THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

EVA PIERSON,

Grievant,

v. DOCKET NO. 06-20-182

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Eva Pierson filed this grievance against her employer, the Kanawha County Board of Education (KCBOE) on October 6, 2005, claiming she was improperly denied an opportunity to substitute teach. Her stated relief sought is “[C]ompensation for wages lost with interest.”

A level four hearing was held in the Grievance Board's Charleston office on August 8, 2006. Grievant was represented by John Everett Roush, and Respondent was represented by James Withrow. The matter became mature for decision on September 8, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant had originally been called to substitute for an extended absence, but the regular employee returned to work early. When the employee was again absent, a new substitute was assigned. Grievant did not show she should have been assigned to cover the regular employee's continued absence.

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

Findings of Fact

1. Grievant is employed by KCBOE as a substitute Aide.
2. KCBOE uses an automated computerized system (TSSI) to record employee absences and

call out substitutes for them. If a regular employee is going to be absent, he calls in to the system and enters a code, and the dates for the absence. The system then begins calling substitutes based on a rotation list, until someone answers the phone and accepts the assignment.

3. The TSSI depends on the absent employee reporting his absence timely and correctly. If the employee calls in once and reports a two-day absence, the system gives a two-day assignment to the substitute. If the regular employee calls in once for each day on two consecutive days, the system assigns a different substitute to each absence, based on the rotation list.

4. In September and October 2005, a regular Aide at Clendenin Elementary School was called for jury duty. On September 12, she reported to the TSSI that she would be absent, and Grievant was called to substitute. The TSSI called another substitute for September 13, but called Grievant again to cover absences on September 14, 15 and 16.

5. Grievant worked September 14 and 15, but was called on the evening of the 15th and told the regular Aide would be there the next day, so no substitute was needed for the 16th as had been originally anticipated.

6. The regular Aide did report to work on the 16th, but left due to a health issue, and a different substitute was called in to cover the second half of the work day.

7. The regular Aide was scheduled to be out for the following week, and a different substitute was called to work that week, through the end of the regular employee's jury duty service on October 3. 8. Grievant worked substitute assignment at Elk Elementary on September 21, 27-30, and October 3.

9. Grievant prefers to work only in certain schools close to her home, and turned down various offers of other substitute assignments between September 13 and October 3. However, she was available to substitute at Clendenin.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. (See footnote 1) Grievant contends that the regular Aide she substituted for was on an extended absence, and therefore Grievant was entitled to keep the substitute assignment throughout the period of the absence. This is generally a valid assertion. 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. (See footnote 2)

Here, although the regular employee had anticipated and reported a lengthy absence due to jury duty, and the assignment was given to Grievant originally, in fact the employee returned to work, creating a break in the extended absence. “Substitutes are to be selected to fill in for absent regular employees 'on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments.'” (See footnote 3) When the absent employee returned to work, Grievant's substitute assignment ended, and Respondent was obligated to returnto the substitute rotation pool when the employee was next absent. It is of no consequence that the regular Aide's return to work was for only a half day, or that her subsequent absence corresponded closely with the originally-anticipated absence; it was nevertheless a new absence.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so 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 Res.*, 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. “Substitutes are to be selected to fill in for absent regular employees 'on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments. . . .' W. Va. Code § 18A-4-15.” *Ferguson v. Lincoln County Bd. of Educ.,* Docket No. 05-22-313 (Nov. 9, 2005); *Stewart v. Gilmer County Bd. of Educ.*, Docket No. 02-11-093 (Aug. 6, 2002).

3. 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.

4. When an absent employee returns to work, “the period of the regular employee's absence”

ends. 5. Grievant did not meet her burden of proving she was entitled to work additional days in the same substitute assignment.

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

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty 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.

January 23, 2007

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

W. Va. Code § 18A-4-15.

Footnote: 3

Ferguson v. Lincoln County Bd. of Educ., Docket No. 05-22-313 (Nov. 9, 2005).