THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

STEVE YEAGER,
Grievant,

v. **DOCKET NO. 07-20-149**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on February 16, 2007, by Grievant, Steve Yeager. His statement of grievance reads:

> The board violated 18A-4-15(b) and 18A-4-8b[1] by not placing the grievant in the vacant position created by the illness of a regular full-time employee. The board placed a substitute in the position who had less seniority.

The relief sought by Grievant is "[t]o be placed in the regular full-time HACM position with all back pay and benefits as of December 20, 2006."

Grievant's supervisor denied the grievance, and Grievant appealed to level two of the grievance procedure. A level two hearing was held on April 3, 2007, and the grievance was denied at level two on April 26, 2007. Grievant bypassed level three, appealing to level four on April 30, 2007.[2] A level four hearing was held before Administrative Law

---

[1] Grievant did not explain how this statutory provision was applicable to this grievance.

[2] In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided

Judge Landon R. Brown, on March 28, 2008, in the Grievance Board's Charleston office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by James W. Withrow, Esquire. This matter became mature for decision on May 6, 2008, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law. This grievance was reassigned to the undersigned Administrative Law Judge on September 15, 2008, for administrative reasons.

Synopsis

Grievant is employed by Respondent as a substitute Electrician. A regular employee of Respondent had to take some time off work, and a substitute was needed to fill his position. This employee did not request a leave of absence. Respondent filled the position from the substitute Electrician rotation list, which consisted of two people, including Grievant. Grievant was not next in line on the substitute Electrician rotation list, and was not placed in this position. Grievant argued the employee who was placed in this assignment had resigned his employment with Respondent, but he did not demonstrate that this was true. Grievant also argued he should have been placed in this long-term assignment because of his seniority. Grievant is mistaken. Unless the regular employee requests a leave of absence, all absences are filled from the substitute rotation list, and Grievant was not next in line on the rotation list.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

---

under the former statutes, W. VA. CODE §§ 18-29-1 to 18-29-11, for education employees, and W. VA. CODE §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. *See* Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Findings of Fact

1. Grievant has been employed by the Kanawha County Board of Education ("KBOE") as a substitute Electrician for approximately seven years.

2. Lyle Wright is employed by KBOE as a substitute Electrician, and has less seniority than Grievant. Mr. Wright stated to Grievant that he was going to quit his job with KBOE, but he did not inform any official of KBOE of his intention, he did not submit a written resignation to KBOE, he did not complete a KBOE resignation form, and he was not removed from the substitute Electrician rotation list.

3. Mr. Wright did not resign his employment with KBOE.

4. Sometime shortly after December 25, 2006, Rodney Haynes, a Heating and Cooling Mechanic II employed by KBOE, advised KBOE that he was going to have to take some time off work due to his disability. He did not request a leave of absence.

5. KBOE has no substitutes in the Heating and Cooling Mechanic II classification.

6. As there were no substitutes in the Heating and Cooling Mechanic II classification, the automated call-out system for substitutes could not call any substitutes to fill Mr. Haynes' position. Daryl Smith, Supervisor of the Electrical Shop for KBOE, used the substitute Electrician rotation list to fill the assignment. There were only two substitutes on the Electrician rotation list, Grievant and Mr. Wright. Grievant had already accepted employment with KBOE as "extra help," and was working every day in this position.[3] Grievant had worked nearly every day up to that point during the 2006-2007 school year

[3] The parties did not place any information in the record to explain what an "extra help" job was, or how the Grievant came to be in this position.

in a substitute assignment. Mr. Smith called the next employee on the substitute Electrician rotation list, Mr. Wright, and Mr. Wright accepted the assignment.

7. Prior to accepting the assignment at issue, Mr. Wright had been called several times to substitute, but had not accepted any other substitute assignments for several months. KBOE does not drop a substitute from the substitute rotation list when the substitute fails to accept a particular number of assignments, or fails to answer the telephone after a particular number of attempts to call the substitute.

Discussion

Grievant has the burden of proving his grievance by a preponderance of the evidence. *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). Where the evidence equally supports both sides, the employee has not met her burden. *Id*.

