WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KEITH COOK,
Grievant,

v. **Docket No. 2012-0106-LinED**

LINCOLN COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant, Keith Cook, is a Bus Operator employed by the Respondent, Lincoln County Board of Education ("Board"). Mr. Cook applied for a posted bus run vacancy, but the bus run was awarded to a different applicant. On July 15, 2011, Mr. Cook filed a level one grievance alleging that the successful applicant was not a Bus Operator at the time the position was posted and therefore should not have been given the position ahead of a Grievant who was a full-time Bus Operator. Grievant seeks to be placed in Bus Run 18.[1]

A level one conference was held on August 8, 2011. By letter dated August 12, 2011, the grievance was denied as being untimely and because Grievant was found to lack standing. Grievant appealed to level two and restated his grievance as follows:

> Respondent hired an applicant for a bus operator that was employed out of the classification of bus operator rather than Grievant. Grievant alleges a violation of W. Va. Code 18A-4-8b & 18A-4-8g.

Grievant continues to seek "instatement into Bus Run # 18."

[1] Bus Run 18 is the bus run that was vacant and posted.

A level two mediation was held on November 28, 2011, and Grievant appealed to level three on December 5, 2011. A level three hearing was held at the Charleston Office of the West Virginia Public Employees Grievance Board on two separate days; April 12, 2012, and May 10, 2012. Grievant appeared on both days and was represented by John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by Rebecca M. Tinder, Esquire, Bowles Rice McDavid Graf & Love LLP. The parties submitted Proposed Findings of Fact and Conclusions of Law which were received by the West Virginia Public Employees Grievance Board on June 13, 2012. The grievance became mature for decision on that date.

Synopsis

Grievant argues that the successful applicant should not have been selected for the position because he was not working in the Bus Operator classification when the position was posted and priority must be given to those applicants working in the posted classification. Grievant notes that he may not have been the most senior Bus Operator applicant who applied for the position, but the person who is more senior than him did not contest the selection of another candidate. Since Grievant was the only applicant to file a grievance, he believes he is entitled to be placed in the position if the successful applicant was improperly selected.

Respondent believes that it was appropriate to select the successful applicant because he was working as a Bus Operator when the position was filled and when the job was to start. Additionally, Respondent argues that the grievance was not filed within the statutory time frame and that Grievant did not have standing to be placed in the

position because there was a more senior applicant for the position who would have received the position if the successful applicant had not been selected.

Respondent did not prove that the grievance was untimely. The successful applicant was improperly selected for the position. However, Grievant is not entitled to be placed in the bus run vacancy because he was not the next applicant in line for the position and would not have received the position had the successful applicant not been selected.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Keith Cook, has been employed by the Board as a Bus Operator since August 2005.

2. On April 20, 2011, the Board posted a number of Service Personnel Vacancies. Among those positions was posting S11-71 which was a vacancy for a bus operator on Bus Route 18.[2] The closing date for Route 18, and the rest of the vacancies, was May 4, 2011. All applications had to be in by that date to be considered.

3. Eight full-time service personnel and eight substitute Bus Operators applied for Route 18. Grievant's Exhibit 1.

4. On June 21, 2011, the Board accepted the recommendation of the Superintendent, David Roach, and selected Mark Midkiff to fill the Bus Operator position for Route 18 to commence on July 1. 2011. Grievant's Exhibit 4.

[2] For convenience, the position will be referred to herein as "Route 18."

5. The successful applicant, Mark Midkiff, was employed in the Mechanic classification when the Route 18 was posted, but he was hired as a Bus Operator on May 16, 2011.[3] Mr. Midkiff had been previously employed by the Board as a Bus Operator before becoming a Mechanic. Mr. Midkiff was classified as a Mechanic when the posting for Route 18 closed on May 4, 2011, but he was employed as a Bus Operator when the position was filled by the Board on June 21, 2011. When Mr. Midkiff was reemployed as a Bus Operator, he was credited with seniority for his prior years in that classification and his seniority date as a Bus Operator was July 26, 2001. Grievant's Exhibit 3, Seniority list for Bus Operators as of July 1, 2011.

