THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES LONG,
Grievant,

v. **DOCKET NO. 2008-1396-MasED**

MASON COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION ON REMAND

This matter comes on for decision following a remand by an Order of the Circuit Court of Kanawha County, entered June 3, 2009, directing the Grievance Board to determine the amount of back pay to which Grievant is entitled.

A remand hearing was held in the Grievance Board's office on September 28, 2009 before Administrative Law Judge Mark A. Barney. Thereafter the matter was reassigned to the undersigned Administrative Law Judge for decision, due to ALJ Barney's resignation. Grievant was represented by John Everett Roush, Esq. of the West Virginia School Service Personnel Association, and Respondent was represented by Gregory W. Bailey of Bowles Rice McDavid Graff & Love, LLP. The matter became mature for decision on November 3, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant challenged his dismissal from employment through the grievance process and won, whereupon Respondent appealed the Decision to the Circuit Court of Kanawha County, which affirmed the Grievance Board Decision, but remanded the matter for a

determination of damages. Grievant did not establish an entitlement to any back pay amount by a preponderance of the evidence.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant filed a grievance directly to level three on April 1, 2008, challenging his dismissal from employment with Respondent.

2. A Level three grievance decision issued August 4, 2008 held that:

> Following Grievant's appearance before the Respondent BOE, it voted (3 to 2) to approve the County Schools Superintendent's recommendation that the Grievant's employment as a substitute bus operator be terminated for his failure to accept the number of bus runs required under the Respondent's policy for filling temporary operator vacancies. The evidence failed to establish that the Grievant's failure to accept calls was knowing or intentional, particularly in light of evidence of technical problems with Respondent's automated call system. As a result, the BOE failed to meet its burden to prove by a preponderance of the evidence that the Grievant willfully neglected the duties of his position. Grievance GRANTED.

3. In his grievance filing, Grievant requested the following relief: "[R]einstatement as a substitute bus operator or as a regular bus operator, compensation for all lost wages and benefits, both pecuniary and nonpecuniary, with interest."

4. The level three decision granted the following relief: "Accordingly, the grievance is GRANTED, and the Respondent BOE's action terminating Grievant's employment is REVERSED. The Respondent is DIRECTED to reinstate any applicable seniority, salary, and benefits attributable to the Grievant's termination, together with legal interest on any sums, subject to the calculation of any other earnings by the

Grievant, and to remove references to the termination from the records which Respondent maintains on the Grievant."

5. Respondent appealed the Grievance Board Decision to the Circuit Court of Kanawha County; thereafter, the Decision was affirmed and the matter was remanded to the Grievance Board "for a determination and calculation of back pay and other related benefits to which Mr. Long is entitled under the Grievance Board's Decision of August 4, 2008."

6. Grievant had been dismissed from employment improperly, and was re-employed for the following school year, so the period for which back pay must be determined is March 28, 2008 through June 9, 2008.The next most senior substitute driver on the roster above Grievant, Vickie Flora, worked every day from March 28, 2008 to the date of her hire as a permanent employee on April 22, 2008.

7. Grievant was not available to work every day due to his other part-time job, and he did not establish with any certainty which days he would have been available to work.

8. Grievant testified that it would be impossible to identify the assignments he may have accepted during the relevant period.

9. Three substitute bus operators with less seniority than Grievant were hired into regular positions following Grievant's dismissal and prior to his reinstatement.

Discussion

On remand from circuit court, the grievant bears the burden of proving his entitlement to and the amount of back pay. *Smith v. Mingo County Bd. of Educ.*, Docket No. 95-29-913R (April 30, 1999). As with similar cases in the past, calculating the amount

of back pay due to a substitute bus operator is nigh on impossible. Due to the nature of their employment and the inherent uncertainty of the days to be worked in any given period, a substitute bus operator's pay is not predictable.

Grievant's dismissal was overturned by the prior decision, and he was re-employed by the following school year, so the period of unemployment was March 28, 2008 to June 9, 2008. However, there is insufficient evidence to establish with any certainty on which days Grievant would have been called out to work. Even if those days were known, there is no evidence on which of those days Grievant would have been able to work. Prior to his termination, Grievant had accepted 75% of the runs he was offered. [Finding of Fact No. 18 of Prior Decision.] However, if this ratio were to be applied to the period of unemployment, there is little to no reliable evidence of how many calls he would have gotten during that time. Further, the evidence indicates there was at least one long-term substitute position available after Grievant was dismissed. However, Grievant did not establish that he would have been available to take this job. Grievant bears the burden of proving by a preponderance of the evidence the amount of his back pay, but has not met that burden.[1] Any award based on the evidence that is in the record would be speculative at best. Further, there was no clear evidence of earnings Grievant made in mitigation of his losses, which must be deducted from his back pay award as granted in the prior Decision.

Contrary to Grievant's assertion that the Grievance Board demands mathematical certainty in back pay calculations, the preponderance standard simply requires the

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[1] *See Steward v. Marion County Bd. of Educ.*, Docket No. 96-24-151 (July 23, 1996).

Grievant to establish that the amount he claims he should be awarded is more likely than not the amount he would have earned. It is significant that, nowhere in Grievant's argument nor in his proposed findings of fact does he suggest any number at all. If the Grievant cannot establish with any level of certainty the amount his is asking for, it is impossible to evaluate that amount against the burden of proof.

A second issue is whether Grievant should be awarded full time employment as a result of the prior decision, which directed Respondent to "reinstate any applicable seniority, salary, and benefits attributable to Grievant's termination." Grievant argues that guaranteed full-time employment is a benefit of his employment as a substitute, as regular drivers are hired from the substitute list. The driver immediately above him on the list and at least three drivers less senior than Grievant were hired into regular positions during the relevant period. Although Grievant requests "instatement into the position he would have received if he had not been terminated," he does not identify that position.

Grievant's argument is not well founded. Regular employment is not a "benefit" of substitute employment by any stretch of the imagination. Not only must regular positions be competitively posted, but they must be applied for. Grievant did not apply for any of the positions offered, and it should be noted that the drivers who got these jobs were not necessarily the next drivers on the seniority list. This introduces an element of uncertainty in the process that, together with Grievant's unpredictable unavailability through his second job, means it cannot be determined from the evidence if Grievant would have been regularly employed in the time period in question. There are a whole host of factors that intervene between an employee's status as a substitute and their employment as a regular

operator, and Grievant cites no authority for the proposition that regular employment is an entitlement to substitute employment.

The following conclusions of law support this discussion:

Conclusions of Law

1. A Grievant must establish each element of his grievance by a preponderance of the evidence. 156 C.S.R. 1 § 3. In disciplinary actions which would otherwise shift the burden of proof to the respondent, Grievant must nevertheless establish by a preponderance of the evidence any other issues not relevant to the propriety of the disciplinary action, such as an entitlement to back pay. *Smith v. Mingo County Bd. of Educ.*, Docket No. 95-29-913R (April 30, 1999).

2. Determination of the lost pay of an irregularly-employed substitute employee is speculative at best. *Steward v. Marion County Bd. of Educ.*, Docket No. 96-24-151 (July 23, 1996).

3. Grievant has not met his burden of proving an entitlement to back pay by a preponderance of the evidence.

4. Employment as a regular bus operator is not a “benefit” or entitlement of employment as a substitute bus operator.

For the foregoing reasons, Grievant is awarded no back pay, and is not awarded regular employment. Consistent with the prior decision, his seniority as a substitute operator is restored to its original date, and any mention of his termination is struck from his employment record.

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).

July 1, 2010

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M. Paul Marteney
Administrative Law Judge