NICKIE L. SMALLS,

Grievant,

v. **DOCKET NO. 04-27-255**

MERCER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On March 22, 2004, Grievant filed a grievance against Respondent, claiming a posted Secretary 2 position at Bluefield Middle School was not filled in a timely manner. (See footnote 1) The position was filled prior to the level two hearing, at which time the grievance was amended to claim Grievant was the most qualified and most senior applicant and should have been awarded the position. Grievant alleges at level four violations of W. Va. Code §§ 18A-4-8b and 18A-4-8g. Grievant also alleges a violation of W. Va. Code § 18A-2-12a in regards to a performance evaluation she received that negatively affected her application for the position. As relief, Grievant seeks instatement in the position with seniority, backpay and benefits from twenty days after the posting.

Having been denied at levels one and two, level three was bypassed and a level four hearing was held in the Grievance Board's Beckley office on November 3, 2004. Grievant was represented by John Roush, Esq. of the West Virginia School Service PersonnelAssociation. Respondent was represented by counsel, Kathryn Reed Bayless, Esq. The matter became mature for decision on December 6, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Substitute Secretary. She began working for

Respondent in March 2001. At the time the grievance was filed, Grievant was working as a long-term substitute at Bluefield Middle School (BMS), filling in for Ondeena Calfee.

2. Grievant began work at BMS, which has about 600 students, on January 2, 2004, and worked about 45 days. She had worked at several other schools as a substitute secretary prior to then, but had not worked at BMS before.

3. Prior to Grievant's assignment at BMS, the position vacated by Ms. Calfee was posted as a permanent position, and Grievant had applied.

4. Grievant's primary duties at BMS were preparing reports for attendance and payroll. In addition, she was expected to perform general secretarial duties such as answering the telephone, preparing correspondence, filing and acting as a receptionist in the front office.

5. While Grievant was working at BMS, Principal Dr. Stephen Akers completed an unscheduled “Performance Evaluation Report for Service and/or Auxiliary Personnel” on January 16, 2004. Using a form designed for permanent employees rather than the one usually used for substitutes, Dr. Akers identified nine (of twenty-five) areas in which Grievant's performance did not meet expectations: meeting schedules; reliable, punctual and accurate with reports, inventories; follows directions; demonstrates initiative; quality of work;quantity of work; work coordination; planning and organizing; and displays accuracy in her work.

6. A second evaluation conducted February 26, 2004, rated Grievant as failing to meet expectations in thirteen categories.

7. Cathy Daniels is Assistant Principal at BMS. She did not participate in the first evaluation, but agreed with its conclusions. She did help Dr. Akers with the second evaluation. Ms. Daniels believed Dr. Akers could have been harsher in his evaluation, and that the goal of the evaluations was to get Grievant to improve.

8. Rosemary Mitchell is Dean of Students at BMS. She prepared three memoranda addressed to Grievant, all addressing her performance shortcomings. She worked with Grievant closely on a daily basis. Her intent was to give Grievant definite notice of her duties and suggestions on how to improve her performance.

9. Grievant was expected to keep accurate attendance records, to input the records into the WVEIS computer system, and to timely update entries if a student recorded as absent later showed up tardy or with an excuse. A daily absence report was to be prepared by the end of second period.

Grievant failed to perform this duty accurately or in a timely manner. At first Grievant misunderstood that Ms. Dean had told her not to file absence forms in the students' files, but even after being explicitly instructed, in writing, to do so, Grievant failed to keep up with the filing of these forms and others had to do the work for her.

10. Dr. Akers, Ms. Daniels and Ms. Dean all received complaints about Grievant's manner of answering the phone and taking and relaying messages from callers. Grievant rarely took messages from callers as she should have, and when she did, she did not give the message to the person being called. Her phone manner was unprofessional. 11. Grievant had difficulty preparing the payroll reports and resisted efforts to help her. Although she had not used the computerized record-keeping method in place at BMS before, she resisted efforts to advise her in its use, failed to keep accurate non-computerized records that could be cross-checked with the entries, and showed little improvement in maintaining accurate payroll reports over the time she was at BMS.

