THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN BROSKY,
Grievants,

v. **DOCKET NO. 2010-1410-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on April 30, 2010, by Grievant, John Brosky, against his employer, the Monongalia County Board of Education. The statement of grievance reads:

> Grievant, a 230-day employee, contends that he was entitled to take a vacant 261-day position pursuant to W. Va. Code 18A-4-8b(d)(4) & 18A-4-19. Instead, Respondent posted and filled the position county-wide by seniority.

The relief sought by Grievant is "instatement into the 261-day position with compensation for lost wages with interest and benefits."

A hearing was held at level one on June 23, 2010, and the grievance was denied at that level on July 12, 2010. Grievant appealed to level two on July 20, 2010, and a mediation session was held on October 28, 2010. Grievant appealed to level three on November 8, 2010, and a level three hearing was held before the undersigned Administrative Law Judge, in the Grievance Board's Westover office, on February 25, 2011. Grievant was 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 March 25,

2011, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent at Morgantown High School as a Custodian 3 with a 230-day contract. When a Custodian 3 with a 261-day contract transferred to another school, Respondent posted the position, and it was awarded to another, more senior applicant. Grievant asserted he should have been given the 261-day contract, without posting, because WEST VIRGINIA CODE § 18A-4-8b(d)(4) provides that the "assignment of a custodian to work shifts in a school or work site is based on seniority." This statutory provision is not applicable to this situation.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a Custodian 3 for two years, and worked for MBOE as a substitute employee prior to obtaining full-time employment. His job is to set up for sporting events, and clean the playing fields, locker rooms, public bathrooms, and the band room at Morgantown High School ("MHS"). Grievant has a 230-day contract.

2. During the spring of 2010, Danny Berkshire, a Custodian at MHS who held a 261-day contract transferred to a different location, leaving his position at MHS vacant.

3. Grievant advised the Principal at MHS, that he was interested in the 261-day position.

4. Grievant was not the most senior Custodian 3 at MHS.

5. MBOE posted the 261-day Custodian 3 position at MHS.

6. Grievant bid on the posted 261-day Custodian 3 position at MHS, as did another more senior Custodian 3, Charlie Denison. The position was awarded to Mr. Denison. Mr. Denison had been working for MBOE as a Custodian 3 at University High School. Mr. Denison is assigned to clean the gymnasium at MHS.

7. The record does not reflect the shifts worked by Grievant or Mr. Berkshire.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. *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).

Grievant argued Respondent should not have posted the 261-day position. He believes Respondent should have placed him in the 261-day position, because he asserts he was the most senior Custodian assigned to MHS *who expressed an interest in the position*. The undersigned would note at this point that the record reflects only that Grievant expressed an interest in the position to the Principal at MHS, and that no other Custodian at MHS told the union representative at MHS, Charlotte Jo Ann Vincent, that

they were interested in the position. Grievant, however, did not call the Principal at MHS, the Head Custodian at MHS, or any other Custodians at MHS to testify. The undersigned cannot conclude from this that no other more senior Custodian at MHS was interested in the position.

Grievant relies on WEST VIRGINIA CODE § 18A-4-8b(d)(4) in support of his argument that the vacancy should not have been posted, but rather should have been assigned from within the existing custodial staff at MHS. That CODE SECTION provides as follows:

> Assignment of a custodian to work shifts in a school or work site is based on seniority within the custodian classification category.

Respondent argues this CODE SECTION is not applicable to this situation because it applies only to shifts, not to contract days. The undersigned agrees.

The statute, first and foremost, relates to the assignment of work shifts. While the term "work shift" would seem obvious, perhaps it is not. A work shift means the daily work schedule, that is the days of the week the person reports to work, and the starting and ending time each day. For example, the undersigned will take judicial notice that schools generally employ some custodians to work during the school day, and employ other custodians to work primarily when the students are not present. These represent two different shifts. Some schools may have three different shifts of custodians. Some may work during the week, while others work on week-ends. The undersigned finds nothing in the record regarding the work shifts to which either Grievant or Mr. Berkshire were assigned. If both were assigned to work the same shift, then this is clearly not a case of Grievant asking to be assigned a different, more preferable shift. The evidence in the record relates to the number of contract days, and to the area to which each was assigned

to clean. Mr. Berkshire had a 261-day contract, while Grievant had a 230-day contract. Mr. Berkshire had a preferable contract term, but the contract term is not a work shift. Likewise, an employee's assigned area is not a work shift, and Grievant testified that he was willing to continue to work in the same assignment, so this was not a case of Grievant seeking a preferable work assignment.

This grievance is solely about Grievant seeking a 261-day contract. WEST VIRGINIA CODE § 18A-4-8b(d)(4) is not applicable to this situation. Grievant did not demonstrate that he was entitled to be placed in the position.

The following Conclusions of Law support the Decision reached.

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. *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. "Assignment of a custodian to work shifts in a school or work site is based on seniority within the custodian classification category." W. VA. CODE § 18A-4-8b(d)(4).

3. WEST VIRGINIA CODE § 18A-4-8b(d)(4) is not applicable when the issue is solely related to the number of days in a contract. The number of days an employee is contracted to work is not a work shift.

4. Grievant did not demonstrate that he should have been placed in the position at issue.

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: June 30, 2011