THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEB BARNETTE, et al.,
Grievants,

v. **Docket No. 2010-0622-CONS**

PUTNAM COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants filed this grievance at level one on November 5, 2009, against the Respondent asserting that "Respondent has assigned Gene Blake, a teacher's aide, to a transportation aide's position in Respondent's Hurricane transportation area without posting this position. Grievants allege a violation of West Virginia Code 18A-4-8b." For relief Grievants "request the posting of this assignment. After posting, if one of the Grievants is the successful candidate for this position, Grievants seek instatement, retroactive wages & benefits, seniority, and interest on all monetary sums."

This grievance was denied at level one by decision of Respondent's designee on December 18, 2009. Grievants appealed to level two on December 23, 2009, and a mediation session was conducted on March 11, 2010. Grievants appealed to level three on March 15, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on June 3, 2010, in the Grievance Board's Charleston office. Grievants appeared by their attorney, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its attorney, Rebecca M. Tinder, Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 1, 2010.

Synopsis

In October 2009, a new bus run requiring a bus operator and aide was created by Respondent. The bus operator position was posted. An aide previously hired by Respondent was assigned to work on this newly created assignment. Grievants contend that the Respondent should have posted the aide assignment for that bus and route. Given that this was a newly created position and many other employees were qualified for this aide position, the position should have been posted to allow the hiring decision to be made on the basis of statutory criteria such as seniority and past service. However, Grievants failed to establish that they are entitled to any relief other than the request that the position in question be posted. This grievance is granted, in part, and denied, in part.

The following Findings of Fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievants are employed by the Respondent in the aide classification category, which includes the class titles of paraprofessional, autism mentor, and Braille/Sign Language Specialist.

2. Gene Blake is employed by the Respondent as an aide. Mr. Blake acquired a position as a transportation aide in the Hurricane area after he was the successful bidder on a posted position in October 2006. Respondent's Exhibit 1, Level One.[1]

3. The student to whom Mr. Blake was assigned died on April 11, 2009, after

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[1]Nothing in the record of this grievance supports a finding that the position was itinerant.

the time permitted for notice of transfers or termination. Mr. Blake remained employed under his contract to provide bus aide services in the Hurricane area; however, the record is unclear as to his actual duties other than an indication that he "was basically being compensated for riding the school bus." Level One Transcript, page 45.

4. In early October 2009, a new run requiring a bus operator and aide was created for bus #945 in the Hurricane area. The bus operator position was posted.

5. On October 20, 2009, David Taylor was employed to fill the bus operator position for the newly created assignment. The aide position was not posted. Mr. Blake was assigned to provide aide services on the Hurricane area bus run in question.

6. Some Grievants have indicated that they were not sure if they would have bid on the position had it been posted and were only interested in the opportunity to bid on it. Lead Grievant Barnette and Grievant Bailey indicated that they would have bid on the job if it had been posted. The record does not establish any type of damage amount and, in fact, demonstrates the possibility that the assignment would pay less than some Grievant's current assignment compensation.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

Grievants' main argument is that the aide position given to Mr. Blake in October 2009, should have been posted. The record of the grievance is not fully developed on the issue of relief, other than a ruling that a posting should have taken place. Respondent argues that Mr. Blake was assigned to provide aide services on the Hurricane area run in question in conformance with the contract under which he was hired, as well as the original posting under which he was hired. Respondent asserts that there was no vacancy to be posted for a new bus aide. Finally, Respondent argues that the grievance was not timely filed.

The undersigned agrees with Grievants that newly created positions must be posted and filled on the basis of seniority, qualifications, and evaluations. W. VA. CODE § 18A-4-8b(g) requires boards of education to "post and date notices of all job vacancies of existing or newly created positions[.]"

W. VA. CODE § 18A-4-8b(a) provides the following:

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

_____Based upon the forgoing statutory provisions, and the unfortunate facts of this grievance, the undersigned disagrees that this situation created any exception to the statutory posting requirement. Respondent's own policy recognizes new positions as

vacancies to be posted.[2] The position into which Mr. Blake was assigned is clearly a newly created position. This is further supported by the undisputed fact that the bus operator position associated with this route was posted and filled as required by statute. In addition, Mr. Tribble, Respondent's Supervisor of Transportation, testified to this assignment as newly created during the level three hearing.

Respondent argues that Mr. Blake was available to perform the required duties pursuant to the posting under which he was hired in 2006, and within his job description and contract in the Hurricane area; therefore, no vacancy existed requiring a posting for a bus aide. This analysis ignores the fact that this bus run established in October 2009, some three years after Mr. Blake's initial contract, was a newly created position that resulted in a vacancy to be filled in concert with W. VA. CODE § 18A-4-8b(a).

The record of this grievance demonstrates that, although operating in the Hurricane area, the bus run established in October 2009, was a newly created position distinct from the original posting under which Mr. Blake was contracted.[3] The statute requires that the newly created position should have been filled by offering it to all the transportation aides in the area and assigning it to the most senior aide who bid on the position. The law on this point is clear, and the aide position should have been posted.

The undersigned does agree with Respondent that the Grievants failed to establish any damages as a result of the failure to post the aide position. Grievants failed to develop the record to prove any injury resulting from the actions of the Board in failing to follow the

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[2]Grievant's Exhibit 1, Level Three.

[3]Level One Transcript, page 17.

posting requirements. The Grievance Board does not award relief based upon speculation about what might happen. *Pristavec v. W. Va. Dep' t of Health and Human Res.,* Docket No. 99-HHR-328 (Oct. 27, 1999).

Finally, Respondent argued that the grievance was not timely filed by way of a dismissal motion and again at level three. Respondent points out that although Grievants argue the time line for measuring the timeliness of the grievance was not until the time expired for filling the vacancy, their grievance document clearly states that they were grieving the assignment of Mr. Blake without posting and competitive bidding. The burden of proof is on Respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." WEST VIRGINIA CODE § 6C-2-4(a)(1) identifies the time limits for filing a grievance and states:

> Within fifteen days[4] following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of*

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[4] Pursuant to WEST VIRGINIA CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

Empl. Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

The undersigned finds that the grievance was timely filed. The grievance was filed on November 5, 2009, which is fifteen working days following October 15, 2009. The undersigned agrees with Grievants' position that, on October 15, 2009, it was not completely clear that the position was not going to be posted. As the position was created in early October, the Respondent had twenty working days to post and fill the position. Therefore, it was not until late October, when the position had been in existence for at least twenty working days, that the Grievants became unequivocally aware of Respondent's decision to ignore the posting requirement. Accordingly, Respondent's request that the grievance be dismissed on timeliness grounds is denied.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

2. W. VA. CODE § 18A-4-8b(g) requires boards of education to post and date notices of all job vacancies of established existing or newly created positions.

3. W. VA. CODE § 18A-4-8b(a) requires boards of education to fill service personnel positions on the basis of seniority, qualifications, and evaluations of past service.

4. Grievants met their burden of proof in this grievance and demonstrated that Respondent violated the applicable law by failing to post the newly created position.

5. Grievants failed to meet their burden of proof in this grievance as it relates to an award of retroactive wages, benefits, and seniority.

6. Pursuant to the requirements of W. VA. CODE § 6C-2-4(a)(1), a grievance must be filed within fifteen days of the event upon which it is based, or within fifteen days of the date upon which the event became known to the employee.

7. Respondent failed to meet its burden of proof that the grievance was not timely filed.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED,** in part. Respondent is **ORDERED** to post the position of Bus Aide for Bus #945 serving the Hurricane area.

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: September 30, 2010

Ronald L. Reece
Administrative Law Judge