THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

STEPHEN VANGILDER,
Grievant,

v. **Docket No. 2008-0708-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent,

and

GARY TOOTHMAN,
Intervenor.

DECISION

This grievance was initiated by Stephen VanGilder ("Grievant") on October 28, 2007, alleging he should have been selected for an extracurricular bus assignment. Following a level one hearing, in a decision dated November 15, 2007, the grievance was granted, and Grievant was placed in the position. Gary Toothman ("Intervenor") was the original successful applicant for the assignment in question and appealed the grievance to level two on December 5, 2007. The parties agreed to waive level two mediation, and a level three hearing was convened in Westover, West Virginia, on May 19, 2008, before Administrative Law Judge Brenda L. Gould. Grievant was represented by Owens Brown of the West Virginia Education Association; Intervenor was represented by counsel, John E. Roush of the School Service Personnel Association; and Respondent was represented by counsel, Stephen R. Brooks. The parties submitted post-hearing proposals on June

25, 2008. In order to expedite the level three decision, this grievance was reassigned to the undersigned administrative law judge on February 6, 2009.

Synopsis

Due to confusion caused by two very similar postings for mid-day vo-tech runs whose posting periods overlapped, Grievant's application for the position for which he applied was not considered. His bid was considered for the first posting, and he was not the most senior applicant. Intervenor was placed in the second posted position, which was the position that Grievant had bid upon. At level one, the grievance was granted, because Grievant was the most senior, qualified applicant for the position that he bid on.

Intervenor contends that Grievant did not make his application sufficiently clear and should have not been considered for the second posted position. However, Respondent's posting system does not number or provide clear designations for applicants when applying for service positions, and Grievant should not have been required to know that there were two different postings with very similar descriptions posted at the same time. Grievant sufficiently described the position he was bidding on, and he was entitled to placement in that position. Intervenor's request for relief is denied.

Findings of Fact

Based upon a review of the entire record, including the level one transcript and exhibits, along with the recording of the level three hearing, the undersigned makes the following findings of fact:

1. Grievant has been employed by Respondent as a regular bus operator since October 31, 1983.

2. Intervenor has been employed as a bus operator since March 16, 1993.

3. On September 7, 2007, Respondent posted the following extracurricular assignment: "after school bus run – MCTC[1] (as needed) -- Approx 11:20 a.m. – one year only." The deadline for applications for this position was 4:00 p.m. on September 20, 2007.

4. Grievant saw the September 7 posting, but he did not apply, because he already had an after school assignment.

5. Shortly after it was posted, the September 7 posting was corrected to say "midday bus run," instead of "after school."

6. On September 19, 2007, Respondent posted another extracurricular assignment, described as "mid day bus run – Marion County Tech Center, as needed." The deadline for applications was October 2, 2007.

7. On September 20, 2007, Grievant submitted a bid sheet, intended to apply for the assignment that was posted on September 19, 2007. In the "Description of Vacancy" section of the bid sheet, Grievant wrote "Mid Day Vo Tech."

8. Because the two posting periods overlapped, Grievant's bid was mistakenly assumed to be for the first extracurricular bus run, posted on September 7, 2007.

9. Grievant was not the most senior applicant for the first posting, so another individual was awarded that assignment.

10. Intervenor applied for both postings. Since Grievant's application was not considered for the second posting, Intervenor was the most senior applicant and was awarded the position.

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[1]Marion County Tech Center.

Discussion

Because this grievance does not involve a disciplinary matter, Intervenor has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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). "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).

West Virginia Code § 18A-4-16(5) provides that extracurricular school service personnel assignments are to be filled in accordance with West Virginia Code § 18A-4-8b.[2] In turn, that statute states that school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service." The parties in this case do not dispute that, pursuant to these provisions, Grievant was the most senior, qualified applicant for the second posted position. However, Intervenor argues that Grievant was

[2]West Virginia Code §18A-4-16 defines extracurricular duties to "mean, but not be limited to, activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis." The Grievance Board has found bus runs between a school and a vocational educational center to be part of a bus operator's regular run, rather than extracurricular, as these runs occur during the bus operator's regularly scheduled working hours, when the bus operator has a six hour work day. *Garner v. Monongalia County Bd. of Educ.*, Docket No. (June 8, 2000). The parties did not dispute, however, that these assignments, which appear to occur during regularly scheduled working hours, were properly posted as extracurricular runs.

obligated to make his application as clear as possible and, because he did not do so, was not entitled to placement in the position.

