WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RANDALL ROBERTSON,
Grievant,

v. **Docket No. 2009-0698-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Randall Robertson ("Grievant") filed this grievance against his employer, Respondent Wayne County Board of Education ("BOE"), on November 18, 2008. His "Statement of Grievance" provides as follows:

> Grievant has been assigned duties and responsibilities that are both outside of his classification and were formerly performed by the Coordinator of Electrical Services, Roger Perry, prior to Mr. Perry's retirement. These duties include planning of electrician/electronic projects, preparation of the site of the project and ordering the materials for the project, and oversight of the performance of the project including supervision of employees involved in the project. Grievant alleges a violation of West Virginia Code §§ 18A-4-8 and 18A-2-5.

As relief, "Grievant seeks either: (a) reclassification to Coordinator of Services with the same pay grade and supplement as was received by Mr. Perry prior to his retirement, back pay retroactive to the maxim allowable by law, and interest on any sums to which he is entitled to; or (b) removal of the duties described above, back pay from the date of the removal of the duties retroactive back to the earliest date allowable by law, and interest on any sums he is entitled."

This grievance was denied at Level One by decision dated January 14, 2009. A Level Two mediation, conducted on April 7, 2009, was unsuccessful. A Level Three evidentiary hearing was held before the undersigned Administrative Law Judge ("ALJ") in

Charleston, West Virginia, on June 8, 2009. Grievant appeared in person and through his counsel, John Everett Roush, Esquire, West Virginia School Service Personnel Association, and the BOE appeared by and through its counsel, David A. Lycan, Esquire. After presentation of the evidence, the parties were afforded the opportunity to submit proposed findings of fact and conclusions of law on or before June 30, 2009, and this matter became mature for decision on this date. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant is one of two employees in the BOE maintenance department whose position is classified as "Electrician II." After the retirement of the Coordinator of Electrical Services, Grievant claimed that his position was misclassified, and his position should be classified as the Coordinator of Electrical Services. However, Grievant is not the immediate supervisor of any employee. He does not direct electrical, electronic or technology projects. Nor does the Grievant coordinate contractors for projects.

Grievant has not established that it is more likely than not the duties of his position are more closely related to the "Director or Coordinator of Services" classification. Accordingly, this grievance is **DENIED**.

The following findings of fact are based upon a thorough review of the record produced in this matter:

Findings of Fact

1. Grievant is employed by Respondent BOE. His position is classified as "Plumber II/ Electrician II/ Truck Driver."

2. Roger Perry worked for the BOE as the Coordinator of Electrical Services. He was paid on pay grade H and received a supplement of approximately $10,000 per year. Mr. Perry retired at the end of the 2006-2007 school year. After his retirement, the BOE hired Mr. Perry as a private contractor for ninety days to help complete one last project, the technology[1] system at the June Harless Center at Kellogg School.

3. While Mr. Perry was employed as Coordinator of Electrical Services, the BOE was able to complete all of its major county-wide technology/electronic projects, such as county teleconferencing, county school phone system, county internet system, school computer systems and distance learning.

4. In view of his impending retirement, Mr. Perry attempted to convey "institutional" memory and "know how" to Grievant over the course of his last several years of employment with the BOE.

5. After Mr. Perry's retirement, Grievant was assigned a cellular telephone. A cellular telephone was also assigned to an HVAC employee so that particular employee, and his fellow employee normally assigned to work with him, could be in contact with Maintenance Director Don Davis. Level Three, Testimony of Don Davis.

6. After sitting idle for nearly six months, the truck formerly assigned to Mr. Perry was assigned to the Grievant. Prior to the truck being assigned to the Grievant, the Director of Technology, Tim Conzett, took certain technology related tools from the truck. These tools were previously used by Mr. Perry. Level Three, Testimony of Tim Conzett.

7. Director of Technology Tim Conzett plans and oversees all technology projects

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[1] Generally, technology projects and electronic projects involve some electrical-type work because electricity must be wired to provide a power source to technological devices.

within the Wayne County School System. Since he became Technology Director, he is now in charge of the planning of all electronic and technology projects within the county school system.

