THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TRACY NICOLE SLONE,
Grievant,

v. **Docket No. 2011-1896-CONS**

MINGO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Tracy Nicole Slone, is employed by Respondent, Mingo County Board of Education. Grievant filed three grievances for nonselection against Respondent for three separate secretarial positions: Matewan High School on September 15, 2010, Williamson High School on September 15, 2010, and Respondent's central office on November 30, 2010. For relief, grievant seeks "instatement, compensation for lost wages with interest, and all benefits, pecuniary and nonpecuniary, she would have received had she been employed in the position."

Following the January 5, 2011 level one conferences, a level one decision was rendered on January 24, 2011, denying the grievances. Grievant appealed to level two on February 4, 2011. Grievant perfected the appeals to level three of the grievance process on June 2, 2011. A level three hearing was held on March 27, 2012, before Administrative Law Judge William B. McGinley[1] at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John E. Roush, West Virginia School Service Personnel Association. Respondent was represented by counsel, Howard Seufer, Bowles Rice McDavid Graff & Love LLP. At the hearing, the parties agreed to consolidate the three grievances, and a consolidation order was

[1] This case was assigned to the undersigned Administrative Law Judge on August 16, 2012 for administrative purposes.

entered on March 28, 2012. This matter became mature for decision on April 30, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleges that Respondent erred in calculating seniority, and therefore improperly awarded three separate positions to applicants with less seniority than Grievant. Grievant failed to present sufficient evidence to prove she was the most senior applicant for any of the positions. Respondent did not violate its policy regarding removal of substitutes when it allowed one of the successful applicants to remain a substitute, preserving her greater seniority over Grievant. Respondent did not violate any law or policy, and acted reasonably, in requiring Grievant to report for regular duty several days later than another successful applicant, resulting in that applicant's greater seniority. Grievant was not entitled to regular seniority when she worked a short-term substitute assignment during the first few days of her regular contract. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is currently employed by Respondent as a Secretary II at Mingo High School, but is serving temporarily in a long-term substitute Secretary III position at Respondent's central office. At the time the grievances were filed, Grievant was employed as a Secretary II at Matewan Middle School.

2. On July 22, 2010, Respondent posted multiple positions, including Secretary II positions at Matewan High School and Williamson High School.

3. Shortly thereafter, Respondent posted additional positions, including a Secretary II position at Matewan Middle School.

4. Grievant bid on all three positions and was awarded the Matewan Middle School position, which was not her preferred position. The Williamson High School position was awarded to Tammy Hodge and the Matewan High School position was awarded to Jennifer Toler.

5. According to Respondent's payroll records, as reviewed by Personnel Director, Nell Hatfield, in considering substitute seniority for the above postings, Tammy Hodge was most senior with a start date of September 28, 1999, Jennifer Toler was next with a start date of January 13, 2003, and Grievant followed with a start date of February 21, 2003.[2]

6. Prior to her consideration for the above positions, on March 8, 2010, Tammy Hodge received a warning letter stating that she would be terminated if she had two more refusals for unacceptable reasons to accept substitute assignments. Ms. Hodge was then offered another substitute position at Tug Valley High School, which she declined by letter stating that her husband was "quite ill" and she needed to accompany him for a surgery consultation in Huntington, West Virginia. Respondent accepted this as a reasonable excuse for Ms. Hodge's refusal of the substitute position and did not terminate her employment.[3]

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[2] Respondent's Exhibit # 2.
[3] Respondent's Exhibit # 1.

7. Also, prior to her consideration for the above positions, Grievant had declined substitute positions because she was working a full-time job for Mingo County Housing Authority. She received a call from Randy Keathley, current Superintendent and former Personnel Director, telling Grievant she would be removed from the substitute list if she continued to decline substitute opportunities. As a result, Grievant quit her full time job to accept the Tug Valley High School substitute position that Ms. Hodge had declined.

8. School secretaries would ordinarily report for work five days before the start of school, which was August 13, 2010. Ms. Toler reported to work on that date. Ms. Hodge and Grievant did not report on that date, but reported on August 16, 2010, and August 17, 2010, respectively.[4]

9. On September 9, 2010, Respondent posted multiple positions, including a Secretary III position at Respondent's central office. Again, Ms. Toler, Ms. Hodge, and Grievant all bid on the position.[5]

10. As all three were now regular service personnel, and not substitutes, seniority was based on their start date in their regular service positions. If the start date had been the same, a random selection would have been made between the three.

11. As Ms. Toler's start date was prior to that of Grievant and Ms. Hodge, Ms. Toler was awarded the Secretary III position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. §

[4] Respondent's Exhibit # 2.
[5] Another person who applied had more seniority, but turned down the position.

156-1-3 (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).

