ORVAL MILLER,

Grievant,

v. Docket No. 04-30-373

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Orval Miller ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a bus operator, filed a level one grievance on June 4, 2004, in which he alleged a violation of W. Va. Code § 18A-4-15 occurred when he was not allowed to return to a substitute position after attending an association meeting. For relief, Grievant requests lost wages, with interest, and benefits, less any appropriate set-off. The grievance was denied at level one and level two. Grievant elected to bypass consideration at level three, and filed a level four appeal on October 20, 2004. A hearing to supplement the lower-level record was conducted in the Grievance Board's Westover office on March 14, 2005. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq., of Kay, Casto & Chaney. The grievance became mature for decision upon receipt of post-hearing proposed findings of fact and conclusions of law filed by the parties on or before April 12, 2005.

The following facts are undisputed, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant was regularly employed by MCBE as a bus operator for approximately twenty-five years prior to his retirement on July 1, 2002. 2. Grievant became a substitute bus operator for MCBE on October 1, 2002. On March 15, 2004, Grievant accepted an assignment to substitute for Mary Jane Conley on bus number 202.

3. Grievant advised Supervisor Duane Prickett that he would not be at work on May 21, 2004, but did not state any reason for his absence. Grievant did not have any accrued leave to cover his absence. The next substitute on the list was given the assignment, which lasted until the end of the school year.

4. On May 24, 2004, Grievant reported for work and was told that he would be driving bus number 168. Grievant stated that he was entitled to drive bus 202, and that if he could not drive that bus, he would not drive any bus.

5. Grievant was not called to work the remaining ten days of the school year, based upon his representation that he would only drive bus 202.

6. Grievant attended a West Virginia School Service Personnel Association Leadership Conference on May 21, 2004. Grievant was not an officer, and did not have an active part in the meeting. Grievant could have been approved to attend the meeting without loss of pay, but he did not request leave for this purpose.

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 preponderance standard generally requires proof that a reasonable person would acceptas sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued he had the right to continue to drive Ms. Conley's route after his one day absence, relying upon W. Va. Code § 18A-4-15, and Thompson v. Putnam County Board of Education, Docket No.02-40-027 (Apr. 15, 2002). MCBE argued Grievant was not ill, or otherwise compelled to miss work, and had accrued no leave time which he could take on May 21, 2004. While Grievant could have held the position until the end of the year, MCBE asserts that he was no longer entitled to remain in the assignment after simply taking a day off.

W. Va. Code § 18A-4-15(b) provides, in pertinent part:

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.

The Grievance Board has previously addressed a break in substitute service in Thompson, supra, in which it was held that the grievant should have been allowed tocontinue in the assignment when he returned from his illness the following day. This decision followed the holding in Hanner v. Fayette County Board of Education, Docket No. 95-10-288 (Oct. 12, 1995), which relied on an interpretation of the State Superintendent to determine 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. (See footnote 1)

The present case may easily be distinguished from Thompson, supra, and Hanner, supra, in that Grievant's absence was voluntary and intentional. MCBE may have approved Grievant's attendance at the meeting, without loss of time; however, he did not request such consideration. Further, he did not advise his supervisor of the reason for his absence, and he had not accrued any leave time for a vacation day. While it is fair to allow a substitute service employee to retain an assignment after an absence over which he had no control, there would be no fairness in allowing an employee to simply take time off, and then return to the assignment when he was ready. Therefore, Grievant was not entitled to return to bus 202 when he returned from the meeting.

Even if Grievant had been entitled to return to his prior assignment, he was obligated to mitigate any damages sustained, and this he did not do. Contrary to Grievant's characterization that Mr. Prickett did not offer him assignments after May 24, 2004, as "revenge," it is undisputed that he declined an assignment on that day, andindicated that he

would only drive bus 202. Mr. Prickett testified at level four that Grievant could have driven every day from May 24 though June 7, but for his refusal. Under these circumstances, Grievant would not be entitled to any relief.

The following conclusions of law support the decision reached.

CONCLUSIONS OF LAW 1. 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. 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. While 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, his intentional and voluntary absence from work does constitute a "break," resulting in the relinquishment of the assignment.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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 tosuch 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 28, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.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).