RANDALL McMILLAN,

Grievant,

v. **DOCKET NO. 03-27-339**

MERCER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Randall McMillan (Grievant) filed this grievance against, the Mercer County Board of Education (Respondent) on September 25, 2003, stating: “WV § 18A-4-8b & WV § 18A-4- 15.” Grievant stated the relief sought as: “Truck Driver/Warehouse-Textbook Clerk position posted pending the return of the employee.”

Having been denied at levels one and two, with level three being waived, the matter was submitted to level four for a decision based on the record developed below. Grievant is represented by Ben Barkey of the W. Va. Education Association, and Respondent was represented by counsel, Kathryn Reed Bayless. This matter became mature for decision on November 24, 2003, and it was assigned to the undersigned Administrative Law Judge upon receipt of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a service employee in its maintenance department. 2. Respondent had a position at Grievant's work for a truck driver/warehouse clerk.

That position was redesignated as truck driver/warehouse clerk/textbook clerk in 2002. The regular employee who held the former job was transferred into the latter.

3. At the time the position was changed, the employee holding it had been off work for several years due to an on-the-job injury covered by Workers' Compensation.

4. During his absence, the position was filled by a substitute, who during the 2002-2003 school year, was himself injured on the job and has since been off work on Workers' Compensation.

5. The position was then filled with the next available substitute from the substitute list.

6. Neither the original, regular employee, nor the first substitute employee requested a medical leave of absence.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant argues the position in question should have been posted and filled by a regular service employee on the basis of seniority. Respondent contends it has no authority to fill the position in such a manner when the absent employee has not requested a leave of absence.

Both parties rely on W. Va. Code § 18A-4-15, which, in pertinent part, reads 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 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;

(3) To perform the service of a service employee who is authorized to be absent from duties without loss of pay;

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight, article two of this chapter, or death of the regular service employee who had been assigned to fill the position: Provided, That within twenty working days from the commencement of the vacancy, the board shall fill the vacancy under the procedures set out in section eight-b of this article and section five, article two of this chapter and the person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to the position;

(5) To fill the vacancy created by a regular employee's suspension: Provided, That if the suspension is for more than thirty working days the substitute service employee shall be assigned to fill the vacancy on a regular basis and shall have and be accorded all rights, privileges and benefits pertaining to the position until the termination by the county board becomes final. If the suspended employee is not returned to his or her job, the board shall fill the vacancy under the procedures set out in section eight-b of this article and section five, article two of this chapter; and

(6) To temporarily fill a vacancy in a newly created position prior to employment of a service personnel on a regular basis under the procedure set forth in section eight-b of this article.

(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.

(Emphasis added.)

___Although Respondent stated it has no real objection to posting positions that have been temporarily vacated by an employee on a long-term absence, it is correct that it is not authorized to do so. A significant feature of W. Va. Code § 18A-4-15 is its mandatory language, with the use of "shall" instead of "may," limiting any discretion the employer has to fill such a position in a way other than that specifically described by the statute.

Grievant argued the legislative intent of the statute was to allow a board of education to fill any position that has been vacated for more than 30 days with a regular employee. However, the statute only authorizes a board to do so when the absence is that of an employee "who is granted the leave in writing by the county board." W. Va. Code § 18A-4- 15(a)(2). Further In this case, the employee has not requested nor has he been granted a leave of absence. 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). The express language in W. Va. Code § 18A-4-15(a)(2) conveys the legislativeintent plainly. "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).

Further, this same question has recently been addressed by the Grievance Board in Zirkle and Mullins v. Hancock County Bd. of Educ., Docket No. 03-15-127 (Aug. 25, 2003). In that case, the Administrative Law Judge found: "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). [Citation omitted.]" Subsection (a)(1) requires the position to be filled by a substitute service employee, exactly the way Respondent filled it.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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. 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). "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 clearlyexpressed." 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)).

3. "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)." Zirkle and Mullins v. Hancock County Bd. of Educ., Docket No. 03-15-127 (Aug. 25, 2003).

4. Respondent properly filled the temporarily vacant position with a substitute employee.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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: December 5, 2003

M. Paul Marteney

Administrative Law Judge