Grievant alleges that all three grieved positions were filled by applicants who had less seniority than Grievant. County Boards are required to fill service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W.Va. Code §18A-4-8b(a). Grievant does not allege that she was more qualified, but only that Respondent erred in the calculation of seniority. In support of her allegations regarding her greater seniority relevant to the Matewan High and Williamson High positions, Grievant offered only her testimony. In support of her allegation regarding the central office position, she offered her testimony and novel legal argument.

Grievant testified that both she and Ms. Toler believed that Grievant had actually begun substituting prior to Ms. Toler. However, Grievant could not provide in her testimony any specific dates to support her allegation, and the records of Respondent directly contradict her allegation. It cannot be concluded from the evidence that Grievant's substitute seniority was actually greater than Ms. Toler's.

Regarding her substitute seniority relevant to Ms. Hodge, Grievant asserts Ms. Hodge should have been removed from the substitute list, thereby removing her seniority. Grievant had declined substitute assignments because she was working a

full-time job for Mingo County Housing Authority, and she alleges Ms. Hodge was also declining substitute assignments due to other employment. After declining some substitute assignments, Grievant received a call from Randy Keathley, current Superintendent and former Personnel Director, telling Grievant she would be removed from the substitute list if she continued to decline substitute opportunities and that Ms. Hodge would be removed as well. As a result, Grievant quit her full-time job to accept the Tug Valley High School substitute assignment that Ms. Hodge had declined.

Removal of a substitute from the list for declining assignments is governed by Mingo County Board of Education Policy 820.04.1. The policy states that a warning letter will be issued after a substitute declines work on three consecutive occasions or a total of five occasions in one school year. *Id.* at § 3.5. Two more instances of declining work without an acceptable reason will result in the termination of the substitute employee. *Id.* at § 3.6. Acceptable reasons for declining an assignment include the "life-threatening illness of an immediate family member." *Id.* at § 3.4. In the case of Ms. Hodge, she explained in writing that she declined the Tug Valley assignment because her husband was "quite ill" and she needed to accompany him for a surgery consultation in Huntington, West Virginia. Respondent's personnel department determined this was an acceptable reason for Ms. Hodge to decline the assignment and did not remove her from the substitute list. While it appears that Mr. Keathley's telephone contact with Grievant was not consistent with the policy, it was not the event grieved. Grievant has not proved that Respondent acted inappropriately in allowing Ms. Hodge to remain on the substitute list. Therefore, the evidence shows Ms. Hodge clearly had more seniority than Grievant.

Regarding the central office position, Grievant argues she should be granted regular seniority from August 13, 2010, either because Respondent erred in asking her to report to work on August 17, 2010, or because Grievant was actually working for Respondent in a substitute position on August 13, 2010. Grievant did not prove Respondent erred in requiring her to report to her regular duty Secretary II position at Matewan Middle School on August 17, 2010. While testimony from the Personnel Director indicated that secretaries for the schools usually are to report five days prior to the start of school, there is no law or policy that requires this. Testimony also reveals that, for Grievant's specific position, the principle of that school also reported to work on August 17, 2010. Therefore, it was reasonable for Respondent to require the secretary to report on the same day the principle was to report.

Contrary to Grievant's assertion that she is entitled to regular seniority from August 13, 2010, statute specifically prohibits this. W.VA. CODE § 18A-4-8g governs the determination of seniority for service personnel, and it states:

> (a) Seniority accumulation for a regular school service person:
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> (1) Begins on the date the employee enters upon regular employment duties . . .
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> . . . .
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> (b) Seniority accumulation for a substitute service person:
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> (1) Begins on the date the employee enters upon the duties of a substitute . . .
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> . . . .
>
> k) Seniority acquired as a substitute service person and as a regular service person shall be calculated separately and may not be combined for any purpose.

The statute is clear that accumulation of seniority hinges on the performance of the duties of the particular type of employment. To accumulate regular seniority, Grievant

has to be performing regular employment duties. The duties she performed on August 13, 2010 were that of a substitute, which only entitles her to substitute seniority accumulation. Respondent properly calculated Grievant's regular seniority start date as August 17, 2010; therefore she was not the most senior applicant.

Grievant has not proven her grievance by a preponderance of the evidence as she failed to prove that she had, or should have had, equal or greater seniority than the successful applicants.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. County Boards are required to fill service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W.Va. Code §18A-4-8b(a).

3. W.VA. CODE § 18A-4-8g governs the determination of seniority for service personnel, and it states:

> (a) Seniority accumulation for a regular school service person:

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> (1) Begins on the date the employee enters upon the duties of a substitute . . .
>
> . . . .
>
> k) Seniority acquired as a substitute service person and as a regular service person shall be calculated separately and may not be combined for any purpose.

4. Grievant has not proven her grievance by a preponderance of the evidence as she failed to prove that she had, or should have had, equal or greater seniority than the successful applicants.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: August 21, 2012

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Billie Thacker Catlett
Administrative Law Judge