THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DENNIS GARNER,
Grievant,

v. **DOCKET NO. 2011-1421-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Dennis Garner, filed a grievance against his employer, the Monongalia County Board of Education, on April 5, 2011. The statement of grievance reads: "Grievant asserts that Respondent has deprived him of the opportunity to step-up into available extracurricular assignments.[1] Grievant asserts that this action constitutes discrimination and retaliation/reprisal.[2] Grievant cites W.Va. Code 18A-4-15 & 6C-2-2." As relief Grievant sought, "cessation of discrimination & retaliation/reprisal and compensation for lost wages with interest."

A hearing was held at level one on May 18, 2011, and a level one decision denying the grievance was issued on June 3, 2011. Grievant appealed to level two on June 9, 2011. A mediation session was held on September 26, 2010. Grievant appealed to level three on October 5, 2011. A level three hearing was held before the undersigned

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[1] Although Grievant referred in his testimony to the assignments at issue as "extra-duty," it is clear that they were extracurricular assignments.

[2] Grievant did not pursue the claims of discrimination or retaliation/reprisal either in his presentation of evidence, or his post-hearing written argument. These claims are deemed abandoned and will not be addressed.

Administrative Law Judge on February 8, 2012, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on March 14, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserted he was denied the opportunity to step-up into extracurricular assignments when the employees holding those assignments were absent. While there is some question as to whether Respondent's rotation list for these assignments was being properly maintained, once Grievant brought the issue to his supervisor's attention, Grievant was offered and accepted two opportunities to step-up into extracurricular assignments. Grievant did not demonstrate that he was next in line to receive any other step-up opportunities.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a bus operator for 23 years. Grievant works out of the Morgantown bus garage. There is a second bus garage in Monongalia County at Blacksville, which is in the western end of the county.

2. When a bus operator is unable to work his or her scheduled extracurricular assignment, other full-time bus operators employed by the board of education are to be given the opportunity to “step-up” into that assignment during the regular bus operator’s absence.

3. Bus operators who step-up into extracurricular assignments earn extra pay at their regular hourly rate for the time it takes to make these runs.

4. During the 2010-2011 school year, prior to the time this grievance was filed, Grievant was not asked if he was available to step-up into any extracurricular assignments when the regular bus operator could not make the run.

5. From approximately December 13, 2010, through the end of the school year, Grievant had a mid-day, extracurricular assignment. The record does not reflect that Grievant wished to step-up into any other more lucrative, mid-day, extracurricular assignment which was available during this period of time.

6. Many times, bus operators do not call the bus garage to report off work until it is nearly time for the bus to leave the garage to make the bus run. In these emergency situations, the only way that Paul Christopher, MBOE’s Supervisor of Transportation, can get someone to make the run close to the scheduled time is to see who is in the bus garage at that time and ask them to make the run, or if he knows someone close to the assignment location has taken his or her bus home, he will call them and see if they can make the run right away.

7. Ronda Owens is a bus operator in Monongalia County. During the latter part of the 2010-2011 school year, Ms. Owens had been assigned an evening extracurricular assignment which began at 7:00 p.m. Ms. Owens had, on more than one occasion, asked

another bus operator, Lester LeMasters, to make this run for her, rather than reporting to Mr. Christopher that she would not be making the run so that he could arrange for another bus operator to make this run. Mr. Christopher was not aware that Ms. Owens was making these arrangements on her own until either Grievant or Mr. LeMasters told him sometime in or around April 2011. As soon as Mr. Christopher was made aware that this was occurring, he told Ms. Owens to cease this practice, and to contact him when she could not make this run. Grievant was asked if he wanted to step-up into Ms. Owens' evening assignment in her absence on April 4, 2011, and May 17, 2011, and he accepted this assignment on both occasions.[3]

8. MBOE does not have a written policy altering or explaining the application of the step-up provisions found in WEST VIRGINIA CODE § 18A-4-15(b).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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 standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is

[3] Grievant testified at the level three hearing that he did not recall what the assignment was on May 17, 2011, but at the level one hearing, held on May 18, 2011, he stated he had stepped-up into this assignment the evening before.

more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued that the method used by Respondent to determine which employees wished to participate in stepping-up into extracurricular assignments when an employee was absent "deprives the process of any legitimacy," referring to the testimony provided by Mr. Christopher at level one that he was aware of who wished to be called to step-up into assignments "by word of mouth." Grievant specifically argued that he had missed out on two opportunities to step-up into Ms. Owens' assignments near the time this grievance was filed, and suggested that Mr. Christopher was lying when he testified that he was not aware that Ms. Owens had called Mr. LeMasters on her own to work in her place.

