THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELAINE PRICKETT, et al.,
Grievants,

v. **DOCKET NO. 2011-0557-CONS**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, Elaine Prickett, Yvette Boyles, David Gerard, Thomas B. Hart, John Dolog, Dennis Garner, Vera Jones, Robert Williard, Jr., and Rhonda Owens, all bus operators, filed a grievance against their employer, the Monongalia County Board of Education, on October 15, 2010. The statement of grievance reads:

> Grievants contend that Respondent failed to post six extracurricular assignments[1] and one regular bus operator position on its web site for five working days. Grievants contend that this violates W. Va. Code 18A-4-8b(g).

As relief Grievants seek "reposting of the positions for five working days on Respondent's web site and other regular posting locations and filling of the positions on the basis of applications from that posting."

A conference was held at level one on November 23, 2010, and a level one decision denying the grievance was issued on December 2, 2010. Grievants appealed to level two on December 7, 2010, and a mediation session was held on February 28, 2011. Grievants appealed to level three on March 11, 2011. A level three hearing was held

---

[1] There were actually eight extracurricular assignments that were posted together, rather than six.

before the undersigned Administrative Law Judge on July 13, 2011, at the Grievance Board's Westover office. Grievants were represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on August 15, 2011, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants complained that several extracurricular bus operator assignments and a regular bus run had not been posted for the required five-day period. Respondent admitted its error, but pointed out that the extracurricular assignments had all been filled by bus operators who had held the assignments the preceding school year, as required by law, thus reposting the assignments would not change the end results. As to the regular bus run, Grievants did not demonstrate that any Grievant was harmed by the failure to follow the statutory posting requirements. Respondent's failure to post the assignments for five working days, as required by statute, was harmless error.

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

Findings of Fact

1. Grievants are all employed by the Monongalia County Board of Education ("MBOE") as bus operators.

2. In September of 2010, MBOE posted eight extracurricular bus operator assignments which required the transportation of special education students to and from

the Shell Building for activities, and one regular bus run for Bus # 229. These assignments were posted on MBOE's website for less than five days.

3. All eight of the extracurricular assignments were offered to the bus operators who had held these runs the preceding school year, and these bus operators accepted these assignments. These bus operators were Jeannie Strader, Elizabeth Snyder, Charlene McMillen, Pat Statler, Rod Moore, Grievant Williard, Grievant Prickett, and Robert Markeley.

4. Jeannie Strader resigned from her Shell Building extracurricular assignment shortly after the start of the 2010-2011 school year. This run was then awarded to Grievant Garner.

5. Grievant Garner bid on the regular bus run identified as the Bus # 229 assignment, was offered the job, and declined to accept it. The run was awarded to Lester LeMasters.

6. The only Grievants who appeared at the level three hearing were Grievants Prickett and Owens.

7. The only employee identified as someone interested in the Bus # 229 run was Peggy Squires. Ms. Squires is less senior than Mr. LeMasters.

8. The record does not reflect whether any of the Grievants, other than Grievants Prickett, Garner, and Owens, are more senior than Mr. LeMasters.

9. Grievant Prickett and Grievant Owens would not bid on the regular bus run which was previously identified as the Bus # 229 run if it were reposted. None of the other Grievants testified, nor was any other evidence introduced regarding whether any of the Grievants would bid on this bus run were it reposted.

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).

WEST VIRGINIA CODE § 18A-4-8b(g) requires that notices of job vacancies be posted "in conspicuous places for all school service personnel to observe for at least five working days." Subsection (1) specifically states that "[p]osting locations include any website maintained by or available for the use of the county board." Respondent acknowledged that it did not post the assignments at issue for five working days, as is required by statute, but argued this grievance is moot with regard to the extracurricular assignments, because they were filled by employees who held the assignments the preceding year, also as required by statute, and that three of these assignments have in fact been filled by Grievants. Grievants seemed to acknowledge in their written proposals that this was true.

Paragraph six of WEST VIRGINIA CODE § 18A-4-16 states:

> An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel

> extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b [§ 18A-4-8b] of this article.

