THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

THOMAS LACY,

Grievant,

v. **DOCKET NO. 2013-0847-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Thomas Lacy ("Grievant") filed this grievance at Level One of the grievance procedure on October 25, 2012, against the Kanawha County Board of Education ("Respondent"). His grievance included the following statement of grievance:

> The working out of class [classification] individual and clarification of the people being work (*sic*.) on the mulching job.

As relief, Grievant sought "pay for time these people have worked." A Level One hearing was held on November 9, 2012, and a written decision denying the grievance was issued on December 4, 2012, by the chief administrator's designee, Joe Godish. This matter proceeded through mediation at Level Two, and Grievant appealed to Level Three on March 11, 2013.

A Level Three hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on April 18, 2013. Grievant appeared *pro se,* and Respondent was represented by its General Counsel, James W. Withrow. Grievant waived making a closing argument, or submitting a post-hearing brief. This matter became mature for decision on May 17, 2013, upon receipt of Respondent's post-hearing proposals.

Synopsis

Grievant is employed by Respondent Kanawha County Board of Education ("KCBOE") in the capacity of a substitute service employee holding dual class titles for custodian and general maintenance positions. In or about September through October 2012, KCBOE needed mulch spread on various school playgrounds. After the regular custodians declined to perform this work on an overtime basis, KCBOE awarded the assignment to two employees on its list of available substitute custodians. During this time, Grievant was only accepting assignments for general maintenance work, and had asked to have his name removed from the substitute custodian list.

Prior to September-October 2012, KCBOE had assigned the vast majority of mulch spreading jobs to employees in a maintenance classification, with some mulch work being done by custodians. Grievant is asserting that this work should have been offered to persons on KCBOE's list of substitute general maintenance personnel. However, none of the Code provisions relied upon by Grievant deprive KCBOE of its reasonable discretion to assign work to school service personnel holding multiple classification titles, as was done here. Further, even if spreading mulch should have been assigned to substitute general maintenance employees, Grievant failed to establish that he was the "next in line" on the substitute list so that he is entitled to any remedy. Accordingly, this grievance must be DENIED.

The following Findings of Fact are made based upon the record developed through the hearings conducted at Levels One and Three of the grievance procedure.

Findings of Fact

1. Grievant is employed as a substitute service employee by Respondent Kanawha County Board of Education ("KCBOE").

2. Grievant holds dual class titles for Custodian and General Maintenance positions, and is eligible to be listed as a substitute for each classification he holds.

3. Terry Hollandsworth is employed by KCBOE as its Executive Director for Maintenance, Custodial Services and Energy Management.

4. Frances Goodwin is employed by KCBOE as a Custodial Supervisor.

5. At the time this grievance arose, Grievant had requested that his name be removed from the list of substitutes to be called to perform custodial duties, because Grievant preferred working maintenance jobs during the day, and did not want to work as a substitute custodian during the evening.

6. In September through October 2012, KCBOE had a requirement to have mulch spread on multiple school playgrounds.

7. Ms. Goodwin initially offered this work to regular custodians at each school, to be performed on an overtime basis, in addition to their usual duties inside the school building.

8. When the regular custodians declined to perform this work on an overtime basis, Ms. Goodwin offered the opportunity to do this work to substitute custodians. The substitute custodians who accepted this work had less seniority than Grievant.

9. KCBOE's usual practice for accomplishing short-term projects requiring what is referred to as "extra help" is to offer such work to regular employees first, on an

overtime basis, and then to call in substitutes from the appropriate substitute list, if the regular employees do not accept the assignment on an overtime basis.

10. Prior to September 2012, approximately 90 to 95 percent of the mulch spreading work for KCBOE had been performed by general maintenance personnel, including, on occasion, Grievant, in his capacity as a substitute maintenance employee. *See* G Ex 1. The remaining mulching work had been performed by custodial personnel.

11. At the time the challenged work was assigned to two custodians on Respondent's custodial substitute list, Grievant was being called to perform general maintenance work, and performed such work on approximately ten of the estimated thirty-five days that the two substitute custodians spread mulch.

12. Grievant is one of approximately 15 employees on KCBOE's general maintenance substitute list. There was no evidence presented to establish where Grievant stood on this rotation list for substitutes in the general maintenance classification. The mulching work at issue was never offered to anyone on the general maintenance substitute list.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which

as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997).

Employment of school service personnel, including substitutes, is governed by multiple statutory provisions. W. Va. Code § 18A-1-1(a) provides that "school personnel" means all personnel employed by a county board of education and consists of two categories: (1) professional personnel; and (2) service personnel. In regard to service personnel, the following provisions in W. Va. Code § 18A-4-8 are pertinent to this grievance:

> (a) The purpose of this section is to establish an employment term and class titles for service personnel. . . .
>
> (1) A maintenance person means a person who holds a classification title other than in a custodial, aide, school lunch, office or transportation category as provided in section one, article one of this chapter.
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> (3) "Class title" means the name of the position or job held by a service person;
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> (30) "Custodian I" means a person employed to keep buildings clean and free of refuse;
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> (31) "Custodian II" means a person employed as a watchman or groundsman;
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> (32) "Custodian III" means a person employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs;
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> (33) "Custodian IV" means a person employed as head custodians. In addition to providing services as defined in "custodian III," duties may include supervising other custodian personnel;

* * *

(43) "General maintenance" means a person employed as a helper to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system;

* * *

(46) "Groundsman" means a person employed to perform duties that relate to the appearance, repair and general care of school grounds in a county school system. Additional assignments may include the operation of a small heating plant and routine cleaning duties in buildings;

(47) "Handyman" means a person employed to perform routine manual tasks in any operation of the county school system;

* * *

Also pertinent to this grievance is W. Va. Code § 18A-4-15, which specifically regulates employment of school service personnel substitutes as set forth, in pertinent part, as follows:

(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.

