DAVID CHAPMAN,

Grievant,

v v.

Docket No. 03-51-279

WEBSTER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Chapman, filed this grievance on July 14, 2003, against his employer the Webster County Board of Education ("WCBOE" or "Board"). His Statement of Grievance reads:

> Grievant contends that the Respondent failed to timely fill a summer position as a bus operator and failed to offer him the opportunity to substitute in the position. Grievant alleges that Respondent has violated, West Virginia Code §§ 18A-4-8b, 18A-4-15, & 18-5-39. (Grievant ultimately received the position as a result of the posting but missed approximately three weeks as a result of the failures on the part of Respondent.)
>
> Relief sought: Grievant seeks back pay for the three weeks of salary he lost and compensation for any lost benefits.

This grievance was denied at Levels I and II. Grievant by-passed Level III, and appealed to Level IV on September 28, 2003. A Level IV hearing was scheduled on March 23, 2004, and this case became mature for decision on April 8, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a Bus Operator by WCBOE for approximately 26 years.

2. At the end of the regular 2002 - 2003 school year, Bus Operator Richard Moats retired.

3. Grievant knew Mr. Moats had a summer run with the Energy Express, and Grievant wished to receive this run if it were posted for the Summer of 2003.

4. He checked frequently with the Transportation Secretary, Carol Green, during the end of the school year, and was informed WCBOE did not know if there would be a need for the run.

5. Grievant was due to go on vacation in mid-June, and he gave this information to Ms. Green. He placed a bid for the position with Ms. Green in case it was posted while he was on vacation in North Carolina.

6. Grievant did not leave a number where he could be reached while he was on vacation, and Ms. Green did not know if he had phone service at his North Carolina camp.

7. On Thursday, June 19, 2003, Ms. Green received notice there would be a need for Mr. Moats' summer run, and she began calling regular bus operators according to seniority to see if any of them wanted to substitute on the run until it was posted and filled. On that same day, John Cutter, a bus operator with less seniority than Grievant, accepted the substitute position.

8. Friday, June 20, 2003, was a state holiday, and Ms. Green was not at work. The first day of work in the position was Monday morning, June 23, 2003.

9. Ms. Green did not call Grievant because he was on vacation, and she did not have a number where she could reach him. 10. Grievant returned from vacation on June 26 or 27, 2003. He learned the position had been filled by a substitute until it could be posted and filled pursuant to W. Va. Code § 18A-4-8(b).

11. He requested to assume the position, but was told the position was Mr. Cutter's by statute until it was posted and filled.

12. The Board approves all postings and approved this posting on Tuesday, July 1, 2003. The position was posted on Monday, July 14, 2003. After the required posting period was over, Grievant, as the most senior applicant, received the position on Monday, July 21, 2003, and held it until the assignment was completed.

13. The position was not posted sooner because the two administrators responsible for this posting, the Transportation Director and the Personnel Director, were on vacation.

14. Grievant also filled in for Mr. Cutter the week of July 7 - 11, 2003, while Mr. Cutter was on vacation.

Issues and Arguments

Grievant questions both how the position in question was filled on a temporary basis, and on what date it should have been filled. Grievant asserts Respondent had four days (See footnote 2) to fill the position between June 19, 2003, and the start of the run on June 23, 2003, and maintains it was "unconscionable" that Ms. Green did not attempt to contact him about the position. He indicates Ms. Green should have called his parents to obtain a number in North Carolina where he could be reached, and if called, he would have cut his vacationshort to accept the position. Grievant also asserts Respondent knew well in advance that there would be a need for the run, and it should have posted and filled it sooner. Grievant alleges a violations of W. Va. Code §§ 18A-4-8b and 18A-4-15 as the position was not filled within twenty days of when the vacancy was known.

Respondent maintains it followed all statutes in posting and filling the position. Respondent notes Grievant was not available when the substitute position became available.

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 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. "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The statutes involved in this grievance will be reviewed first. W. Va. Code § 18A-4- 8b(g) states:

> Boards shall post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service employees to observe for at least five working days. The notice of the job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five-day minimum posting period all vacancies shall be filled within twenty workingdays from the posting date notice of any job vacancies of established existing or newly created positions. Job postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply. Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant.

(Emphasis added).

W. Va. Code § 18A-4-15 discusses the employment of substitutes and states:

> (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:
>
> . . .
>
> (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 employee who had been assigned to fill the position: Provided, That within twenty working days from the commencement of the vacancy, the board shall fill the vacancy under the procedures set out in section eight-b of this article and section five, article two of this chapter and the person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to the position;

(Emphasis added).