8. The BOE's Maintenance Department is relatively small. It is comprised of approximately 18 to 20 service personnel employees. Level Three, Respondent's Exhibit 2. Employees of the Maintenance Department draw their daily or weekly work assignments from Maintenance Director Don Davis. Level Three, Testimony of Don Davis. There are currently no members of his Maintenance Department who have the classification of coordinator of any kind of services. *Id*.

9. There are only two Electrician IIs within the Wayne County Board of Education's Maintenance Department (Grievant being one of them). The other Electrician II, James D. Billups, works almost exclusively on assignments separate from the Grievant.

10. Mr. Billups draws his work assignments from the county Maintenance Director. Grievant also draws his work assignments from the Maintenance Director. Grievant does not supervise Mr. Billups with regard to his work assignments. Grievant does not plan Mr. Billups' activities. Mr. Billups is allowed and expected to exercise independent judgment in his work assignments, such as ordering materials when needed, revising plans, etc., just like the Grievant.

11. Grievant is normally paired by the Maintenance Director with Sammy Pete Fry, an HVAC classified employee of the Maintenance Department, who is skilled as an electrician but does not hold that classification. Grievant and Mr. Fry normally work together on electrical assignments and share the same work truck. Grievant and Mr. Fry work together as a team on work assignments for safety reasons, and because it normally

takes two persons to do such electrical tasks such as pulling electrical wire. Grievant does not supervise Mr. Fry and quite often, Mr. Davis gives the work assignments for these two employees to Mr. Fry rather than the Grievant and provides Mr. Fry with the instructions for the assignment.

12. Grievant has never been assigned by the Maintenance Director to direct or supervise other employees. Grievant does not supervise any employee. Level Three, Testimony of Randall Robertson. The Grievant does not plan out and direct projects or order any materials that would fall outside his position's normal electrician duties. Level Three, Testimony of Donald Davis.

13. Grievant has worked on projects such as installing a new intercom system for a small elementary school. He has worked on installation projects involving wiring and running cable lines for computer systems in schools, all of which constitute routine electrician's duties.

14. The BOE has outsourced several projects such as "smart boards," projectors and proximity security sensors.[2]

15. Grievant does not direct a division or department.

Discussion

Because a misclassification grievance is non-disciplinary in nature, the Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "The preponderance standard generally requires proof that a reasonable person would accept

[2] Proximity security sensors are electronic devices that help control and regulate entrances and exits throughout a building.

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). Where the evidence equally supports both sides, the employee has not met his burden. *Id.*

Generally, in order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than that under which the employee's position is categorized. *Sammons/Varney v. Mingo County Bd. of Educ.*, Docket No. 96-29-356 (Dec. 30, 1996); *Savilla v. Putnam County Bd. of Educ.*, Docket No. 89-40- 546 (Dec. 21, 1989). A school service employee who establishes, by a preponderance of the evidence, that he is performing the duties of a higher WEST VIRGINIA CODE §18A-4-8 classification than that under which he or she is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995); *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991); *Holliday v. Marshall County Bd. of Educ.*, Docket No. 89-25-376 (Nov. 30, 1989); *Scarberry v. Logan County Bd. of Educ.*, Docket No. 89-23-63 (Oct. 30, 1989). However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him or her misclassified *per se*. *Carver v. Kanawha County Bd. of Educ.*, Docket No. 01-20-057 (Apr. 13, 2001).

Grievant's position is currently multiclassifed as "Plumber II/ Electrician II/ Truck Driver." See W.VA. CODE § 18A-4-8(i)(69)(Plumber II classification); W.VA. CODE § 18A-4-8(i)(37)(Electrician II classification); W.VA. CODE § 18A-4-8(i)(82)(Truck Driver classification). However, the great majority of the Grievant's duties are electrical in nature.

