KAREN WHITE-ROSS,

Grievant,

v. **DOCKET NO. 04-18-437**

JACKSON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Karen White-Ross filed a grievance on September 21, 2004, in which she claimed that Respondent, the Jackson County Board of Education, used substitute employees to work in maintenance when she should have been used. As relief, she is seeking payment for the time she would have worked, plus interest.

The grievance was denied at level one and two, level three was bypassed, and a level four hearing was held in the Grievance Board's Charleston office on March 16, 2005. Grievant was represented by West Virginia School Service Personnel Association Attorney John E. Roush, Esq., and Respondent was represented by Howard Seufer, Jr., Esq., of Bowles Rice McDavid Graff & Love LLP. The matter became mature for decision on the deadline for the parties' submissions of proposed findings of fact and conclusions of law, April 18, 2005.

Issues and Arguments

Grievant's contention is that she held a contract to perform the work that Respondent improperly used two substitute employees to do. On some of the days inquestion, Grievant argues, the "substitutes" were not actually called out to replace missing regular employees, (See footnote 1) but instead were performing work that should have been assigned to her within the Handyman/Truck Driver classifications. Respondent's position is that the two substitute employees were not performing work within the scope of Grievant's job classifications, and so did not deprive her of opportunities to work.

Based on a preponderance of the evidence adduced at the hearing, I find the following material

facts have been proven:

Findings of Fact

1. Grievant is regularly employed by Respondent as a Bus Operator during the regular school term.

2. In the summer of 2004, Grievant was employed from June 14 to August 20 as a Handyman/Truck Driver. The contract for the temporary position she filled specified, “The period of employment is as needed[.]” She held similar summer jobs in 2002 and 2003.

3. Two substitute service employees, Lois Parsons and Randall Stephenson, were called out to work during the same time period covered by Grievant's summer employment contract.

4. Mr. Stephenson testified at level four that his work consisted of digging a ditch with Ms. Parsons, and delivering furniture with Grievant.

5. Ms. Parsons testified that on the days she was not substituting for an absent employee, she was either helping to dig a ditch or working as a plumber's helper. She also mowed on two days in August. 6. Grievant worked July 6 - 9 and July 12.

7. Ms. Parsons worked June 14-18, June 22-25, and June 28-30. She worked July 1, 2, 6-9, 12-16, 19-22 and 26-30. She also worked August 2-6, 9-13, and 16-20.

8. Mr. Stephenson worked June 14-18, 22-25, and 28-30; and July 1, 2, 6-9, 12- 16, 19-23 and 26-28.

9. Employee absence reports in evidence show Mr. Stephenson was substituting June 14, 15, 16, 17, 18, 22, 23, and 24. Ms. Parsons was substituting June 14, 15, 16, 17, 18, 22, 23, 24.

Discussion

In this non-disciplinary grievance, Grievant bears the burden of proof. Her allegations must be proven by a preponderance of the evidence. *(See footnote 2)* Grievant must therefore prove that Ms. Parsons and Mr. Stephenson did work, on days they were not actually substituting for absent employees, that should have been assigned to her. While Respondent admits that on some days these substitutes were not actually substituting, and on some days they performed work within the scope of Grievant's job, nevertheless Grievant failed to meet her burden of proving both the circumstances concurrently occurred.

Mr. Stephenson testified at level four that his work consisted of digging a ditch with Ms. Parsons, and delivering furniture with Grievant. Obviously, Grievant was not deprived of work if she was working with Mr. Stephenson. The dates on which he performed the ditch-digging work are not in evidence, so there is no way to tell if Grievant was working on some other job those days or not.

Ms. Parsons testified that on the days she was not substituting for an absent employee, she was either helping to dig a ditch or working as a plumber's helper. Again, she could not be specific about which days were which. She did help move some books and equipment, but that was after Grievant's summer employment term ended.

Grievant's legal premise is entirely accurate. W. Va. Code § 18A-4-15 only permits substitutes to be called out to replace absent regular employees. Respondent nevertheless used them to perform odd jobs of the nature contemplated by Grievant's “as- needed” contract. The jobs Grievant's contract enabled her to perform were those encompassed by the statutory definitions of “”Handyman” and “Truck Driver,” found in W. Va. Code §§ 18A-4-8(l)(47) and (81): “manual tasks in any operation of the county school system,” and “operat[ing] light or heavy duty gasoline and diesel-powered vehicles.” The Handyman definition is broad enough to cover all the tasks Mr. Stephenson and Ms. Parsons remember working on. Although Respondent contends Grievant's temporary position was created to assemble and deliver furniture and deliver food to the schools, no such limitation is specified in her contract, which controls the terms of her employment.

Obviously, Mr. Stephenson and Ms. Parsons worked far more days than Grievant. Employee absence reports in evidence show Mr. Stephenson was substituting June 14, 15, 16, 17, 18, 22, 23, and 24. Ms. Parsons was substituting June 14, 15, 16, 17, 18, 22, 23, 24. While Respondent argues that Grievant has not shown on which days she could have worked while Mr. Stephenson and Ms. Parsons were not substituting, the facts become readily apparent when all the data is in the same place: (See footnote 3)

	6/14-24	7/1	7/2	7/6-9	7/12	7/13-16	7/19-22	7/23	7/26-30	8/2-6	8/9-13	8/16-20
G	-	-	-	W	W	-	-	-	-	-	-	-
P	Sub	W	W	W	W	W	W	W	W	W	W	W
S	Sub	W	W	W	W	W	W	-	W	-	-	-

On July 1, 2, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30; and on August 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, and 20, either Mr. Stephenson or Ms. Parsons (or both) were working on jobs where they were not assigned as a substitute for absent employee, and Grievant

was not called to work, although she was available. Respondent needed someone to do the work, and Grievant's contract stated she would be used “as needed.” That is, on thirty-one days in the summer of 2004, Grievant's contract entitled her to the assignments given to Mr. Stephenson or Ms. Parsons. Grievant has indeed met her burden of proving the facts as she claims them to be, and those facts entitle her to the compensation she seeks.

The following Conclusions of Law support this decision:

Conclusions of Law

1. This is a non-disciplinary grievance in which 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. Code St. R. § 156-1-4.21. "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 & Human 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. W. Va. Code § 18A-4-15 only permits substitutes to be called out to replace absent regular employees. 3. A ”Handyman” performs “manual tasks in any operation of the county school system,” and a “Truck Driver . . . operate[s] light or heavy duty gasoline and diesel-powered vehicles.” W. Va. Code §§ 18A-4-8(I)(47) and (81).

4. Grievant met her burden of proving Respondent improperly used substitute employees to perform work tasks it has previously contracted with Grievant to perform on thirty-one days.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant at the rate specified in her Summer, 2004 temporary contract for thirty-one days, plus interest on the amount owed.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

May 31, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Grievant makes no claim for days the substitutes actually were replacing regular employees. Those days, and the days Mr. Stephenson and Ms. Parsons worked outside the employment term in Grievant's contract, will not be discussed.

Footnote: 2

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

Footnote: 3

"Sub" indicates a day worked as a substitute;"-" indicates a day not worked; and "W" indicates a day worked performing the duties contemplated by Grievant's temporary summer contract."G,""P," and "S" indicate Grievant, Ms. Parsons, and Mr. Stephenson, respectively.