THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

VICKIE JANE PHILLIPS,
Grievant,

v. **DOCKET NO. 2010-0304-MorED**

MORGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Vickie Jane Phillips, filed a grievance against her employer, the Morgan County Board of Education, on September 3, 2009. The statement of grievance is quite lengthy in explaining that Grievant, a substitute employee, was asked if she wanted a regular position, and then after she accepted this position, quit her job with another employer, and worked in the position for one day. The next work day she was told that an applicant with more seniority had been overlooked and would be placed in the position. As relief Grievant sought to be placed in a position with Respondent as a regular employee.

A conference was held at level one, and a level one decision denying the grievance was issued on September 15, 2009. Grievant appealed to level two on September 16, 2009. A mediation session was held on November 6, 2009. Grievant appealed to level three on January 4, 2010, and a level three hearing was held on April 14, 2010, before the undersigned Administrative Law Judge in the Grievance Board's Westover, West Virginia office. Grievant appeared *pro se*, and Respondent was represented by Jason S. Long, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on May 6, 2010,

upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a substitute employee. She applied for a posted regular position and was awarded the position in error. She worked in the position for one day before a more senior applicant brought the error to Respondent's attention. Respondent acted to correct this mistake immediately, removing Grievant from the position on her second day in the position. Grievant argued she should have been credited with one day of regular seniority. "School service personnel must be given seniority earned for time served under a contract for a position later determined to have been incorrectly awarded to such employee." Syl. Pt. 6, *Hall v. Bd. of Educ. of the County of Mingo*, 208 W. Va. 534, 541 S.E.2d 624 (2000). Grievant earned one day of regular seniority.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Morgan County Board of Education ("MBOE") as a substitute employee.

2. On August 11, 2009, MBOE posted a service personnel position for an aide/special education program, Paw Paw Elementary School. Grievant applied for the position, as did Debra Michael.

3. When the seniority of the applicants for this position was being reviewed, the person reviewing the substitute seniority list confused Debra Michael with Mary Jane

Michael. Debra Michael has more seniority than Grievant, while Mary Jane Michael has less seniority than Grievant. Because of this error, Grievant was recommended for the position as the most senior applicant, and her employment in this position was approved by MBOE on August 18, 2009.

4. Grievant quit her job with another employer to accept this position. She reported to work on August 21, 2009, and worked in the subject position that day.

5. Sometime between Friday, August 21, and Monday, August 24, 2009, Debra Michael approached MBOE's Personnel Director, Joan Williard, and questioned why she was not selected for the subject position. Ms. Williard reviewed the substitute seniority list and confirmed that Debra Michael had more seniority than Grievant, and should have been placed in the position.

6. Shortly after Grievant reported to work on August 24, 2009, Grievant was advised that a mistake had been made, and that Debra Michael should have been placed in the position, and Grievant was removed from the position. MBOE hired Debra Michael for the subject position on August 25, 2009, and rescinded Grievant's employment in this position effective August 20, 2009. The Board members acknowledged at the August 25 Board meeting that a mistake had been made, and expressed to Grievant that they were sorry this had occurred. They stated they would like to offer her employment in another position if possible. Grievant was not placed in another position.

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).

Grievant does not dispute that Debra Michael should have been placed in the position due to her seniority. Rather, Grievant believes that Respondent should have placed her in the next available position, as the Board members said they would do. Grievant seemed to recognize, however, that MBOE was required to follow the statutory requirements for filling positions, and argued that she was entitled to one day of regular seniority for the day she served in the subject position, and that had that one day of regular seniority been recognized, she believed she should have been placed in an Aide position posted the latter part of August 2009. Respondent pointed out that it had an obligation to correct the mistake that was made, and Grievant does not contend otherwise, and argued that the case law does not support Grievant's position that she earned one day of regular seniority.

The Supreme Court of Appeals of West Virginia has definitively addressed whether a substitute employee who is placed in a posted position by mistake earns regular seniority.

> Noting that seniority arises only from statutory mandate or from an employment contract, the Court held that "school service personnel must be awarded seniority earned for time served under a contract for a position later determined to have been incorrectly awarded to such employee." After reviewing several statutes which provide that seniority is to be retained by

> school service employees under various circumstances, the Court reasoned that "because of its significance, 'earned' seniority cannot be removed from an employee in an arbitrary manner," specifically the situation in which the employee was placed in a position erroneously. *Hall v. Bd. of Educ. of the County of Mingo,* W. Va. S. Ct. Nos. 27870 & 28396 [208 W. Va. 534, 541 S.E.2d 624] (Dec. 1, 2000).

Pennington v. Randolph County Bd. of Educ., Docket No. 00-42-232 (Dec. 20, 2000).

W. VA. CODE § 18A-4-8g provides, in pertinent part, as follows with regard to how an employee earns regular seniority:

> (a) Seniority accumulation for a regular school service person:
> (1) Begins on the date the 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; and
> (3) Does not cease to accumulate when the county board has authorized an absence whether without pay or due to illness or other reason over which the employee has no control.
>
> (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 county 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. . . ..

W. VA. CODE § 18A-2-5 provides, in pertinent part, that "[b]efore entering into their duties service personnel shall execute with the board a written contract. . .."

This position was posted, and Grievant was awarded the position, and actually served in the position for one day before the error was discovered and corrected. Grievant was immediately returned to her status as a substitute employee. MBOE took official action to hire Grievant, and it is presumed that Grievant signed a contract to work in the

regular position, as is required by statute, although the record does not contain this information. It is through such a contract that Grievant would acquire the statutory right to earn regular seniority. *Hall, supra.* By signing a contract to work in the subject position, Grievant acquired the right to earn regular seniority, and she is entitled to be credited with one day of regular seniority.[1]

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 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).

---

[1] Grievant further asserted that had she been credited with one day of regular seniority, she would have been the successful applicant for a particular Aide position posted later in August 2009. Grievant produced no evidence that she had applied for the identified position, which would be a prerequisite to her selection for any position, nor did she present evidence sufficient to prove that she would have been next in line for the position had it not been awarded to the successful applicant. Further, the statement of grievance did not contest her nonselection for a particular position, so as to place either Respondent or the person who had been placed in the position on notice that this was one of the issues in this grievance so that the rights of the person selected would be protected. Accordingly, this issue will not be addressed.

2. "Seniority arises either from a statute or from a contract between an employer and an employee." Syl. Pt. 3, *Hall v. Bd. of Educ. of the County of Mingo*, 208 W. Va. 534, 541 S.E.2d 624 (2000).

3. "Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in [18A-2-5], and continues until the employee's employment as a regular employee is severed by the county board." W. VA. CODE § 18A-4-8g(a).

4. "School service personnel must be given seniority earned for time served under a contract for a position later determined to have been incorrectly awarded to such employee." Syl. Pt. 6, *Hall, supra.*

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to credit Grievant with one day of regular seniority for August 21, 2009.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 30, 2010