WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

NANCY JAMISON,

Grievant,

v. **Docket No. 2008-0293-MonEd**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Nancy Jamison ("Grievant") initiated this proceeding on August 28, 2007, alleging she should have been called to substitute for an absent regular secretary on August 7, 2007. She seeks compensation "for all days I was pasted [sic] over to a less senior employee. The personnel office needs to [sic] held accountable for continuing this disregard of the county policy." A level one hearing was convened by Dr. Louis Hlad, and decision which denied the grievance at that level was dated November 17, 2007. The parties elected to waive level two, and a level three hearing was scheduled for the Grievance Board's office in Westover, West Virginia, on March 13, 2008. At that time, the parties elected to submit the grievance for a decision based upon the record developed below, supplemented by fact/law proposals, which were submitted by April 14, 2008. Grievant was represented throughout this grievance by John E. Roush, Esquire, and Respondent was represented at level one by Rick Williams, Assistant Manager of Human Resources, and at level three by Jennifer S. Caradine, Esquire.

Synopsis

Grievant contends that Respondent failed to follow the statutorily-mandated procedure for using regular employees to serve as substitutes to fill summer absences. On the day at issue, the evidence was unclear regarding what happened, but a substitute was placed in the assignment, apparently without consultation of the list of regular employees who had volunteered to perform summer substitute work. Grievant alleges that, had the procedure been followed, she would have received the assignment and seeks payment as if she had worked on the day in question. However, although she established that it was likely the statutory procedure was not followed, she failed to provide specific evidence proving that she was next in line to receive a substitute assignment. Therefore, the grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a Secretary III, pursuant to a 220- day contract.

2. Grievant and four other regularly employed secretaries requested to be placed on a list of regular employees who would be called to substitute for absent regular employees during the summer of 2007. The secretaries on the “summer substitute list” had shorter contract terms and did not work during the summer, like the year-round employees for whom they might be called to substitute. 3. Grievant's regular employment term expired on July 1, 2007, and had not yet begun for the next school year as of August 7, 2007.

4. Grievant was the most senior regular employee on the summer substitute list during the summer of 2007.

5. Grievant substituted on one occasion during the summer of 2007 for four days in July. According to Respondent's records, Grievant was the last regular employee who worked as a substitute in the secretary classification prior to mid-August.

6. Regular secretary absences occurred on July 30 and July 31 - August 2, which were filled by substitutes. The record contains no explanation as to why none of the regular secretaries on the summer substitute list were used during these absences. (See footnote 1)

7. Betty Wolfe, a secretary in the superintendent's office, was absent on August 7, 2007. For

unknown reasons, a substitute was called to fill her absence that day, and it appears that none of the regular secretaries were called first.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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 standardgenerally 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).

This is not the first time Grievant has grieved Respondent's practices in filling summer substitute positions. *See Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006). As in her previous grievance, Grievant claims Respondent has violated the provisions of West Virginia Code § 18-5-39(f), which provides that, when a summer employee is absent, employees in the same classification category who are not employed during the summer must be provided the first opportunity to substitute, pursuant to a seniority-based rotation.

Respondent does not dispute that, pursuant to this statute, its normal procedure for filling Ms. Wolfe's absence would have been to call the next regular secretary on the summer substitute list and offer the assignment to all of those individuals before contacting actual substitutes. However, on the specific date at issue, Mr. Williams was unsure exactly what happened, surmising that Ms. Wolfe's call-off early in the morning somehow “triggered” the automatic call-out system, which only calls substitute employees.

Nevertheless, while admitting that it would constitute a statutory violation if Grievant's theory is correct and the summer substitute list was not consulted, Respondent contends that Grievant has failed to establish any entitlement to relief. As in her previous grievance regarding this issue, Grievant has provided no evidence to establish that she would have been the next person called from the summer list, let alone whether or not one of the other people on the list might have accepted the assignment first. It was noted in the previous decision in *Jamison*, *supra*, “In order for a grievant to

demonstrate entitlementto a position or compensation, it is necessary to establish he or she was 'next in line.' *See Richards v. Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998)."

It is beyond question that Grievant has not established that, if the summer substitute list had been consulted, she would have received this particular assignment. Indeed, as Respondent has argued, since Grievant was the last regular employee to perform such substitute work, and there is no evidence regarding who else was called or when, it is more likely that she would not have been "next in line." Moreover, as noted in *Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003), granting relief under such circumstances would result in Grievant receiving "what, in essence, would be a windfall by paying her for . . . work she did not perform."

Grievant's frustration with Respondent's failure to follow the statutory requirements with regard to this issue is understandable, especially in light of the fact that these failures have now resulted in at least two grievances. However, without specific evidence establishing that Grievant was entitled to the assignment, relief cannot be granted. While Grievant argues that having to establish that she was next in line "renders the burden of proof on a Grievant impossible to carry," the undersigned disagrees. Mr. Williams testified, and the parties appear to agree that, when substitutes are needed during the summer, an individual in the office is designated to make those calls, rather than using the automated system. Therefore, the person assigned to perform that function could have been called to testify as to what happened on August 7, 2007. In addition, Ms. Wolfe could have beenquestioned regarding when and how she called off work on the day in question, explaining whom she spoke with, or whether she spoke with anyone at all. Grievant also could have questioned the other individuals on the summer substitute list regarding when they were called prior to August 7 and when they had most recently turned down the opportunity for substitute work, or at least obtained more specific records or information on the subject. Any or all of these options could have provided more specific evidence regarding Grievant's entitlement to the assignment.

Accordingly, for all of the foregoing reasons, this grievance must be denied. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

2. Regular employees whose contract terms do not extend into the summer months are to be given first opportunity to substitute for absent summer employees within the same classification category, on a rotating and seniority basis. W. Va. Code § 18-5- 39(f).

3. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was "next in line." *See Richards v.Kanawha County Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999); *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1998).

4. Grievant has failed to establish that, had the proper procedure been followed, she would have received the substitute assignment in question.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 27, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant has not taken issue with the use of substitutes on these dates, so one would assume that the regular

employees on the summer substitute list declined the assignments.