Grievant argued first, that it was improper for KBOE to call Mr. Wright to substitute in the position at issue, because Mr. Wright had resigned his employment with KBOE. While Mr. Wright told Grievant he was quitting, he did not inform any official of KBOE of this, and he remained on the substitute Electrician rotation list. It was not improper for KBOE to keep Mr. Wright's name on the substitute Electrician rotation list, and to continue

to call him to substitute, when he had not officially resigned his employment as a substitute.

Grievant also argued he should have received this assignment because this was a long-term assignment, and Grievant had more substitute seniority than Mr. Wright. First, unless an employee requests a leave of absence, substitute assignments must be filled in the same manner whether the employee is absent 1 day or 100 days. W. VA. CODE § 18A-4-15 provides, in pertinent part:

> (a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
> (1) To fill the temporary absence of another service employee;
> (2) To fill the position of a regular service person as follows:
> (A) If the regular service person requests a leave of absence from the county board in writing and is granted the leave in writing by the county board; or
> (B) If the regular service person is on workers' compensation and absent. . . ..

"In the absence of a leave of absence in writing, a regular employee's absence will be treated as a 'temporary absence' under subsection (a)(1)." *Jarvis v. Logan County Bd. of Educ.*, Docket No. 01-23-003 (Nov. 11, 2001). Mr. Haynes did not request a leave of absence; therefore the assignment had to be filled with the next available substitute on the rotation list, as is provided by W. VA. CODE § 18A-4-15(b)(2), which states, "[a]ll service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments." *Jarvis, supra.*

In this instance, there were no Heating and Cooling Mechanics on the substitute list, so Mr. Smith went to the Electrician rotation list.[4] "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." *Stewart v. Gilmer County Bd. of Educ.*, Docket No. 02-11-093 (Aug. 6, 2002). Grievant was already working in an assignment, and had been working nearly every day as a substitute, while Mr. Wright had not accepted a substitute assignment for some time. Mr. Wright was next in line on the substitute Electrician rotation list.

Grievant submitted into evidence a written statement made by Mr. Smith that he had filled this assignment with someone with less seniority than Grievant, because he "saw a window of opportunity to increase the number of men I had by calling Lyle Wright to fill the position and I took it." Grievant felt this supported his position that the position was not properly filled. Regardless of Mr. Smith's intentions, he filled the assignment with the next

---

[4] Grievant did not contend that it was improper to fill this position with an Electrician. In fact, it appears from the record that Mr. Wright actually worked as an Electrician, rather than as a Heating and Cooling Mechanic II, while he filled the position at issue. It also appears, from the evidence placed into the record, that neither Grievant nor Mr. Wright had taken or passed the competency test for the Heating and Cooling Mechanic II classification title. The Grievance Board has held that "[s]ubstitutes are required to pass the competency examination before they [begin] the duties of any classification. W. VA. CODE § 18A-4-8e." *Richardson v. Putnam County Bd. of Educ.*, Docket No. 05-40-333 (Mar. 10, 2006). Grievant testified he had substituted in a long-term substitute "HVAC" assignment several years ago, but he did not state that he had taken the competency test at that time either, or otherwise attained the classification title. Thus, it is possible that KBOE should not have gone to the substitute Electrician rotation list to fill this position. The undersigned questions whether Grievant even has standing to pursue this grievance. However, as the parties did not raise this issue, it will not be further addressed. To the extent that Respondent improperly used the substitute Electrician rotation list to fill this assignment, Grievant has not demonstrated that he was otherwise qualified to fill the position.

person on the substitute Electrician rotation list. Grievant was not the person next in line for the assignment.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. *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. "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." *Stewart v. Gilmer County Bd. of Educ.*, Docket No. 02-11-093 (Aug. 6, 2002).

3. "In the absence of a leave of absence in writing, a regular employee's absence will be treated as a 'temporary absence' under subsection (a)(1) [of W. VA. CODE § 18A-4-15]." *Jarvis v. Logan County Bd. of Educ.*, Docket No. 01-23-003 (Nov. 11, 2001).

4. Grievant did not demonstrate he was next in line on the substitute Electrician rotation list to be placed in an assignment, or that he was otherwise entitled to the position at issue.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 18-29-7. (*See* Footnote 2) 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 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.

BRENDA L. GOULD
Administrative Law Judge

Date: January 20, 2009