THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES MICHAEL SWIMM,
Grievant,

Docket No. 2009-0836-WayED

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, James Michael Swimm, on December 31, 2008, against his employer, the Wayne County Board of Education. The statement of grievance reads:

> Grievant, a regularly employed school bus operator, applied for several custodial vacancies while he was suspended from employment. (Grievant has subsequently been dismissed from employment.) These positions were awarded to less senior candidates. Grievant alleges a violation of W.VA. CODE §§ 18A-4-8b and 18A-4-8g.

As relief, Grievant seeks:

> Instatement into one of the sought after vacancies, wages, benefits and regular employment seniority as a school custodian retroactive to the date of the filling of these vacancies. Grievant also requests an award on interest on all monetary sums.

A hearing was held at level one on March 20, 2009, and the grievance was denied at that level on May 7, 2009. A level two mediation session was conducted on December 1, 2009. Appeal to level three was made on December 13, 2009, and a level three hearing was conducted on March 23, 2010, before Administrative Law Judge Wendelyn A. Elswick[1] at the Public Employees Grievance Board in Charleston, West Virginia. Grievant was

[1]This matter was transferred to the undersigned ALJ for administrative reasons.

represented by counsel, John Roush, Esq., of WVSSPA, and Respondent was represented by counsel, David A. Lycan, Esq. This matter became mature for decision on April 26, 2010, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed as a bus operator for Respondent, the Wayne County Board of Education. While employed by Respondent, Grievant was arrested while off duty and charged with driving under the influence ("DUI"). Subsequently, Grievant was suspended from his employment by Respondent without pay. While under suspension without pay, Grievant applied for positions outside the classification of bus operator. Respondent refused to consider Grievant for any of the posted positions for which he applied. Grievant ultimately pled no contest to the charge of driving under the influence, and Respondent terminated Grievant's employment on the ground of incompetency. Grievant argued that if it had not been for his status of suspended without pay, he would have been the successful applicant for a number of the positions, conditioned upon passing the custodial competency test. .

The Grievance is denied.

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

Findings of Fact

1. James Michael Swimm, Grievant, was employed by Respondent as a regular bus operator on October 9, 2008, when he was arrested off duty and charged with driving

under the influence.

2. Grievant was suspended without pay from his employment with Respondent, effective October 20, 2008, and thereafter, pending the outcome of the DUI charge. Also pending was the outcome of Grievant's appeal to the West Virginia State Superintendent of Schools regarding the recommendation by State Executive Director of School Transportation that Grievant's certification to operate and drive a school bus be suspended.

3. Respondent posted a number of service personnel positions for the period of November 26, 2008 through December 4, 4008.[2]

4. Grievant applied for the following positions:[3]

- Custodian at Pritchard Elementary School
- Custodian at Wayne Elementary School
- Custodian at Spring Valley High School
- Custodian at Ceredo Elementary School
- Custodian at Kellogg Elementary School

5. Respondent refused to consider the Grievant for any of the posted positions that he bid upon during the posting period of November 26, 2008 through December 4,

---

[2]*See* Grievant's Exhibits 3 & 4.

[3]After filing the present grievance on December 31, 2008, Grievant asserted at the level one hearing that he should also be considered for positions posted during the period of January 12, 2009 through January 16, 2009. On November 31, 2009, Respondent filed a Motion for Partial Dismissal of Grievance. At the level three hearing, Parties stipulated that the Grievant is no longer pursuing the positions applied for during the posting period of January 12-16, 2009, as part of this grievance. The matter of Respondent's Motion for Partial Dismissal of Grievance is no longer a contested issue.

2008, because he was suspended from employment without pay at the time.

6. Had Grievant's bids for the positions of custodian at Spring Valley High School, custodian at Kellogg Elementary and custodian at Ceredo Elementary been accepted by Respondent, Grievant would have been the successful applicant, conditioned upon passing the custodial competency test.[4] (Stipulated by Parties at level three hearing).

7. Had Grievant not been under suspension without pay, he would have been afforded the opportunity by Respondent to take the custodian competency examination. (Stipulated by Parties at level three hearing).

8. On March 21, 2009, Grievant pled no contest to the charge of driving under the influence.

9. Following Grievant's plea to the DUI charge, the Superintendent recommended that Grievant be terminated on the grounds of incompetency and immorality.

10. The Board members terminated Grievant's employment on the basis of incompetency and immorality.[5]

11. The position of custodian at Ceredo Elementary was filled by substitute employee Lejeanna Blatt.[6]

---

[4]At the level three hearing, the Parties stipulated that the Grievant is no longer pursuing the positions of custodian at Wayne Elementary School and custodian at Pritchard Elementary School. *See* Grievant's Exhibit 1.

