THE WEST VIRGINIA PUBLIC EMPLOYEE

GRIEVANCE BOARD

GARY BOWLES,

Grievant,

v. Docket No. 2008-0313-PutED

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Gary Bowles, is employed by the Putnam County Board of Education ("PCBOE") as a substitute bus operator. He filed this grievance over his removal from a position. His Statement of Grievance reads:

> **The Respondent has posted Run 2305 due to the leave of absence of the incumbent employee and awarded this position to William Matthews, a regularly employed school bus operator. The Respondent had called the Grievant, a substitute school bus operator, to substitute in Run 2002 which was Mr. Matthews['] former position. The Respondent subsequently removed the Grievant from this position and permitted a regularly employed school bus operator to "step up" into this position. The Grievant alleges a violation of West Virginia Code § 18A-4-15 in that Mr. Matthews is not an "absent employee" that would permit a regular employee to "step up" .**

The Relief Sought is, "[t]he Grievant seeks reinstatement in Run 2002, retroactive wages, benefits, and experience pay credit[,] less appropriate set-off, and an award of interest on all monetary sums."

This grievance was filed at Level One on August 29, 2007, a Level One hearing was conducted on September 11, 2007, and a decision denying the grievance was issued on September 18, 2007. The parties agreed to waive mediation, and the matter was set for hearing on August 12, 2008, at the Grievance Board's Charleston office. Grievant was

represented by Kimberly Levy, Esq., from the West Virginia School Service Personnel Association, and PCBOE was represented by Rebecca Tinder, Esq., of Bowles RiceMcDavid Graff & Love. This matter became mature for decision on September 4, 2008, following the submission of the parties' proposed Findings of Facts and Conclusions of Law.

Synopsis

Grievant asserts Matthews was not an absent employee because he was still employed by PCBOE, thus the "step up" provisions of W. Va. Code §18A-4-15 were not triggered. Respondent notes PCBOE was in error in not utilizing the provision of W. Va. Code § 18A-4-15 in initially filling Matthews' position, and it has since corrected this error. For the reasons listed below, the undersigned Administrative Law Judge finds this grievance must be Denied.

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 employed by PCBOE as a substitute bus operator.

2. On April 2, 2007, PCBOE formally approved a leave of absence for Darrell Warner, who operated Run 2306. Warner's position was posted and awarded to Leah Stidham, a regularly employed bus operator, who was to serve in the position until the return of Warner. Stidham served in the position from May 8, 2007, to May 23, 2007. Grievant's Exhs. 2 & 3 at Level Three.

3. The Warner position, Run 2306, was not reposted for the 2006 - 2007 school year, as it was anticipated Warner would obtain disability retirement and because the school year was almost over. A substitute bus operator temporarily filled the position for the rest of the school year. 4. At the start of the 2007 _ 2008 school year, Run 2306 was posted, and regularly employed bus operator Matthews applied for and received the position. He was to fill this temporary position until the return of Warner, or Warner received his disability, and the vacant position was posted.

5. At the time Matthews was awarded Run 2306, he was the bus operator for Run 2002. Matthews would return to Run 2002 when he was no longer employed on Run 2306. (See footnote 1)

6. On August 23, 2007, Grievant, a substitute bus operator, was called to substitute on Run 2002 for Matthews, starting on August 24, 2007.

7. After Grievant was called, a group of regularly employed bus operators questioned the use of a substitute in Matthews' position when regularly employed bus operators had not been allowed the opportunity to "step up" first.

8. Grievant completed his assignment on Friday, August 24, 2007, and was paid for this work day.

9. PCBOE's regularly employed bus operators had not previously expressed an interest in "stepping up" in this situation. Testimony Brazeau.

10. PCBOE administrators reviewed the "step up" requests made by the regularly employed bus operators and believed them to be valid. After review, Chris Saunders, a regularly employed, half-day bus operator was allowed to "step up" into Run 2002. He was to fill the position until Matthews returned from Run 2306.

