CHRISTOPHER STEWART,

Grievant,

v. **DOCKET NO. 02-11-093**

GILMER COUNTY BOARD

OF EDUCATION,

Respondent,

and

GERALD MCHENRY,

Intervenor.

DECISION

Christopher Stewart ("Grievant") initiated this proceeding on January 31, 2002, alleging Respondent Gilmer County Board of Education ("GCBOE") violated statutory provisions requiring that substitutes be called in a rotational order for assignments. He seeks back pay for a substitute bus run which began on January 22, 2002. The grievance was denied at level one, and a level two hearing was conducted on February 25, 2002. A level two decision, denying the grievance, was issued on March 1, 2002. A level three hearing was held on March 25, 2002, and the grievance was denied at the conclusion of that hearing. (See footnote 1) Grievant appealed to level four on April 2, 2002. A hearing was held in the grievance board's office in Elkins, West Virginia, on June 3, 2002. Grievant was represented by counsel, F. John Oshoway; Respondent was represented by counsel, Kimberly S. Croyle; and Intervenor was represented by counsel, John E. Roush. Thismatter became mature for consideration upon receipt of the parties' final fact/law proposals on July 25, 2002.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as a substitute bus operator. He has the least seniority

of the 12 substitute bus operators employed by GCBOE.

2. Intervenor is employed by GCBOE as Bus Supervisor and is responsible for making assignments for substitute bus operators.

3. Respondent has adopted Policy 4122.3, "Daily Substitute Assignment - Service Personnel," which provides, in pertinent part:

> A log of calls made to each substitute shall be maintained on a standardized form. No more than two efforts will be made to contact an individual substitute per occasion of need. The offers of work made to each substitute and the incidents of acceptance and refusals (with reasons) shall be recorded. If a substitute employed is called and there is no answer, the reason for not accepting employment is "Not Available."

The policy also provides that substitutes will be called in a seniority-based rotation.

4. Intervenor maintains a substitute call list for regular bus routes, which has each substitute driver's name on it in descending order of seniority. Beside each driver's name is a series of boxes, which are filled in each time a driver either accepts an assignment, refuses work, or cannot be reached. Once each driver has had his box filled going down the list, Intervenor then goes back to the top of the list with the next assignment, starting the rotation again. 5. Prior to the beginning of each work week, Intervenor calls substitute drivers to fill any runs which are available due to a scheduled absence of a regular driver. Then, as each week progresses, substitutes are called from the list to fill runs which become available on short notice. Because Intervenor only writes on the list the date the run is actually made by each driver, rather than the date he was called and accepted the run, the dates on the substitute call list appear to not be in chronological order. For example, assuming A, B, and C are the next three substitutes on the list in order of seniority, A would be offered a run which would occur on March 20, which Respondent received notice of on March 2. On March 5, notice is received of a vacancy for March 12, which is offered to and accepted by B. On the evening of March 9, notice is received for an assignment the following day, which is offered to C. On the list maintained by Intervenor, in order of the dates of the runs, it would appear as C first, then B, then A. Actually, these runs were offered and filled in order of seniority. (See footnote 2)

6. On January 18, 2002, Intervenor was notified that a regular driver would be unable to make his afternoon run. Intervenor called the next person on the substitute list who had not been given an opportunity for a run, Rick Sheets, who did not answer the call. Intervenor noticed at that point that a more senior driver, Harold Allen, had somehow been "skipped" in the current rotation. Mr. Allen was

offered the January 18 run and accepted it. 7. Grievant's name is the next name on the list after Rick Sheets in order of seniority.

8. After Mr. Allen accepted the January 18 run, all drivers had either been offered or given a run during that rotation.

9. A run became available on the evening of January 21, 2002, for the following day. Intervenor started a new rotation, calling the most senior drivers first, and the run was ultimately given to Tommy Ratliff, the third most senior substitute.

10. The run driven by Mr. Ratliff became a long-term vacancy, which he served in until it was posted and filled with a regular driver.

11. Prior to January 18, Grievant had most recently performed a substitute bus run on January 11.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. When a substitute is to be employed to fill a vacancy created by the temporary absence of a regular employee, the substitute must be selected "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. Grievant contends that Intervenor's list obviously shows that substitutes were not called in order of seniority, violating both the statute and Respondent's policy. It appears that Grievant does not claim he should have been awarded the January 18 run given to Harold Allen, who had been skipped in the rotation. Rather, he claims that, if proper rotational order had been followed, he would have been the next person in line to receive a run on January 22. However, Grievant has failed to acknowledge the explanations given by Intervenor and other witnesses, who explained how the seniority rotation was followed. Grievant has become “hung up” on the fact that the dates on Intervenor's substitute sheet after each driver's name do not appear in chronological order. However, as set forth in the findings of fact above, the evidence supports a finding that the runs were, in fact, offered and assigned in order of seniority,

although they may not have been driven in chronological order. In a very similar factual situation, this Grievance Board has concluded that, due to the many varying factors that affect the list reflecting substitute assignments, the mere fact that the dates are not in chronological order does not establish that seniority rotation has not been followed. Anderson v. Raleigh County Bd. of Educ., Docket No. 01-41-378 (Jan. 28, 2002).

In the instant case, Respondent's evidence clearly demonstrates that every possible effort has been made to employ substitute bus drivers on a rotating basis. After January 18, every driver had been given an opportunity to accept or refuse a run, and a new rotation was started. Grievant is not entitled to the relief requested.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

3. Grievant has failed to prove by a preponderance of the evidence that Respondent failed to employ substitute bus drivers on a rotating basis in order of seniority during January of 2002.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Gilmer County, and 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. 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.

Date: August 6, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Because he is responsible for making the substitute bus operator assignments, Mr. McHenry was allowed to intervene at level three.

Footnote: 2

As a result of the instant grievance, Intervenor has begun keeping a more detailed list, reflecting when each substitute was called, when runs were accepted, and when they actually occurred.