[5]Grievant appealed the decision, and on February 22, 2010, the West Virginia Public Employees Grievance Board ("WVPEGB") denied the grievance and confirmed the termination of Grievant's employment, but only for the reason of incompetency and not for the reason of immorality.

[6]*See* Grievant's Exhibit 2.

12. The position of custodian at Spring Valley High was filled by substitute employee Angela Adkins.[7]

13. The position of custodian at Kellogg Elementary was filled by substitute employee Sam Perry.[8]

14. Without objection from Respondent, Grievant received unemployment benefits while suspended and after his termination of employment. (Stipulated by Parties at level three hearing).

Discussion

This grievance does not challenge a disciplinary action, therefore Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence.[9] "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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993).

Grievant applied for posted custodian positions while suspended from employment without pay as a school bus operator for Respondent. Respondent does not dispute that had Grievant not been suspended without pay, he would have been awarded the choice of the custodian positions at Spring Valley High School, Kellogg Elementary and Ceredo Elementary, contingent upon Grievant passing the custodial competency test. However,

---

[7] *Id.*

[8] *Id.*

[9] Procedural Rules of the West Virginia Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008)

because Grievant was suspended without pay at the time he applied for the posted positions, Respondent did not consider Grievant for any of the positions.

Grievant asserts that W.Va. CODE § 18A-4-8b requires school service personnel position vacancies to be filled on the basis of seniority, evaluation, and qualification. Grievant also claims W.Va. CODE § 18A-4-8g determines an applicant's seniority when applying for positions outside of their classification.[10] Respondent, on the other hand, argues that an employee suspended without pay loses the right to bid upon posted positions during the suspension. The fact that Grievant was suspended at the time he applied for the positions makes this case unique. Therefore, it must be taken into account that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transferring and promotion of school personnel" as long as they exercise this discretion "reasonably, and in the best of the interest of the schools, and in a manner which is not arbitrary and capricious." *Dillon v. BOE of the County of Wyoming*, 351 S.E.2d 58 (W.Va. 1986).

Because it is stipulated by the parties that Grievant would have been the successful applicant for three custodian positions if his application had been considered, the crux of the matter in this case is what an employee can or cannot do while suspended without pay, particularly whether an employee has the right to bid upon posted positions. While Chapter

---

[10] Grievant's Proposed Findings of Fact and Conclusions of Law alleges discrimination and favoritism in violation of W.Va. CODE § 6C-2-2, although Grievant did not develop the claim at the level three hearing. The Grievance Board has long held that elements of allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.,* Docket No. 33-87-214 (Nov. 30, 1987). Accordingly, the assertions of discrimination and favoritism need not be addressed.

18A of the West Virginia Code does not specifically address an employee's right to bid on a position while suspended without pay, W.VA. CODE § 18A-4-8g(c)(2) provides:

> (c) Seniority of a regular or substitute service person does not continue to accumulate under the following conditions:
>
> (2) When a service person is suspended without pay.

Grievant argues that because the code contains specific language stating that an employee without pay loses the right to accrue seniority, then rights not specifically prohibited in the code should be presumed to be retained by the employee. However, an omission is not always an admission.

Grievant's assertion that he has the right to bid on posted positions while suspended for driving under the influence, which ultimately resulted in the termination of his employment as a bus operator for Respondent, is illogical. While suspended without pay, an employee does not continue to enjoy all of the benefits afforded an active employee. For example, the employment benefit of accruing seniority is halted during a suspension without pay. If seniority cannot accrue during suspension without pay, then the undersigned infers that Respondent did not act in violation of W.VA. CODE § 18A-4-8b, in conjunction with W.VA. CODE § 18A-4-8g(c)(2), in refusing to consider Grievant for any posted positions that he bid upon during his suspension period.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. Procedural Rules of the West Virginia Public Employees Grievance Board 156

C.S.R. 1 § 3 (2008). "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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. W.VA. CODE § 18A-4-8g(c)(2) provides:

> (c) Seniority of a regular or substitute service person does not continue to accumulate under the following conditions:
>
> (2) When a service person is suspended without pay.

3. While suspended without pay, an employee does not continue to enjoy all of the benefits afforded an active employee.

4. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. Grievant did not prove by a preponderance of the evidence that Respondent violated W.VA. CODE § 18A-4-8b, when taken into conjunction with W.VA. CODE § 18A-4-8g(c)(2), by not considering Grievant's bids placed while under suspension from employment for the positions of custodian at Spring Valley High School, Kellogg Elementary and Ceredo Elementary.

Accordingly, the 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: NOVEMBER 9, 2010

_____

Jennifer Lea Stollings-Parr
Administrative Law Judge