11. Also at the beginning of the 2007 - 2008 school year, Bus Operator Debbie Lett's Run 980 was treated in the same manner. Substitute Charity Luikart was called tofill Lett's position while Lett was off work due to a work-related injury. Luikart was removed when regularly employed bus operators called the "step up" provision to PCBOE's attention. The position was then filled by regularly employed bus operators who requested to "step up" into the position. **(See footnote 2)**

12. Later, Run 980 was posted and filled because Lett's leave of absence had extended beyond 30 days.

13. PCBOE has now developed a procedure for dealing with "step up" issues, and this procedure has been in effect since October of 2007. Regularly employed bus operators, who have expressed an interest in "stepping up," are called first to fill the position. If no regularly employed bus operator is interested, the assignment is then given to a substitute bus operator.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *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). "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 employee has not met his burden. *Id. **The issue before the undersigned Administrative Law Judge is basically a legal one. Grievant's argument centers on the interpretation of the term "absent employee" utilized in W. Va. Code § 18A-4-15(b)(3). Grievant asserts Matthews is not absent from Run 2002, but "he is merely working in another position for an unknown period of time and, at some point, will return to his former assignment." Grievant's Proposals at 5. Thus, since Matthews is not absent, the "step up" provisions of W. Va. Code §18A-4-15 are not triggered.**

W. Va. Code §18A-4-15 titled, "Employment of service personnel substitutes," states, in pertinent part:

> **(a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:**
>
> **(1) To fill the temporary absence of another service employee;**
>
> **(2) To fill the position of a regular service person as follows:**
>
> **(A) If the regular service person requests a leave of absence from the county board in writing and is granted the leave in writing by the county board; or**
>
> **(B) If the regular service person is on workers' compensation and absent.**
>
> **. . .**
>
> **(D) If a regular or substitute employee fills a vacancy that is related in any manner to a leave of absence or the absence of an employee on workers' compensation as provided in this section, upon termination of the absence the employee shall be returned to his or her original position or status;**
>
> **. . .**

> **(3) To perform the service of a service person who is authorized to be absent from duties without loss of pay;**
>
> **. . .**
>
> **(b) Service personnel substitutes shall be assigned in the following manner:**
>
> **(1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b of this article**
>
> **. . .**
>
> **(3) Any regular service person employed in the same building or working station and the same classification category of employment as the absent employee shall be given the first opportunity to fill the position of the absent employee on a rotating and seniority basis. In such case the regular service person's position is filled by a substitute service person. A regular service person assigned to fill the position of an absent employee has the opportunity to hold that position throughout the absence. For the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.**

(Emphasis added).

Grievant is correct in stating that the Legislature and Grievance Board have not defined the term "absent employee." "'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute should be afforded its plain meaning.' *Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey*, 399 S.E.2d 657, n. 9 (W. Va. 1990), *citing Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983)." *Lasure v. Tyler County Bd. of Educ.*, Docket No. 90-48-330 (Mar. 26, 1992). *See Martin v. Raleigh County Bd. of Educ.*, Docket No. 02-41-212 (Sept. 13, 2003). According to Merriam-Webster's Collegiate Dictionary, absent means "not present or attending." 7th ed. at 4. As Matthews was not present on Run 2002, the logical interpretation would be he was absent from this position. *Cf. McGuire v. Fayette County Bd. of Educ.*, Docket No. 06-10-220 (Dec. 15, 2006). Thus, the "step up" provision was triggered.

The undersigned Administrative Law Judge finds the purpose of W. Va. Code §18A- 4-15(b)(3) is to offer regular employees (employees with greater seniority) a "benefit" - theopportunity to hold temporarily a position the employee considers more advantageous. A

regularly employed bus operator may have many reasons for wishing to "step up." The position may be closer to home, have a shorter running time, may contain a midday run, or, as here, enable a regular half-time employee to obtain a regular full-time position, at least temporarily.

Additionally, it might be helpful to note that statues governing board of educations typically favor employees with regular seniority as demonstrated by W. Va. Code § 18A-4-8b which controls the hiring of school service personnel. This Code Section includes the following provisions indicating a preference for regularly employed/more senior employees.