W. Va. Code § 18-5-39(f) discusses the summer employment of service personnel states:

> Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight, article four, chapter eighteen-a of this code. . . . If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code. When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

(Emphasis added). The Grievance Board has consistently held that "[i]Implicit in the provisions of W.Va. Code §18A-4-8b governing the appointment of school service employees is that an employee making application must be available to assume the duties of a position at the times designated by the Board. See, Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (April 21, 1995)." Walls v. Wyoming County Bd. of Educ., Docket No. 95-55- 157 (Aug. 29, 1995). See Russell v. Mason County Bd. of Educ., Docket No. 03-26-028 (June 3, 2003), aff'd Kanawha County Cir. Ct.

Civil Action No. 03-AA-95 (Jan. 13, 2004); McClintock v. Morgan County Bd. of Educ., Docket No. 02-32-378 (Apr. 18, 2003); Skeens v. Lincoln County Bd. of Educ., Docket No. 02-22-070 (June 19, 2002); White v. Monongalia County Bd. of Educ., Docket No. 00-30-279 (Jan. 2, 2001); Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996); O'Neal v. Kanawha County Bd. of Educ., Docket No. 20-86-239 (May 13, 1987). Grievant was on vacation when the run began; accordingly, Grievant was not "available to assume the duties of [the] position." Walls, supra.

As for Grievant's assertions Ms. Green's behavior was "unconscionable" when she did not call his parents to obtain Grievant's vacation phone number, this statement is specious. Grievant did not leave a number where he could be reached, he was aware the position might come available at the last moment, and he was aware the position had not been posted before he left. W. Va. Code § 18A-4-8b and W. Va. Code § 18-5-39(f) require a vacant summer position be posted before it is filled, and such a position is filled in the intervening period by a substitute. Ms. Green had no duty to seek Grievant out. If, indeed, Grievant had left his vacation phone number with Ms. Green with directions to phone him, then that might be a different story. As for Grievant's assertions that Respondent was required by W. Va. Code §§ 18A- 4-8b and 18A-4-15 to fill the position within twenty days of when the vacancy was known, this contention is incorrect. As stated in W. Va. Code § 18A-4-8b, Respondent is required to fill the position in the following manner, "[a]fter the five-day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions." (Emphasis added). In this case the posting was taken down on July 21, 2003, and Grievant was notified on that same day that he would start the position the following Monday. Accordingly, the dictates of W. Va. Code § 18A-4-8b were followed.

As for a violation of W. Va. Code § 18A-4-15, this Code Section requires, "[i]f the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code." In other words, W. Va. Code § 18A-4-15 required this position be filled by a substitute until it could be posted and filled. This is what Respondent did.

Additionally, there is no evidence to support Grievant's contention that WCBOE knew in advance the run would be needed. Indeed, the testimony was the exact opposite. Respondent found out the Thursday before the run was to start on the following Monday, and then filled it according to the applicable statutes.

The above-discussion will be supplemented by the following Conclusions of Law.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Hollyv. 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. "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 Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." Walls v. Wyoming County Bd. of Educ., Docket No. 95-55-157 (Aug. 29, 1995). See Russell v. Mason County Bd. of Educ., Docket No. 03-26-028 (June 3, 2003), aff'd Kanawha County Cir. Ct. Civil Action No. 03-AA-95 (Jan. 13, 2004); McClintock v. Morgan County Bd. of Educ., Docket No. 02-32-378 (Apr. 18, 2003); Skeens v. Lincoln County Bd. of Educ., Docket No. 02-22-070 (June 19, 2002); White v. Monongalia County Bd. of Educ., Docket No. 00-30-279 (Jan. 2, 2001); Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996); O'Neal v. Kanawha County Bd. of Educ., Docket No. 20-86-239 (May 13, 1987).

3. When the summer assignment began, Grievant was not "available to assume the duties of [the] position." Walls, supra.

4. Grievant did not meet his burden of proof and establish violations of W. Va. Code §§ 18A-4-8g, 18A-4-15, and/or 18-5-39. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Webster County. Any 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: May 5, 2004

Footnote: 1

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and the Board was represented by its Howard Seufer, Esq. from Bowles Rice McDavid Graff and Love.

Footnote: 2

Grievant's contention is incorrect. See Finding of Fact 8, supra.