6. Vickie Linville is a Bus Operator employed by the Board, and she also applied for the Route 18 position. Ms. Linville's seniority date as a Bus Operator is August 23, 2004. Grievant's Exhibit 3. She had the most seniority of any applicant other than Mr. Midkiff. Consequently, if Mr. Midkiff had not been selected for any reason, Ms. Linville would have been the applicant next in line to receive the position.

7. Ms. Linville was reluctant to take Route 18 because when the position was posted a bus was assigned to the route which was larger than she was accustomed to driving. However, if she had been offered the Route 18 position she would have accepted it.[4] She decided not to contest the selection of Mr. Midkiff for the position. *See*: Footnote 4.

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[3] Grievant's Exhibit 2, the employment contracts for Mark Midkiff. On Ms. Midkiff's application for the Route 18 position (*See:* Grievant's Exhibit 1) he listed his classification as Mechanic – Bus Operator because he was occasionally asked to drive a bus while employed as a Mechanic. However, his employment contract lists him as a Mechanic only. There is no evidence that Mr. Midkiff was multi-classified.

[4] Level three testimony of Vickie Linville.

8. Grievant, Keith Cook, also applied for Route 18. He is a Bus Operator for the Board, and like Ms. Linville, he held that certification when Route 18 was posted and filled. Grievant's seniority date as a Bus Operator is August 23, 2005. He ranked next behind Ms. Linville in seniority among the applicants for Route 18.

9. The June 21, 2011, Board meeting was covered by the local newspaper, however, no article was introduced indicating when, or if, the Board's specific action related to Route 18 was reported.

10. The Board's Personnel Director at the time was Patricia Ann Lucas.[5] Ms. Lucas testified that she sent Grievant a letter the day after the Board meeting advising him that he was not the successful applicant for Route 18. Grievant testified that he did not receive a letter like the one described by Ms. Lucas. No copy of the letter was introduced into evidence.

11. Grievant was in the Board's bus garage on July 15, 2011, and was told that Mr. Midkiff had been awarded Route 18. He filed a grievance that day.

Discussion

Timeliness:

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*.,

[5] Ms. Lucas has subsequently accepted the position of Superintendent of Lincoln County Schools.

Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011). The grievance procedure statute defines "days" as follows.

> (c) "Days" means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.[6]

[6] W. VA. CODE § 6C-2-2(c).

The Respondent presented no evidence that Grievant received any notice that the Board had voted to hire Mr. Midkiff for Bus Route 18, beyond Ms. Lucas's testimony that she sent him a letter the next day, June 22, 2011. However, Grievant denied he received that letter and Respondent did not produce a copy of the letter at the hearing. Even if it is assumed that Ms. Lucas mailed the letter to Grievant on June 22, 2011, and he received it on the following day, June 23, 2011, the period for filing the grievance would begin the next day June 24, 2011. If all Saturdays, Sundays, and Official Holidays[7] are excluded, July 15, 2011, was the fifteenth day after Grievant would have received this notice and the Grievance was therefore timely filed pursuant to W. VA. CODE §§ 6C-2-2(c) and 6C-2-3(a)(1).

Selection of Mr. Midkiff:

W. VA. CODE § 18A-4-8b(b) provides that the Board is required to consider applicants for vacant positions in the following order:

> (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
>
> (2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;
>
> (3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy; . . .

Since the position in question was a Bus Operator vacancy, those applicants who were classified as Bus Operators were required by statute to be selected ahead of any applicant who was not classified as a Bus Operator. The successful Applicant for Bus Route 18, Mr. Midkiff, was classified as a Mechanic when Route 18 was posted and when that posting was closed on May 4, 2011. Mr. Midkiff was hired as a Bus Operator on May 17, 2011, so he held that certification when Bus Route 18 was filled on June 21, 2011. Respondent argues that Mr. Midkiff was entitled to the priority in filing the Route 18 position because he held the Bus Operator classification at the time the position was

[7] July 4, 2011.

filled and when it became effective on July 1, 2011.[8] As support for that position Respondent cites *Roberts v. Marshall County Bd. of Educ.*, Docket No. 91-25-395 (Jan. 15, 1992), which states:

> When during a current employment term, a service vacancy is known and posted for a position which will be available during the following school year, all applicants must be viewed in the light of what their employment status will be when the job is actually available, and the employee with the greatest service time in the classification of the vacancy has employment priority.

