THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MELISSA LYNN YOUNG,
Grievant,

v. **Docket No. 2011-1845-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Melissa Lynn Young, is employed by Respondent, Kanawha County Board of Education. On June 23, 2011, Grievant filed this grievance against Respondent stating, "Grievant alleges that Respondent failed to offer her summer substitute work in the Warehouse from June 9 through June 28, 2011 and instead employed another substitute, Kelli MacGaw (sic), who is inferior in status and seniority to Grievant. Grievant alleges a violation of W.Va. Code 18-5-39." For relief, grievant seeks "compensation for all lost wages and benefits with interest."

Following a level one conference, a level one decision was rendered on August 29, 2011, denying the grievance. Grievant appealed to level two on September 13, 2011. Grievant perfected the appeal to level three of the grievance process on December 21, 2011. A level three hearing was held on May 3, 2012, before Administrative Law Judge Landon R. Brown[1] at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent was represented by counsel, James W. Withrow, Kanawha County Board of Education General Counsel.

[1] This case was assigned to the undersigned Administrative Law Judge on October 4, 2012 for administrative purposes.

This matter became mature for decision on June 1, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a 200-day school service employee, alleges Respondent improperly denied her the opportunity to substitute during a portion of the summer. Grievant was not entitled to first opportunity to substitute under W. VA. CODE § 18-5-39 for the position she sought because the position was not a summer position and because the position was not within the same classification category as Grievant's regular employment contract. Grievant did not prove she was next in line to substitute under W. VA. CODE § 18A-4-15, and despite Grievant's argument that this should be a defense proven by the Respondent, the weight of precedent requires Grievant to prove she was next in line in order to be granted relief.

Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is regularly employed by Respondent as an Aide III, holding a 200-day contract as such during the regular school term under contracts dated July 1, 2010[2] and July 1, 2011[3].

[2] Grievant's Exhibit # 1.
[3] Grievant's Exhibit # 2.

2. Grievant was previously employed as a Substitute Warehouse Clerk. The Respondent lists her seniority date for that position as May 17, 2008, which is the date she passed the Warehouse Clerk test.[4]

3. Respondent's employees hold contracts of employment for varying lengths from summer only, to school term only, to year-round. For school term (200-day) employees, their employment responsibilities conclude at the end of the regular school year, around June. Therefore, those employees would be available for other employment during the summer.

4. Regular (200-day) employees who are not under contract for the summer are entitled to be substitutes during the summer under certain circumstances. Different school boards have different procedures in place to allow these employees to substitute. Respondent has set up a process whereby any regular employee, not under contract for the summer, may "sign up"[5] to be a "summer substitute." Respondent keeps this list separate from regularly-hired substitutes who substitute year-round.

5. Regular substitutes are hired specifically as substitutes, are hired based on a posted position for a substitute position, and hold a contract as a substitute.

6. Regular (200-day) employees holding a less than year-round contract may also seek to obtain a contract for regular summer employment.

7. When a year-round (261-day) employee is absent during the summer, Respondent calls a regular substitute to cover the absence. When a summer employee is absent, Respondent calls a substitute from the summer substitute list to cover the absence.

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[4] Respondent's Exhibit # 1.
[5] No evidence was presented as to how this sign up process works.

8. For summer 2011, Respondent hired two summer Warehouse Clerks.

9. For summer 2011, Grievant signed up to be a summer substitute, and she was only the third most senior person on the list of summer substitutes. Two other women, Rita Vineyard and Barbara Vanoy, each possessed greater seniority than Grievant.

10. Respondent contacted Grievant on June 9, 2011, to offer her a substitute assignment for a summer maintenance employee. Grievant was not available, and the evidence is unclear why she was unavailable, but the end result is that the substitute assignment was given to another substitute.

11. Grievant was not contacted again to substitute until June 27, 2011, when she was offered and accepted an assignment to substitute for a summer maintenance employee, which assignment she held for the remainder of the summer.

12. Between June 9, 2011 and June 24, 2011, when Grievant was not offered substitute employment in the warehouse, a regular substitute, Kelli Magaw, worked continuously in the warehouse. Ms. Magaw was hired as a substitute Warehouse Clerk after Grievant had been hired as a substitute Warehouse Clerk and Grievant trained Ms. Magaw. However, while Ms. Magaw remained a regular substitute and continues as a regular substitute, Grievant was hired as a regular (200-day) Aide.