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.
>
> (b) Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
>
> (4) Substitute service personnel; and
>
> (5) New service personnel.

(Emphasis added).

As stated above, service personnel positions shall be filled on the basis "of seniority, qualifications, and evaluations of past service." A preference for hiring the employee with the most seniority is indicated by the statement that if the most senior employee is not hired a

board "must show valid cause." *Id*. If evaluations and qualifications are roughly equal, the position is awarded to the most senior employee. Additionally, posted service personnel positions are filled first with the qualified employee with the most regular seniority. Substitutes are considered next to last and rank only above new hires.

This emphasis on seniority was discussed in *Harrison County Bd. of Educ. v. Coffman*, 189 W. Va. 273, 430 S.E.2d 331 (1993). The West Virginia Supreme Court of Appeals stated "the legislative intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." *Id*. at 274. *See Edmonds v. Kanawha County Bd. of Educ.*, Docket No. 00-20-023 (Mar. 31, 1999).

Lastly, "[t]his Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible. *" Conners v. Hardy County Bd. of Educ.,* Docket No. 99-16-459 (Jan. 14, 2000)*; Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997); *Petrovich v. Hancock County Bd. of Educ.*, Docket No. 98-15-074 (July 13, 1998). Here, PCBOE erred in not offering the opportunity to "step up" to regularly employed bus operators before it called Grievant to fill the position. PCBOE corrected this error by replacing Grievant with a regularly employed bus operator. Then, PCBOE developed a form for regularly employed bus operator to fill out, noting their desire to be called to "step up." 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. *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). "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 employee has not met his burden. *Id*.

2. "'In the absence of specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning, and the plain language of a statute

should be afforded its plain meaning.' *Meadows on Behalf of Professional Employees of W. Va. Educ. Assoc. v. Hey*, 399 S.E.2d 657, n. 9 (W. Va. 1990), *citing Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983)." *Lasure v. Tyler County Bd. of Educ.*, Docket No. 90-48-330 (Mar. 26, 1992). *See Martin v. Raleigh County Bd. of Educ.*, Docket No. 02-41-212 (Sept. 13, 2003).

3. As Matthews is not present in his position, he is an absent employee, and the "step up" provision is triggered.

4. A preference for hiring the employee with the most seniority is indicated by the statement that if the most senior employee is not hired, a board, if requested, "must show valid cause," and posted service personnel positions are filled first with the qualifiedemployee with the most regular seniority. Substitutes are considered next to last and rank only above new hires. W. Va. Code § 18A-4-8b.

5. The West Virginia Supreme Court of Appeals discussed this emphasis on seniority in *Harrison County Bd. of Educ. v. Coffman*, 189 W. Va. 273, 430 S.E.2d 331 (1993) and stated "the legislative intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." *Id.* at 274. *See Edmonds v. Kanawha County Bd. of Educ.*, Docket No. 00-20- 023 (Mar. 31, 1999).

6. The "step up" provision is in keeping with the preference shown senior, regular employees, and rewards regular employees by allowing them to fill temporarily positions beneficial to them. Accordingly, PCBOE correctly allowed Saunders to "step up."

7. "This Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible." *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000)*; Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997); *Petrovich v. Hancock County Bd. of Educ.*, Docket No. 98-15-074 (July 13, 1998).

8. Here, PCBOE's error in not offering the opportunity to "step up" to regularly employed bus operators before it called Grievant to fill the position was corrected by replacing Grievant with a regularly employed bus operator and by developing a form for regularly employed bus operators to complete noting their desire to be called to "step up."

9. Grievant has not met his burden of proof and demonstrated PCBOE erred in applying the "step up" provision and replacing him with a regularly employed bus operator.

Accordingly, this grievance is DENIED.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: October 31, 2008

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Janis I. Reynolds

Administrative Law Judge

Footnote: 1

As demonstrated by the record, Run 2306 is also called to Run 930.

Footnote: 2

The position was filled by Robert Liptrap and then Regina Gibson.