WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAMELA Y. FUCCY,
Grievant,

v. **Docket No. 2008-0264-HanEd**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent,
and
DAVID LOWTHER,
Intervenor

DECISION

Pamela Fuccy ("Grievant") filed this grievance on August 14, 2007, alleging she should have been selected for the posted position of Food Truck Driver/Custodian. A level one hearing was held on August 28, 2007, and the grievance was denied in a decision dated September 17, 2007. Level two was waived by agreement of the parties, and a level three hearing was held in the Grievance Board's office in Westover, West Virginia, on May 19, 2008. Grievant was represented by Owens Brown of the West Virginia Education Association; Intervenor David Lowther was represented by counsel, John E. Roush of the School Service Personnel Association; and Respondent was represented by counsel, William T. Fahey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 23, 2008.

Synopsis

Intervenor was selected over Grievant for the position of Food Truck Driver/Custodian. Grievant, a substitute bus operator, argued that she should have been given the opportunity to take the custodian competency test in order to qualify for the

position. However, pursuant to applicable statutes, the board of education is obliged to offer a vacant position to qualified applicants who already hold the classification title in question, and competency testing is not required, unless no qualified applicants apply. Intervenor held the applicable class titles, having taken the custodian test when this position had been posted in 2005.

Grievant also contended that Respondent engaged in discrimination and favoritism by allowing Intervenor and others to substitute in the position at issue, alleging they were allowed an opportunity to take the custodian competency test that others were not given. These allegations were simply untrue, in that Intervenor and the other substitutes had qualified as custodians by virtue of taking the competency test when they applied for this position in 2005. Grievant had not applied at that time, so she was not qualified as a custodian when it was posted in 2007. No discrimination or favoritism was proven, and the grievance is denied.

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education as a substitute bus operator since 2003.

2. In June of 2007, Respondent posted a vacancy for the position of Food Truck Driver/Custodian. In addition to standard qualifications, the posting required the successful applicant to have a CDL (Commercial Driver's License) and a food handler's card.[1]

[1]This position has historically required a food handler certification, which is administered by the county health department, because it requires constant contact/handling of food items.

3. Respondent does not administer a county test for applicants for truck driver positions; once an applicant has obtained a CDL, they are considered qualified for that classification title.

4. Grievant applied for the Food Truck Driver/Custodian position. At the time of the posting, she had a CDL, but she did not have a food handler's card and had not taken the competency examination for custodian.

5. The successful applicant for the position was Intervenor. At the time of the posting, he was also employed as a substitute bus operator, but had less seniority in that classification than Grievant. Intervenor had taken and successfully passed the custodian examination in March of 2005 when the position at issue was previously posted. He also had a food handler's card since 2005.

6. Because Intervenor had all of the qualifications for the position at issue, no competency examinations were offered to applicants for the Food Truck Driver/Custodian position.

7. The individual who served in the Food Truck Driver/Custodian position since 2005 had been sick for extensive periods of time, and Respondent had allowed substitute bus operators who had successfully passed the custodian test to substitute in the position. Most of these individuals had taken the custodian test when the position was previously posted in March of 2005. Intervenor was one of the individuals who substituted in the position.

8. Since filing this grievance, Grievant has successfully bid upon a regular bus operator's position and is no longer interested in being placed in the position at issue.

Discussion

Because this grievance does not involve a disciplinary matter, 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 § 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).

Grievant contends that she should have been allowed the opportunity to take the custodian competency examination after she applied for the position in question. She further alleges that male substitutes were given advantageous treatment over her, in that a list of “favorites” were called to substitute in the Food Truck Driver/Custodian position and allowed to take the custodian exam in order to be qualified. Because he was a substitute with less seniority than her, Grievant contends she was entitled to the position over Intervenor. Grievant argues that Respondent’s discrimination and favoritism deprived her of the opportunity to qualify for this position, permanently affecting her seniority as a regular employee. Therefore, although she no longer desires this particular position, she believes she should have been placed in it, giving her an earlier seniority date as a regular employee.

It is well-settled that “[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel.

Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ*., 177 W. Va. 145, 351, S.E. 2d 58 (1986). West Virginia Code § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." In turn, the same statute defines "qualifications" as meaning that "the applicant *holds* the classification title in his or her category of employment . . . and shall be given first opportunity for . . . filling vacancies." (Emphasis added.) Respondent contends that, because Intervenor had completed all requirements for the classification titles for this position, it filled the position with the most qualified applicant.

Grievant argues that it has been "past practice" of Respondent to allow all applicants for vacant positions the opportunity to take the competency test for any applicable class title they do not already hold. The requirements for competency testing by county boards of education are set forth in West Virginia Code § 18A-4-8e, which defines the purpose of the tests as "to provide county boards of education a uniform means of determining whether . . . employees who do not hold a classification title . . . meet the definition of the classification title."

Grievant is, unfortunately, incorrect in her assertion that Respondent had any practice or obligation to offer a competency test to her under the circumstances presented. As further stated in West Virginia Code § 18A-4-8b(b), only if no applicant holds the classification title are "[o]ther employees . . . then considered and shall qualify by meeting definition of the job title." Therefore, only if no qualified individuals apply, i.e., no applicants

hold the class titles in question or have successfully completed the competency test, is the board obligated to offer competency testing in order for other employees to be deemed qualified through successful completion of the examination. There is no dispute that Intervenor was qualified in both the truck driver and custodian classifications and held the necessary food handler's card. Accordingly, Respondent correctly provided him the first opportunity to fill this vacancy, as required by the statute.

Grievant is also incorrect in her assertion that a list of "favorites" was provided an additional opportunity to take the custodian examination, just so that they could substitute in the Food Truck Driver/Custodian position. As explained by Superintendent Susan Smith in her testimony, the individuals who were used as substitutes had taken the custodian examination and passed it when the position was posted in 2005.[2] Grievant did not apply for the position at that time, so she had not qualified for the custodian classification title, and, as discussed above, when no vacancy is presented, the board of education has no obligation to provide opportunities for competency testing.

"Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-

[2]Any issue regarding the propriety of use of substitutes or by what method for the Food Truck Driver/Custodian position between 2005 and 2007 is not properly before this Grievance Board at this time and will not be addressed.

2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007);[3] *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant has failed to establish discrimination and/or favoritism under the facts presented. Grievant's "exclusion" from the list of employees who were asked to substitute in the position at issue was not the result of any illegal act or motive. The employees who were used to perform this service had necessary qualifications that Grievant did not, simply because she had not previously applied for the position as they had and had, therefore, not taken the applicable competency test. Accordingly, Grievant's allegation that she was excluded from the "list" because she is a woman is, likewise, not supported by the facts presented.

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[3]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

In summary, Grievant's allegations of discrimination, favoritism, and improprieties in the selection decision at issue are unsupported by the evidence presented. Intervenor met all qualifications for the position and was entitled to the position over Grievant.[4]

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, 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 § 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. A board of education must fill service personnel positions on the basis of "seniority, qualifications and evaluation of past service." West Virginia Code § 18A-4-8b(a).

3. Pursuant to the provisions of West Virginia Code § 18A-4-8b(a), "qualifications" means the applicants holds the classification title in the applicable employment category, and such individuals are entitled to first opportunity in filling vacancies.

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[4]Grievant had also raised the issue that the position in question was originally to be offered to another applicant before Intervenor, but that applicant had not yet obtained a CDL. Grievant argued that, because that applicant was going to be given an opportunity to obtain that license prior to serving in the position, she similarly was entitled to an opportunity to qualify as a custodian. However, that applicant withdrew his application before his hiring was presented to the board of education, so the matter is a moot issue and has no bearing on the selection of Intervenor or the issues raised by this grievance.

4. If no applicants hold the applicable classification title, competency testing must be provided to employees in order to meet the definition of that classification title. *See* West Virginia Code §§ 18A-4-8e and 18A-4-8b(b).

5. Because Intervenor was qualified for the position at issue, Respondent had no obligation to offer competency testing to other applicants.

6. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007);[5] *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

7. Grievant has failed to establish discrimination or favoritism in this case.

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.

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[5]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

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: January 14, 2009

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DENISE M. SPATAFORE
Administrative Law Judge