JOSEPH WOLFE,

Grievant,

v. **Docket No. 05-30-412**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Joseph Wolfe ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a bus operator, filed a level one grievance on March 14, 2005, in which he alleged a violation of *W. Va. Code* § 18A-4-15 when he was not permitted to "step-up" into the position of an absent bus operator. For relief, Grievant requests that bus operators be allowed to "step-up" into the positions of absent bus operators, and compensation for lost wages, with interest. The grievance was denied at levels one and two. Grievant elected to by-pass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(e), and advanced his appeal to level four on November 14, 2005. An evidentiary hearing was conducted in the Grievance Board's Westover office on March 6, 2006, for the purpose of supplementing the lower-level record. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Jennifer S. Caradine, Esq., of Kay Casto & Chaney, PLLC. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions filed by the parties on or before April 6, 2006.

The following facts have been derived from a preponderance of the credible evidence made part of the record at levels two and four.

Findings of Fact

1. Grievant has been employed by MCBE as a bus operator for approximately seven years, and did not have a mid-day assignment at any time pertinent to this grievance.

2. MCBE maintains two bus garages in the county, the Morgantown Transportation Center and the Blacksville Transportation Center. Separate step-up lists are maintained for the area garages.

3. Beginning in October 2005, MCBE implemented a program which allows regular bus operators to step-up into the position of absent bus operators. This step-up procedure limits bus operators to the area in which they work.

4. Although Grievant works in the Morgantown area, he resides in the Blacksville area, and would like to step-up into those positions when the regular employees are absent.

5. Grievant has amended his grievance to request relief for all noon-time runs during the past year for which he was not allowed to step-up.

6. Because step-up opportunities are offered on a rotational basis, Grievant cannot identify exactly which runs he would have been offered, but estimates that he would have received approximately eighteen percent of all mid-day assignments to which substitutes were assigned in the absence of regular bus operators.

Discussion

Grievant argues that MCBE has incorrectly implemented *W. Va. Code* § 18A-4-15(b) which requires that all bus operators in the county are to be considered to have a singlework station. MCBE asserts that it has reasonably exercised its substantial discretion in determining that it is in the best interest of the school to maintain two separate transportation facilities, and consequently, two separate step-up lists. MCBE further argues that Grievant cannot establish the number of occasions which he would have stepped up into other positions, making the requested relief speculative.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 accept as 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).

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 [§ 8A-4-8(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 work 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. **For thepurpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.**

(Emphasis added.)

This amended statute became effective March 10, 2004. MCBE has implemented the revised procedure for bus operators, but does not allow bus operators to step-up into an assignment outside their geographical district. Maintaining two separate step-up lists is contrary to the clear and unambiguous wording of the of the statute, which does not limit the benefit to assigned work areas for this specific purpose.

Grievant concedes that it is not possible to calculate lost wages exactly, and proposes that relief be established based on the opportunities he has had since October 2005, or eighteen percent of all step-up assignments. While Grievant has proposed an interesting approach to the question of relief, under any such circumstances it is speculative. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *MacCumbee v. Morgan County Bd.of Educ*., Docket No. 05-32-190 (Nov. 18, 2005); *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990). *See Clark v. Putnam County Bd. of Educ*., Docket No. 97-40-313 (April 30, 1998).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 2004, an amendment to *W. Va. Code* § 18A-4-15(b) extended the rights of bus operators to "step-up" into positions of absent regular bus operators when the following sentence was added: For the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.

3. Grievant has proven that MCBE failed to implement the revised procedure until October 2005; however, he could not identify a specific entitlement to wages for the lost opportunities. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *MacCumbee v. Morgan County Bd.of Educ*., Docket No. 05-32-190 (Nov. 18, 2005); *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990). *See Clark v. Putnam County Bd. of Educ*., Docket No. 97-40-313 (April 30, 1998).

Accordingly, the grievance is **DENIED.**

Either 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 VirginiaEducation 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: MAY 31, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE