THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CALVIN DWAINE BUTTS,
Grievant,

v. **DOCKET NO. 2011-1592-OhiED**

OHIO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Calvin Dwaine Butts, filed a grievance against his employer, the Ohio County Board of Education, on or about March 29, 2011.[1] The statement of grievance reads:

> On February 22, 2011, I was senior bidder for Bus 0306 p.m. I had to wait for board approval until the meeting on March 14th. Despite meetings on February 23 & 24. On March 11th, a substitute aide was selected for West Liberty Elementary and was added to the board agenda for the meeting the next business day. This discriminated against me in violation of WV Code 6-2-2. I became aware of this on March 14th.

As relief Grievant sought, "Pay for [February] 24, 25, and March 1, 2, 3, 4, 7, 8, 10, 11, 14 of 2011 plus adjustment of sick days."

A conference was held at level one on April 7, 2011, and a level one decision denying the grievance was issued on April 18, 2011. Grievant appealed the decision on May 9, 2011, attempting to waive level two. An Order was issued on May 11, 2011, denying the request to waive level two, and a mediation session was held on October 12,

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[1] The original grievance form is not among the documents in the Grievance Board's file.

2011. Grievant appealed to level three on October 24, 2011. A level three hearing was held before the undersigned Administrative Law Judge on September 25, 2012, at the Grievance Board's Westover office. Grievant was represented by Joseph Canestraro, Esquire, Berry, Kessler, Crutchfield, Taylor & Gordon, and Respondent was represented by Kathy M. Finsley, Esquire, Steptoe & Johnson, PLLC. This matter became mature for decision on October 18, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserted he was discriminated against because Respondent did not take action to approve his hiring for a posted half-day bus run at the first available opportunity, while, Grievant asserted, Respondent acted on the hiring of an aide the day after the posting closed. Grievant's hiring was approved by Respondent within 20 days of the date the posting closed, as required by statute. Grievant did not demonstrate that he was treated differently from any other similarly-situated employee.

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

Findings of Fact

1. Grievant was employed by the Ohio County Board of Education ("OCBOE") as a bus operator from August 30, 1994, until his retirement on September 12, 2012.

2. On February 15, 2011, OCBOE posted a half-day, afternoon bus run, transporting special needs students to and from school. Grievant applied for the posted position on February 15, 2011. The closing date on the posting was February 22, 2011;

however, schools were unexpectedly closed in Ohio County on February 22, 2011, due to snow, so the closing date was extended to 4:00 p.m. on February 23, 2011.

3. OCBOE approved the hiring of Grievant for the posted half-day bus run at a meeting on March 14, 2011, effective March 15, 2011.

4. OCBOE held Board meetings on February 23, 2011, at 8:00 a.m., February 24, 2011, at 8:00 a.m., and March 4, 2011. The meeting on February 23, 2011, was held before the posting at issue closed, and was a goals meeting. No personnel issues were taken up at that meeting. The meeting on March 4, 2011, was a special meeting, but some personnel issues were taken up by Respondent. Some personnel issues were also taken up at the February 24, 2011 meeting.

5. It is the practice of OCBOE that the agenda for the regularly scheduled Monday meetings be completed and provided to Board members by the Thursday preceding the meetings. Deviations are made from time to time for special circumstances, such as when there is a need to place an Aide in a special education classroom immediately. With regard to filling a posted position, such matters are not placed on the Board agenda until the supervisor of the position or the principal sends the request to the OCBOE Human Resources office.

6. OCBOE also approved the hiring of Tracy Sturm at the March 14, 2011 Board meeting, for a Supervisory Aide/Paraprofessional/Autism Mentor position at West Liberty Elementary School, effective March 15, 2011. The record does not reflect when the posting for that position closed, however, those in charge of placement of the Autism Mentor believed that Ms. Sturm should be placed in the classroom immediately in order to properly serve the needs of the autistic student in the classroom.

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 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).

WEST VIRGINIA CODE § 18A-4-8b(g)(3) requires that, "[a]fter a five-day minimum posting period, all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of existing or newly created positions." Grievant does not dispute that Respondent filled the position at issue within the statutorily required 20-day period. Rather, Grievant argued he was discriminated against because Respondent did not approve his hiring at the first board meeting after the closing date, asserting that Ms. Sturm's hiring was approved the day after the posting closed.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant argued he was similarly situated to Ms. Sturm because, "the special needs bus operator and the special needs substitute aide positions['] duties require the employee to assist with autistic children." This argument is specious. Grievant is a bus operator. His job is to drive the bus, and to operate the chair lift on his bus when an Aide is placing a wheelchair-bound student on the bus. There is an Aide on his bus who assists the special needs students while they are on the bus. Grievant does not have the special training required to be an Autism Mentor, nor does he assist autistic students in the classroom. His job duties do not compare in any way to those of Ms. Sturm. It is well-established that employees who are in different job classifications are not similarly-situated to one another. *Flint, et al., v. Harrison County Bd. of Educ.*, Docket No. 97-17-348 (Jan. 22, 1998); *aff'd*, *Flint v. Bd. of Educ. of County of Harrison*, 207 W. Va. 251, 531 S.E.2d 76 (1999). Grievant is not similarly-situated to Ms. Sturm.

Further, although Grievant testified that someone told him the posting for the position for which Ms. Sturm applied and was selected had closed on March 13, 2011, he did not know whether this was in fact the case, and presented no evidence to support this assertion. It would have been easy enough to obtain the posting and place it in the record,

which Grievant did not do. Grievant did not prove that Ms. Sturm's hiring was approved by Respondent the day after the posting closed.

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 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. WEST VIRGINIA CODE § 18A-4-8b(g)(3) requires that positions be filled within 20 working days from the date the posting closes.

3. Respondent filled the position at issue within the time period required by statute.

4. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Employees who are not in the same classification are not similarly-situated for purposes of determining whether an employee has been discriminated against. *Flint, et al., v. Harrison County Bd. of Educ.*, Docket No. 97-17-348 (Jan. 22, 1998); *aff'd*, *Flint v. Bd. of Educ. of County of Harrison*, 207 W. Va. 251, 531 S.E.2d 76 (1999).

6. Grievant did not demonstrate that he was treated differently from any similarly-situated employee, and did not demonstrate that he was discriminated against in the hiring process.

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
Acting Deputy Chief
Administrative Law Judge

Date: November 27, 2012