THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN E. SIMPSON,
Grievant,

v. **DOCKET NO. 2011-1305-TayED**

TAYLOR COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, John E. Simpson, filed a grievance against his employer, the Taylor County Board of Education, on March 14, 2011. The statement of grievance reads: "18A-4-8G Number of days in the suspension was calculated incorrectly. Suspension calculated included days that were not working or paid days in my contract year." As relief Grievant sought, "Recalculate original hire date. Hire date was moved seven months for a four month suspension. The number of days moved exceeds the number of days I am under contract."

The parties agreed to waive levels one and two, proceeding directly to level three. After a hearing was scheduled at level three, the parties asked to submit this grievance for decision based upon agreed stipulations of fact, and this request was granted. Grievant was represented by Eric M. Gordon, Esquire, Berry, Kessler, Crutchfield, Taylor & Gordon, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on September 15, 2011, upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a bus operator, was suspended through the end of the 2007-2008 school year following an accident, and his school bus operator certification was suspended for this period also. Further, his school bus operator certification was not renewed until he had completed additional training, which he did in mid-August 2008. Grievant returned to work on August 21, 2008, fully certified to operate a bus. Respondent adjusted Grievant's seniority date by 204 days, reflecting every day between January 30 and August 20, 2008. Grievant argued Respondent could not adjust his seniority date for any period not covered by his suspension, and that his suspension ended on the last day bus operators reported to work for the 2007-2008 school year, on June 10, 2008. The applicable statutory language provides for seniority to be adjusted during any period of time when an employee is suspended without pay. The suspension ended on the last day of the school year, and that is the last day that could be used in the calculation of the adjustment of Grievant's seniority.

The following Findings of Fact are properly made from the stipulations of fact agreed to by the parties.

Findings of Fact

1. Grievant has been employed by the Taylor County Board of Education ("TBOE") as a bus operator for more than 25 years. His contract is for a 200-day employment term.

2. On January 10, 2008, a kindergarten student assigned to Grievant's afternoon bus run was seriously injured when she exited the bus and was struck by a motor vehicle.

3. Immediately after the accident on January 10, 2008, an investigation ensued by officials from both the Taylor County Board of Education and the State Department of Education.

4. At the conclusion of the investigation, on January 30, 2008, TBOE Superintendent Diane Watt advised Grievant that he was being suspended without pay for a period of thirty days and that she would recommend he be suspended for the remainder of the school year, as a result of the accident on January 10, 2008.

5. Immediately following the accident, the State Department of Education also suspended Grievant's certification as a bus operator. Grievant exercised his right to contest that decision through the hearing and appeal process of the Department.

6. Grievant's certification as a bus operator remained suspended through the remainder of the 2007-2008 school year.

7. The last day of work for Taylor County's bus operators for the 2007-2008 school year was June 10, 2008. For 200-day employees, there were 89 work days between January 30, and June 10, 2008.

8. On July 30, 2008, upon conclusion of the state hearing and appeal process, the State Superintendent of Schools issued an Order, officially suspending Grievant's certification as a bus operator from January 10, 2008, until the end of the 2007-2008 school year. The Order also required that Grievant's certification not be re-issued until he

completed safety training in specified areas, and a plan of supervision was to be implemented upon his return to employment as a bus operator.

9. By letter dated August 11, 2008, TBOE Assistant Superintendent Sam McDaniel informed Grievant of the specific safety practices training courses he was required by the State Department of Education to complete, along with the requirement that he successfully pass the West Virginia School Bus Operator Certification Test.

10. Grievant completed the required safety training and certification test in mid-August 2008, just prior to the beginning of the school year for 2008-2009.

11. Grievant's first day at work, after completing all state requirements and obtaining his bus driver certification, was August 21, 2008.

12. Upon his return to employment with Taylor County Schools, Grievant's seniority was adjusted for the period of time that he was not certified as a bus operator. A total of 204 calendar days were deducted from Grievant's seniority, reflecting the time period from January 30, 2008 (the date Grievant was placed on suspension by the Superintendent) through August 20, 2008 (the day prior to his return to work).

13. Grievant believes that he could have held positions in other classifications with Taylor County Schools during the period of his suspension, but Respondent does not agree.

Discussion

Grievant is not contesting his suspension, but rather the calculation of the number of days' seniority he lost as a result of his suspension. 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 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).

Following Grievant's suspension, Respondent adjusted Grievant's seniority date by 204 calendar days, from January 30, 2008, to August 20, 2008, moving his seniority date from August 29, 1986, to March 21, 1987. Grievant does not contest the use of calendar days rather than work days in calculating his new seniority date. Grievant's argument is that his suspension ended on June 10, 2008, the last day of school, and Respondent could not count any day after that in adjusting Grievant's seniority date. Grievant believes his lost seniority should be 133 days, not 204 days. Respondent argued that because Grievant did not hold bus operator certification until after he had completed the training required by the State Department of Education until mid-August, he was not available to work as a bus operator until then, and his seniority had to be adjusted accordingly.

WEST VIRGINIA CODE § 18A-4-8g(c) provides that:

> Seniority of a regular or substitute service person does not continue to accumulate under the following conditions:
> (1) When a service person is willfully absent from employment duties because of a concerted work stoppage or strike; or
> (2) When a service person is suspended without pay.

Grievant was advised by the TBOE Superintendent of Schools that she would recommend that he be suspended without pay through the end of the school year, and apparently, this recommendation was accepted by TBOE. This is the only period of time when Grievant

was officially suspended without pay. TBOE took no other action to prevent Grievant from returning to work.

Respondent points to the fact that subsection (a)(3) of this Code Section states specifically that the employee "[d]oes not cease to accumulate [seniority] when the county board has authorized an absence whether without pay or due to illness or other reason over which the employee has no control," arguing that this indicates that an employee does not accumulate seniority when his absence is not authorized. The undersigned does not find this provision to be applicable to the instant situation. There is no indication in the record that Grievant was ever absent from work without authorization. Grievant worked under a 200-day contract, meaning he was not required to report to work during the summer, and was not paid for the days during the summer when he did not work. He was not absent from work during this time. Grievant resumed his employment either at or near the beginning of the 2008-2009 school year, although the record does not reflect whether August 21, 2008, was the first day of school for all school service personnel. Accordingly, Respondent acted in error in including the period from the end of Grievant's suspension through August 20, 2008, when recalculating Grievant's seniority date.

The only question remaining is whether the suspension ended on June 10, 2008, or June 30, 2008. The record does not reflect which date constituted the last day of the school year, which is when the suspension ended. The undersigned will take administrative notice that the school year runs from July 1 through June 30. The burden of proof was on Grievant, and he failed to demonstrate that the school year ended on June 10, 2008. This date was the last day he would have had to report to work under his 200-

day contract, but it was not the last day of the “school year.” Respondent must restore 51 days to Grievant’s seniority date, for the period from July 1 through August 20, 2008.

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. Regular school service personnel do not continue to accumulate seniority during any period of time when they are suspended without pay. W. VA. CODE § 18A-4-8g(c).

3. Grievant could not accumulate seniority during his period of suspension, which continued through the end of the 2007-2008 school year, which was June 30, 2008. Grievant did accumulate seniority from July 1 through August 20, 2008, while he was not suspended and was not absent from work.

Accordingly, this grievance is **GRANTED in part, and DENIED in part.** Respondent is **ORDERED** to restore 51 days of seniority to Grievant's seniority date.

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: September 30, 2011