This provision makes clear that once an employee is awarded an extracurricular assignment, he or she retains that assignment from year to year, and maintains the right to that assignment even if it is eliminated in one year, and is entitled to placement in the assignment should it later be reestablished, regardless of the employee's seniority. Although the eight extracurricular assignments were not posted for five days as required, the employees who held these assignments the preceding school year were entitled to be placed in the positions, and this was done.

"In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation constitutes "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008)." *Russell/Christian v. Wayne County Bd. of Educ.*, Docket No. 2010-1032-CONS (May 19, 2011). While any failure to follow the statutory posting requirements certainly cannot be condoned, requiring MBOE to repost these extracurricular assignments would not change the end results and would accomplish nothing, other than possibly causing confusion among the bus operators. MBOE's actions

constitute harmless error. It is difficult to understand why the Grievants have pursued this issue at all, particularly when three of them were placed in these assignments.

As to the improper posting of the regular bus run at issue, Respondent pointed out that only two of the nine Grievants bothered to come to the level three hearing, and both of those Grievants testified that if the job were reposted, they would not apply for it. Grievant Garner was offered the position, but declined to accept it. Respondent argued that Grievants did not demonstrate that any of the Grievants were harmed, and therefore, the Grievants were entitled to no relief. Grievants argued "[a] more senior bus operator, who relied upon the website posting, *could* have missed the posting of this job and failed to apply for it." (Emphasis added.) No such individual was identified. Grievant Prickett testified that she had been watching for this posting for another bus operator, Peggy Squires, and that Lester LeMasters, who ultimately was awarded the position, had called Grievant Prickett and told her the job had been posted. While she apparently relayed this message to Ms. Squires, Mr. LeMasters had more seniority than Ms. Squires, and was entitled to placement in this position ahead of Ms. Squires. No other evidence was presented that any Grievant, or any other bus operator, would apply for this position were it reposted. Nor was any evidence placed into the record that any of the Grievants had more seniority than Mr. LeMasters, other than Grievants Prickett, Owens, and Garner; and these three Grievants were not interested in the job.

Moreover, Grievants do not have standing to grieve for other employees who may have applied for the regular bus run at issue had they seen the posting.

> "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v.*

> *Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). Although poor morale among the workers resulting from such an error is a real and difficult problem, it simply does not give Grievants standing to contest [another employee's] reallocation, which did not otherwise personally harm them.

Mason, et al., v. W. Va. Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001). Grievants have not demonstrated that any of them were harmed by the failure to post the position at issue for the statutory time period.

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). "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).

2. WEST VIRGINIA CODE § 18A-4-8b(g) requires that notices of job vacancies be posted "in conspicuous places for all school service personnel to observe for at least five working days." Subsection (1) specifically states that "[p]osting locations include any website maintained by or available for the use of the county board."

3. Once an employee is awarded an extracurricular assignment, he or she retains that assignment from year to year, and maintains the right to that assignment even if it is eliminated in one year, and is entitled to placement in the assignment should it later be reestablished, regardless of the employee's seniority. W. VA. CODE § 18A-4-16(6).

4. "In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation constitutes "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008)." *Russell/Christian v. Wayne County Bd. of Educ.*, Docket No. 2010-1032-CONS (May 19, 2011).

5. Requiring Respondent to repost these assignments would not change the end results and would accomplish nothing, other than possibly causing confusion among the bus operators. Respondent's actions constitute harmless error.

> 6. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievants must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for Grievants to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, Grievants are without standing to pursue this grievance. *Lyons v. Wood County Bd. of Educ.,* Docket No. 89-54-601 (Feb. 28, 1990). Even if the employer has misapplied applicable regulations regarding the classification and/or a corresponding salary increase to another employee, where a grievant is not personally harmed, there is no cognizable grievance. *See Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). Although poor morale among the workers resulting from such an error is a real and difficult problem, it simply does not give Grievants standing to contest [another employee's] reallocation, which did not otherwise personally harm them.

Mason, et al., v. W. Va. Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001).

7. Grievants do not have standing to grieve for other employees who may have applied for the regular bus run at issue had they seen the posting.

8. Grievants did not demonstrate that any Grievant was interested in the regular bus operator position should it be reposted, or that any Grievant, other than the three Grievants who did not want the job, had more seniority than the successful applicant. Grievants did not demonstrate they have standing to contest the posting.

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 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 31, 2011