13. Prior to June 9, 2011, Ms. Magaw began an assignment to deliver meals to satellite locations for the Child Nutrition Department. Since this assignment took only about 3 hours per day, the rest of the day Ms. Magaw worked as a Warehouse Clerk. The evidence is unclear whether this dual position was in the nature of a substitute assignment or was some sort of temporary position. Regardless, the assignment was

not substituting for either of the two summer Warehouse Clerk positions. This assignment ended June 17, 2011. From June 21 through 24, 2011, Ms. Magaw was assigned as a substitute for a year-round (261-day) Warehouse Clerk.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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).

Respondent's employment of service personnel substitutes is governed by statute. "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…" W.VA. CODE § 18A-4-15(a) (2011). The statute further describes the manner in which substitutes must be assigned:

> (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…
> (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.

W. VA. CODE § 18A-4-15(b). Additionally, W. VA. CODE § 18-5-39 (2011), entitled "Establishment of summer school programs; tuition," also discusses substitutes. In subsection (f) it reads:

> 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, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

Grievant asserts she was entitled to substitute from June 9, 2012 through June 24, 2011 rather than Ms. Magaw, because § 18-5-39 entitles her as a regular employee to first opportunity to substitute for any position for which she qualifies during the summer. In support of this assertion, Grievant argues that the plain meaning of "summer employee" in § 18-5-39 is any employee who is working during the summer, including year-round employees. This is not the plain meaning of the statute. Although the statute does not define "summer employee," it does define "summer employment:"

> (h) "For the purpose of this section, summer employment for service personnel includes, but is not limited to, filling jobs and positions as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code and especially established for and which are to be predominantly performed during the summer months to meet the needs of a county board."

Summer employment is defined as filling jobs "especially established for and which are to be predominately performed during the summer months." To define a "summer employee" as any employee working during the summer, as proposed by Grievant, is inconsistent with the definition of "summer employment." Furthermore, § 18-5-39 clearly deals with summer programs only, so it would not make sense for the

provision for summer substitutes to be applied to year-round employee absences when there is an entire code section, 18A-4-15, dealing only with substitutes. If the legislature did not intend a different rule specifically for summer employee substitutes, then there would have been no need to discuss substitutes in § 18-5-39, it could simply have referred to § 18A-4-15 or omitted reference to substitutes completely.

It is clear that the provisions in § 18-5-39 grant a specific exception to the normal assignment of substitutes per § 18A-4-15. Although Grievant cites previous cases of the Grievance Board to support her reading of the statute that a summer employee is any employee working during the summer, these cases are not binding precedent on that issue. *See Jamison v. Monongalia County Board of Education*, Docket No. 2008-0293-MonED (Aug. 27, 2008) (position to be substituted was for an absent 261-day employee, but the meaning of "summer employee" was not argued and the grievance was denied because the grievant did not prove she was next in line); *Jamison v. Monongalia County Board of Education*, Docket No. 05-30-338 (Jan. 20, 2006) (position to be substituted was for an absent 261-day employee, but the meaning of "summer employee" was not argued and grievance was denied because the grievant did not prove she was next in line); *Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003) (it is unclear whether the position to be substituted was for an absent 261-day employee or not, but the meaning of "summer employee" was not argued and grievance was denied because the grievant did not prove she was next in line). In none of these cases was the interpretation of the statute at issue and all three cases were decided on other issues. Therefore, based on strict statutory construction,

Grievant was not entitled to substitute for the Warehouse Clerk position she cites, because that was a year-round position and not a summer position.

Grievant's argument also fails because she does not meet the second requirement for a substitute under § 18-5-39, which requires her to hold the same classification category as the substitute position she seeks. The statute clearly states that a regular employee unemployed during the summer is to be given first opportunity to substitute "within the same classification category." As an Aide III, Grievant would only be granted first priority, if she had the most seniority and was next in line, to substitute for summer Aides. Grievant asserts that she should have been called to substitute for the positions Ms. Magaw substituted for between June 9, 2012 and June 24, 2012, but none of those positions were that of an Aide. While it is true that Grievant met the qualifications to substitute as a Warehouse Clerk as she had previously passed the test, § 18-5-39 only gives her the right to substitute within her classification as an Aide.

