THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

THOMAS G. LACY,
Grievant,

v. **Docket No. 2010-1255-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Thomas G. Lacy, on March 19, 2010, against Respondent, the Kanawha County Board of Education. The statement of grievance reads:

> Working out of class people causing loss of overtime for subs that are assigned to unit during the summer and now March 6, 7, 13, & 14, 2010.

As relief, Grievant seeks:

> Pay for time that sub was denied weekends of March.

A conference was held at level one on April 1, 2010, and the grievance was denied at that level. A level two mediation was conducted on October 6, 2010. On October 8, 2010, Lillian Wells, Rebecca Shanklin, Betty Newhouse and Walter Hancock requested intervenor status. Intervenor status was granted. A level three hearing was held on January 27, 2011 before the undersigned at the Public Employees Grievance Board in Charleston, WV. Grievant appeared at the level three hearing *pro se*, and Respondent was represented by James W. Withrow, Esq., for Kanawha County Schools. Intervenor Hancock was represented by Rosemary Jenkins, of the American Federation of Teachers ("AFT-WV"), and Intervenors Wells, Shanklin and Newhouse were represented by Kimberly A. Levy, of the West Virginia School Service Personnel Association. This matter became

mature on February 23, 2011, upon final receipt of parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant seeks payment for four days of work mulching playgrounds in March 2010. Grievant asserts Respondent should have offered the assignment to him because he is a substitute general maintenance employee instead of offering the assignment to regular employees who are not classified as general maintenance employees. Respondent asserts that it did not violate any statue by offering the extra-duty assignment to Intervenors. Grievant did not prove by a preponderance of the evidence that Respondent should have offered him the four day extra-duty mulching assignment in March 2010.

The Grievance is denied.

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

Findings of Fact

1. Grievant is a substitute general maintenance worker for Kanawha County Board of Education.

2. Intervenors are regular employees for Kanawha County Board of Education. Intervenor Hancock and Intervenor Newhouse are teacher's aides. Intervenor Wells and Intervenor Shanklin are cooks.

3. All intervenors have been employed by the Respondent in summers as general maintenance employees.

4. In March 2010, Respondent needed to have mulch spread on several school playgrounds prior to a federal review.

5. Respondent contacted its regularly employed general maintenance employees to determine if any of those employees were available for the assignment.

6. All regularly employed general maintenance employees declined the assignment.

7. Respondent contacted Intervenors, regular employees who are not classified as general maintenance employees.

8. Intervenors accepted the assignment of mulching the playgrounds for federal review and worked the two weekends of March 6, 7, 13, & 14, 2010.

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). Also, it is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school

personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E. 2d 58 (1986).

Grievant argues that after all regular maintenance employees declined the assignment, Respondent should have offered the assignment to substitute maintenance employees instead of other regular employees. Intervenors argue that Grievant is ineligible for extra-duty assignments because he is a substitute employee instead of a regular employee. Intervenors also assert that even if Grievant is found eligible to accept extra-duty assignments, Grievant has failed to demonstrate an entitlement to the extra-duty mulching assignment because he did not show that he was "next in line". Respondent asserts that it correctly offered the extra-duty mulching assignment to regular employees after regular general maintenance employees declined the assignment.

The mulching assignment in question falls within the definition of an extra-duty assignment. Extra-duty assignments are defined as "an irregular job that occurs periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." W.VA. CODE § 18A-4-8b(f)(1). This CODE Section continues to describe how extra-duty assignments are to be allocated, stating in § 18A-4-8b(f)(2) that:

> (A) A service person with the greatest length of service time in a particular category of employment shall be given priority in accepting extra[-]duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated.
>
> (B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the

> alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

No assertion was made, nor was any evidence introduced, that an alternative procedure for extra-duty assignments exists. Therefore, if, as in this case, no employee within the classification accepted the extra-duty assignment, the assignment should have been offered to other fellow employees on a rotating basis according to the length of their service time. W.VA. CODE § 18A-4-8b(b) lists the order of priority for considering school service personnel for promotions and filling vacancies as follows:

> 1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
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> 2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;
>
> 3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;
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> 4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;
>
> 5) Substitute service personnel who hold a classification title within the classification category of the vacancy;
>
> 6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and
>
> 7) New service personnel.

No assertion was made that Intervenors were offered the assignment ahead of more senior regular employees. Grievant has failed to meet his burden of proof beyond a preponderance of the evidence that Respondent incorrectly assigned the extra-duty mulching assignment by not offering the assignment to substitute general maintenance

employees.

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. 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. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E. 2d 58 (1986).

3. Respondent did not incorrectly offer the extra-duty assignment to regular employees following W.VA. CODE §§ 18A-4-8b(b) and 18A-4-8b(f)(2).

4. Grievant failed to prove that he should have been offered the extra-duty assignment.

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: March 25, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge