THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

LES HANSON, et al.,
Grievants,

v. **Docket No. 2011-0146-CONS**

MASON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants contend that they were entitled to fill posted 2010 summer Bus Operator/Custodian positions from close to the beginning of that program. Grievants seek compensation for lost wages and the right to return to those positions if they are available in the future. Following a conference, this grievance was denied at level one by Decision dated July 31, 2010. Grievants appealed to level two. A level two mediation session was conducted on October 19, 2010. Grievants perfected their appeal to level three on October 29, 2010. A level three hearing was conducted on February 7, 2011, at the Grievance Board's Charleston office before Administrative Law Judge Landon R. Brown. Grievants appeared by their counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Gregory W. Bailey, Bowles Rice McDavid Graff & Love LLP. The case was reassigned to the undersigned Administrative Law Judge due to administrative reasons on October 3, 2011. This matter became mature for consideration on March 8, 2011, upon receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

Respondent posted summer assignments for which the Grievants were not qualified. Respondent did not approve the Superintendent's recommendation to hire less senior employees who were qualified for the positions in order to give other more senior applicants, such as Grievants, the opportunity to take the necessary competency test. Once Grievants passed the competency test, Respondent placed them into the summer positions. Grievants' argument that they be given back pay to a date twenty days after the end of the posting period is without merit. This grievance is denied.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Les Hanson, Benny Hoffman, Rodney Gleason, John Settle, and Doris Settle are Grievants in this case and are employed by Respondent as bus operators.

2. By posting dated May 14, 2010, Respondent posted an unspecified number of Bus Operator/Custodian summer positions to work in the Summer Feeding Program on an as needed basis from June 14 to August 17, 2010. Grievant's Exhibit 2.

3. Grievants, along with a number of other applicants, bid on the positions. During a meeting conducted on June 8, 2010, the Superintendent recommended to Respondent a total of nine applicants to fill the positions in question. All of the applicants that were recommended by the Superintendent held the qualifications as both Bus Operator and Custodian.

4. Grievants were regularly employed as Bus Operators, however, none of the Grievants held the Custodian qualification. Grievants held greater seniority as Bus Operators than the applicants recommended for the positions by the Superintendent.

5. Respondent did not approve the recommendation of the Superintendent for filling the positions and directed the Superintendent to provide applicants for the jobs, who had not taken and passed the Custodian competency test, with the opportunity to take the test. Board members felt it would be unfair to afford less senior bus operators with a preference with respect to future summer bus operator assignments by awarding them the positions without providing the more senior bus operators with an opportunity to take the Custodian competency test.

6. The "Summer Feeding Program" began on June 14, 2010, and ended on August 17, 2010.

7. The applicants recommended by the Superintendent were designated to perform the summer assignments as substitutes starting on June 14, 2010.

8. Each of the Grievants took and passed the Custodian competency test on June 17, 2010.

9. This grievance was filed on July 7, 2010. Following the level one conference, a decision was issued that awarded Grievants an opportunity to begin performing the assignments as substitutes pending the Superintendent's recommendation that they be awarded the positions. At that time, the number of summer assignments had been reduced from nine to five based upon reduced student participation. Grievants began performing the assignments on a substitute basis on July 19, 2010.

10. During a meeting conducted on July 27, 2010, the Superintendent recommended that the Grievants be awarded the positions. This recommendation was approved by the Respondent.

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 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).

Grievants concede in their proposals that allowing the more senior applicants the chance to take the custodial competency test was perfectly reasonable and in compliance with the spirit and letter of WEST VIRGINIA CODE § 18A-4-8e. Grievants contend the issue is when they should have been placed in the positions. In support of their argument they cite to WEST VIRGINIA CODE § 18A-4-8b(g)(3). This code section requires that positions be filled within twenty days of the five-day posting period. Grievants argue that the positions

in question were posted from May 14, 2010 to May 20, 2010. Accordingly, Grievants contend that they should receive back pay retroactive to June 18, 2010.

Respondent counters that it was in the discretion of Respondent to fill the positions from the pool of applicants who were qualified without affording other applicants an opportunity to take the competency tests. *Fuccy v. Hancock County Bd. of Educ.*, Docket No. 2008-0264-HanED (Jan. 14, 2009). Instead, Grievants received the opportunity to take the Custodian competency test due to the Respondent's concern that it just might not be fair to overlook Grievants due to their seniority.

Grievants lacked the qualifications to perform the assignments on June 8, 2010, when the Respondent considered the Superintendent's initial recommendation and decided to take no action. Grievants lacked the qualifications to perform the assignments as substitutes on June 14, 2010, when the program started. The undersigned agrees with Respondent that no basis existed to displace the employees who were performing the assignments as substitutes until Grievants were awarded such relief after the level one conference. Grievants' reliance on the posting statute is misplaced. In fact, the posting clearly indicates that the Respondent reserves the right to extend any posting deadline. This is, in essence, what Respondent did when working with Grievants in giving them the opportunity to be qualified for the summer positions. Accordingly, Grievants have failed to demonstrate any basis to award back pay.

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 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).

2. Grievants failed to meet their burden of proof and demonstrate by a preponderance of the evidence that they were entitled to receive back pay in this grievance.

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: October 26, 2011

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Ronald L. Reece
Administrative Law Judge