THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Charles Davis,
Grievant,

v. **Docket No. 2011-0002-KanEd**

Kanawha County Board of Education,
Respondent.

DECISION

Grievant, Charles Davis, is employed by Respondent, Kanawha County Board of Education ("Board"). On July 1, 2010, Grievant filed this grievance against Respondent for denying Grievant the opportunity to fill a long-term substitute electrician position in violation of statute. For relief, Grievant sought instatement into the position and compensation of lost wages and benefits. At level three, Grievant withdrew his request for instatement into the position and sought as relief "compensation for all lost wages and benefits, pecuniary and nonpecuniary, resulting from the denial of the opportunity to substitute in the electrician position form [sic] the date he was first called to the date the position was filled on a permanent basis."

Following the December 8, 2010 level one conference, a level one decision was rendered on December 27, 2010, denying the grievance. Grievant appealed to level two on January 13, 2011. Grievant perfected the appeal to level three of the grievance process on April 13, 2011. A level three hearing was held on February 23, 2012, before Administrative Law Judge William B. McGinley[1] at the Grievance Board's Charleston, West Virginia office. Grievant appeared by counsel, John Roush. Respondent appeared by counsel, James Withrow. This matter became mature for decision on

[1] This case was assigned to the undersigned Administrative Law Judge on July 12, 2012 for administrative purposes.

March 27, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant contends Respondent has no authority to prevent Grievant's acceptance of a second substitute position while he was already assigned to another substitute position. Respondent's employment of service personnel substitutes is governed by statute, and Respondent's interpretation of that statute is entitled to great weight unless clearly erroneous. Grievant did not show Respondent is clearly wrong in its implementation of the statutory requirements. In addition, Respondent has substantial discretion in this matter, and Grievant failed to prove Respondent acted in an arbitrary and capricious manner.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is currently employed as a Custodian I for Respondent, Kanawha County Board of Education. At the time of the events grieved, Grievant was a substitute Electrician for Respondent.

2. In June 2010, Grievant served as a substitute Maintenance/Electrician at Laidley Field for Respondent, which was scheduled to end shortly.

3. Respondent assigns substitutes through the use of an automated telephone and online system. Positions are made available to substitutes based on a rotating seniority list, and the system automatically calls the next person on the list.

Once a substitute is placed in an assignment, he/she is removed from the list and receives no more callouts until his/her current assignment ends.

4. On June 4, 2010, while Grievant was still assigned to the substitute position at Laidley Field, he received a call from Respondent's automated callout system offering him a long-term substitute Electrician position at the Maintenance Department. Grievant accepted the assignment through the automated system.

5. Both Terry Hollandsworth, Director of Maintenance, and Bill Courtney, Director of Employee Relations, informed Grievant that he was called in error and that he could not accept the Maintenance Department substitute assignment because he was already in a substitute assignment.

6. On June 7, 2010, Grievant again attempted to accept the Maintenance Department assignment through the automated system. Mr. Hollandsworth and Mr. Courtney again informed Grievant he was not allowed to accept the assignment.

7. Grievant was still on the substitute call-out list because his supervisor at Laidley Field mistakenly failed to remove him from the list upon beginning his assignment there.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2007); *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).

Respondent's employment of service personnel substitutes is governed by statute. "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…" W.VA. CODE § 18A-4-15(a) (2011). The statute further describes the manner in which substitutes must be assigned:

> (1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b of this article…
> (2) All 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.

W. VA. CODE § 18A-4-15(b). Respondent assigns substitutes through the use of an automated telephone and online system. Positions are made available to substitutes based on a rotating seniority list, and the system automatically calls the next person on the list. Once a substitute is placed in an assignment, he/she is removed from the list and receives no more callouts until his/her current assignment ends. This is the system developed by Respondent to comply with the requirements of the statute. The West Virginia Supreme Court of Appeals has routinely held that "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Syl. Pt. 4, Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981); *Syl. Pt.1, Dillon v. Bd. of County of Mingo*, 171

W. Va. 631, 301 S.E.2d 588 (1983). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). Grievant has not shown Respondent is clearly wrong in its implementation of the statutory requirements.

Respondent's system, when functioning properly, is a rational and orderly way to assign substitutes according to the statute. In this case, an isolated error caused Grievant to be offered the second position while still on assignment. While the statute does not specifically state that substitutes currently on assignment be removed from the list, the interpretation proposed by Grievant does not make sense in viewing the statute as a whole. While the statute requires assignment of substitutes based on seniority, it further requires this be done on a rotating basis. If the statute were to be interpreted to require that substitutes remain on the list while already on assignment, this would act to defeat the requirement that assignment be done on a rotating basis. The most senior substitute would be offered every position first and could prematurely abandon job after job. This would be a chaotic result, assigning substitutes for substitutes, and unnecessarily complicating the substitute process. It is true that "'[s]chool personnel regulations and laws are to be strictly construed in favor of the employee.' *Syl. Pt. 1, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." *Syl. Pt. 1, Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.,* 197 W. Va. 176, 475 S.E.2d 176 (1996). However, what this requirement means is that Boards must strictly comply with statutory mandates in their

personnel decisions. *See Lavender v. McDowell County Bd. of Educ.,* 174 W. Va. 513, 327 S.E.2d 691 (1984); *Brum v. Bd. of Educ. of Wood County*, 215 W.Va. 372, 599 S.E.2d 795 (2004); and *Morgan*, *supra*. Respondent's practice strictly complies with the code by awarding substitute positions based upon seniority while also giving meaning to the rotation requirement. Grievant's interpretation might be in favor of this certain employee at this time, but would disfavor many more employees.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Respondent's refusal to allow a substitute to abandon his/her current assignment to accept another substitute assignment is reasonable. Allowing such conduct would unnecessarily complicate the provision of services and would not be in the best interests of the schools. Grievant has failed to prove Respondent was arbitrary and capricious in refusing to permit Grievant to accept the second assignment prior to completing his current assignment.

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. W.Va. Code St. R. § 156-1-3 (2007); *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. Respondent's employment of service personnel substitutes is governed by statute that requires service personnel substitutes be assigned by seniority on a rotating basis. W.VA. CODE § 18A-4-15 (2011).

3. The West Virginia Supreme Court of Appeals has routinely held that "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Syl. Pt. 4, Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.,* 166 W. Va. 775, 277 S.E.2d 613 (1981); *Syl. Pt.1, Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). The clearly wrong standard requires the reviewing authority to presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W.Va. 105, 556 S.E.2d 72 (2001); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). Grievant has not shown Respondent is clearly wrong in its implementation of the statutory requirements.

4. It is true that "'[s]chool personnel regulations and laws are to be strictly construed in favor of the employee.' *Syl. Pt. 1, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." *Syl. Pt. 1, Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.,* 197 W. Va. 176, 475 S.E.2d 176 (1996). However, what this requirement means is that Boards must strictly comply with statutory mandates in their personnel decisions. *See Lavender v. McDowell*

County Bd. of Educ., 174 W. Va. 513, 327 S.E.2d 691 (1984); *Brum v. Bd. of Educ. of Wood County*, 215 W.Va. 372, 599 S.E.2d 795 (2004); and *Morgan*, supra. Respondent's practice strictly complies with the code by awarding substitute positions based upon seniority while also giving meaning to the rotation requirement.

5. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Grievant has failed to prove Respondent was arbitrary and capricious in refusing to permit Grievant to accept the second assignment prior to completing his current assignment.

Accordingly, the 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* W. VA. CODE ST. R. 156-1-6.20 (2007).

DATE: August 8, 2012

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Billie Thacker Catlett
Administrative Law Judge