BERNARD THOMPSON,

Grievant,

v. **Docket No. 02-40-027**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Bernard Thompson, filed this grievance against his employer, the Putnam County Board of Education ("PBOE"), on November 20, 2001. The statement of grievance reads:

> Grievant is employed as a substitute school bus operator. Grievant was assigned to a long-running substitute assignment (Bus #974) until he became ill and missed one day of work on October 31, 2001. The Respondent declined to reinstate him to Bus #974 when he was able to return to work on November 1, 2001. Grievant alleges a violation of West Virginia Code §18A-4-15.

As relief Grievant seeks “reinstatement to his former assignment on Bus #974, retroactive wages less appropriate set-off, benefits, and interest on any and all monetary sums.”

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. Grievant has been employed by PBOE as a substitute bus operator for two years.

2. On April 6, 2001, Peggy Lively, a regular bus operator for PBOE, was struck by a vehicle while walking across a roadway, and has been absent from work since that time. She has not requested a leave of absence in writing.

3. Grievant was called off the substitute rotation on April 6, 2001, to drive Ms. Lively's bus route, using Bus #974. He continued in this assignment until October 31, 2001.

4. On October 31, 2001, Grievant was ill, and missed work. Grievant's absence from work on

October 31, 2001, was a non-paid day. Brenda Stollings was called off the substitute rotation list to drive Ms. Lively's route on October 31, 2001. Grievant was not allowed to continue driving Ms. Lively's bus route after October 31, 2001.

5. Ms. Lively's route was never posted. Grievant did not bid on Ms. Lively's bus route, and did not receive regular employee benefits while driving her route.

6. As of March 12, 2002, Ms. Lively was still absent from employment, and was receiving worker's compensation temporary total disability benefits.

DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievant argued he had the right to continue to drive Ms. Lively's route after his one day absence, relying upon W. Va. Code § 18A-4-15, and Hanner v. Fayette County Board of Education, Docket No. 95-10-288 (October 12, 1995).

Respondent argued Grievant had accrued no leave time which he could take on October 31, 2001, and that he was not entitled to remain in the assignment after 30 days, because Ms. Lively never requested a leave of absence. W. Va. Code § 18A-4-15 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 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;

. . .

> (b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. 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 perform similar 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, the 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. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence.

W. Va. Code § 18A-4-15 was amended, effective July 1, 2000, and overruled 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 theposting provisions of Code § 18A-4-8b." Jarvis v. Logan County Bd. of Educ., Docket No. 01-23-003 (Nov. 20, 2001). After the amendment,

> 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).

Id. Accordingly, Grievant was properly serving in the position pursuant to Code § 18A-4- 15(a)(1), even though Ms. Lively's absence had extended for a period of seven months at the time Grievant became ill, and had extended another four months by the Level IV hearing. Thus, W. Va. Code § 18A-4-15(b) controls the outcome.

Hanner, supra, involved a regular employee who had stepped up into a position temporarily in another employee's absence. However, the Administrative Law Judge applied the principles applicable to substitute employees in reaching her decision that when an employee substituting in a position is absent due to his illness, this does not constitute a break in service which would result in the substitute relinquishing the position in which he had been serving.

> A vacation day, sick day, OSE day, or snow day, shall not be interpreted as a "break" in the substitute's period of service under Code § 18A-4-15, which would require the next employee on the substitute or seniority roster to be given the opportunity to rotate into the position. State Superintendent's Opinion (February 16, 1984).

Hanner, supra. The parties did not indicate whether the State Superintendent's Opinion cited in Hanner was still in existence, but that is of no consequence. The statute clearly provides that the substitute is to continue in the assignment “throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article.” The statute does not state that the substitute loses the assignment if he takes one day off work because he is sick, regardless of whether the employee has accrued leave which he may use or not.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. A substitute employee properly assigned to fill the position of an absent employee on a temporary basis shall hold that position throughout the period of the regular employee's absence. W. Va. Code § 18A-4-15.

3. Grievant was properly assigned to fill the position of Ms. Lively on a temporary basis during her absence.

4.

> A vacation day, sick day, OSE day, or snow day, shall not be interpreted as a "break" in the substitute's period of service under Code § 18A-4-15, which would require the next employee on the substitute or seniority roster to be given the opportunity to rotate into the position. State Superintendent's Opinion (February 16, 1984).

Hanner, supra.

5. When Grievant took a sick day, it did not constitute a break in service, and he should have remained in Ms. Lively's position.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to return Grievant to Ms.

Lively's position as a substitute, if the temporary vacancy still exists, and to pay Grievant back pay in the amount of the difference between what he would have earned had he remained in Ms. Lively's position, and the amount he earned in other assignments as an employee of the Putnam County Board of Education, from November 1, 2001, until such time as he is either returned to the assignment, or it no longer exists, plus interest at the statutory rate.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 15, 2002

Footnote: 1

The grievance was denied at Level I on December 17, 2001. Grievant appealed to Level II, where a hearing was held on January 15, 2002. A Level II decision denying the grievance was issued on January 28, 2002. Grievant bypassed Level III, appealing to Level IV on February 4, 2002. A Level IV hearing was held on March 12, 2002, at which time the parties agreed to submit this grievance for decision based upon the Level II record, supplemented by stipulations of fact. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by John A. Grafton, Esquire. This grievance became mature for decision on April 3, 2002, upon receipt of the last of the parties' written arguments.