THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAMELA WEBB,
Grievant,

v. **DOCKET NO. 07-14-334R**

HAMPSHIRE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on May 14, 2007, by Grievant, Pamela Webb. Her statement of grievance reads:

> WV Code 18A-4-8g, 18A-4-8b
> My seniority date needs to be corrected as to my first day of work for the school year 1996-1997. I have documents to support this.

The relief sought by Grievant is "to have my seniority date changed."

The grievance was denied at levels one and two by decision dated May 21, 2007, without hearing, based upon "lack of documentation," and because it was not filed in a timely manner. Grievant appealed to level three on June 13, 2007, and was verbally advised on June 19, 2007, that the board of education had waived participation at level three. Grievant appealed to level four on June 22, 2007. A level four hearing[1] was held

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[1] In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. *W. Va. Code §§* 18-29-1 to 18-29-11 and *W. Va. Code §§* 29-6A-1 to 29-6A-12 were repealed and replaced by *W. Va. Code §§* 6C-2-1 to 6C-2-7 and *W. Va. Code §§* 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, *W. Va. Code §§* 18-29-1 to 18-29-11, for education employees, and *W. Va. Code §§* 29-6A-1 to 29-6A-12, for other state and higher education employees. *See* Executive Order No. 2-07, May 8, 2007. References in this decision are to the former

before the undersigned on January 8, 2008, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer Carradine, Esquire, Dinsmore & Shohl. On April 9, 2008, the undersigned dismissed this grievance, finding it was untimely filed.

Grievant appealed the Dismissal Order to the Circuit Court of Kanawha County. By Order entered on August 5, 2009, Judge Irene C. Berger vacated the Dismissal Order[2], and remanded the case for a determination on the merits. The undersigned inquired on August 29, 2009, as to whether the parties believed it was necessary to supplement the record or file additional written argument. Both parties advised that another hearing was not necessary, but that they would like the opportunity to file additional Proposed Findings of Fact and Conclusions of Law by October 16, 2009. On October 7, 2009, Respondent advised, by its counsel on remand, Jason S. Long, Esquire, Dinsmore & Shohl, LLP, that it would rely on its previous filings. Grievant's counsel, John Everett Roush, Esquire, advised the undersigned on October 29, 2009, that he also would rely on his previous submission.

Synopsis

Grievant argued her seniority date should be changed from October 1, 1996, to the first day of school in August 1996. Grievant could not recall whether she was called to work as a substitute or as a full-time contract employee. Respondent approved Grievant's

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statutes, which continue to control the proceedings in this case.

[2] This Order mistakenly identified the Administrative Law Judge as Ronald L. Reece.

contract effective October 1, 1996, and Grievant accepted and signed that contract on October 10, 1996. After the significant lapse in time, the contract was the best evidence of Grievant's seniority date.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

Findings of Fact

1. Grievant is employed by the Hampshire County Board of Education ("HBOE") as an Aide.

2. Early in 2007, a co-worker told Grievant she should look at the seniority list, because her position on the list had changed. Grievant looked at the seniority list, and discovered that her seniority date was wrong.

3. By letter dated February 1, 2007, Grievant asked HBOE personnel to correct her seniority date.

4. By letter dated March 14, 2007, Grievant was notified that HBOE's Superintendent had approved a change in her seniority date, to October 1, 1996,[3] which improved her position on the seniority list. This change was based upon minutes of a September 30, 1996 meeting of HBOE, which approved the employment of Grievant as a "Contracted Aide at Romney Elementary for Michelle Cunningham's class, effective immediately," and an employment contract which describes Grievant's contract term as "[f]rom October 1, 1996 to June 1997." Grievant accepted this contract, and signed it on

[3] The record does not reflect what her seniority date had been before this correction was made.

October 10, 1996. Grievant did not ask that the contract term be changed to a date prior to October 1, 1996.

5. At some point Grievant obtained HBOE payroll records which showed she had been paid on September 25, 1996, and this caused her to question whether her seniority date should be some date in September 1996, rather than October 1, 1996.

