THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD E. SHAFFER,
Grievant,

v. **Docket No. 2011-1773-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Ronald Shaffer, filed, *pro se*, a grievance against his employer, the Kanawha County Board of Education on May 6, 2011.The statement of grievance reads:

> Heavy equipment Oper, PEIA, certified, Heavy equip Operator, tractor trailor Oper. High power light was in ground at Andrews Heights.

As relief Grievant sought:

> Extra pay, Hazard pay, differential pay, ect [sic].

A conference was held at level one and a level one decision denying the grievance was issued on June 7, 2011. Grievant appealed to level two and a mediation session was held on August 19, 2011. Grievant appealed to level three on August 29, 2011. The statement of grievance reads:

> Mechanic at Crede was posted 6-5-2008 [.] I bid on this job my hire date 3-31-08. The job was givin [sic] to a sub I was not ask E1 salary is not adequate for a heavy equipment operator.

As relief Grievant sought:

> F1 service personnel salary schedule, with back pay to 5-25-11 for my educational differential from 3-31-08.

On November 8, 2011, Respondent filed a Motion to Dismiss, arguing the grievance form submitted at level three constituted a new and distinctly different grievance, and that the new statement of grievance was untimely filed. Grievant opposed the dismissal of the grievance.

A level three hearing was convened on the motion to dismiss on November 16, 2011, before Administrative Law Judge (ALJ) Landon R. Brown in the Grievance Board's Charleston, West Virginia office. Grievant was represented at this hearing by Matthew A. Victor, Esquire, Victor, Victor & Helgoe, LLP, and Respondent was represented by James W. Withrow, Esquire, General Counsel. Grievant's counsel was given the opportunity to restate the statement of grievance and stated that the statement of grievance was: "E1 pay grade classification is an inadequate pay grade classification for extra work performed by the skilled grievant outside of the job description of a heavy equipment operator." At the conclusion of the hearing, the parties chose to submit written arguments on the Motion to Dismiss.

Thereafter, the matter was transferred for administrative reasons to ALJ Brenda L. Gould, who issued an Order Denying the Motion to Dismiss on February 29, 2012, holding that "no matter how you read the language on the [May 6, 2011 and August 29, 2011] grievance forms, it cannot be read as a complaint about misclassification or working out of classification. . . [h]owever, it is true that the underlying issue throughout has been Grievant's claim that he is not adequately compensated." ALJ Gould further held that it would serve no useful purpose to remand the grievance to level one after so much time had elapsed, or to make Grievant refile the grievance.

On March 13, 2012, pursuant to ALJ Gould's February 29, 2012 Order, Grievant filed his Statement of Grievance and Relief Requested as follows:

> The Grievant complains about his classification of a Heavy Equipment Operator who routinely performs additional tasks unrelated to, and outside of, said E-1 classification and job description, such as carpentry, masonry, roofing, tree work, mechanics, electrical work, welding, et. The Grievant does not assert that the pay grade assigned to the Heavy Equipment Operator classification is, in and of itself, inadequate. Working, *de facto*, out of his job description and classification, the Grievant should be reclassified to the pay grade consistent with his daily tasks. The Grievant maintains that since he is performing tasks consistent with the minimum F-1 Service Personnel classification, but not included in or required for, and by, his Heavy Equipment Operator job classification and description, the Grievant seeks a re-classification to, as he consistently argued, the F-1 Service Personnel pay grade because of the scope of the tasks performed and the skills necessary for the performance of the same.
>
> In the alternative, the Grievant seeks multi-classification including Welder F-2; Mechanic F-1; Carpenter F-3; for all of which the Grievant is qualified by virtue of his education and training, and which tasks he routinely performs in his current employment of a Heavy Equipment Operator. The Grievant consistently argued that he was trained and qualified to perform (and that he, indeed, performed) jobs and tasks requiring additional and very specific skills (masonry, mechanical, carpentry, welding, roofing, tree work) in addition to risky and unsafe mechanical jobs and tasks, for which he, in contrast to any substitution workers, did not receive adequate, F-1 pay grade, salary.

Thereafter, the matter was transferred for administrative reasons to the undersigned Administrative Law Judge.

A level three hearing on the March 13, 2012 Statement of Grievance was convened on September 19, 2012. At the outset of the hearing, Respondent's general counsel, Mr. James Withrow, orally moved to limit the evidence considered in the grievance and to limit the damages and/or any back pay award based on the timeliness of the filing of the grievance if the grievance is successful. Respondent's counsel further moved to raise the defense of timeliness at level three arguing that the nature of the grievance had

changed over the course of the grievance. Grievant's counsel objected to the raising of the timeliness defense. At the hearing, the undersigned ALJ ruled that, given the procedural history of the grievance, the defense of timeliness could be raised by Respondent at level three. The undersigned ALJ further requested the parties provide written briefs on how the defense of timeliness would affect evidence considered in the matter and any award issued if the grievance is successful.

The grievance became mature on October 22, 2012, after receipt of the parties' briefs on the timeliness issue and proposed Findings of Fact and Conclusions of Law.

Synopsis

Mr. Shaffer's grievance is timely, but is without merit because occasionally performing skilled tasks outside of one's job classification does not render one misclassified *per se*.

