DICKEY FOSTER,

Grievant,

v v.

Docket No. 04-03-275

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Dickey Foster ("Foster"), grieves the fact that his employer, the respondent Boone County Board of Education ("BOE"), did not assign Foster to act as a temporary substitute while his supervisor, Andrew Dolan, Director of Maintenance, ("Director Dolan") was absent for medical reasons from February 19, 2004, to April 19, 2004.

Foster filed this grievance on April 8, 2004. A written decision denying the grievance was issued on April 19, 2004. A Level II hearing was conducted on May 19, 2004. The Level II decision, issued June 28, 2004, denied the grievance on the ground that Foster was "not employed in the same classification category as Mr. Dolan. Accordingly, he had no right to fill in for Mr. Dolan under the provisions of [West Virginia Code] §18A-4-15." BOE waived proceedings at Level III.

Foster then brought this appeal to Level IV by filing a statement of grievance with the West Virginia Education and State Employees Grievance Board ("the GrievanceBoard") on July 16, 2004. Foster alleged that BOE "created and improperly filled a service personnel supervisory position over the maintenance department. The position was never posted and Grievant has more seniority than the employee 'assigned' to the position. Grievant alleges a violation of West Virginia Code § 18A-4-8b." For relief, Foster stated that he sought "posting of the position, instatement into the position, and compensation for all lost wages (supplement and overtime) retroactive to the placement of the

employee into the position."

The Level IV evidentiary hearing was held on September 20, 2004, in the Grievance Board's Charleston office. Foster appeared in person, and by his counsel, John Roush, Esquire. BOE was represented by counsel, Timothy R. Conaway, Esquire. During the Level IV hearing, the parties agreed to supplement the Level II record with copies of the proposed findings of fact and conclusions of law each party had submitted at that level. This grievance matured for decision at Level IV on October 22, 2004, after both parties had submitted proposed findings of fact and conclusions of law.

The operative facts are not in dispute. After careful review of the entire record, the undersigned finds that the following facts were agreed to or proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. Foster is employed by BOE in its Maintenance Department.

2 2. Foster has been classified as a warehouse clerk/computer technician since 1998, but previously held plumber and electrician titles. His current job duties include maintaining the computerized inventory for the Maintenance Department.

3 3. Foster's immediate supervisor is Director Dolan.

4 4. Both Foster and Director Dolan have offices in the warehouse.

5 5. Director Dolan is responsible for all of the maintenance operations of the Boone County School System. In this capacity, he directly supervises the maintenance workers, processes maintenance requests, prioritizes the maintenance work, makes daily work assignments, orders the requisite supplies and materials, and oversees the inventory. Director Dolan must be familiar with pertinent statutes and regulations. He deals with a number of different regulatory agencies and their respective requirements. He also bears some supervisory responsibility for custodians, who are directly supervised by their building principals.

6 6. In terms of spending authority, Director Dolan may approve expenditures for up to Five Thousand Dollars ($5,000.00). However, he testified that when the amount exceeds Three Thousand Dollars ($3,000.00) he generally calls the superintendent for approval.

7 7. Director Dolan has previously asked Foster to perform some of his duties when he was going to be absent for a day or two. On those occasions Director Dolan had the job assignments

prepared in advance. Foster merely communicated the assignments to the appropriate employees.

8 8. It is convenient for Foster to fill in for Director Dolan on such a limited basis because Foster is present in the warehouse throughout the day, whereas another employee would probably have to be brought in from the field.

9 9. Previously, when Director Dolan has been absent for more than a few days, his immediate supervisor, John Hudson, Assistant Superintendent of Schools, ("Assistant Superintendent Hudson") has undertaken Director Dolan's responsibilities.

10 10. Director Dolan was scheduled for major surgery in February 2004. At the time, he was unsure how long he would be need to be off work. As it turned out, he was absent from February 19, 2004 until April 19, 2004.

11 11. Director Dolan did not submit a written request for a leave of absence.

12 12. Prior to Director Dolan's absence, Assistant Superintendent Hudson planned to take over his responsibilities in full. However, Steve Pauley, Superintendent of Schools for Boone County ("Superintendent Pauley"), was concerned that this would be too much for Assistant Superintendent Hudson to handle.

13 13. Therefore, during Director Dolan's absence, his duties were divided among Superintendent Pauley, Assistant Superintendent Hudson, and Alvin Justice ("Justice").

14 14. Justice, who is employed as a roofer in BOE's Maintenance Department, is classified as a foreman.

15 15. Foster is not a foreman but has asserted, without contradiction, that he has greater seniority than Justice as a regular employee in the Maintenance Department.

16 16. During Director Dolan's absence, Justice was selected to oversee the general day-to-day operations. His selection was based upon both the fact that he is a foreman and the fact that he has a lot of field experience.

17 17. In Director Dolan's absence, Assistant Superintendent Hudson took over responsibility for, among other things, completing certain reports, approving expenditures of up to $500, dealing with problems involving custodians, conducting periodic reviews of work logs, and reviewing project plans.

18 18. Superintendent Pauley initially approved a temporary pay grade increase for Justice. However, his approval was withdrawn because Justice was not performing all of Director Dolan's

duties.

19 19. During Director Dolan's absence, Justice was required to work a substantial amount of overtime, for which he was compensated.