Grievant further argues that even if she were not entitled under § 18-5-39 to substitute, she was entitled to substitute simply due to her greater seniority. This argument fails because Grievant did not prove she was next in line to be assigned as a substitute. Substitute assignments are not governed solely by seniority, but rather are assigned by seniority on a rotating basis. W.VA. CODE § 18A-4-15(a)(2). Although it appears Grievant has more seniority than Ms. Magaw, who was substituting during the time period Grievant was not, there were at least two other employees with greater seniority than Grievant. Grievant argues that whether or not a grievant is next in line should be a defense requiring proof by the Respondent. Grievant's argument is simply

not supported by the weight of precedent. "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.'" *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. 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. Kanawha County Bd. of Educ.,* Docket No. 96-20-352 (Apr. 30, 1997)) (followed by *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008)).

These previous decisions of the Grievance Board have made clear that to award back pay without requiring proof that the grievant was actually entitled to the disputed position would be to grant speculative relief. It is well settled law that the Grievance Board will not grant relief sought that is "speculative or premature, or otherwise legally insufficient." *See Dooley v. Dept. of Trans./Div. of Highways,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991). If Grievant was not "next in line", then she was not actually harmed. It is clear that a grievant must sustain an actual injury by being passed over for a position to which he/she was actually entitled, otherwise any award of back pay would be a windfall*. See Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003).

While the undersigned acknowledges that this requirement makes it more difficult to prove such a case, it is certainly not impossible. *See Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008). In this case specifically, Grievant could have called the other two women with greater seniority than she to testify

about whether they were called or if they would have accepted the job. While the current precedent might allow a school board to violate the substitute assignment requirement without immediate repercussion as Grievant asserts, to allow a grievant to recover wages for work he/she did not perform and was not entitled to perform, would create an unfair windfall at taxpayer expense. Grievant argues for a drastic change in the way these types of grievances are argued and decided. Grievant may have varied from the previous arguments against the next in line doctrine by now arguing it should be a defense, but the balancing of the two interests is still the same. The argument, while understood, is not sufficient to overturn the well-settled precedent of this Board.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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).

2. Respondent's employment of service personnel substitutes is governed by statute. "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…" W.VA. CODE § 18A-4-15(a) (2011). The statute further describes the manner in which substitutes must be assigned:

> (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…
> (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.

W. VA. CODE § 18A-4-15(b). Additionally, W. VA. CODE § 18-5-39 (2011), entitled "Establishment of summer school programs; tuition," also discusses substitutes. In subsection (f) it reads:

> 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, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

3. Although the statute does not define "summer employee" it does define "summer employment:"

> (h) "For the purpose of this section, summer employment for service personnel includes, but is not limited to, filling jobs and positions as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code and especially established for and which are to be predominantly performed during the summer months to meet the needs of a county board."

4. It is clear that the provisions in § 18-5-39 grant a specific exception to the normal assignment of substitutes per § 18A-4-15. Therefore, the right to substitute

under § 18-5-39 is only for absences of employees hired specifically for the summer and not for absences of year-round employees.

5. Grievant is not entitled to substitute § 18-5-39 in this instance because the position was neither a summer employee nor was it in the same classification category Grievant holds. Nor was Grievant entitled to substitute under § 18A-4-15 because Grievant did not prove by a preponderance of the evidence that she was next in line for a substitute position.

6. "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.'" *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. 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. Kanawha County Bd. of Educ.,* Docket No. 96-20-352 (Apr. 30, 1997)) (followed by *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008)).

7. It is well settled law that the Grievance Board will not grant relief sought that is "speculative or premature, or otherwise legally insufficient." *See Dooley v. Dept. of Trans./Div. of Highways,* Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991). If Grievant was not "next in line", then she was not actually harmed. It is clear that a grievant must sustain an actual injury by being passed over for a position to which he/she was actually entitled, otherwise any award of back pay would be a windfall*. See Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003).

8. Proof that a grievant was next in line to receive a position is not a defense requiring proof by a respondent, but rather a necessary element of a grievant's claim.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: November 19, 2012

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Billie Thacker Catlett
Administrative Law Judge