ERNEST QUATTRO,

Grievant,

v. DOCKET NO. 04-34-425

NICHOLAS COUNTY BOARD

OF EDUCATION,

Respondent.

D E C I S I O N

On or about August 25, 2004, Grievant Ernest Quattro filed his grievance against his employer, the Nicholas County Board of Education ("NCBOE"), alleging:

> Grievant, a regularly employed Mechanic, contends that Respondent erred in utilizing a substitute mechanic to substitute for absent Mechanics at Grievant's work station. Grievant contends that he was available and willing to serve for the absent mechanic. Grievant alleges a violation of W. Va. Code §§ 18A-4-15 & 18-35-39(f). (See footnote 1)
>
> Relief Sought: Grievant seeks compensation for wages lost with interest. (See footnote 2)

This grievance was denied at Levels I and II and waived at Level III. A Level IV hearing was held in the Grievance Board's Beckley office on July 9, 2004. (See footnote 3) This matter became mature for decision on March 1, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts he should have been called to substitute for absent mechanics. Respondent avers Grievant had requested a period of time off to care for his wife, and this time was granted. Grievant was to call if he was available sooner, and he did not.

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

Findings of Fact

1. Grievant is regularly employed by Respondent as a 240-day Mechanic, and he is currently assigned to the Summersville garage.

2. On June 18, 2004, NCBOE's mechanics, including Grievant, met with then- Superintendent Gus Penix, Director of Transportation David Baber, Director of Personnel Gene Sparks, and Shop Foreman Marvin Wood to plan the summer schedule and discuss various issue and problems.

3. At that time, Grievant informed the administrators he would need five weeks off, June 18, through July 26, 2005, to take his wife to Charleston for cancer treatments.

4. Grievant's request was granted, and the other mechanics worked around his schedule. The mechanics were also told if there was a need for a substitute during the summer, a regular mechanic would be called first.

5. After this meeting, Grievant told Mr. Baber he would call him if he was available sooner. Mr. Baber directed Grievant to call Mr. Wood if he was unable to contact him. Grievant also gave Mr. Baber several cell phone numbers and asked him to call if the time for another grievance hearing, scheduled for July 9, 2004, was changed. Grievant stated these cell phones were not his, so please do not use them for other reasons.

6. Shortly after this meeting, Mr. Baber sent all the mechanics their schedulesby mail.

7. While Grievant's wife received treatment, Grievant and his wife stayed in a camper in Sissonville, and they only came home on the weekends. Grievant checked his home phone messages daily.

8. At the July 9, 2004 hearing which was held in Charleston, Grievant's wife informed Superintendent Penix and Mr. Baber that she had nine more treatments, and these treatments were done Monday through Friday. The approximate date of her last treatment corresponded to the date Grievant had stated he would be available for work. Although Grievant talked to Superintendent Penix and Mr. Baber at the hearing, he did not indicate he might be available to work sooner.

9. The last week of her treatments, Grievant's wife told Grievant he could have a break and some "self time," and she would get her friends to take her to her appointments. Grievant was available for work at this time, but he did not call anyone and tell them.

10. Grievant's friend and co-worker, Donis Snider, testified he asked Mr. Woods if he was going to call Grievant to substitute, and Mr. Woods said he was not. Mr. Woods does not remember

this conversation, and indicated he would have no reason to talk to Mr. Snider about this situation as it was not his business.

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 (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. "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 Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Applicable law

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

> (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. . . . Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence.

(Emphasis added).

Pursuant to this Code Section and the statements at the June 2004 meeting, Grievant should have been called to substitute if he had been available.

II. Credibility

The issue of whether Grievant was available must be determined by examining the credibility of the witnesses. Grievant's testimony is in direct conflict with Respondent'switnesses. Grievant believes Mr. Baber said he would call him if he needed him, and Mr. Baber is sure Grievant said he

would call if he became available. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 4) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

In assessing the testimony presented, the undersigned Administrative Law Judge found the testimony of Mr. Baber, Mr. Woods, Mr. Penix, and Mr. Sparks to be convincing. The testimony of Respondent's witnesses was internally and externally consistent, and consistent with each other. Their testimony was plausible. It is reasonable andappropriate that Mr. Baber and Mr. Woods would not call Grievant to work unless he knew he was available, especially since Grievant had specifically asked for this time off to be with his wife while she had cancer treatments. Further, Grievant received a copy of his summer schedule by mail shortly after the meeting. If he had concerns, all he had to do was call Mr. Baber and seek clarification. Next, if Grievant knew he was going to be available for work the last week of his scheduled time off, he could have informed either Mr. Woods or Mr. Baber at the Level IV hearing in Charleston. This he did not do. Additionally, Grievant's testimony at Level IV was inconsistent with his testimony at the Level II hearing. Grievant stated at Level II that he requested these days off to be with and assist his wife while she was in Charleston for treatment. At the Level IV hearing, he made the following statements about his scheduled time off: 1) his wife's treatment had no bearing on his summer schedule; 2) his schedule was decided without his input; 3) the schedule was discussed and debated; and 4) he did not get a copy of his schedule. Further, the undersigned Administrative Law Judge found Grievant had a tendency to exaggerate. He said his

wife's treatment only took five minutes. While the length of the treatment may have indeed been five minutes, the length of time spent getting to the hospital, parking, signing in, waiting to be seen, and the treatment time would certainly have taken longer than five minutes.

These credibility findings answer the question raised by the grievance. Grievant was to call Mr. Baber if he became available and he did not. Given Grievant's wife was undergoing extended treatment in a city over an hour away, and Grievant had asked for time off to be at her side, it would have been inappropriate for Respondent to call Grievant. 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 (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. "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 Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant failed to meet his burden of proof and demonstrate Respondent violated any statutory provision.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Nicholas 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 partyto 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: April 29, 2005

Footnote: 1

W. Va. Code § 18-5-39(f) deals with summer employment. Since Grievant is a 240-day employee, he is employed year around and his work in the summer is part of his regular contract. It is unclear why this Code Section was cited, and how Grievant thought it was violated.

Footnote: 2

It was not clarified how Grievant lost wages, as he testified that if he worked earlier in the contract year these days would count against his 240 work days.

Footnote: 3

Grievant was represented by John E. Roush, Esq. of the West Virginia School Service Personnel Association, and Respondent was represented by Erwin L. Conrad, Esq.

Footnote: 4

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing hearsay. See Borninkhof v. Dep't of Justice, 5 MSBP 150 (1981).