THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROGER HANNER, Jr.,
Grievant,

v. **Docket No. 2010-0541-FayED**

FAYETTE COUNTY BOARD
OF EDUCATION,
Respondent,

DECISION

Grievant Roger Hanner, Jr. filed a grievance against his employer on October 26, 2009. His statement of grievance reads, "Grievant contends that the Respondent filled a multiclassification [sic] position in the maintenance department with a less senior applicant. Grievant contends that the less senior applicant was improperly accorded 'in classification preference.' Grievant asserts a violation of W. VA. CODE 18A-4-8e & 18A-4-8g."

For relief, "Grievant seeks instatement [sic] into the multiclassification [sic] position with back pay and all benefits, pecuniary and non pecuniary and interest on all sums of money to which he is entitled."

A level one hearing was held on November 30, 2009. The parties then participated in level two mediation on March 24, 2010. After a successful appeal to level three, a hearing was held on August 20, 2010, at the Grievance Board's Beckley office. Grievant was represented by John Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Erwin L. Conrad, Conrad & Conrad, PLLC. This case became mature on September 10, 2010, upon receipt of the parties' findings of fact and conclusions of law.

Synopsis

Grievant asserts Chris Goodson, an employee who held the multi-classified position of Truck Driver/General Maintenance/Groundsman/Custodian II while Roger McComas was on a medical leave of absence, should have been placed back into his regular position of bus operator when Mr. McComas gave notice of his retirement. Grievant argues that would have made him the successful applicant, as he would have had the most seniority.

Respondent avers that Mr. Goodson held the appropriate classification, and Grievant did not. Respondent further asserts that Grievant's argument is incorrect, as W. VA. CODE § 18A-4-15 deals only with substitutes, and Mr. Goodson was never a substitute employee, but a regular employee.

Grievant has met his burden in this matter. Therefore, this grievance is GRANTED.

Findings of Fact

1. Grievant is employed as a custodian by Respondent.

2. Roger McComas, an employee of the Maintenance Department, took a medical leave of absence, and his position was posted January 6, 2009, with the employment term stated as "during duration of absence."

3. Mr. McComas's position was multi-classified as Truck Driver/General Maintenance/Groundsman/Custodian II.

4. On February 17, 2009, Respondent employed Chris Goodson, a regular bus operator, to fill the position until Mr. McComas's return.

5. By letter dated September 15, 2009, Mr. McComas notified Respondent of his intention to retire effective September 22, 2009. Respondent accepted Mr. McComas's retirement effective on September 21, 2009.

6. On September 22, 2009, Respondent posted the position of Truck Driver/General Maintenance/Groundsman/Custodian II again.

7. Grievant, Chris Goodson, and Terry Frazier applied for the position.

8. Grievant has more seniority as a regular employee than Mr. Goodson or Mr. Frazier.

9. Grievant possesses a CDL, which qualifies him to serve as a truck driver. Grievant worked as a General Maintenance/Groundsman employee in the summers of 2008 and 2009, qualifying him for those classification titles.

10. Mr. Goodson received the position of Truck Driver/General Maintenance/Groundsman/Custodian II. Mr. Goodson was retained in that position after Mr. McComas's retirement was accepted by Respondent, during the pendency of the posting, and until the final hiring decision.

Discussion

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. *See* W. VA. CODE § 18-29-6; 156 C.S.R. 1 § 3. "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.*

Grievant asserts that W. VA. CODE § 18A-4-15 requires Respondent place Mr. Goodson back into his regular position of bus operator upon termination of the absence. Respondent argues that code provision applies to substitutes and Mr. Goodson was a regular employee at all times.

W. VA. CODE § 18A-4-15(D) states:

> If a *regular* or substitute employee fills a vacancy that is related in any manner to a leave of absence or the absence of an employee on workers' compensation as provided in this section, *upon termination of the absence the employee shall be returned to his or her original position or status.*

(Emphasis added).

Since the Code specifically states "regular or substitute employee," Grievant's argument is correct. Upon the termination of the leave of absence, Mr. Goodson should have been returned to his regular status as a bus operator.

The question then becomes when the leave of absence was terminated. In *Shelton, et al. v. Barbour County Bd. of Educ. and Kaufman*, Docket No. 04-01-181 (Aug. 25, 2004), a bus operator was suspended, and a substitute was given his position during the suspension. However, the suspension was resolved at a board meeting, and the position was posted. The Administrative Law Judge held respondent was to return the substitute back to his original status at the time it deemed the suspension to end.

While the case at hand does not deal with a substitute, but a regular employee, the situation is similar. Respondent should have returned Mr. Goodson to his regular bus operator status at the time Mr. McComas's leave of absence terminated.

W. VA. CODE § 18A-4-8b(b)(1) grants first preference in filling posted service personnel positions to regular employees who hold a classification category of the vacancy. By removing Mr. Goodson from the classification, as is legally proper, there were no applicants in the classification of Truck Driver/General Maintenance/Groundsman/Custodian II. Therefore, Respondent must look at the applicants from outside the classification.

W. VA. CODE § 18A-4-8b(a) requires that service personnel positions be filled on the basis of seniority, evaluation, and qualification. Grievant has more seniority than the other two applicants. Therefore, he should have been awarded the position.

Accordingly, this grievance is **GRANTED**.

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. *See* W. VA. CODE § 18-29-6; 156 C.S.R. 1 § 3. "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-4-15(D) requires that if a regular or substitute employees fills a vacancy related to a leave of absence, upon the termination of the absence that regular or substitute employee is required to be returned to his or her original status.

3. W. VA. CODE § 18A-4-8b(b)(1) grants first preference in filling posted service personnel positions to regular employees who hold a classification category of the vacancy.

4. Mr. Goodson was not in classification at the time he was awarded the position.

5. Grievant is more senior than Mr. Goodson.

Accordingly, this grievance is **GRANTED**. It is hereby **ORDERED** that Grievant be placed in the position of Truck Driver/General Maintenance/Groundsman/Custodian II upon receipt of this Decision. It is further **ORDERED** that Grievant receive all back pay, seniority and benefits to which he is entitled.

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: January 6, 2011

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Wendy A. Elswick
Administrative Law Judge