CHRISTINE ZIRKLE and JUDY MULLINS,
Grievants,

v. **Docket No. 03-15-127**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Christine Zirkle and Judy Mullins ("Grievants"), employed by the Hancock County Board of Education ("HCBE") as bus operators, filed a level one grievance on October 30, 2002, in which they alleged violations of W. Va. Code §§ 18A-4-8b and 18A-4-15 when three bus runs were not posted after thirty days. For relief, Grievants requested the assignments be posted. The record does not include a level one decision, although the grievance form indicates that one was issued on November 11, 2002. The grievance was denied at level two. A level three decision, if any, was not made part of the record. A level four appeal was filed on May 12, 2003. After a level four hearing was scheduled, the parties agreed to submit the matter on the level three record. The due date for proposed findings of fact and conclusions of law was August 15, 2003; however, neither Grievants, represented by Owens Brown of the West Virginia Education Association, nor HCBE, represented by William T. Fahey, Esq., elected to file any submissions.

The facts of this matter have been derived from the level three record, and are set forth as the following findings of fact

Findings of Fact

1. Grievants have been employed by HCBE as bus operators at all times pertinent to this grievance.

2. HCBE employs bus operators either five and three-fourths, or seven, hours per day. Grievants are both five and three-fourths hour employees.

3. Prior to July 1, 2000, HCBE posted positions as temporary vacancies after an employee was absent longer than thirty days. Effective July 1, 2000, W. Va. Code § 18A-4-15 was amended to change the way boards would fill long-term substitute positions.

4. After July 1, 2000, HCBE ceased posting positions requiring a long-term substitute, unless the regular employee requested a medical leave of absence. Long-term substitute positions not involving an approved leave of absence are now filled through rotation of the substitute seniority roster.

5. Bus operators holding runs 49, 61, and 62, have been absent due to work-related injuries since February 2001, January 2001, and January 2002, respectively. Because all three employees intend upon returning to work, and none have requested a leave of absence, HCBE has not posted any of the positions. The assignments are being performed by substitute employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.

Prior to the statutory amendment in 2000, the Grievance Board had 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 absence has 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) Thus, 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. In reliance upon this practice, Grievants argue that the three runs should be posted as temporary positions, allowing them the opportunity to improve their status by bumping into a seven hour assignment.

While not specifically referenced, it appears that Grievants are relying on the provision set forth in W. Va. Code § 18A-4-15(b),

> 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.

Grievants argue the amendment to this Section applies only to substitutes, and does not rescind their right to bump into the temporary vacancy created by an absent employee. This issue, as it relates to bus operators, was addressed by the Grievance Board over a decade ago, in Terek v. Ohio County Board of Education, Docket No. 91-35-366 (Mar. 6, 1992), in which it was held that the "job swapping," described in W.Va. Code §18A-4-15, is only triggered when both the absent employee and the employee who wishes to assume the absent employee's duties, are assigned to perform their duties in a common working site, that is, "in the same building or working station." Bus operators, whose primary duties consist of pre-servicing their own buses and driving their own designated bus routes, generally do not share a common working site with other bus operators in the performance of their duties, as is contemplated by W.Va. Code. Therefore, Grievants would not be eligible to bump into the assignments in question, even if they were posted. Miller v. Monongalia County Bd. of Educ., Docket No. 99-30-223 (Sept. 29, 1999); Messer v. Mingo County Bd. of Educ., Docket No. 96-29-513 (July 31, 1997); Vincent v. Marion County Bd. of Educ., Docket No. 93-24-077 (Oct. 18, 1993).

Even if bus operators were allowed to job swap, the positions may not be posted unless the regular employee requests a 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; . . . .

"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. Until an employee requests a leave of absence in writing, a regular employee's absence will be treated as a "temporary

absence" under subsection (a)(1). Jarvis v. Logan County Bd. of Educ., Docket No. 01-23-003 (Nov. 20, 2001). See Thompson v. Putnam County Bd. of Educ., Docket No. 02-40-027 (Apr. 15, 2002). HCBE has acted in compliance with W. Va. Code § 18A-4-15 by not posting the positions in question.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have 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. A regular service employee may bump into the position of an absent service employee under certain circumstances. This "job swapping," described in W. Va. Code §18A-4-15, is only triggered when both the absent employee and the employee who reports for work and wishes to assume the absent employee's duties, are assigned to perform their duties in a common working site, that is, "in the same building or working station."

3. Bus operators do not share a common working site with other bus operators in the performance of their duties, as is contemplated by W. Va. Code, and are not eligible to bump into assignments held by absent bus operators. Terek v. Ohio County Bd. of Educ., Docket No. 91-35-366 (Mar. 6, 1992).

4. 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 further, That no service person may be required to request or to take a leave of absence . . . .

5. 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). Jarvis v. Logan County Bd. of Educ., Docket No. 01-23-003 (Nov. 20, 2001).

Accordingly, this grievance is **DENIED**.

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

DATE: AUGUST 25, 2003

SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE