THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICKEY YOUNG,
Grievant,

v. **Docket No. 2009-0813-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Rickey Young initially filed this grievance against his employer, Respondent Marshall County Board of Education on December 18, 2008 at level one. The parties subsequently entered into a mutual agreement to waive levels one and two and proceed to level three. The level three grievance form was filed on March 12, 2009. His Statement of Grievance reads as follows:

> Grievant contends that the Respondent erred in failing to place him in a 260-day Custodian job at the new school created by consolidation of Grievant's school with other schools. Grievant asserts a violation of W. Va. Code 18A-4-8b & 18A-4-8f.
>
> Relief Sought: Grievant seeks instatement into the 260-day custodian position at Hilltop Elementary School with compensation for lost wages and benefits with interest.

The level three hearing was conducted before the undersigned Administrative Law Judge on May 18, 2009, at the Grievance Board's Westover office. Grievant appeared in person and by his counsel, John Everett Roush, WVSSPA. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice McDavid Graff & Love LLP. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 26, 2009.

Synopsis

Grievant is currently assigned to an elementary school that will cease to exist as a result of consolidation at the end of the 2008-2009 school year. One other elementary school is also slated to be consolidated at the end of the 2008-2009 school year, both will be consolidated into Hilltop Elementary School. Grievant is the only custodian at his current elementary school on a 260-day contract. The service personnel of Marshall County voted to give preference to employees at schools that are closed by consolidation in the filling of new positions at the new school.

Grievant bid on a posted 260-day contract position at Hilltop Elementary School; however, he was not selected for the position because an applicant with more seniority applied. The successful applicant had previously been employed under a 200-day contract at one of the elementary schools closed due to consolidation. Grievant argues that he should have been directly transferred into the available 260-day position at Hilltop Elementary School without the posting process. Respondent counters that it filled the new positions at Hilltop Elementary School from the five custodians at the elementary schools that were consolidated on the basis of seniority. Grievant failed to prove the procedure used by Respondent was arbitrary and capricious, or otherwise wrong. This grievance is denied.

The following Findings of Facts are based upon the record developed at level three:

Findings of Fact

1. Grievant is employed by Respondent as a custodian on a 260-day contract and is assigned to Sherrard Elementary School. The other custodians currently at

Sherrard Elementary School, Lexis Skibo and Betty Woods, are on 200-day contracts.

2. Sherrard Elementary School and Limestone Elementary School are slated to close at the end of the 2008-2009 school year and be consolidated into Hilltop Elementary School.

3. The school service personnel of Marshall County voted to give preference to employees at schools that are closed by consolidation in the filling of new positions at the new school.

4. The new Hilltop Elementary School is scheduled to have three custodians, two with 220-day contracts and one with a 260-day contract.

5. Grievant bid on the 260-day custodian position at Hilltop Elementary and no other position. Another displaced custodian possessing the benefit of the preference vote, Betty Woods, also bid on that 260-day custodian's position at Hilltop Elementary.

6. Betty Woods was awarded the 260-day custodian position at Hilltop Elementary because she possesses more seniority than Grievant; however, Ms. Woods held a 200-day contract term for the 2008-2009 school year.

7. The least senior custodian in Marshall County with a 260-day contract, Judy Stanley, was removed from her position at the County Office/Bus Garage and placed on transfer to make a position available for Grievant. Grievant was placed in the 260-day custodian's position at the County Office/Bus Garage for the 2009-2010 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

W. VA. CODE § 18A-4-8f governs seniority rights during school consolidations, and provides, in pertinent part, the following:

> (a) Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers or school service personnel, who vote to do so, in accordance with procedures established in this section, and who are employed by a county board, the board shall give priority to classroom teachers or school service personnel in any schools or schools to be closed as a result of a consolidation or merger when filling positions in the new school created by consolidation or newly created positions in existing schools as a result of the merger.
>
> . . .
>
> (d) If a majority approves, the teachers or school service personnel in the school or schools to be closed have priority in filling new positions in the new or merged schools for which the teachers are certified or for which the school service personnel are qualified and meet the standards set forth in the job posting on the basis of seniority within the county. A teacher or school service person may receive priority for filling a position at a school affected by merger or consolidation only for the position being created by the influx of students from a consolidated or merged school into the school receiving students from their closed school or grade level.
>
> . . .

(2) The most senior service person from the closed school or schools has priority in filling any position within his or her classification category. The second most senior service person from the closed school or schools then has priority in filling remaining vacancies and so on until all available positions are filled.

(3) If there are fewer new positions in the newly created school or merged school than there are classroom teachers or school service personnel from the school or schools to be closed, the teachers or school service personnel who were not placed in the new positions retain the same rights as all other teachers or service personnel with regard to seniority, transfer and reduction in force.

Grievant begins his argument in the context of transfer and reduction in force and the general rule of posting of vacancies and filling them by seniority containing an exception. This exception is applicable when it is necessary that an employee entitled to a certain employment term is actually placed in a position which has that employment term. When a board of education is conducting a "Berry Bump," it is not required to make available to all the employees, by the posting process, a position with a certain employment term that the board needs for a certain employee.[1] Grievant goes on to assert that "all the normal rules in the normal transfer/reduction in force context apply to the consolidation-preference situation, it is only logical that the exceptions to the former would also apply to the latter. If this is done, then it is easy to see that Respondent had only one 260-day employee at the two closing schools and it had only one 260-day position at the new school." Therefore, Grievant should have been placed, via direct transfer, into the

[1]In the context of a "Berry Bump," a board of education may make a direct transfer of employees in order to insure that employees to a particular employment term receive a position with the appropriate term. This provides an exception to the general rule of posting of vacancies and filling them on the basis of seniority. *Milam et al. v. Kanawha County Bd. of Educ.*, Docket No. 03-20-194 (Sept. 15, 2003); *Berry v. Kanawha County Bd. of Educ.*, 191 W. Va. 422, 446 S.E.2d 510 (W. Va. 1994).

260-day position at Hilltop Elementary School. Grievant's argument is well grounded in logic; however, it lacks any authority which would support it and does not demonstrate that Respondent abused its discretion in any way.

Respondent's process in filling the new positions at Hilltop Elementary School does not appear to be arbitrary and capricious. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Respondent filled the new position at Hilltop Elementary School from the five custodians at the two consolidated elementary schools on the basis of seniority. Grievant was given the same benefit of the preference vote under W. VA. CODE § 18A-4-8f as Ms. Woods, the successful candidate for the 260-day position at Hilltop Elementary. Respondent properly awarded the position to Ms. Woods who had preference for that position under the consolidation statute because of seniority superior to that of Grievant. In addition, Grievant was placed directly into a 260-day position after another service person was bumped out of that position to allow Grievant to retain a position with the same number of work days. In short, the preference given to employees at closed schools by vote pursuant to W. VA. CODE § 18A-4-8f retains the traditional posting and filling by

seniority process. Grievant has not proven that this decision was arbitrary and capricious or constituted an unreasonable interpretation of the statute.

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 his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. When a majority of the service personnel in a county vote to do so, a board of education shall give priority to service personnel in any school or school to be closed as a result of a consolidation or merger when filling positions in the new school created by the consolidation. W. VA. CODE § 18A-4-8f.

3. The preference given to employees at closed schools by majority vote pursuant to the consolidation statute retains the traditional posting and filling by seniority process. It merely restricts the employees eligible to bid on the positions made available by the consolidation. W. VA. CODE § 18A-4-8f.

4. Respondent appropriately followed W. VA. CODE § 18A-4-8f in making the selection for the 260-day custodian position at Hilltop Elementary School.

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 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* 156 C.S.R. 1 § 6.20 (2008).

Date: September 22, 2009

Ronald L. Reece
Administrative Law Judge