RANDALL MILAM,

Grievant,

v v.

DOCKET NO. 97-41-380

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On or about April 20, 1997, Grievant filed a grievance alleging a violation of W. Va. Code §18A-4-8b, in that Respondent assigned extra duty work performed on Saturday, April 12, 1997, to a long-term, substitute service employee who was less senior than Grievant, without first offering Grievant the extra duty. The grievance was denied at Levels I and II, and was waived at Level III. A Level IV hearing was held on October 4, 1997. The matter became mature for decision on November 12, 1997, the deadline for submitting Proposed Findings of Fact and Conclusions of Law. For reasons explained below, the grievance is granted.

FINDINGS OF FACT

1 1.

Grievant is employed as an Electrician II/HVAC II, (See footnote 1) and is currently assigned to Respondent's Food Services Department. Agreed Exhibit 1.

2 2.

Grievant was previously assigned to Respondent's Maintenance Department, along with Respondent's other five Electricians. He was moved to Food Services sometime in the past year, to reflect the fact that Grievant's position is paid through federal food services funding, and to allow Grievant to spend more time working on refrigeration and food services equipment.

3 3.

In the Maintenance Department, employees are allowed to work overtime to complete a particular project on which they worked during the regular work day. Such “carry

over" work is termed "overtime" and distinguished from "extra-duty" work in Raleigh County. Saturday work is generally assigned on a rotating, seniority basis, as "extra-duty work."

4 4.

Respondent has six employees who hold the Electrician classification. Grievant and one ofthe other five Electricians are multiclassified as Electrician II/HVAC II. All Electricians other than Grievant are in the Maintenance Department. The Maintenance Department employees are generally paired in teams of two, who work well together.

5 5.

Prior to April 30, 1997, Grievant was offered extra-duty work from the Maintenance Department on a rotating seniority basis only when it involved work performed on a Saturday. Prior to that date, any extra-duty work performed at other times was assigned on a rotating seniority basis only to Electricians assigned to the Maintenance Department. If all five of the Maintenance Department Electricians declined the non-Saturday extra-duty work, it then was offered to Grievant.

6 6.

Grievant received all overtime and extra-duty work available from Food Services for Electricians and/or HVACs. Electricians in the Maintenance Department were not offered the opportunity to accept extra-duty work from the Food Services Department.

7 7.

Work installing lighting in the hallways of Respondent's Alternative Education Center was planned for a Saturday, because it involved using ladders and fewer people would be travelling the hallways on Saturday. On Friday, April 11, 1997, Charles Jones, Electrician and Crew Leader, performed some work at the Alternative Education Center in preparation for installing lighting the next day. He evaluated the material and equipment needs of the job, and did some planning. No other employee performed such "preparatory work."

8 8.

On Saturday, April 12, 1997, three Electricians from the Maintenance Department were assigned to work at the Alternative Education Center. Mr. Jones and another Electrician assigned to work were both more senior than Grievant. Teresa Mason was the third Electrician assigned to work. Each Electrician worked eight hours that day.

9 9.

Ms. Mason had been substituting for an absent regular employee for several months as of April 12, 1997. She had not received the position through competitive bid; but had instead received the position by being "called out" as a substitute, from the substitute rotation list. Ms. Mason has less seniority as an Electrician than Grievant.

10 10.

Mr. Jones offered the April 12, 1997, work to all five Maintenance Department

employees in the Electrician classification. Two Electricians declined the assignment prior to Mr. Jones offering it to Ms. Mason. Grievant was not offered the opportunity to work. 11 11.

For school year 1996-97, Grievant and Mr. Jones received the most hours of overtime and extra-duty work of all Electricians. (L II, Administration Exhibits 1 and 2.) Mr. Jones was often required to work, as a consequence of his position as Crew Leader, when others declined extra-duty work. Grievant accepted every overtime/extra-duty assignment offered him, whether in the Electrician or HVAC classification, and whether from the Food Services Department or the Maintenance Department. Other Electricians had turned down opportunities to work.

12 12.

Sometime after April 12, 1997, and after this grievance was instituted, Grievant and all other Electricians voted unanimously to allow long-term substitutes to be placed on the extra-duty rotation list and to accept extra-duty work. (L II, Admin. Ex. 4.)

DISCUSSION

In a non-disciplinary grievance, the burden of proof is on the grievant to prove all elements of his case by a preponderance of the evidence. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). See also, W. Va. Code §18-29-6. Here, Grievant asserts that the work performed on April 12, 1997, was extra-duty work, and that it should have been offered to him, rather than to Ms. Mason, as the next most senior Electrician on the rotation list. He further argues that Ms. Mason was not eligible for the extra-duty assignment on April 12, 1997, as she was not hired by competitive bid after the regular employee for whom she was substituting was absent for 25 days, citing Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995).

Respondent counters that W. Va. Code §18A-4-15(2) (See footnote 2) requires long-term substitute serviceemployees to be treated as if they have regular employee status, and that Ms. Mason was entitled to such “regular” status pursuant to W. Va. Code §18A-4-8g. (See footnote 3) Respondent proposes that W. Va. Code §18A-4-8b, which governs making extra-duty assignments, be given a construction which includes employees who are afforded regular employment status pursuant to Code §§18A-4-8g and 18A-4- 15(2). Respondent also suggests that it is entitled to assign extra-duty work among employees assigned to the Maintenance Department before offering it to Electricians in other departments, and alludes to the inequity of allowing Grievant to participate in the extra-duty rotation of Maintenance Department Electricians, while receiving all the Food Services

Department's extra-duty work himself.