* * *

(3) To perform the service of a service person who is authorized to be absent from duties without loss of pay;

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight, article two of this chapter, or death of the regular service person who had been assigned to the position. Within twenty working days from the commencement of the vacancy, the county board shall fill the vacancy under the procedures set forth in section eight-b of this article and section five, article two of this chapter. The person hired to fill the vacancy shall have and be accorded all rights, privileges and benefits pertaining to the position;

(5) To fill the vacancy created by a regular employee's suspension.

* * *

(6) To fill temporarily a vacancy in a newly created position prior to employing a service person on a regular basis pursuant to section eight-b of this article.

(b) Service personnel substitutes shall be assigned in the following manner:

(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. Length of service time is calculated from the date a substitute service person begins assigned duties as a substitute in a particular category of employment.

(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.

(3) Any regular service person employed in the same building or working station and the same classification category of employment as the absent employee shall be given the first opportunity to fill the position of the absent employee on a rotating and seniority basis. In such case the regular service person's position is filled by a substitute service person. A regular service person assigned to fill the position of an

> absent employee has 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.
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> * * *

In addition to these statutory provisions, there is also a significant body of law in West Virginia regarding application of these statutes to school service personnel and other county board of education employees. Thus, any analysis must begin by recognizing that "[c]ounty 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*., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Grievant complains that KCBOE assigned the job of spreading mulch on school playgrounds to substitute custodians when such work had previously been performed by service personnel holding the general maintenance classification. KCBOE argued that mulching work has previously been performed by both custodial and general maintenance personnel. The definitions of various service personnel job titles are not completely exclusive in that, for example, a "groundsman" has responsibility for "general care of school grounds" and a "custodian II" may be "employed as a watchman or groundsman." *See* W. Va. Code § 18A-4-8(a)(31) & (46). Thus, KCBOE contends it was not arbitrary and capricious to assign the mulching work at issue to substitute custodians rather than substitute general maintenance employees.

Grievant is asserting that established practice dictates that spreading mulch on school playgrounds must be accomplished using personnel holding a general maintenance classification. The concept that certain work may only be performed by employees holding a particular classification is a well-established doctrine within American law governing the collective bargaining arena in both the public and private employment sectors. However, the terms and conditions of employment for school service personnel in West Virginia are not established through a collective bargaining process. Instead, the employment relationship is governed by a complex series of statutory provisions, none of which restrict KCBOE's discretion to reasonably assign work among school service personnel holding multiple classification titles. More particularly, the definitions in W. Va. Code §18A-4-8 for custodian, groundsman, handyman and general maintenance are sufficiently broad to allow KCBOE to assign the mulching work at issue here to substitute employees holding any of these classification titles.

Even if Grievant were correct in his assertion that the work at issue should have been assigned to general maintenance substitutes, rather than custodial substitutes, he would not be entitled to receive any remedy. Grievant failed to establish that, if KCBOE assigned this work as he proposes, he was "next in line" to receive this assignment. *See Jamison v. Monongalia County Bd. of Educ*., Docket No. 05-30-338 (Jan. 20, 2006); *Saddler v. Raleigh County Bd. of Educ*., Docket No. 02-41-420 (Apr. 29, 2003); *Clark v. Putnam County Bd. of Educ*., Docket No. 97-40-313 (Apr. 30, 1998). Grievant testified that he only received work on 10 days during the period of approximately 35

days during which the mulch spreading was accomplished. However, he was one of fifteen employees on the general maintenance substitute list. Indeed, Grievant stated, without contradiction, that he had greater seniority than either of the two substitute custodians who were assigned the mulching work, but never claimed that he had the most seniority on the substitute list for general maintenance work, or that he was "next in line" to be called.

Once the school board properly establishes a substitute list in a particular classification of employment by applying employee seniority, assignments must be offered to each employee on the list on a rotating basis. If an employee has accepted an assignment, he or she must wait his or her turn before the next available assignment is offered. *See Davis v. Kanawha County Bd. of Educ*., Docket No. 2011-0002-KanEd (Aug. 8, 2012). Unless Grievant demonstrates that he would have received the assignment, he has no standing to challenge the decision to assign the work to substitutes within the Custodian classification, because he would not be entitled to any personal benefit as a result of the ruling he seeks.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). *See Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ*., Docket No. 93-29-481 (Apr. 4, 1993).

2. 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 fill the temporary absence of another service employee. W. Va. Code § 18A-4-15.

3. The definitions for custodian, groundsman, handyman, and general maintenance set forth in W. Va. Code § 18A-4-8 are sufficiently broad to give Respondent discretion to assign mulching work on school playgrounds to substitute employees holding any of these classification titles.

4. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish that he or she was "next in line." *Jamison v. Monongalia County Bd. of Educ*., Docket No. 05-30-338 (Jan. 20, 2006); *Saddler v. Raleigh County Bd. of Educ*., Docket No. 02-41-420 (Apr. 29, 2003). *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).

5. Grievant failed to establish that, if the mulch spreading work had been assigned to general maintenance substitutes rather than custodial substitutes, and the proper seniority rotation been followed, he would have received any of the work assignments at issue in this grievance.

Therefore, 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).

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LEWIS G. BREWER
Administrative Law Judge

Date: May 29, 2013