6. During the 1996-1997 school year Grievant worked as an Aide in Michelle Cunningham's classroom. Grievant could not state what date she began working in this position, but she believed she began working in Ms. Cunningham's classroom on the first day of school, before the students started school.

7. HBOE's payroll records show that Grievant was not paid for the first week of school during the 1996-1997 school year. Grievant was paid on September 25, 1996, for work during the period from August 26 through September 10, 1996. This check does not reflect the number of hours worked, and in the space normally used to indicate the check is in payment for substitute service, the check is blank. Grievant's gross pay for the two week period was $466.20. Grievant's hourly rate of pay was $7.40 an hour. Grievant was paid for working 63 hours during this pay period.

8. Grievant does not recall who advised her that she should report to work in this position, or if she was told that she would be working as a substitute.

9. When the Aide position in Ms. Cunningham's classroom was posted, Grievant applied for it. The record does not reflect when the position was posted.

10. During the 1995-1996 school year, Bonnie Shafer was Ms. Cunningham's Aide. Ms. Shafer was employed under contract for one year, and her contract expired on June 6, 1996. Ms. Shafer resigned her employment with HBOE on September 9, 1996.

The parties were not able to produce a contract for Ms. Shafer for the 1996-1997 school year.

11. During the 1995-1996 school year Grievant worked for HBOE as a hot lunch Clerk and as a substitute Aide.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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).

Although this grievance is about Grievant's seniority date, a little background information should assist the reader. In 1996, HBOE, apparently as a money saving mechanism, often employed service personnel as contract employees, without benefits, at an hourly rate. HBOE did not treat these employees as regular employees, and they did not earn seniority. This practice was challenged in *Ganoe v. Hampshire County Board of Education*, Docket No. 97-14-229 (July 30, 1997). The Administrative Law Judge determined in that case that individuals employed as contract employees in a particular position for a set period of time, were regular employees and should earn regular seniority.

HBOE followed this decision, and awarded its contract employees, including Grievant, regular seniority. Many years passed before Grievant questioned her seniority date.

Grievant argued that an employee begins accumulating seniority on the date the employee begins working in the position, not when the employment is approved by the board of education, and the contract is signed. Respondent argued that Grievant did not demonstrate that she was employed in a permanent position prior to October 1, 1996, rather than as a substitute, and that substitute and regular seniority are separate, by statute, and cannot be combined. Respondent pointed to the contract of employment as the only evidence of Grievant's employment status.

Although this matter was remanded for a determination on the merits, the undersigned did, in fact, speak to the merits of this grievance in the Dismissal Order entered on April 9, 2008, noting as follows:

> However, were the merits to be addressed, the undersigned would find it difficult to grant Grievant's request. Grievant is contesting something which occurred more than 10 years ago. While it is clear from the record that during a portion of September 1996, Grievant was working in the same position for which she was officially hired on October 1, 1996, the record does not reflect the exact date she began working in that position. Not even the Grievant could remember exactly how she came to be working in the position, or the date she began working in the position. It would be Grievant's burden to demonstrate the date she was hired into the position as a regular employee. *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). *See W. Va. Code §* 18-29-6. The best evidence of when Grievant was hired by HBOE to serve as a "regular employee"[4] are the minutes of the September 30, 1996 board meeting, and her contract, which was effective October 1, 1996.

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[4] Grievant was actually hired on a "contracted services basis" with no benefits, according to the contract. HBOE is treating this as regular employment for seniority purposes based upon its understanding of an earlier Grievance Board decision.

The undersigned continues to find this to be true.

It is clear that Grievant was working in the same position before October 1, 1996, as she was working in after October 1, 1996, although the exact date Grievant began working in this position was not placed into evidence. This, however, is not the end of the inquiry. The next question is whether Grievant was working as substitute prior to October 1, 1996. Grievant's argument ignores the fact that there is a distinct difference between substitute employment and regular employment, and that an employee does not earn regular seniority while working as a substitute. W. VA. CODE § 18A-4-8g.

