VIRLEY FERGUSON,

Grievant,

v. **DOCKET NO. 05-22-313**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Virley Ferguson filed this grievance on June 30, 2005, stating, “Working a cook with less seniority than myself all summer and they tell me because choice[.] [N]ot the way I see it if we had same seniority date then it would be choice but this is not the case.” Her stated relief sought is “All time lost.”

After being denied at the lower levels, a level four hearing was held in the Grievance Board's Charleston office on October 7, 2005. Grievant was self-represented, and Respondent was represented by counsel, Gregory W. Bailey of Bowles Rice McDavid Graff & Love, LLP. The matter became mature for decision on October 28, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant contends a purely seniority-based substitute rotation system should have been used to make assignments, rather than rotation through a school-specific substitute list. She had more seniority than a substitute who received a long-term assignment, and she was available at the time to work. Respondent contends it posted several substitute positions and gave the applicants a choice of schools, and the long-term assignment was not at a school Grievant had listed as one of her choices. Grievant rebuts this argument with a contention that, even if seniority were not the only factor, she had amended her list to include the school.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Substitute Cook. She was first employed in that

classification on January 7, 2002. Annette Adkins, another Substitute Cook, was first employed on March 25, 2003.

2. In May 2005 Respondent posted five regular Cook positions for the summer feeding programs at Duval High School/Griffithsville Elementary School, Hamlin Elementary School, Ranger Elementary School, Guyan Valley High School, and West Hamlin Elementary School.

3. In the same vacancy announcement, five Substitute Cook positions were also listed, each to be assigned to one of the above schools, to substitute exclusively for the regular Cook employed there.

4. The Substitute Cook Applications required the applicant to list four choices, in preference order, of the schools desired. Grievant submitted a second application on May 26, 2005, on which she listed Hamlin Elementary as her first choice. Grievant's application of May 21, 2005, listed West Hamlin Elementary as her first choice, and she was chosen for that assignment because she was the most senior substitute to apply.

5. Annette Adkins was chosen for the Duval High School/Griffithsville Elementary School position.

6. Hilda J. Adkins was hired as the regular Cook for the Duval position. At the time she applied and was hired, though, she was on Medical Leave, and never worked a day in the position. Instead, Annette Adkins, as the substitute for Duval, worked the entire term of the summer contract in her place.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. (See footnote 1) The facts in this case are entirely undisputed: Respondent posted five regular Cook positions assigned to five different schools. It then posted five substitute positions, and assigned one to each school. Grievant had the most seniority of all the substitute cooks who applied. On the substitute applications, the applicants were asked to list which school was their first choice at which to work. Grievant did not list Duval as her first choice, but another substitute who had less seniority than Grievant did, and she got this assignment. The regular Cook who was hired for Duval could not work because she was on medical leave, so she required a substitute from day one. The less-senior substitute was given this assignment.

"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. . . .'" (See footnote 2) There is nothing in the Code that authorizes Respondent to fill regular positions with substitutes in the way it did. Unlike regular positions that are assigned a permanent work location, substitutes are intended to be itinerant, and are assigned entirely on the basis of seniority rather than work location, or even seniority at a particular location. Evidence of the Legislature's intention in this regard is contained in West Virginia Code section 18A-4-15(b), which states, in part,

> 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 orher 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[.]

It is clear that overall service time in-classification is the deciding factor, and that there is one pool of substitutes, all of whom are in the same classification. Work assignment location is not a factor and is irrelevant. In this case, Grievant was the most senior applicant in the substitute pool, and should have been assigned the vacancy when the regular employee was not available.

Respondent also argues that, since there was a regular employee who applied for the substitute positions, this employee would have had priority over Grievant to fill the Duval position had it not been given to Ms. Adkins. While this is an accurate interpretation of the substitute assignment statute, there is no evidence in the record that employee was available for the assignment, or that she would have accepted the assignment had it been offered. There is evidence Grievant was available and would have accepted the job. As such, the regular employee's status is a non-issue.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 andHuman Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

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." *Stewart v. Gilmer County Bd. of Educ.*, Docket No. 02-11-093 (Aug. 6, 2002).

3. Grievant was the most senior substitute cook in the rotation, and should have been offered the Duval position when the regular cook assigned was not available.

For the foregoing reasons, this grievance is hereby **GRANTED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln County. Any such appeal must be filed within thirty 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.

November 9, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

Stewart v. Gilmer County Bd. of Educ., Docket No. 02-11-093 (Aug. 6, 2002).