Respondent argued that Grievant had not demonstrated he was next in line to be called out to step-up into any particular assignment, that Respondent corrected the problem created by Ms. Owens as soon as it became aware of it, as it has been encouraged by the Grievance Board to do, and that Mr. Christopher must do what he has to do in emergency situations to keep the buses running.

WEST VIRGINIA 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 the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.**

(Emphasis added). Pursuant to this statute, when a regular bus operator is absent for all or a portion of his or her workday, the so-called "step-up" provision is implicated, requiring that other regular employees be offered the opportunity to substitute, on a rotating and seniority basis. *See Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 06-30-326 (March 20, 2007). All regular employees employed in the same building or work station and in the same classification as the absent employee are to be given the opportunity to step-up into the assignment. For purposes of this grievance, the only type of assignments at issue are extracurricular assignments. The record is not entirely clear as to how Mr. Christopher has been maintaining a step-up rotation list, but to the extent he is relying on "word of mouth" to determine who is interested in these assignments, this is inconsistent with the law. Steps need to be taken to assure that all regular employees who wish to do so are provided the opportunity to step-up into extracurricular assignments when employees are absent.

The problem in this case for Grievant is that 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." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20,

2006); *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). "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). While Mr. Christopher in his testimony at level one indicated that, in fact, he was not aware that Grievant was interested in stepping-up into extra-curricular assignments and had not been calling him off the rotation list, Grievant produced no evidence that he was next in line to have been called out to step-up for any particular assignment. As soon as Grievant brought the problem to Mr. Christopher's attention, corrective action was taken and Grievant received two opportunities to step-up into Ms. Owens' evening extracurricular assignment.

It is understandable that Grievant would be unhappy that Mr. LeMasters was filling in for Ms. Owens on a continuing basis; however, this circumstance was not created by Respondent, and Respondent cannot be faulted for it. Neither Ms. Owens nor Mr. LeMasters reported this little arrangement to Respondent until after it had apparently been going on for awhile, and Mr. Christopher had no idea it was occurring until it was brought to his attention by either Grievant or Mr. LeMasters himself. As soon as Mr. Christopher became aware of the situation, he put a stop to it and Grievant was called on to step-up into Ms. Owens' assignment twice. Despite Grievant's suggestions to the contrary, Grievant produced no evidence that Mr. Christopher played any role in this arrangement between Ms. Owens and Mr. LeMasters.

As to any complaint that Grievant may have with Mr. Christopher not following the rotation list in emergency situations, the Grievance Board has previously stated that "the normal rotation used for making substitute bus operator assignments does not have to be followed in an emergency situation." *Prickett, supra*., *citing Thompson v. Logan County Bd. of Educ.,* Docket No. 05-23-068 (Sept. 1, 2005). To the extent, however, that the emergency situation is created by Mr. Christopher forgetting that someone has reported off work in a timely manner, as he admitted has occurred, a procedure should be put in place to resolve this problem as it cannot be excused.

While Mr. Christopher's method of maintaining the step-up rotation list throughout the school year is certainly questionable, as soon as Grievant questioned why he wasn't being called out, Mr. Christopher corrected the problem. No further relief can be granted.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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 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).

2. When a regular bus operator is absent for all or a portion of his or her workday, the so-called “step-up” provision found in WEST VIRGINIA CODE § 18A-4-15(b) is implicated, requiring that other regular employees be offered the opportunity to substitute, on a rotating and seniority basis. *See Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 06-30-326 (March 20, 2007).

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." *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *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). "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).

4. Grievant produced no evidence that he was next in line to have been called out to step-up for any particular assignment.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: March 30, 2012