LOEL FLOWERS,

Grievant,

v. **Docket No. 04-30-381**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Loel Flowers ("Grievant") initiated this proceeding on August 18, 2004, challenging Respondent's use of substitute employees for a work assignment during the summer of 2004. He seeks lost wages plus interest. The grievance was denied at level one on August 27, 2004. A level two hearing was conducted on September 30, 2004, and the grievance was denied in a decision dated October 21, 2004. Level three consideration was bypassed, and Grievant appealed to level four on October 26, 2004. A hearing was held in Westover, West Virginia, on December 20, 2004. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 19, 2005.

The following pertinent facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as a Custodian III, assigned to Mountainview Elementary School ("Mountainview"). He holds a 220-day contract, and does not work a portion of the summer. 2. Grievant's first day of work under his contract for the 2004-2005 school year was August 1, 2004.

3. Grievant had previously worked at Mountainview as a year-round employee under a 261-day contract, and he was assigned to work during the summers. Grievant had bid upon another position, which he worked in briefly, then returned to Mountainview in 2003, after the position had been

reduced to 220 days.

4. During the summer of 2004, two full-time custodians, Carl Molisee and Keith Kuchish, worked at Mountainview. This was the first summer that there were two full-time custodians, rather than three, at the school.

5. Mountainview is the site of various summer school programs, during which students are present at the school throughout June and most of July.

6. At the end of July, Mountainview Principal Steven King notified the Board that he needed additional custodial help to prepare the school prior to the beginning of the regular school year. Work which needed performed included moving furniture, stripping and waxing floors, washing walls and cleaning light fixtures in classrooms which had been used during summer classes.

7. Two substitute custodians worked at Mountainview for one week, beginning on August 9, 2004, to prepare the school for the new school year.

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. LoganCounty 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.

___Grievant has asserted a variety of theories in support of his contention that he, rather than two substitutes, should have been allowed to perform the extra custodial work needed at Mountainview. First, he argues that , pursuant to the provisions of W. Va. Code § 18-5-39(f), he should have been allowed to perform this “substitute” work. That statute provides, in pertinent part:

> 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.

Clearly, this statute is not applicable to the instant situation, because there was no “absent” employee whose position these substitutes were hired to fill. The work involved here was simply

extra work, for which additional personnel was needed, not work which was normally performed by one or more absent employees.

Likewise, the same reasoning requires rejection of Grievant's allegation that he should have been allowed to “step up” into these “positions” pursuant to W. Va. Code § 18A-4-15(b), which requires that regular employees employed in the same building and classification as an absent employee be given the first opportunity to fill the position. Once again, this provision would not apply to the instant situation, where there was no absent regular employee.

However, Grievant does appear to have a valid argument that this assignment was extra duty work, which should not have been given to substitutes. West Virginia Code § 18A-4-8b defines extra-duty assignments as “irregular jobs that occur periodically oroccasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips.” The statute further provides that such assignments shall be made on the basis of seniority on a rotating basis, unless the employees within that particular job classification have voted upon an alternative procedure. The need for extra custodians to ready the building for the start of a new school year took Mountainview officials somewhat by surprise, and the assignment was of very short duration. Obviously, this work could not be performed by regular custodians at the school, at least not without assistance, because of its volume and the short time frame in which it needed to be completed. In fact, Grievant and the other two custodians assigned to Mountainview were all working during the second week of August, during which time there was a need for two additional custodians to complete all the work. The work was of the “occasional” type contemplated by Code § 18A-4-8b, and it should have been assigned to regular employees pursuant to a seniority- based rotation. See Prickett v. Monongalia County Bd. of Educ., Docket No. 02-30-242D (Jan. 13, 2003).

Nevertheless, as Respondent has pointed out, Grievant had already begun working under his 2004-2005 contract when the need for extra help arose, and personnel in addition to himself and the other custodians at Mountainview were still needed. Although Grievant contends that the work could have been performed in July, the evidence in this case established that Principal King did not realize additional help was needed until the end of July. Therefore, additional personnel were needed briefly in August to complete the work. As Grievant was already working, it would have been impossible for him to perform the additional work while performing his own, so he is not entitled to the relief requested. In addition, even if Grievant were deemed available to perform the work, it would have

hadto have been offered to more senior employees first. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

The following conclusions of law support this decision.

Conclusions of Law

1. 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.

2. Extra-duty assignments are “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips” and such assignments shall be made on the basis of seniority on a rotating basis. W. Va. Code § 18A-4-8b.

3. The custodial work performed in August of 2004 was an extra duty assignment, which should have been assigned to regular employees, pursuant to a seniority-based rotation.

4. Grievant was performing his regular work at the time of the extra duty assignment in August of 2004, so he could not have performed the extra work.

Accordingly, this 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: February 9, 2005

DENISE M. SPATAFORE

Administrative Law Judge