Findings of Fact

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact:

1. Mr. Shaffer has been employed as a Heavy Equipment Operator with the Kanawha County Board of Education since 2010.

2. The Kanawha County Board of Education job description for a Heavy Equipment Operator is that "[he/she [r]eports to the supervisor of maintenance for work assignments written and verbal. Maintenance department employees will be required, as needed, to assist in providing general maintenance duties as may be requested by the supervisor." Grievant's Exhibit 1. A Heavy Equipment Operator "operates all heavy

equipment" and is responsible for "[c]leaning and basic service of the equipment operated." *Id.*

3. Since his hire date, Mr. Shaffer, in addition to operating and maintaining heavy equipment, has performed tasks seemingly unrelated to the operation or maintenance of heavy equipment. Mr. Shaffer has assisted masons in pouring concrete, assisted roofers in repairing roofs and assisted electricians.

4. In addition to assisting personnel classified in the task at hand, Mr. Shaffer has performed welding tasks, removed trusses from a building, moved furniture between schools on a box truck, picked up tree limbs and mulched at Kanawha County school playgrounds.

5. Mr. Shaffer holds state certifications as a heavy equipment operator, mechanic and carpenter.

6. It is common practice for other maintenance personnel to perform a variety of tasks and services for the maintenance department similar to those tasks and services performed by Mr. Shaffer that he believes are unrelated to or outside of his classification.

7. Mr. Shaffer did not perform any tasks outside of his classification, nor did he assist any other employee in the performance of general maintenance, in the 15 days prior to the filing of the May 6, 2011 statement of grievance.

8. Mr. Shaffer did not perform any tasks outside of his classification, nor did he assist any other employee in the performance of general maintenance, in the 15 days prior to the filing of the March 13, 2012 statement of grievance.

9. There was an incident precipitating the filing of the original grievance involving high voltage underground electrical lines at Andrew Jackson Middle School.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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).

Respondent raises timeliness as a defense to the March 13, 2012 statement of grievance. Grievant clarified his statement of grievance after a level three hearing on Respondent's motion to dismiss. The clarified March 13, 2012 statement of grievance differed from the two previously filed statements of grievance. Thus, Respondent's procedural due process rights would have been violated had it not been granted the opportunity to raise timeliness as a defense at level three. *See* West Virginia Code § 6C-2-4(c)(2)(the administrative law judge shall conduct all proceedings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process).

Timeliness is an affirmative defense, and the burden of proving the affirmative defense, by a preponderance of the evidence, is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ*., Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

Pursuant to statute, the grievance process shall be initiated:

> [w]ithin 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. . . .

West Virginia Code § 6C-2-4(a)(1).

However, this is a misclassification grievance and:

> *W. Va. Code,* 18-29-2 (1992), allows an employee to contest a misclassification at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance.

Syl. pt. 5, *Martin v. Randolph County Board of Education*, 195 W.Va. 297 (1995).

Thus, Mr. Shaffer's misclassification grievance is timely.

To this end, the undersigned recognizes that "'simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him misclassified *per se*.' *Hatfield, supra*." *Carver v. Kanawha County Bd. of Educ*., Docket No. 01-20-057 (Apr. 13, 2001). Additionally, the undersigned notes that Grievant's job description specifically sets forth that he is to provide general maintenance duties as may be requested by the supervisor. The legislature, in West Virginia Code §18A-4-8(i)(43), established that "'[g]eneral maintenance' means a person employed as a helper to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system."

The statutory definition of general maintenance, read *in para materia* with the heavy equipment operator job description, lends itself to the situation in which grievant finds himself, that is, assisting workers classified in the roles being performed, *e.g.* assisting electricians to perform electrical work, assisting roofers to perform roofing work, and

assisting masons to perform masonry work. The fact that Mr. Shaffer has occasionally performed skilled tasks that are technically outside of his classification, *e.g.* the performance of tree work, mulching playgrounds, welding, removal of trusses and moving furniture, such does not constitute a grievable practice and, as such, Mr. Shaffer's grievance is denied.[1]

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. *Heckler v. Randolph County Bd. of Educ*., Docket No. 97-42-140 (Feb. 28, 1998); *Lynch v. W. Va. Div. of Highways*, Docket No. 97-DOH-060 (July 16, 1997).

3. Pursuant to statute, the grievance process shall be initiated:

> [w]ithin 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

[1] In most instances, when Mr. Shaffer was performing work that may be considered outside of his classification, he was working on a crew which could have included a properly classified employee.

practice giving rise to a grievance. . . .

West Virginia Code § 6C-2-4(a)(1).

4. "West Virginia Code 18-29-2 (1992), allows an employee to contest a misclassification at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance." Syl. pt. 5, *Martin v. Randolph County Board of Education*, 195 W.Va. 297 (1995).

5. "'[S]imply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render him misclassified *per se*.' *Hatfield, supra*." *Carver v. Kanawha County Bd. of Educ*., Docket No. 01-20-057 (Apr. 13, 2001).

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 West Virginia 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 13, 2012

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HEATHER D. FOSTER KITTREDGE
ADMINISTRATIVE LAW JUDGE