> (a) Seniority accumulation for a regular school service person:
> (1) Begins on the date such employee enters upon regular employment duties pursuant to a contract as provided in section five [§ 18A-2-5], article two of this chapter;
> (2) Continues until the service person's employment as a regular employee is severed with the county board;
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> . . .
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> (b) Seniority accumulation for a substitute service person:
> (1) Begins on the date the employee enters upon the duties of a substitute as provided in section fifteen [§ 18A-4-15], of this article, after executing with the board a contract of employment as provided in section five [§ 18A-2-5], article two of this chapter; and
> (2) Continues until the employee enters into the duties of a regular employment contract as provided in section five [§ 18A-2-5], article two of this chapter; or employment as a substitute service person with the county board is severed.
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> . . .
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> (k) Seniority acquired as a substitute service person and as a regular service person shall be calculated separately and may not be combined for any purpose. . . .

Id.

Grievant asserted that "it seems a bit ridiculous to apply retroactively such concepts as 'regular status' and 'substitute status' to positions that Respondent considered at the time to be neither regular nor substitute positions." While it may seem ridiculous to Grievant, the extensive statutory scheme applicable to school service personnel makes clear that for the purposes of accumulating seniority, substitute seniority is distinctly different from regular seniority. *Ganoe, supra.*, found that individuals employed by HBOE under contract to fill a position for an extended period of time were regular employees, regardless of HBOE's belief. That case also stated clearly that, even under these circumstances, there was a distinct difference between employment under a contract for an extended, set period of time, and "substitute situations in which the job is performed on a temporary, short-term basis until the regular employee returns or the position is filled on a permanent basis."

The applicable statutory scheme also sets forth, in detail, the circumstances under which positions may be filled on a temporary basis, without posting, and the circumstances under which a position must be posted and filled. As Grievant noted in her own testimony, the mechanism used to fill substitute positions is distinctly different from the mechanism used to fill a position on a permanent basis. W. VA. CODE §§ 18A-4-8b; 18A-4-15. In this case, neither party was able to present any testimony or documentary evidence to clearly explain the circumstances under which Grievant initially came to fill the Aide position in Ms. Cunningham's classroom in 1996. Grievant knew that at some point the position had been posted and she had bid on it, but neither party could state when this occurred. While it is clear that Grievant filled what had been Ms. Shafer's position, and that Ms. Shafer resigned her employment with HBOE on September 9, 1996, this information is not determinative

because the parties could not produce a contract for Ms. Shafer for the 1996-1997 school year, and her previous one year contract had expired in June 1996.

While Grievant was working in the same position prior to September 10, 1996, as she was working in under contract on October 1, 1996, it seems more likely than not that she was working as a substitute prior to October 1. It is clear that none of the parties, including Grievant, had a clear memory of the facts. Grievant was obviously incorrect in her belief that she had begun her employment in this position on the first day of school, and she readily admitted that she did not recall how she had been contacted to begin working in this position. The only evidence to support that Grievant was not working as a substitute is the omission of the word "sub" on her paycheck.[5] Such an omission, however, cannot be used as the sole basis for a finding that Grievant was not working as a substitute. This omission could easily have been human error. Grievant did not present proof that her contract, which she signed in October 1996, should be disregarded. Grievant's contract offers the best evidence of Grievant's status under these circumstances.

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 her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't*

[5] The undersigned would note that Grievant called as a witness Kim Poland to testify that Grievant was working at Romney Elementary every time she was there in September 1996. Ms. Poland, however, readily admitted that she could not shed any light on Grievant's employment status, and her testimony is of no use to this determination.

of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. "Seniority acquired as a substitute service person and as a regular service person shall be calculated separately and may not be combined for any purpose." W. VA. CODE §§ 18A-4-8g(k).

3. The applicable statutory scheme sets forth, in detail, the circumstances under which positions may be filled on a temporary basis, without posting, and the circumstances under which a position must be posted and filled on a permanent basis. The mechanism used to fill substitute positions is distinctly different from the mechanism used to fill a position on a permanent basis. W. VA. CODE §§ 18A-4-8b; 18A-4-15.

4. Grievant did not demonstrate that her regular seniority date should be changed from October 1, 1996.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Hampshire County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE § 18-29-7 (*See Footnote 1*). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

BRENDA L. GOULD
Administrative Law Judge

Date: November 20, 2009