As the parties have duly noted, there are no statutory provisions specifying a required format for job bids submitted by service employees. However, Intervenor cites past Grievance Board decisions which have held that "it is the responsibility of a job applicant 'to ensure that his interest in a given position is clearly made known and his application therefore adequately completed.'" *Mills v. Doddridge County Bd. of Educ.*, Docket No. 90-09-402 (Nov. 26, 1990) *citing Delaney v. Harrison County Bd. of Educ.*, Docket No. 89-17-352 (Sept. 25, 1989); *See also Crouch v. Cabell County Bd. of Educ.*, Docket No. 01-06-518 (Jan. 25, 2002). Intervenor contends that it was incumbent upon Grievant to specify which of the posted mid-day vo-tech runs he was bidding on, which he did not do.

Interestingly, although Intervenor has argued that Grievant's lack of specificity should preclude him from being considered for the second posted run, Intervenor's application was similarly "non-specific." Intervenor's bid described the position as "Mid Day Bus Run MCTC." However, since his bid was submitted on September 18, 2007, when only the first run had been posted, there was no possibility for the confusion which ensued when Grievant's bid was submitted during the overlapping period encompassed by the two postings.

Other applicants for these postings did have the foresight to specify exactly what position they were bidding on, by providing additional information such as "one year only" or "after school bus run." However, neither Grievant nor Intervenor did this, because they did not believe it was necessary at the time. While Grievant did see the first posting in its

original form, described as an after school run, he testified that he never saw the corrected posting designating it as a mid-day vo-tech run. Therefore, he did not know that there were two mid-day vo-tech runs posted at the same time, when he submitted his bid for the second position. Accordingly, he had no reason to add more descriptive terms to his bid sheet.

After granting the grievance at level one, the hearing officer suggested that Respondent implement a numbering system for its postings, so that this type of confusion would not occur in the future. Indeed, it seems somewhat excessive to require employees to know what positions have been posted at any given time and whether positions are similar enough to cause confusion. A numbering system, which the undersigned notes is used by many boards of educations in this state, is a simple solution. In this case, knowing that there were two overlapping postings for very similar positions when Grievant submitted his bid, the personnel office could have made a simple phone call to clarify his application. Because of the ensuing confusion, Grievant "lost out" on a position he desired, for which he was qualified, through no fault of his own.

In this case, Grievant was the most senior, qualified applicant for the position posted on September 19, 2007. His bid designating the position for which he was applying as "Mid Day Vo Tech" was a valid application for the posted position of "Mid Day Bus Run – Marion County Tech Center." Respondent acted properly by granting his requested relief at level one, and Intervenor's appeal must be denied.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary case, a party has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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. Extracurricular school service personnel assignments are to be filled "on the basis of seniority, qualifications and evaluation of past service." West Virginia Code §§ 18A-4-8b and 18A-4-16(5).

3. "It is the responsibility of a job applicant 'to ensure that his interest in a given position is clearly made known and his application therefore adequately completed.'" *Mills v. Doddridge County Bd. of Educ.*, Docket No. 90-09-402 (Nov. 26, 1990) *citing Delaney v. Harrison County Bd. of Educ.*, Docket No. 89-17-352 (Sept. 25, 1989); *See also Crouch v. Cabell County Bd. of Educ.*, Docket No. 01-06-518 (Jan. 25, 2002).

4. Grievant was the most senior, qualified applicant for the position at issue in this case, and he submitted a proper bid for the position.

Accordingly, Intervenor's request for relief is **DENIED**, and the relief granted to Grievant at level one is hereby **AFFIRMED**.

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: February 20, 2009

DENISE M. SPATAFORE
Administrative Law Judge