NANCY JAMISON,

Grievant,

v. **Docket No. 05-30-338**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Nancy Jamison ("Grievant") initiated this proceeding on July 22, 2005, alleging she should have been called to substitute for another absent regular employee during the summer of 2005. The grievance was partially granted at level two, with respect to the fact that Grievant could have been called for some substitute assignments during the summer, but she was found to have no entitlement to monetary damages. After level three consideration was waived, Grievant appealed to level four on September 16, 2005. A hearing was conducted in Westover, West Virginia, on November 18, 2005, at which time Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Jennifer S. Caradine. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 19, 2005.

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

Findings of Fact

1. Grievant has been employed by Respondent for approximately 10 years and is currently classified as a Secretary III. 2. For the 2004-2005 school year, Grievant's employment term ended on June 30, 2005.

3. Grievant's assignment for the 2005-2006 school year began on August 9, 2005.

4. Pursuant to an inquiry from Rick Williams, Assistant Manager of Human Resources, Grievant asked to have her name placed on a list of substitute "summer" secretaries, who could be called to substitute for the full-time secretaries employed in the central office. (See footnote 1)

5. Seven secretaries were placed on the summer substitute list, and all of them were classified as Secretary III. Listed in order of seniority, they were:

Bonnie Snyder

Sandy Moore

Beverly Osborne

Nancy Jamison

Cindy Gyorko

Charlene Bowen

Nancy Miller

6. Betty Wolfe is employed in the central office as a secretary. Effective July 1, 2005, her classification changed from Secretary III to Executive Secretary. Ms. Wolfe is assigned to assist the superintendent, answer the phones, and operate the automated substitute call-out system ("TSSI").

7. In order to operate the TSSI system, employees must attend a training class. Ms. Wolfe teaches other secretaries how to use the central office phone system. 8. Of the seven secretaries on the summer substitute list, only Ms. Snyder, Ms. Bowen and Ms. Miller were trained to use TSSI and the phone system.

9. During the summer of 2005, Ms. Wolfe was absent on July 8 and 11 (a Friday and succeeding Monday), July 15 and 18 (also a Friday and Monday), and on July 22.

10. For Ms. Wolfe's absence on July 8 and 11, only Ms. Bowen was asked if she wanted the assignment, and she accepted it. According to the seniority list, Ms. Snyder should have been called first.

11. For the absence on July 15 and 18, administrators first called Ms. Miller, as the next person on the seniority list after Ms. Bowen. After Ms. Miller refused the assignment, Ms. Snyder was called, and she was unavailable. Because the other substitutes were not trained, they were "skipped" in the rotation, and Ms. Bowen was again called and placed in the substitute assignment.

12. For Ms. Wolfe's absence on July 22, Ms. Miller was called, and she refused the assignment. Once again, the assignment went to Ms. Bowen. (See footnote 2)

13. Grievant and the other three "untrained" secretaries on the summer substitute list were never called to substitute during the summer of 2005.

14. During the 2004-2005 school year, Grievant was assigned to work on a grant, and she

continued to perform some hourly work during the summer of 2005. In order to “wrap up” paperwork related to the grant, Grievant worked on an as-needed basis during the summer and set her own hours. With regard to the dates involved in this grievance, she worked five hours on July 11, seven hours on July 15, and four hours on July 18.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

While admitting that it failed to properly follow the summer substitute list in order of seniority with respect to its failure to call Ms. Snyder, (See footnote 3) Respondent contends that it had no obligation to call Grievant, who allegedly lacked the appropriate training for the position in question. Conversely, Grievant argues that she should have been allowed the opportunity to learn to use the systems utilized in the superintendent's office, and consequently should have been given her opportunity to participate in the substitute rotation. In addition, she argues that her summer work in the grant program, which Respondent alleges prevented her from accepting some of the substitute assignments, should not be considered a conflict, due to her option to set her own hours for performing that work.

Regular employees are allowed to perform substitute work during the summer, pursuant to West Virginia Code § 18-5-39(f), which states in pertinent part:

> (f) 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 [§ 18A-4-8], article four, chapter eighteen-a of this code. . . . 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, shallbe given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

(Emphasis added.) Indeed, Respondent does not dispute that, pursuant to this statute, it was obligated to offer the substitute assignments in question on a seniority-based rotation.

While much of Respondent's argument is based upon its contention that it was not required to call Grievant and the other three “untrained” secretaries on the list, the undersigned does not believe that Grievant has established entitlement to relief in this case, whether Respondent's argument is accepted or not. Even presuming that Grievant is correct in her belief that she should have been given the opportunity to try to “learn on the job” while filling in for Ms. Wolfe, her argument ignores the fact that there were three more senior secretaries on the substitute list. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was "next in line." See Richards v. Kanawha County Bd. of Educ., Docket No. 99-20-108 (May 5, 1999); Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (Apr. 30, 1998); Little v. Richards v. Kanawha County Bd. of Educ., Docket No. 96-20-352 (Apr. 30, 1998). As was the case in Saddler v. Raleigh County Board of Education, Docket No. 02-41-420 (Apr. 29, 2003):

> [T]here were three people who would need to refuse the position before Grievant would have been offered it. No evidence was presented to show these individuals would have been unable to serve if called. Accordingly, although Grievant has demonstrated a violation of W. Va. Code § 18-5-39, and Respondent agrees this was the case, there is no evidence to support Grievant should receive what, in essence, would be a windfall by paying her for . . . work she did not perform.

Similarly, in the instant case, there are only three assignments at issue, and there were three people who would have been offered those assignments before Grievant, if theproper rotation had been followed. Ms. Snyder has already grieved Respondent's failure to call her first, and the status of the other employees on the list is unknown. As recently observed in MacCumbee v. Morgan County Board of Education, Docket No. 05-32-190 (Nov. 18, 2005), "[w]hen 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 are consistent with the foregoing.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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. Regular employees whose contract terms do not extend into the summer months are to be given first opportunity to substitute for absent summer employees within the same classification category, on a rotating and seniority basis. W. Va. Code § 18-5- 39(f).

3. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was "next in line." Saddler v. Raleigh County Bd. of Educ., Docket No. 02-41-420 (Apr. 29, 2003); See Richards v. Kanawha County Bd. of Educ., Docket No. 99-20-108 (May 5, 1999); Clark v. Putnam County Bd. ofEduc., Docket No. 97-40-313 (Apr. 30, 1998); Little v. Richards v. Kanawha County Bd. of Educ., Docket No. 96-20-352 (Apr. 30, 1998).

4. Grievant has failed to establish that, had the proper seniority rotation been followed, she would have received any of the substitute assignments in question.

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: January 20, 2006

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The superintendent's secretary, whose position gave rise to this grievance, has a contract term which extends into the summer months, and she is a year-round employee.

Footnote: 2

There was no record reflecting whether or not Ms. Snyder was called for this assignment.

Footnote: 3

In fact, Ms. Snyder initially filed a grievance over this same matter, and Respondent settled her claim by paying her for three of the days that Ms. Wolfe was absent.