Id. Conclusion of Law 3.

However, Grievant points to a statutory change that took place subsequent to the *Roberts* decision. Grievant notes that W. VA. CODE § 18A-4-8g(j) which appears to have been enacted in 2007, provides:

> (j) Service personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.

This provision clarifies when applicants must hold the certification of the vacant position to receive the priority for filling the position set out in W. VA. CODE § 18A-4-8b(b). Instead of holding the certification when the position takes effect, as set out on *Roberts, supra,* the legislature has specified that it is the classification held at the time the vacant position was posted that is controlling. Mr. Midkiff was classified as a Mechanic when Bus Route 18 was posted and when the posting closed. Therefore, any applicant who was certified as a Bus Operator at the time the position was posted should have been selected to fill that position ahead of Mr. Midkiff. Grievant proved that Mr. Midkiff should not have been the successful applicant for Bus Route 18. That

[8] The position was to be effective for the 2011-2012 school year.

position should have been awarded to the most senior applicant who held the Bus Operator certification, Vickie Linville.

Remedy:

As a remedy, Grievant seeks to be instated into the position of Bus Route 18. Unfortunately, Grievant is not entitled to that relief. The Grievance Board has consistently held that "[i]n order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.'" *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999). *Clark v. Putnam County Bd. of Educ.,* Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.,* Docket No. 96-20-352 (Apr. 30, 1997)) (followed by *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008)).

It is undisputed that Vickie Linville was the most senior Bus Operator to apply for Route 18 at the time the position was posted. She was the candidate who was next in line to receive the position if Mr. Midkiff was disqualified. Grievant initially believed that Ms. Linville would have rejected the position had it been offered to her because the bus assigned to Route 18 was bigger than the buses she was accustomed to operating. Had Ms. Linville testified that she would not have taken the position, Grievant would have been next in line. However, Ms. Linville clearly testified that she would have taken the position had it been offered to her. Accordingly, Grievant was not the next applicant in line for the position and is therefore not entitled to the remedy he seeks. "It is well settled law that the Grievance Board will not grant relief sought that is 'speculative or premature, or otherwise legally insufficient.' *See Dooley et al. v. Dept. of Trans./Div. of*

Highways, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991). If Grievant was not "next in line", then he was not actually harmed. It is clear that a grievant must sustain an actual injury by being passed over for a position to which he was actually entitled, otherwise any award of back pay would be a windfall*. See Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003)." *Young v. Kanawha County Bd. of Educ.,* Docket No. 2011-1845-KanED. (Nov.19**,** 2012) Accordingly, the grievance is DENIED.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse her failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't.*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

2. Respondent did not prove by a preponderance of the evidence that the grievance was not filed within the statutory time frame.

3. W. VA. CODE § 18A-4-8b(b) provides that the Board is required to consider applicants for vacant positions in the following order:

> (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
>
> (2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;
>
> (3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy; . . .

Since the position in question was a Bus Operator vacancy, those applicants who were classified as Bus Operators were required by statute to be selected ahead of any applicant who was not classified as a Bus Operator.

4. Grievant points to W. VA. CODE § 18A-4-8g(j) which appears to have been enacted in 2007 and states:

> (j) Service personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.

This provision clarifies when applicants must hold the certification of the vacant position to receive the priority for filling the position set out in W. VA. CODE § 18A-2-8b(b). The legislature has specified that it is the classification held at the time the vacant position was posted that is controlling.

5. Grievant proved by a preponderance of the evidence that the Board erred in selecting Mr. Midkiff for Route 18 because he was not certified as a Bus Operator when the position was posted. All applicants who were certified as Bus operators when the position was posted should have been considered for the position ahead of Mr. Midkiff. *See,* W. VA. CODE §§ 18A-4-8b(b) and 18A-4-8g(j).

6. "In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line.'" *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999)). *Clark v. Putnam County Bd. of Educ.,* Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.,* Docket No. 96-20-352 (Apr. 30, 1997) (followed by *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008)).

7. Grievant was not the next applicant in line to receive the Route 18 position after Mr. Midkiff. Therefore, he was not entitled to the relief of instatement into that position which is the only relief he sought.

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: DECEMBER 4, 2012.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE