THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA R. SMITH,

Grievant,

v. **Docket No. 07-15-329**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Pamela R. Smith ("Grievant"), employed by the Hancock County Board of Education ("HCBE") as a bus operator, filed a level one grievance on March 14, 2007, in which she alleged violations of *W. Va. Code* §§ 18A-4-8, 18A-4-8b, and 18A-2-6, when a vacancy was posted as a five and three-quarter hour position when it had previously been a seven- hour position. For relief, Grievant requests reinstatement of the seven-hour run and back pay. HCBE Coordinator of Transportation Timothy Reinard lacked authority to grant the relief at level one. Superintendent Danny A. Kaser denied the grievance following an evidentiary hearing at level two. Grievant elected to bypass consideration at level three, as is permitted by *W. Va. Code* § 18-29-4(c). (See footnote 1) A level four appeal was filed on June 21, 2007. Grievant, represented by Owens L. Brown of the West Virginia Education Association, and HCBE counsel William T. Fahey, agreed to submit the grievance fordecision based upon the lower-level record. Proposed findings of fact and conclusions of law were to be filed by no later than July 20, 2007. Neither party elected to submit proposals, and the grievance became mature for decision as of the due date.

Synopsis

When a seven hour bus run became vacant due to a resignation, HCBE posted a five and three-quarter hour position. Grievant had held the seven hour position during a leave of absence, and was awarded the new position, which did not include a two hour midday run. Grievant argues that HCBE must post a mid-year vacancy using the same criteria that was previously applicable. She requests reinstatement of the midday run and back pay. HCBE asserts that when the position became vacant,

it properly exercised its discretion and posted the assignment with a shorter work day. Grievant failed to prove that HCBE violated any statute, rule or regulation, or otherwise acted improperly in the posting of the vacancy. Grievance DENIED.

The following findings of fact are derived from a preponderance of the evidence made part of the level two record.

Findings of Fact

___1. Grievant has been employed as a bus operator by HCBE since 1990.

2. HCBE typically employs bus operators under either five and three-quarter hour contracts or seven hour contracts, depending on the needs of the assignment.

3. In August 2006, Grievant bid on, and received, an assignment for Bus 15 which was posted when the regular driver, Patsy Prager, was granted a leave of absence. This seven hour position included a two-hour midday run.

4. Ms. Prager resigned in February 2007. 5. A vacancy for Bus 15 was posted as a five and three-quarter hour run, rather than the former seven-hour run. The midday, as-needed, run was posted separately after all extra-curricular runs were reconfigured for efficiency.

6. Grievant was awarded the five and three-quarter hour run in April 2007, but was not the most senior applicant, and did not receive the two-hour midday run.

7. The compensation for the five and three-quarter hour assignment is approximately $200 less per month than the seven hour assignment.

8. The midday run was discontinued on or about May 17, 2007.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *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). *See W. Va. Code* § 18-29-6. "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).

Grievant argues that the vacancy created with the resignation of Ms. Prager should have been posted as it existed, *i.e.,* a seven hour assignment. HCBE asserts that with Ms. Prager's resignation it

was free to determine which type of contract was needed.

None of the alleged statutory violations address this situation. Grievant was not relegated to a lesser position because she bid on, and accepted, a five and three-quarterhour assignment. Certainly, she would like to have worked the additional two hours; however, she has failed to prove that HCBE acted contrary to law when it re-evaluated the position and posted it with a shorter contract.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *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). *See W. Va. Code* § 18-29-6. "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. Grievant failed to prove that HCBE violated any statute, rule, or regulation when it posted a position with a shorter work day than it had previously been assigned.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See W. Va. Code* § 18-29-7 (repealed) (*but see Executive Order* No. 2-07, May 8, 2007). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judgesis 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court

DATE: OCTOBER 22, 2007

_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.In 2007, the Legislature abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.