WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KENNETH D. MARCUM,

Grievant,

v.

Docket No. 2008-0764-WayED

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Kenneth D. Marcum ("Grievant") grieves the decision of the Wayne County Board of Education ("BOE") that denied his grievance. The Grievant filed the instant grievance on November 19, 2007, claiming that he should have received a substitute custodian assignment at Crum Middle School that started on August 1, 2007, and was in existence approximately one month before the custodian who regularly held the assignment returned to work. For relief, Grievant requests that the Respondent BOE "pay for the days I would have worked if called."

This grievance was denied at Level One. The parties mutually agreed to waive Level Two. A Level Three evidentiary hearing was held on October 2, 2008, before the undersigned Administrative Law Judge ("ALJ"). At Level Three, Grievant appeared by and through his counsel, John Everett Roush. (See footnote 1) The BOE appeared by and through its counsel, David Lycan. This matter became mature for decision on or about November 12, 2008, the date findings of fact and conclusions of law were due. Both parties have submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant alleges that the BOE failed to properly include him on a substitute custodian rotation list which caused the Grievant's non-selection for a substitute assignment. Respondent BOE maintains that there is no indication that it deviated from the substitute custodian rotation list.

The only evidence that supports the Grievant's position is his assertion that he was told, via a brief telephone conversation, that he was excluded from the substitute custodian rotation list for the particular area in which Grievant is available to work.

There is no indication that the BOE selected substitute custodians in a manner inconsistent with West Virginia Code § 18A-4-15(b).

For the reasons set forth below, this grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. The Grievant, Kenneth D. Marcum, is employed by the BOE as a substitute custodian, with an effective hiring date of November 14, 1996.

2. Due to his not having an automobile, the Grievant has instructed the BOE to limit him to assignments only “in the Tolsia area” of Wayne County. The “Tolsia area” is located in the southernmost portion of Wayne County and includes only three schools insofar as the Grievant's available work area is concerned: Tolsia High School, Crum Elementary and Crum Middle School. Due to the limitations the Grievant has placed upon himself with regard to availability as a substitute custodian, he has never been in a position to secure a regular position with the BOE. Because of the Grievant's situation, there was a notationafter the Grievant's name on the substitute custodian rotation list that indicated the following: “No Car Tolsia Area Only.”

3. Two names down from the Grievant's name, on the same page, the notation for another substitute custodian, Dana Thompson, read as follows: “Tolsia Only.”

4. On or about August 1, 2008, BOE Personnel Secretary Kelly Watts received a telephone call from the principal at Crum Middle School. The principal indicated that Roger Jarvis, a regularly employed custodian at Crum Middle School, had injured his back and was using some of his sick leave days to recover; therefore, the above principal was requesting that a substitute custodian be sent to his school until the return of Mr. Jarvis.

5. Upon receipt of the above principal's call, Ms. Watts checked the substitute custodian rotation

list and saw that Carl Fluty was the next name on the rotation list following the last person called from the rotation list. Ms. Watts started with Mr. Fluty and proceeded through eleven names on the rotation list before a substitute custodian by the name of Frank Roswall finally accepted the offered assignment. Thereafter, Mr. Roswall filled the position until the return of the regular employee, approximately one month later. At the time that Mr. Roswall accepted the assignment, the Grievant's name, Kenneth D. Marcum, was still eighteen names away on the rotation list from being offered the assignment.

6. The substitute custodian rotation call list was crafted based upon the length of service of the substitutes on the list. The BOE follows a continual rotation list, whereby the first name called off the list for any new year was the first name that remained available on the list at the conclusion of the previous year.

7. Ms. Watts and other employees in charge of making calls for the substitutecustodian rotation list followed the continual rotation list method of calling employees from the substitute custodian rotation list from 2005 up to the time that Frank Roswall was called out to fill the assignment at issue. Ms. Watts or one of the other BOE employees assigned to calling out substitutes, might go through the entire substitute custodian rotation list entirely in one day, looking for substitute custodians to accept assignments.

8. The Grievant called a switchboard operator for the BOE, whom the Grievant believed to be Jennifer Frye, and inquired of her as to why he had not been called for the assignment at Crum Middle School that had been assigned to Mr. Roswall. The switchboard operator informed Grievant that there was a note on the substitute custodian rotation list that indicated that the Grievant was under directive to only be called for substitute custodians' assignments at Tolsia High School. Jennifer Frye is no longer an employee of the BOE and did not testify as a witness.

9. The Grievant has been called out on numerous occasions to substitute at Crum Elementary and Crum Middle School during the previous 2006-2007 school year.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Id*. Hence, the

arguments raised by the Grievant must be considered within the context of the burden of proof.

The Grievant has not established that the BOE diverted from its substitute custodian rotation list or that the procedure used to select substitute custodians violates the law. ThisGrievance must be denied. West Virginia Code § 18A-4-15(b) provides the procedure for placing substitute workers into temporary vacancies for a service personnel assignment. It provides, in part, that,

> (b) Service personnel substitutes shall be assigned in the following manner:
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> (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 [§ 18A-4-8b] of this article. Length of service time is calculated from the date a substitute service person begins assigned duties as a substitute in a particular category of employment.
>
> (2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

Hence, substitutes are to be selected from a rotation list based upon length of service. *Stewart v. Gilmer County Bd. of Educ.*, Docket No. 02-11-093 (Aug. 6, 2002); *Anderson v. Raleigh Co. Bd. of Educ.*, Docket No. 01-41-378 (Jan. 28, 2002). *See also Ferguson v. Lincoln County Bd. of Educ.,* Docket No. 05-22-313 (Nov. 9, 2005)(holding that a substitute list may not be school specific); *Thompson v. Logan Co. Bd. of Educ*., Docket No. 05-23-068 (Sept. 1, 2005)(recognizing the emergency exception).

The issue in this grievance is not whether the individual who spoke with the Grievant on the telephone misspoke and relayed incorrect information to the Grievant. Nor is the issue whether the Grievant misheard the information relayed in the telephone conversation by the BOE employee. Rather, the analysis is whether the BOE violated West Virginia Code § 18A-4-15(b) and failed to follow the substitute custodian rotation list.

Grievant claimed that because he was more senior than Mr. Roswall and because Mr. Roswall had worked some at Crum Middle School the year before, that he, theGrievant, should have been offered the assignment first. Grievant acknowledged that he had been a substitute custodian for around thirteen years, but admitted that he did not fully understand the rotation list system. Grievant recognized that his name would go to the bottom of the rotation list each time he turned down an assignment or was unavailable for an assignment. However, he continued to insist that he should

have been called for the assignment in question because he was a more senior substitute employee than Mr. Roswall and Mr. Roswall had substituted some at Crum Middle School the year before.

In order to prevail, the Grievant must establish that the BOE violated West Virginia Code § 18A-4-15(b) to the extent that a "reasonable person would accept as sufficient" that a violation occurred. *Leichliter*, *supra*. The Grievant has not provided any proof as to precisely why he should have been assigned the assignment at issue. He has provided no proof that he was ahead of Mr. Roswall on the rotation list at the time Mr. Roswall was called and accepted the substitute assignment at Crum Middle School. The Grievant has not met his burden.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Id*.

2. West Virginia Code § 18A-4-15(b) requires that substitutes be selected from a rotation list based upon length of service. *Stewart v. Gilmer County Bd. of Educ.*, DocketNo. 02-11-093 (Aug. 6, 2002); *Anderson v. Raleigh Co. Bd. of Educ.*, Docket No. 01-41- 378 (Jan. 28, 2002).

3. Grievant has not established, by a preponderance of the evidence, that the BOE violated West Virginia Code § 18A-4-15(b).

4. Grievant has failed to prove, by a preponderance of the evidence, that he is entitled to any relief.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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 West Virginia 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 (2008).

Date: December 23, 2008

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Mark Barney

Administrative Law Judge

Footnote: 1

The Grievant was not physically present at the Level Three hearing but appeared via telephone.