CHARLES HACKNEY,

Grievant,

v. **Docket No. 05-18-087**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Charles Hackney ("Grievant") initiated this proceeding on October 13, 2004, challenging Respondent's posting of a substitute position for Supervisor of Transportation. He seeks back pay and benefits for the time period during which the Supervisor of Transportation was absent during the fall of 2004. Grievant's supervisor lacked authority to rule upon the grievance at level one, and a level two hearing was conducted on January 14, 2005. The grievance was denied in a level two decision dated March 7, 2005. Level three consideration was waived, and Grievant appealed to level four on March 11, 2005. In lieu of a level four hearing, the parties elected to submit this matter for a decision based upon the record developed below, supplemented by fact/law proposals submitted on April 14, 2005. (See footnote 1) This grievance was transmitted to the undersigned administrative law judge for a final decision on April 19, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent Jackson County Board of Education ("JCBOE") as a mechanic.

2. Jimmy Stewart, Respondent's Supervisor of Transportation, suffered a heart attack and was absent from work from August 30, 2004, through November 26, 2004. During his absence, Mr. Stewart used his accumulated personal leave, and he did not request a leave of absence.

3. At the time of Mr. Stewart's illness, JCBOE had no employees on the substitute list who were classified as Supervisor or Supervisor of Transportation.

4. Previous to August of 2004, Grievant had taken and passed the competency test for the Supervisor classification, but he had never been employed in that capacity.

5. On September 10, 2004, Respondent posted a vacancy for the position of Substitute Supervisor of Transportation to work on an “as needed” basis. In the same posting, the Board advertised vacancies for substitute supervisors in several other classifications, including principals.

6. Grievant was one of eleven applicants who applied for the position of Substitute Supervisor of Transportation. After being informed by JCBOE officials that he would have to vacate his regular position and become a substitute employee if he were the successful applicant, Grievant withdrew his application.

7. Keith Winter, a retired assistant superintendent, was the successful applicant and served as Substitute Supervisor of Transportation until Mr. Stewart returned to work. Thereafter, Mr. Winter remained on the substitute list in the Supervisor of Transportation classification.

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 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

The gist of Grievant's argument is that he should have been allowed to work as a substitute in Mr. Stewart's position, then return to his previous position as a regular mechanic upon Mr. Stewart's return. He bases his contention upon the provisions of W. Va. Code § 18A-4-8b, which requires boards of education to fill school service personnel positions on the basis of seniority, qualifications and evaluation of past service. As the most senior applicant who had passed the competency test for the Supervisor classification, Grievant argues that he should have been placed in the substitute position. Unfortunately, as Respondent has aptly noted, Grievant's arguments ignore one important point--Mr. Stewart was temporarily absent from his position, necessitating the employment of a substitute, pursuant to the provisions of W. Va. Code § 18A-4-15. As discussed in McMillan v. Mercer County Board of Education, Docket No. 03-27-339 (Dec. 5, 2003), the only circumstances under which a regular employee can be placed in an absent employee's position, and return to his or her regular position at the conclusion of that absence, is when the absence occurs pursuant to a

requested leave of absence, as set forth in W. Va. Code § 18A-4-15(a)(2). That provision states that substitutes are assigned on the basis of seniority:

> (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 extendbeyond 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[.]

(Emphasis added.) Clearly, there was no leave of absence involved in the instant case, and Mr. Stewart was merely absent on a temporary basis, using his own paid leave. “In the absence of a leave of absence in writing, a regular employee's absence will be treated as a 'temporary absence' under [§18A-4-15(a)(1)]” to be filled by a substitute employee. Zirkle and Mullins v. Hancock County Bd. of Educ., Docket No. 03-15-127 (Aug. 25, 2003). (See footnote 2)

Respondent furthers justifies its actions in this case by noting the West Virginia Supreme Court's recent decision in Poling v. Board of Education, 215 W. Va. 231, 599 S.E.2d 654 (2004). In that case, the Court determined that decisions regarding the placement of employees on the substitute list in a particular classification are governed by the posting and selection requirements of W. Va. Code § 18A-4-8b. Accordingly, Respondent acted correctly in posting the vacant position of Substitute Supervisor of Transportation, so that it could hire an employee to serve in that position when needed.

In addition, it must be noted that the undersigned can find no error in Respondent's information to Grievant regarding his status if he were selected to fill the substitute vacancy. Grievant has pointed to no authority, statutory or otherwise, which would allow him to simultaneously maintain his regular position as a mechanic while filling a substitute position for nearly three months. In order to fill the substitute position, Grievant would have to vacate his regular position and all benefits associated with it, and he has established no right to return to it. Accordingly, Grievant's withdrawal of his application was not caused by any misinformation from JCBOE, and has created no right to relief in this case.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-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 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. "In the absence of a leave of absence in writing, a regular employee's absence will be treated as a 'temporary absence' under [§18A-4-15(a)(1)]" to be filled by a substitute employee. Zirkle and Mullins v. Hancock County Bd. of Educ., Docket No. 03-15-127 (Aug. 25, 2003).

3. When a board of education seeks to hire individuals to be placed in a particular classification category as substitutes, it must follow the posting and selection requirements of W. Va. Code § 18A-4-8b. Poling v. Board of Education, 215 W. Va. 231, 599 S.E.2d 654 (2004). 4. There is no provision, statutory or otherwise, which would allow Grievant to simultaneously retain his position as a regular mechanic and fill in for an absent employee as a substitute in another classification.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jackson 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: April 27, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented in this matter by Anita Mitter, Uniserv consultant, and Respondent was represented at level two by Assistant Superintendent Dolores Ranson and at level four by counsel, Howard E. Seufer, Jr.

Footnote: 2

Also, W. Va. Code § 18A-4-15(b) allows regular employees to "step up" into an absent coworker's position, if they are employed in the same building or working station as the absent employee and employed in the same classification category. However, Grievant was not employed in Mr. Stewart's classification or in the same working station, and no argument in that regard has been made in this case.