WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DWIGHT LEON ANDERSON,
Grievant,

v. **Docket No. 2010-0118-JacED**

JACKSON COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Dwight Leon Anderson filed a grievance against his employer, Jackson County Board of Education, on July 30, 2009. The statement of grievance reads, "Grievant bid upon a summer position that was posted as a full day assignment. Grievant received the assignment but was only paid a ½ day pay for each day of the assignment. Grievant alleges a violation of W. Va. Code 18A-4-8b, 18-5-39, & 18A-4-6."

For relief, Grievant is seeking "the difference between the ½ day salary which was paid and the full day salary to which he was entitled for each day that he worked on this position with interest."

A level one conference was held, and the grievance was denied by decision dated September 28, 2009. Level two mediation was held on December 22, 2009. Grievant then timely appealed to level three. A level three hearing was held on March 2, 2010, at the Grievance Board's Charleston office. Grievant was represented by John Roush, West Virginia School Service Personnel Association, and Respondent was represented by Howard Seufer, Jr., Bowles Rice McDavid Graff & Love. This case became mature on March 22, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant bid on and was the successful applicant on a summer assignment transporting students between two schools that were participating in a federally funded program known as PATCH. The posting and the contract had the words "as-needed." Grievant worked no more than 3.5 hours a day, and was therefore, paid for a ½ day's pay. Grievant asserts the posting indicates the position was to be a full time position, and Respondent had no authority to change the position from a full day to a ½ day simply because the duties could be completed in 3.5 hours.

Respondent avers it was following the mandates of W. VA. CODE §18A-4-8a(a). Respondent also argues the term "as-needed," which is in both the posting and the contract, made it clear that the position would be utilized as it was needed.

Grievant has not met his burden of proof in this matter. Therefore, this grievance is Denied.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator.

2. In connection with a federally funded summer program for students, known as PATCH, Respondent posted a notice of vacancy for a summer assignment transporting participating students between two schools. The notice stated:

> TRANSPORTATION
> Bus Operator
> To transport students from Kenna Elementary School to Ripley Elementary School and return, from June 23 to July 30, 2009, on an as-needed basis Monday through Thursday.
> Salary: $101.90-$166.05
> Employment Term As-Needed

Jt. Exhibit 1.

3. Grievant was the successful applicant for the position.

4. Grievant's contract listed the Maximum Hours as "As-Needed." The contract went on to read, "From Kenna Elementary School to Ripley Elementary School and return. From June 23-July 30, 2009. On an as-needed basis, Monday through Thursday, for Summer, 2009." Joint Exhibit 5.

5. Since this was the first summer the PATCH program needed a bus operator, the Supervisor of Transportation and a Coordinator drove the proposed route to assist in preparing instructions for the bus operator. The resulting route sheet estimated that the run would begin at 11 a.m. and end at 1:15 p.m. These times were merely estimated travel times and did not include the pre-trip and post-trip duties of the bus operator.

6. For the week of June 29 through July 4, 2009, Grievant worked 2 days for 3.5 hours a day; July 6 through July 9, 2009, Grievant worked 4 days for 3.5 hours a day; August 13 through August 19, 2009, Grievant worked 4 days for 3.5 hours a day; July 20 through July 23, 2009, Grievant worked 4 days for 3.5 hours a day; and July 27 through July 31, 2009, Grievant worked 3 days for 3.5 hours a day. Joint Exhibit 3.

7. Grievant was paid for his summer position in accordance with Respondent's official monthly pay scale for regular service personnel. Because the pay scale shows monthly salaries based on regular full-time work for a 20-day month, Grievant's pay was calculated by first dividing the full-time monthly salary for a bus operator with his years of experience by 20 to arrive at the daily salary for regular full-time work. Then, because Grievant was entitled to half salary, Grievant was paid half day's pay for his 3.5 hours of work.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

In essence, Grievant asserts he should have received a full day's pay for the 3.5 hours he worked, as the posting indicated the position was full-time. However, it is undisputed that Grievant worked 3.5 hours a day. W. Va. Code § 18-5-39(f) requires that summer service employees "shall" be paid according to the salary schedule of persons regularly employed in the same class title. W. VA. CODE § 18A-4-8a(a) sets out the State Minimum Pay Scale and states in pertinent part that "the minimum monthly pay for each service employee whose employment is for a period of three and one-half hours or less a day shall be at least one-half the amount indicated in the State Minimum Pay Scale Pay Grade II."

Grievant was paid for the time he worked in accordance with the law. Therefore, this grievance must be Denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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. W. VA. CODE § 18-5-39(f) requires that summer service employees "shall" be paid in accordance with the salary schedule of persons regularly employed in the same class title.

3. W. VA. CODE § 18A-4-8a(a) requires that service employees who work 3.5 hours or less be compensated at half the amount indicated in the state minimum pay scale.

4. Respondent legally compensated Grievant for the hours he worked. 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. 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: August 12, 2010

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Wendy A. Elswick
Administrative Law Judge