JOSEPH BOYLES,

Grievant,

v. Docket No. 04-30-342

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Joseph Boyles ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a bus operator, filed a level one grievance on July 7, 2004, in which he alleged violations of W. Va. Code §§ 18-5-39 and 18A-4-15, when he was not awarded a substitute assignment in Summer 2004. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced his appeal to level four on September 21, 2004. An evidentiary hearing was conducted to supplement the lower-level record on March 14, 2005. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq. and Harry M. Rubenstein, Esq., of Kay, Casto & Chaney. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on April 12, 2005.

The essential facts of this grievance are not disputed, and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by MCBE as a bus operator at all times pertinent to this grievance.

2. In Summer 2003, Grievant was employed as a substitute for Cathy White,who was ill, but had not requested a medical leave of absence. Because there was no leave of absence requested, the position had not been posted.

3. In Summer 2004, Ms. White continued to be incapacitated, but again did not request a leave of absence. As the next substitute on the call list, Elaine Prickett was assigned to the run.

Discussion

Grievant argues that he was entitled to retain the position in question until Ms. White returned. MCBE asserts the day-to-day substitute assignment was properly filled from the summer substitute roster, and that Grievant retained no right to the position from the previous summer.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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.

W. Va. Code § 18A-4-15 provides in part:

(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 employee who requests a leave of absence from the county board in writing and who is granted the leave in writing by the county board . . . .

*** * * (b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments.**

Grievant argues that he was entitled to retain the Summer 2004 assignment by virtue of the statutory language, "accepting the assignment throughout the period of the regular employee's absence." Grievant also relies on a level four grievance decision, Thompson v. Putnam County Board of Education, Docket No. 02-40-027 (Apr. 15, 2002), which held that a

break in a substitute employee's assignment does not terminate the employee's claim on the position. Grievant's argument is interesting, but flawed. Consideration must be given to W. Va. Code § 18-5-39(f), which specifically addresses summer employment. In reference to service personnel, it provides:

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. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer.... 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 senioritybasis. When any summer employee who is employed in a summer position is granted a leave of absence for the summer months, the board shall give regular employment status to the employee for that summer position which shall be filled under the procedure set forth in section eight-b, article four, chapter eighteen-a of this code. The summer employee on leave of absence has the option of returning to that summer position if the position exists the succeeding summer or whenever the position is reestablished if it were abolished.

In this case, Grievant was properly assigned to substitute for Ms. White in 2003. However, the assignment reverted to Ms. White, who did not request a leave of absence in 2004. MCBE properly assigned Elaine Prickett, the next substitute employee in the rotational order, to fill the day-to-day position. See Prickett v. Monongalia County Bd. of Educ., Docket No. 04-30-311 (Dec. 7, 2004). This ruling is consistent with the Grievance Board's decision in Wilkinson v. Kanawha County Board of Education, Docket No. 91-20- 464 (Mar. 10, 1992), which determined that Code § 18-5-39 does not give substitutes the right to serve in the same summer position from year to year.

In addition to the foregoing discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. MCBE acted in compliance with W. Va. Code § 18-5-39 when it assigned thenext substitute on the rotational list to fill in for Ms. White in Summer 2004.

3. Grievant has failed to prove by a preponderance of the evidence that he was entitled to retain a substitute assignment from the previous summer.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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.

DATE: APRIL 28, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE