THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DARRYL WHITE, et al.,

Grievants,

v. **Docket No. 2008-0586-CONS**

MONONGALIA COUNTY BOARD

OF EDUCATION,

Respondents.

DECISION

Grievants, (See footnote 1) employed by the Monongalia County Board of Education as bus operators, initiated this grievance on July 18, 2007, alleging that during the summer of 2007, Respondent failed to properly offer and assign substitute and extra duty assignments, allowing substitute employees to receive such assignments. They seek compensation, plus interest, for any bus trips or assignments they would have received had the proper procedure been followed. Following a level one hearing conducted by Dr. Louis Hlad on August 29, 2007, the grievance was granted, in part, but no monetary relief was awarded. A level two mediation was unsuccessful, and a level three hearing was conducted by the undersigned in the Grievance Board's office in Westover, West Virginia, on July 18, 2008. Grievants were represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Jennifer S. Caradine. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on August 25, 2008.

Synopsis

Grievants challenged Respondent's system for awarding summer bus operator assignments, including substitute assignments for absent regular summer employees and summer extra duty assignments. At level one, the grievance was granted, in that it was concluded that Respondent violated statutory provisions requiring that summer and extra duty assignments be offered to regular employees pursuant to a seniority-based rotation. However, Grievants' request for financial damages as relief, pursuant to their theory that they would have received additional assignments if the proper procedure had been followed, would require speculative relief and tort-like damages, which are unavailable from the Grievance Board. The relief requested is, therefore, denied.

Findings of Fact

1. Grievants are regularly employed by Respondent as bus operators.

2. On May 16, 2007, a form was distributed to all service personnel, which employees were asked to complete by stating whether or not they wanted to be placed on a list of employees to be called for summer substitute work. The form was to be returned by June 2, 2007, or employees would not be called to substitute during the summer for absent personnel in their classification.

3. Grievants had regular summer assignments in 2007, and all but Grievant White signed up for summer substitute work, in addition to their regular summer assignments. 4. Shelby Neely was employed by Respondent as a substitute bus operator, was allowed to work as a summer substitute on two occasions, and received one extra duty assignment in 2007.

5. Rebecca Gillespie was employed as a substitute bus operator and was given substitute assignments and extra duty assignments on many occasions during the summer of 2007.

6. In the level one decision, Dr. Hlad concluded that the summer months are not exempted from the seniority-based rotation for extra duty assignments, and that substitutes should not be offered extra duty assignments until regular employees have been given the opportunity and refused. In addition, he found that, pursuant to statute, regular employees must be offered the opportunity to substitute for absent employees during the summer. However, despite the Board of Education's errors, he concluded that, due to the complex procedures that had been followed in awarding the numerous assignments throughout the summer, it was impossible to determine whether any employee was entitled to additional compensation.

7. Respondent has followed the correct procedures for summer work since the level one

decision, offering regular employees the opportunity to substitute for absent summer employees and following the regular rotation list for extra duty assignments.

Discussion

Because this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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 CountyBd. 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

There has been a long-running history of errors in Respondent's system for employing summer service personnel, similar to those alleged in the instant case. *See Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) and *Jamison v. Monongalia County Bd. of Educ*., Docket No. 2008-0293-MonEd (Aug. 27, 2008). Indeed, in the instant case Respondent acknowledges its failure to follow the applicable statutory procedures for filling summer absences and extra duty assignments. However, as occurred in the most recent decision in the *Jamison* series, Grievants are requesting speculative relief along the lines of monetary damages.

A brief explanation of the applicable law would likely be helpful, prior to any determination regarding the relief requested by Grievants. Regular employees are allowed to perform substitute work during the summer, pursuant to West Virginia Code § 18-5-39(f), which states in pertinent part:

> (f) Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. . . . **When any summer employee is absent, qualified regular employees within the same classification category** who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, **shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.**

(Emphasis added.) As to extra duty assignments, such as field trips and athletic events, West Virginia Code § 18A-4-8b(f) requires that such assignments also be offered to employees in the applicable classification pursuant to a seniority-based rotation.

Grievants contend that, because substitutes such as Ms. Neely and Ms. Gillespie were included in the summer rotation, they (Grievants) missed additional opportunities for work that they would have received had these employees not been offered substitute and extra duty assignments. As to Mr. White, he was excluded entirely from the rotation for extra summer work, due to his failure to sign Respondent's (illegal) form expressing a desire for summer substitute and extra assignments. Grievants allege that "[a]s a result of the use of Ms. Gillespie and Ms. Neely, there were fourteen fewer substitute assignments available for employees who were entitled to them." Gr. Proposed FOF & COL. Grievants have provided extensive lists of all bus operator assignments which occurred during the summer of 2007, concluding that the pool of extra duty and substitute assignments was diminished by 22 assignments, which they contend amounts to approximately one-half of a rotation of all summer bus operators, entitling each Grievant to the equivalent of one additional day of compensation, due to Respondent's error. Grievant further allege that they should not be required to establish their entitlement to relief with absolute certainty, equating their case to wrongful death litigation, in which a plaintiff is not required to prove with absolute certainty how long the victim would have lived.

Grievants' point is well taken, that it would seemingly deter Respondent from future infractions of the law if it were subjected to a financial penalty. A similar argument was unsuccessfully made by the grievant in *Spangler v. Cabell County Board of Education*,Docket No. 03-06-375 (March 15, 2004), "seeking punitive damages she likens in her proposed findings of fact and conclusions of law to awards granted in wrongful death suits, in order to deter Respondent's 'lawlessness.' [However, the] Grievance Board does not award tort like damages. *Walls v. Kanawha County Bd. of Educ*., Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ*., Docket No. 97-20-007 (June 30, 1997)."

Unfortunately, it has been long-held that "[i]n 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 Jamison, supra; 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. Richards v. Kanawha County Bd. of Educ*., Docket No. 96-20-352 (Apr. 30, 1998). In a case very similar to the instant one, it was held that "although Grievant has demonstrated a violation of W. Va. Code § 18-5-39, and Respondent agrees this was the case, there is no evidence to support Grievant should receive what,

in essence, would be a windfall by paying her for . . . work she did not perform." *Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003).

Due to the numerous assignments which bus operators performed for Respondent during the summer of 2007, the numerous employees who should have been offered those assignments, along with the numerous grievants participating in the grievance, it would be completely speculative to attempt to ascertain who may or may not have accepted or declined the various assignments, if they had been offered in the proper rotation. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient,[the] claim must be denied." *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, Grievants cannot be granted the relief requested.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. The Grievance Board does not award tort like damages. *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Walls v. Kanawha County Bd. of Educ*., Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ*., Docket No. 97-20-007 (June 30, 1997).

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 Jamison v. Monongalia County Bd. of Educ*., Docket No. 2008-0293-MonEd (Aug. 27, 2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha County Bd. of Educ*., Docket No. 99-20-108 (May 5, 1999); *Clark v. PutnamCounty Bd. of Educ.,* Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Richards v. Kanawha County Bd. of Educ*., Docket No. 96-20-352 (Apr. 30, 1998).

4. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *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).

5. Although Grievants established the Respondent failed to follow the statutory procedures for awarding summer bus operator assignments in 2007, the requested monetary relief is speculative and beyond the authority of this Grievance Board.

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: December 16, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants are Karen Dalton, William Sollars, Donna Sizemore, Darryl White, Cheryl Williams, Rhonda Owens, Elaine Prickett, Mary Rogers, and Ida Osecky.