W. Va. Code §18A-4-8b, paragraph six, defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." "In order to find that a task involves an extra-duty assignment per §18A-4-8b, the name (or nature) of the task is not nearly as important as the time in which the work is performed." Broughman v. Tyler County Bd. of Educ., Docket No. 94-48-068 (Jan. 20, 1995) at 6, aff'd Cir. Ct. Kanawha County No. 95-AA-54 (Nov. 6, 1995). (See footnote 4) Accord Blankenship v. MingoCounty Bd. of Educ., Docket No. 96-29-334 (Apr. 22, 1997).

The April 12, 1997 work was scheduled intentionally for a Saturday, when few people would be in the hallways in which lighting was to be installed. It did not occur during regular working hours, and was an irregular job which had to be performed periodically or occasionally. To the extent that Respondent argues the work performed on April 12, 1997 constituted “overtime” rather than extra-duty work, the argument is rejected. Respondent's own treatment of the work showed it to be “extra-duty,” as Respondent offered the work on a rotating seniority basis to all Electricians in the Maintenance Department. The work performed on April 12, 1997, was an extra-duty assignment.

Extra-duty assignments are governed by W. Va. Code §18A-4-8b, paragraph 6, and are to be made as follows:

> An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated: Provided, That an alternative procedure for making extra-duty assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

Respondent's argument that it could assign extra-duty work to Electricians within the Maintenance Department, without including Grievant on its rotation list in order of seniority, must be rejected. "The statute makes no provision for the allocation of overtime assignments which depend on an employee's site or job location. Rather[,] it states that seniority within a particular category of employment shall determine who receives first priority." Yoho v. Marshall County Bd. of Educ., Docket No. 25-86-073-2 (Dec. 3, 1986) (employer unilaterally excluded a maintenance employee from county-wide extra-duty assignments, as the employer believed that employee had a site-based maintenance employment). Accord, Poling v. Taylor County Bd. of Educ., Docket No. 95-46-444

(Dec. 29, 1995). These prior decisions govern the outcome of this argument. Absent some alternative arrangement agreed to by a majority of the affected employees, Respondent is mandated to offer extra-duty work in order of seniority, on a rotating basis, to all employees holding the Electrician classification, regardless of each employee's specific assignment. Neither physical nor organizational location have bearing on what names must appear in seniority order on the rotation list. Similarly, Respondent cannot assign extra-duty work to Electricians based upon the “team” to which the individuals belong. The statute mandates a strict seniority-based, rotational assignment of extra-duty work.

Due to the above determinations, and to the finding that Grievant had more seniority than Ms. Mason, it is unnecessary to reach the issue of Ms. Mason's status under Code §§18A-4-15 and -8g. (See footnote 5) Grievant should have been on Respondent's Electrician rotation list for extra-duty work, in order of seniority. Seniority would have placed him above Ms. Mason on the rotation list. All other employees had been contacted, so Grievant should have been called before Ms. Mason (if she should have been contacted at all for extra-duty work). Grievant testified that he was available to work on April 12, 1997, and clearly would have accepted the assignment if offered. He is entitled to the pay which Ms. Mason received for the extra-duty work performed on April 12, 1997.

Conclusions of Law

1 1.

Grievant bears the burden of proving the facts supporting his legal claims by a preponderance of the evidence. W. Va. Code §18-29-6. 2 2.

W. Va. Code §18A-4-8b, paragraph six, defines extra-duty assignments as "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips."

3 3.

The work performed on April 12, 1997, by Ms. Mason was extra-duty work.

4 4.

Extra-duty assignments are to be made as follows:

an employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments.

W. Va. Code §18A-4-8b. An alternative procedure may be utilized if it is approved by both the county board of education and two thirds of the employees within the particular classification category of employment. Id.

5 5.

No alternative procedure had been approved for assigning Respondent's extra-duty work for Electricians, prior to April 12, 1997.

6 6.

Grievant proved that Respondent had not properly offered him extra-duty work which was assigned to a less senior Electrician, and performed on April 12, 1997. Had Respondent followed rotation list seniority, Grievant would have been offered, and would have accepted the work.

Accordingly, this grievance is hereby **GRANTED**.

Respondent is **ORDERED** to pay to Grievant the pay, including any benefits and interest, which he would have received had he worked on April 12, 1997.

Any party may appeal this decision to the Circuit Court of either Kanawha or Raleigh County. Such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: December 16, 1997

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JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1 *Although not specifically proven, it is apparent that "HVAC II" is the position described in W. Va. Code §18A-4-8 as "Heating and air conditioning mechanic II."*

Footnote: 2 *W. Va. Code §18A-4-15, states, in pertinent part,*

> *The county board shall employ and the county superintendent, subject to the approval of the county board of education, 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 employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forthin section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position; . . .

Footnote: 3 *W. Va. Code §18A-4-8g, ¶7 states, in pertinent part:*

A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to [§18A-4-15(2) and (5)]: Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

Footnote: 4 *Broughman found that occasionally driving students on field trips during the bus driver's normal work day hours did not constitute "extra-duty" requiring additional compensation. There, the employer had a long-standing practice and a written policy requiring such work of all drivers, on a rotating basis. The additional driving became part of the bus operator's work day on those occasions when it was performed, and additional compensation was not required.*

Footnote: 5 *Respondent is urged to review the situation, considering the cited Code provisions and this Grievance Board's decisions in Stutler v. Wood Co. Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987); and Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995) (must post and fill competitively leaves of absence extending beyond 30 days, and only after competitively obtaining the position may the long-term substitute receive the rights, privileges and benefits of the position as provided by Code).*