Grievant maintains that his position should be classified as Coordinator of Electrical Services. Pursuant to WEST VIRGINIA CODE § 18A-4-8(I)(34), a "Director or Coordinator of Services" must be assigned to "direct a department or division." When used as a verb, "direct" generally means to cause something to move on a particular course, to guide or govern, and/or to instruct with authority. BLACK'S LAW DICTIONARY 370 (Abridged 7th Ed. 2000).

Grievant has not established, by a preponderance of the evidence, that he directs a "department or division." First, Grievant does not direct work assignments or supervise other personnel. Grievant does not assign any employee his or her work assignment. Assignments are given to each employee by the Maintenance Director. Nor does the Grievant supervise any employee. There are only two electricians in the county (one of which is the Grievant). Grievant does not oversee the work of the other electrician in the county, who is more senior than the Grievant, and both perform their electrician assignments independently. Moreover, insofar as the Maintenance Director sends another employee to help the Grievant, the record reflects that the Director sometimes gives the assignment to the "helper" employee, who oftentimes relays the information to the Grievant.

Secondly, Grievant is not held responsible for all electrical work performed. To direct a department or division, an employee must generally be responsible for the department or division. *See Woofter v. Harrison County Bd. of Educ.*, Docket No. 01-17-464 (Dec. 20, 2001); *Fransico v. Fayette County Bd. of Educ.*, Docket No. 03-10-108 (Aug. 21, 2003). Grievant claims that after Mr. Perry's retirement, he somehow inherited Mr. Perry's coordinator status. While Mr. Perry may have imparted some institutional

knowledge to the Grievant, the record does not evince that Grievant was actually made responsible for electrical services.[3] Moreover, there is no indication that the Grievant is responsible for divisional or departmental tasks that establishes such responsibility. He does not perform the same duties that Mr. Perry previously performed, and he does not hold the same classification Mr. Perry held. *See McDaniels v. Raleigh County Bd. of Educ.*, Docket No. 04-41-085 (June 22, 2004)(recognizing that an employee who performs the same duties as his predecessor is entitled to the same salary as his predecessor). Grievant does not plan or direct projects or order materials that are outside the scope of his general electrician duties. Level Three, Testimony of Donald Davis. Even assuming the Grievant has performed some task previously performed by Mr. Perry, a "brief and impermanent undertaking of some of the duties of a position . . . does not equate to an assignment to 'direct a department or division.'" *O'Neal v. Fayette County Bd. of Educ.*, Docket No. 02-10-369 (Mar. 6, 2003).[4]

When this ALJ construes WEST VIRGINIA CODE § 18A-4- 8(l)(34) broadly, and strictly in favor of the employee, it simply cannot be found that it is more likely than not the Grievant's position is misclassified. He does not direct a department or division. Accordingly, this grievance must be denied.

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[3] The record suggest that the Respondent hired Mr. Tim Conzett as Technology Director, to oversee and direct technology projects that Mr. Perry previously worked on. Grievant does not perform the same tasks that Mr. Perry performed.

[4] Additionally, "[c]ounty boards of education may expand upon the W. VA. CODE §18A-4-8 classification definitions in a manner which is consistent with those definitions." *Beahm and Hines v. Randolph County Bd. of Educ.*, Docket No. 98-42-241 (Jan. 7, 1999)(citations omitted). Grievant has not established that he is performing duties beyond the classification of Electrician II.

The following conclusions of law are appropriate:

Conclusions of Law

1. Because this grievance is non-disciplinary in nature, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employee has not met his burden. *Id.*

2. In order to prevail in a misclassification grievance, the employee must establish that his or her duties more closely match those of another classification than that under which the employee's position is categorized. *Sammons/Varney v. Mingo County Bd. of Educ.*, Docket No. 96-29-356 (Dec. 30, 1996). A school service employee who establishes, by a preponderance of the evidence, that he is performing the duties of a higher WEST VIRGINIA CODE §18A-4-8 classification than that under which he or she is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995).

3. Grievant has not established, by a preponderance of the evidence, that his duties more closely match those of another classification, namely Coordinator of Electrical Services, because the Grievant does not direct any department or division.

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 WEST VIRGINIA 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: August 6, 2009

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Mark Barney
Administrative Law Judge