THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Angela Sanders,

Grievant,

v. DOCKET NO. 2008-0698-LinED

Lincoln County Board

of Education,

Respondent.

DECISION

Grievant Angela Sanders filed this grievance on October 23, 2007, alleging "Grievant is on the preferred recall list. Respondent filled a secretary position at Central Office (VB # 2008-09 S08-43) on October 16, 2007 with a substitute secretary. Grievant was not given the opportunity to the inservice and competency test for secr. & was not granted to position. (Violation W. Va. Code §§ 18A-4-8b, 18A-4-8e, 18A-4-8g)." Her stated relief sought was "inservice & opportunity to take secr. comp. test & if she successfully passes test, instatement to ½ time secr. position at central Office w/ back pay, benefits, seniority, interest, etc. effective October 16, 2007."

Although there is no evidence in the record of an official amendment to the grievance, at the time it was appealed to level two on January 9, 2008, Grievant had re- written the Statement of Grievance to allege "Respondent has failed to fill a number of Aide & Cook positions within 20 working days. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b, 18A-4-8g & 18A-4-15." At that time, her relief sought was "instatement into one of [the] positions, preferably an aide position, with back pay & benefits. (Grievant also seeks interest.)" Upon appeal to level three, the Statement of Grievance had been changed yet again, to state:

> The Grievant was reduced-in-force as a teacher's aide at the close of the 2006-07 school year. The Grievant subsequently initiated this grievance during the 2007-08 school year to compel the Respondent to fill several teacher's aides' and cooks' vacancies. The Respondent filled those vacancies with the exception of a half-time cook's position at Ranger Elementary. This position was offered to a more senior

> applicant who accepted another position. The Respondent filled this position with the substitute cook who had been subbing in this position instead of offering this position to the Grievant who was the second most senior applicant for this position. Grievant alleges a violation of West Virginia Code §18A-4-8b and §18A-4-8g.

At this time, the relief Grievant is seeking is “a grant of wages, benefits, and regular employment seniority that she would have earned if she had been awarded the position at Ranger Elementary, and interest on all monetary sums.” The parties agreed that, of all the positions that were originally in dispute, the only one currently in dispute is the half-time Cook job at Ranger Elementary.

A level three hearing was held in the Grievance Board's office on September 3, 2008. Grievant was represented by counsel, John E. Roush and Respondent was represented by counsel, Rebecca Tinder. The matter became mature for decision on October 7, 2008, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was one of at least two employees on a preferred recall list who filed grievances to force Respondent to fill position vacancies in a timely manner, and to allow her to take inservice classes and competency tests for any positions she wished to apply for. During the pendency of this grievance, all the positions were properly filled with other applicants. Despite proving the position she seeks was filled improperly, Grievant did notprove she would have been the successful applicant if not for the error. On that basis, her grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant was employed by Respondent as a Substitute Aide in the 2006- 2007 school year, at the end of which she was laid off and placed on the preferred recall list.
2. Grievant had not been recalled by the start of the 2007-2008 school year, although Respondent had posted a number of positions.
3. One of these open positions was a half-time cook position at Ranger Elementary School.
4. No regularly employed school service personnel applied for the half-time Cook position.
5. Both Grievant and another employee on the preferred recall list, Gail Crum, were among the applicants for the position. It was awarded to an applicant who was employed as a substitute cook.

6. Ms. Crum has greater seniority than Grievant.

7. After Ms. Crum and Grievant brought their preferred recall status to the attention of the Board via this grievance proceeding, both were allowed to take the Cook classification test, and both passed.

8. Because she had greater seniority, it was determined that Ms. Crum was entitled to be instated in the half-time Cook position at Ranger. 9. Before that could happen, however, Ms. Crum applied for another Cook position at Hamlin. When Respondent determined she was entitled to the Ranger position and offered it to her, she declined to transfer into it.

10. Because of her grievance, Ms. Crum was awarded seniority and back pay to the date of the original filling of the half-time Ranger position, and the original hiree was allowed to stay in the position.

11. Grievant, meanwhile, applied for a Cook position at Duvall, and was hired in that position on January 2, 2008. Grievant desires to stay in this position rather than being awarded, as she originally requested, the Ranger half-time position.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. (See footnote 1) Grievant must prove that she was entitled to the half-time Cook position at Ranger Elementary when it was originally filled.

"A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service." (See footnote 2) Employees on the preferred recall list due to a reduction in force are entitled to be hired for a permanentposition over an equally qualified substitute employee. (See footnote 3) Grievant is correct that she should have been considered for the half-time Cook position at Ranger Elementary school, and that Respondent violated the personnel law by filling it with an applicant who, at the time, was employed as a substitute.

At the time the position was filled, Grievant was not the most senior preferred recall applicant, and therefore was never entitled to the job. No subsequent personnel transactions related to the same position can obscure that fact. What Grievant is asking for as relief is for the undersigned to find that,

at some later date long after this grievance was filed, she became eligible for instatement into the position, when the person who should have been placed in the position declined to transfer into it. Like that employee, Grievant wants to remain in her current position rather than transfer into the job she was seeking, but she wants back pay and seniority as if she had been hired into the Ranger job when it was originally posted.

This grievance was, in effect, granted at level one, but Grievant did not like the outcome. The one position which Grievant clung to, the half-time Cook position at Ranger Elementary, had it been filled in the proper manner, would have gone to another applicant who was more entitled to it than Grievant by virtue of greater seniority. At the time it was filled, Grievant was not entitled to the position, and she does not claim she was entitled to the position. The same position became open at a later date - long after this grievance was filed - and Grievant then became eligible for the job. However, she had accepted another employment opportunity by then, and no longer wanted the job. It makes no logical sense to grant Grievant seniority and back pay to the date someone else became entitled to the Ranger Cook position. There was one job, two people seeking it, and only one person could be entitled to it. Grievant was not that person. Although Respondent mistakenly filled the position with a substitute employee rather than one of the employees on preferred recall, it cured that mistake by appointing an employee to it based on seniority and preferred recall status. That should have been the end of this grievance, with any subsequent events relating to that position, if they were in error, being the basis for a new grievance.

The question became moot when Respondent determined Ms. Crum was entitled to the job from the outset, and settled her grievance by granting her back pay and seniority to the date she would have been hired. Since it could not have hired two people into one position, no other person who was seeking that job can show a greater or equal entitlement to the same benefit. It is almost as if Grievant is claiming that, because Ms. Crum was entitled to the job, she was also. “In this situation '[i]t is a well-established rule that a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.'” (See footnote 4)

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant has the burden of proving her case by a preponderance of the evidence.

Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 §156-1-3 (2008); *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. "A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service." W. Va. Code § 18A-4-8b(a).

3. Employees on the preferred recall list due to a reduction in force are entitled to be hired for a permanent position over an equally qualified substitute employee. W. Va. Code §§ 18A-4-8b(b), 18A-4-8b(q).

4. Grievant was not the most senior applicant on the preferred recall list when the half-time Cook position at Ranger Elementary was filled, so she was not entitled to the job.

For the foregoing reasons, 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 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 includedso that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

October 30, 2008

Figure

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); Jamison v. Monongalia County Bd. of Educ., Docket No. 2008-0293-MonED (Aug. 27, 2008); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990).

Footnote: 2

W. Va. Code § 18A-4-8b(a).

Footnote: 3

W. Va. Code §§ 18A-4-8b(b), 18A-4-8b(q).

Footnote: 4

State ex rel. Abraham Linc. Corp. v. Bedell, 216 W.Va. 99, 602 S.E.2d 542 (2004) (Davis, J., concurring) (quoting Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1163 (9th Cir.2002)).