**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**ALISON FLYNN and PAUL BUTCHER,**
**Grievants,**

**v.** **Docket No. 2011-1297-CONS**

**BERKELEY COUNTY BOARD OF EDUCATION,**
**Respondent.**

## DECISION

Alison Flynn and Paul Butcher, Grievants, filed this action at level one on March 9, 2011, alleging that "Respondent did not properly rotate the opportunity for substitute assignments and that this continuing pattern of action violated W. Va. Code 18a-4-15." For relief, Grievants "seek compensation for lost wages with interest to the maximum extent permitted by law." A level one conference was held in this matter on March 22, 2011. Following the conference, Grievants and Respondent agreed that Grievants would submit written questions concerning information contained in Respondent's rotation sheet. Grievants' counsel treated the response to his questions as the level one decision.

A level two mediation session was conducted on September 14, 2011. Grievants appealed to level three on September 28, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on March 19, 2012, at the Berkeley County Board of Education, Martinsburg, West Virginia. Grievants were present in person, and represented by their counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent was represented by its counsel, Gregory W. Bailey, Bowles Rice McDavid Graff & Love LLP. This matter became mature for consideration

upon receipt of the last of the parties' proposed findings of fact and conclusions of law on April 23, 2012.

## Synopsis

Grievants contend that Respondent failed to follow the statutorily-mandated procedure for using regular employees to serve as substitutes to fill summer absences. Evidence showed that runs were offered and assigned to the next available senior bus driver who had not driven in each rotation, and this information was placed on a sheet containing the substitutes' names. However, the document concerning the substitute call-out procedure was not intended to create a record that could be relied upon to demonstrate statutory compliance. Grievants failed to prove Respondent did not follow proper rotation.

The following findings of fact are based upon the record developed at level three.

## Findings of Fact

1. Grievants were employed as substitute bus operators by the Respondent at the time this grievance was initiated on March 9, 2011.

2. Grievants contend that Respondent failed to properly follow the procedure for using regular employees to serve as substitutes to fill summer absences during the 2010-2011 school year.

3. Grievants acknowledged that it was entirely possible for a less senior bus operator to obtain a long-term substitute opportunity, and accumulate a greater number of substitute days worked.

4. Grievants complained that less senior substitute bus operators were observed working on days that Grievants were not. In light of the requirement that

substitute assignments be rotated, less senior substitute bus operators may have been working on certain days when the Grievants were not.

5. Grievants complained that they received no calls on certain days even though they were available to work.

6. The documentation produced by Respondent offers some information concerning the substitute call-out procedure, but was not created to accurately reconstruct call-out activities on a particular date. The document was used as a guide to assist the transportation department to keep track of their activities when calling out substitutes.

7. The level three record established that Respondent made substitute bus operator assignments on a rotating seniority basis.

**Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

When a substitute is to be employed to fill a vacancy created by the temporary absence of a regular employee, the substitute must be selected “on a rotating basis

according to the lengths of their service time until each substitute has had an opportunity to perform similar assignments." W. VA. CODE § 18A-4-15(b)(2). Grievants contend that Respondent's call-out documentation obviously shows that substitutes were not called in order of seniority, thus violating the statute. Grievants have failed to acknowledge the explanations provided by Respondent through testimony and discovery, that explained how the seniority rotation was followed.

The record established that Respondent made substitute bus operator assignments on a rotating seniority basis. Nothing contained in Grievant's exhibits established a violation of the requirement that substitute bus operators be assigned on a rotating seniority basis. Evidence that less senior substitute employees worked a greater number of days does not establish a violation of the requirement that substitute bus operators be assigned on a rotating seniority basis. Evidence that less senior substitute employees worked on days that Grievants did not work, does not establish a violation of the requirement that substitute bus operators be assigned on a rotating seniority basis. Finally, evidence that Grievants received no calls on certain days does not establish a violation of the requirement that substitute bus operators be assigned on a rotating seniority basis.

In the instant case, the record established that Respondent made every possible effort to employ substitute bus drivers on a rotating basis. Nevertheless, Respondent does acknowledge that it implemented an automatic call-out system of late; this may serve to assuage the concerns of Grievants.

The following conclusions of law support the decision reached.

## Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. Grievants failed to prove by a preponderance of the evidence that they were deprived of a substitute opportunity by virtue of a failure by Respondent to observe the requirement that assignments be made on a rotating seniority basis.

Accordingly, this grievance is **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 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 (2008).

**Date: July 31, 2012**

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**Ronald L. Reece**
**Administrative Law Judge**