20 20. Foster claims that he, rather than Justice, should have assumed Director Dolan's responsibilities during his absence from February 19, 2004, to April 19, 2004.

DISCUSSION

This is not a disciplinary grievance. Therefore, Foster bears the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000); *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). "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Foster argues that "[a]n absent service personnel may be replaced by another employee in only three ways." *Proposed Findings of Fact and Conclusions of Law* at 4. He then goes on to summarize the three methods as 1) another employee with the same classification title can assume the absent employee's duties, 2) a substitute may be called in, or 3) if the absence extends beyond thirty days, the position may be posted pursuantto West Virginia Code section 18A-4-8b, which relates to the criteria for employing service personnel. (See footnote 1)

Foster's arguments assume that Director Dolan's position needed to be filled during his absence. This is not the case. West Virginia Code section 18A-4-10 deals with personal leave for illness. This statute expressly provides that

> [w]hen an allowable absence does not directly affect the instruction of the pupils or when a substitute employee may not be required because of the nature of the work and the duration of the cause for the allowable absence of the regular employee, the administration, subject to board approval, may use its discretion as to the need for a substitute where limited absence may prevail.

This is consistent with the oft-cited proposition that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*,

177 W. Va. 145, 351, S.E. 2d 58 (1986). There is no evidence to suggest that Director Dolan's duties had any direct impact on pupil instruction. Further, BOE was able to effectively cover his absence by distributing Director Dolan's responsibilities among Superintendent Pauley, Assistant Superintendent Hudson, and Justice. Therefore, there was no need for BOE to place a substitute in Director Pauley's position for the weeks he was absent as a result of his surgery. Foster may disapprove of the decision to divide Director Dolan's duties instead of hiring a substitute. However, his disapproval of such management decision, standing alone, does not provide a viable predicate for a grievance. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.'" *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999)(quoting *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)). Foster has not alleged that the decision to divide Director Dolan's duties violated any rule, regulation, or statute. (See footnote 2) Nor has he alleged that such decision was a detriment to, or interfered with, his job performance, his health, or his safety.

Foster's complaints relate to his mistaken impression that Justice was given the opportunity to substitute for Director Dolan, while Foster was not. However, Justice did not really function as a substitute. He only assumed a small portion of Director Dolan's responsibilities. This is corroborated by Superintendent Pauley's decision that Justice was not entitled to a temporary upgrade in pay during Director Dolan's absence because Justice was not fulfilling all of Director Dolan's duties.

In a similar vein, Foster overstates the case when he asserts that he has previously substituted for Director Dolan. The evidence establishes that when Director Dolan was going to be away from work for a day or two he made up the work assignments in advance. Foster then communicated the assignments to the Maintenance Department employees. In acting as a conduit for the job assignments, Foster assumed only a very small portion of Director Dolan's responsibilities. It is inaccurate to characterize the minimal coverage provided by Foster as substituting for Director Dolan.

The question that arises under West Virginia Code section 18A-4-10 is whether BOE abused its discretion in deciding not to employ a substitute for Director Dolan while he was off work recovering from surgery. *Calhoun v. Raleigh County Bd. of Educ*., Docket No. 97-41-428 (1998) ("Grievant has failed to prove by a preponderance of the evidence that the Board needed to fill the vacancy created

when Ed Lilly was off work on leave of absence, and its decision not to continue a substitute in that position after July 1, 1997, was not arbitrary, capricious, or in violation of W. Va. Code §§18A-4-8b and 18A-4-15.”). West Virginia Code section 18A-4-8b deals with filling service personnel positions. West Virginia Code section 18A-4-15 relates to the use of substitute service personnel to fill positions when the absent employee submits a written request for a leave of absence.

In light of the fact that a substitute was not placed in Director Dolan's position, neither West Virginia Code section 18A-4-8b nor 18A-4-15 applies to the circumstances of this grievance. Foster has failed to identify any way in which BOE abused its discretion in connection with handling Director Dolan's absence. Therefore, this grievance must be denied.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

CONCLUSIONS OF LAW

1 1. Pursuant to West Virginia Code section 18A-4-10, BOE was not required to obtain a substitute for Director Dolan during his absence.

2 2. BOE was not required to post Director Dolan's position during his absence because Director Dolan did not submit a written request for a leave of absence. Therefore, the mandatory posting provisions found in West Virginia Code section 18A-4-15 do not apply to this grievance. *McMillan v. Mercer County Bd. Of Educ*., Docket No. 03-27-339 (Dec. 5, 2003).

3 3. “'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.'” *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999)(quoting *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)). None of the foregoing exceptions are applicable to this grievance.

4 4. Foster has failed to meet his burden of proof.

Accordingly, this grievance must be **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of 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 West Virginia Code section 29A-5-4(b) to serve a copy of the appeal petition upon theGrievance 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: January 19, 2005

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Under an earlier version of West Virginia Code section 18A-4-15, if the absence of a service employee exceeded thirty working days, the school board was required to post the position of the absent employee. The amendment, which made posting contingent upon a written request for leave of absence, took effect in 2000.

Footnote: 2 The statutory violations alleged by Foster relate to his argument that Justice was improperly selected to stand in Director Dolan's shoes during his absence and to the fact that the position was not posted.