12. Grievant incorrectly prepared the honor roll, and it took the efforts of several others and an extended period of time to correct the errors. Grievant failed to follow advice that she use a list of teachers as a check-off to ensure she had all reports in before she prepared the list, and she failed to include on the honor roll students in the classes of at least one teacher who personally gave her a list.

13. Grievant was not selected to fill the permanent position at BMS, and she had more seniority than the person who was selected. (See footnote 2)

DISCUSSION

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant's complaint is that Principal Akers gave her negative evaluations in order to take her out of the running in the selection of the permanent Secretary at BMS. She argues that, but for the negative evaluations, she would have been selected for the position. Respondent contends Grievant was not the most qualified applicant for the position, and that any criticisms contained in her performance evaluations were valid. “Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. Va. Code §18A-4-8b.” *Leishman v. Monongalia County Bd. of Educ.*, Docket No. 04-30-127 (Aug.

31, 2004). In this case, it is the “evaluations of past service” that are most in dispute. Up until the time Principal Akers started evaluating Grievant using the form designed for permanent employees, Grievant's past evaluations were all positive and were an asset to her applications for permanent positions. However, each of the past evaluations submitted as evidence by Grievant are one-page documents covering one-day substitute stints. Grievant cited no authority that would prevent Dr. Akers from using more comprehensive evaluative instruments.

Grievant failed to prove she should not have been evaluated, nor that the criticisms of her performance were unfounded. Grievant presented her side of the story with respect to the performance shortcomings outlined in her evaluations. By these explanations, it is obvious Grievant's skewed discernment of what was expected of her and what a secretary should be capable of is the cause of her failure to meet expectations or to take responsibility for improving her performance. Typical is her view of her failure to correctly prepare the honor roll list. Grievant argued she had no way of knowing if a particular teacher had honor roll students or not, so just prepared the list from the forms she was given. Ms. Moore's suggestion that Grievant use a check-off list to ensure she had a response from every teacher was unheeded by Grievant as, apparently, an extraneous extra duty.

Grievant failed to rebut Respondent's assertions that she answered the telephone and took and relayed messages improperly, that she could have improved her reliability in preparing the absentee lists, or that she could have improved the accuracy of her payroll work. Grievant complained that the abbreviated list of duties she was given was too much for one person, but failed to rebut Respondent's assertion that the duties were far less than what would be expected of a regular secretary. Dr. Aker's evaluations were corroboratedby the testimony of BMS' teachers, guidance counselors, Dean of Students and Assistant Principal.

Even if Grievant had proven her evaluations were unfair or invalid, she could not prevail in her claim. Grievant presented no evidence by which her qualifications could be compared to the successful candidate. Grievant did not even identify the person who ultimately filled the position. In Grievant's own opinion, she was more qualified simply because she had more seniority. However, W. Va. Code §18A-4-8b, *infra*, lists seniority as only one of three factors to be considered, and “greater seniority” is not synonymous with “more qualified.”

Given the lack of evidence relating to the successful candidate, Grievant's argument that Respondent failed to fill the position in a timely manner, and hence was foreclosed from using

Grievant's poor evaluations (which, Grievant asserts, were completed after the deadline for filling the positions) against her. Moreover, the record does not contain the position posting, the applications of Grievant or any other applicant, minutes or other evidence of when Respondent actually filled the position. Even if Grievant had successfully proven her other assertions, the dearth of information relating to this claim would fall far short of her burden of proof.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 and Human Resources*,Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. "Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. Va. Code §18A-4-8b." *Leishman v. Monongalia County Bd. of Educ.*, Docket No. 04-30-127 (Aug. 31, 2004).

3. Grievant failed to establish by a preponderance of the evidence that her seniority, evaluations and past service were superior to the successful applicant's.

For the foregoing reasons, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: January 10, 2005 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

There were two of these positions posted at the same time. Grievant identified the one vacated by Ondeena Calfee as the one that is the subject of this grievance.

Footnote: 2

Grievant did not identify the successful applicant or present any evidence relating to the qualifications or past evaluations of the successful applicant. Respondent conceded Grievant was more senior.