did not reinstate her into the position.

If the grievance is examined in light of a timeliness issue, the following standard of review is followed. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Hawranick v. W. Va. Dep't of Health and Human Resources, Docket No. 98-HHR-010 (July 7, 1998); Harvey v. Bureau of Employment Programs, Docket No. 96-BEP-484 (Mar. 6, 1998). See Morrison v. W. Va. Bureau of Commerce, Docket No. 97-DOL-490 (Jan. 15, 1998); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

Should the employer demonstrate that a grievance has not been timely filed, the employee may demonstrate a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dep't of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); Sayre v. Mason County Health Dep't, Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha CountyBd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

W. Va. Code § 18-29-4 states a grievance must be filed at Level I, "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 undersigned Administrative Law Judge finds this grievance to be timely filed. Until BCBOE granted Ms. Graley another leave of absence and posted the position for bid instead

of reinstating her, Grievant did not have any problem with BCBOE's actions. Grievant filed as soon as she became aware of these facts. Accordingly, this grievance is timely filed.

B. Merits

Grievant alleges a violation of W. Va. Code § 18A-4-15. This Code Section dealing with the employment of service personnel substitutes states 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:**
>
> **. . .**
>
> **(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. [1]The substitute shall hold the position and regularemployee 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: [2]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; (Numbers and emphasis added.)**
>
> **. . .**
>
> **(c) Regular school service personnel shall be returned by the county board of education to the same position held prior to any approved leave of absence or period of recovery from injury or illness. The school service personnel shall retain all rights, privileges and benefits which had accrued at the time of the absence or accrued under any other provision of law during the absence and shall have all rights, privileges and benefits generally accorded school service employees at the time of return to work.**
>
> **. . .**

Each party in this grievance points to different line in W. Va. Code § 18A-4-15 to supports its contentions. Grievant notes the language in number [1] in the above cited Code Section which states: "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" Respondent points to language in number [2] in the above cited Code Section that directly follows the phrase cited by Grievant: "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." Grievant also cites the case of Simpson v. Mingo County Board of Education, Docket No. 96-29-431 (May 28, 1997), as being virtually identical. In Simpson, the grievant applied for and received a leave of absence cook position to work in the place of Louise Belcher. In the posting the position was to be filled "until the status of the regular employee is determined." Simpson's contract specified she was "[a]ssigned as a Cook I until the status of the regular employee is determined." After several years in the position and without the return of Ms. Belcher, Grievant was placed on the preferred recall list. The administrative law judge in Simpson held "[w]here Grievant was duly selected under the provisions of W. Va. Code § 18A-4-8b to fill a long-term substitute position resulting from the extended absence of a regular employee who suffered a compensable on-the-job injury 'until the status of the regular employee is determined,' MCBE violated W. Va. Code § 18A-4-15(2) when it terminated Grievant's assignment and reposted the position to be 'filled for the 1996-97 school term only or until the status of the regular employee is determined,' when the regular employee had not resigned nor had her employment been terminated by board action."

Respondent argues Simpson is not on point as there was no mention that Ms. Belcher had ever been granted a leave of absence, nor was there any end date to Ms. Simpson's employment. The undersigned Administrative Law Judge agrees and finds Simpson is distinguished from the instant case.

Neither party cited to a series of cases decided by this Grievance Board dealing with temporary contracts. The first case is Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995). In that case a teacher was hired in a temporaryposition for the

school year only. Here, as there, the contract ended according to its own terms. The starting and ending dates of the contract were known on the dates the contract was issued and signed. As stated in Underwood and previously held by this Grievance Board, when a contract "entered into pursuant [to statute] ceases to exist and that cessation is expressly provided for in the terms of the contract, the contract comes to an end by its own terms and is not subject to the procedural requirements of [W. Va. Code §18A-2-8a]." Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994).

Grievant's situation is very analogous to the events in Conley/Farley v. Logan County Board of Education, Docket No. 98-23-425 (February 3, 1999), and Hudson v. Kanawha County Board of Education, Docket No. 00-20-234 (September 27, 2000). In both those cases, the employees applied for and received temporary positions for the school year only. This information was clearly placed on the postings. The administrative law judge in Conley/Farley held "once [the board of education] posted the positions as positions which would end at the end of the school term, it was bound by that condition or bound to repost the positions correctly so that other school service personnel would not be misled, and could make an informed decision as to whether to bid on these positions." (See footnote 2) **See Underwood. It is clear that holding was correct, because when the position inquestion was reposted, a more senior applicant received the position.** (See footnote 3) **It is noted "seniority plays a major role in the statutory scheme governing selection of service personnel for positions." Conley/Farley, supra.**

Pursuant to W. Va. Code § 18A-4-15, Grievant had a right to " 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." Also pursuant to the statute, "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."

BCBOE has decided not to grant leave of absences for greater than one year in order to maintain greater control over its work force. Test. Dr. Richard Akers, Level II Hearing, at 29. Dr. Akers reported this policy had been put in place years earlier because BCBOE had employees on leave of absences, who had accepted positions with other employers, and

BCBOE was still required to hold their assignments for them. Each time a medical leave of absence is requested, a medical update is required with an approximate return date identified. This data assists BCBOE in evaluating the validity of each request. (See footnote 4) When Ms. Graley's leave of absence was terminated at the end of the school year, Grievant was returned to her original position on the substitute list. Grievant was aware that these actions would occur and was so informed by the posting, contract, and letter of March 8, 2000. At the time these actions occurred, BCBOE had no idea if Ms. Graley would need another leave of absence. Pursuant to Conley/Farley, supra and Hudson, supra, Respondent was required to abide by the original posting and repost the position, and Grievant cannot receive the requested relief of reinstatement.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. 2. Grievant's contract of employment expired under its own terms as contemplated by the parties when the 2000 - 2001 school year ended. Ramey v. Lincoln County Bd. of Educ., Docket No. 94-02-002 (June 3, 1994). See Underwood v. Marion County Bd. of Educ., Docket No. 94-24-535 (Jan. 30, 1995).

3. Once BCBOE posted the position held by Grievant as a one year position,"it was bound by that condition, or bound to repost the [position] correctly so that other school service personnel would not be misled, and could make an informed decision as to whether to bid on [this position]." Conley/Farley v. Logan County Bd. of Educ., Docket No. 98-23-425

(Feb. 3, 1999). See Hudson v. Kanawha County Board of Education, Docket No. 00-20-234 (Sept. 27, 2000); Underwood, supra.

4. Pursuant to W. Va. Code § 18A-4-15 Respondent was required, "upon termination of the leave of absence", to return Grievant "her original position."

Accordingly, this grievance is DENIED.

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

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 2001

Footnote: 1

Grievant was represented by Attorney Kimberly Levy from the West Virginia School Service Personnel Association, and Respondent was represented by BCBOE's Attorney, Tim Conaway.

Footnote: 2

The administrative law judge recognized it would be unfair to other possible candidates who may have applied for these positions if they had been aware they would continue.

Footnote: 3

It should be noted that the results differ in cases where the positions are not identified as temporary. See Knotts v. Preston County Bd. of Educ., Docket No. 00-39-387 (Apr. 9, 2001); Dakon v. Preston County Bd. of Educ., Docket No. 00-39-390 (Mar. 27, 2001); Simpson, supra. In those instances the board of education is required to place probationary employees on the preferred recall list when employment is terminated due to lack of need.

Footnote: 4

BBCOE's rationale concerning the past history of the abuse of leaves of absence is a legitimate and/or valid reason for posting positions for one year only. See Cf. Tennantv. Marion County Bd. of Educ., Docket No. 00-24-381 (Mar. 8, 2001).