THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE HOWES,
Grievant,

v. **Docket No. 2010-1185-LogED**

LOGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, George Howes, is a Bus Operator employed by Respondent, Logan County Board of Education. On February 8, 2010[1], Grievant filed this grievance against Respondent for refusing to allow him to withdraw his bid for Bus Operator of bus #2092. For relief, grievant seeks to be reinstated in his previous Maintenance position, back wages, seniority, and benefits.

Following the level one hearing, a level one decision was rendered on November 19, 2010, denying the grievance. Grievant appealed to level two on November 22, 2010. Grievant perfected his appeal to level three of the grievance process on March 7, 2011. A level three hearing was held on February 9, 2012, before Administrative Law Judge Carrie H. LeFevre[2] at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and by counsel, Robert B. Kuenzel. Respondent appeared by counsel, Leslie K. Tyree.

At the conclusion of the hearing, the parties agreed to submit proposed Findings of Fact and Conclusions of Law by March 16, 2012. Grievant's proposed Findings of

[1] The Superintendent's Office stamp on the form is dated February 8, 2009, which is an obvious clerical error as both the date filed and Grievance Board stamp reflect the year 2010.
[2] This case was assigned to the undersigned Administrative Law Judge on July 12, 2012 for administrative purposes.

Fact and Conclusions of Law were received on March 16, 2012. Respondent mailed its proposed Findings of Fact and Conclusions of Law on March 16, 2012, which were received on March 20, 2012. Therefore, this matter became mature for decision on March 20, 2012.

Synopsis

Respondent moved to dismiss the grievance as being untimely filed at level one, however, grievance was filed within fifteen days as required. Grievant bid on a Bus Operator position with Respondent, but then withdrew his bid prior to being awarded the position. The Respondent decided that Grievant could not withdraw his bid, forcing him to accept the Bus Operator position and causing him to lose his previous Maintenance position. In absence of specific written policy establishing a procedure for withdrawing a bid, an employee may withdraw a bid prior to the time it is accepted by the Board of Education. Accordingly, the grievance is GRANTED.

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 employed by the Logan County Board of Education ("Board") as a Bus Operator. At the time of the events leading to the grievance, Grievant was employed in a Maintenance position.

2. On January 8, 2010, Grievant placed a bid for Bus Operator for bus #2092[3].

[3] Respondent's Exhibit No. 1. The Service Personnel Application is dated January 8, 2009, a typographical error by Grievant. The parties acknowledged that the application was actually made January 8, 2010.

3. Bus #2092 is located in the Man, West Virginia garage and Grievant would have been required to drive a significant distance from his home to the bus garage each day.

4. Grievant bid on this position because he believed he might be allowed to take Bus #2092 from the Logan, West Virginia garage instead, which was close to his home.

5. When Grievant discovered he would not be allowed to take the bus from the Logan garage he decided to withdraw his bid.

6. The bid process is as follows: bids remain open for five working days; bids are then reviewed by personnel staff to rank the applicants according to seniority and qualifications; personnel staff then prepares the proposed personnel schedule; the Superintendent reviews the schedule and forwards it to the Board; at the next Board meeting, the Board reviews for approval the proposed personnel schedule; applicants approved are then notified the day after the Board meeting.

7. The Board meeting at which the Board voted to approve the proposed personnel schedule was held on the evening of January 14, 2011.

8. During the day on January 14, 2011, Grievant submitted a hand-written, signed letter to Teresa Dingess, Personnel Secretary, stating: "I would like to recined(sic) my bid for bus #2092".[4]

9. Ms. Dingess is the person to whom a request to withdraw a bid would be submitted.

[4] Grievant's Exhibit No. 3.

10. Ms. Dingess received the letter and forwarded it to Personnel Director, Leslie Tyree[5].

11. Ms. Tyree refused to allow Grievant to withdraw his bid because the Superintendent had already approved the proposed personnel schedule and it had been circulated to the Board.

12. Grievant was advised he had been awarded the Bus Operator position on January 15, 2010. January 18, 2010 was a holiday. Grievant filed his level one grievance on February 8, 2010.[6]

13. The Respondent has no written policy or rule regarding the withdrawal of a bid.

14. The Respondent could not give an answer on exactly how and when an applicant might withdraw his/her bid.[7]

15. Although the Board receives the personnel schedule prior to the Board meeting, the Board takes no action on the schedule until the meeting.

16. The personnel schedule is a short document and the information regarding the position is only two lines.[8]

17. Grievant had previously been allowed to withdraw bids.

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[5]It is noted Ms. Tyree serves as both Personnel Director and General Counsel for the Logan County Board of Education. Therefore, because of this dual capacity, she made the decision to refuse the bid withdrawal, presided over the level one hearing denying the grievance, represented the Board in the level three hearing, and also was called as a witness in the level three hearing.

[6] Grievant's Exhibit No. 1.

[7] Between the testimony of Ms. Dingess, Superintendent Zigmond, and Ms. Tyree it is unclear whether a bid would have to be withdrawn before the closing of the bid, before the personnel schedule is completed, or before Superintendent Zigmond approved the bid.

[8] Respondent's Exhibit No. 3.

18. Another Board employee, a teacher, had bid on a position and asked to rescind. Her request was presented to the Board and the Board allowed her to rescind.[9]

19. Moss Burgess, a current Board member, had previously bid on a job himself as an employee and was allowed to withdraw his bid on the day of the Board meeting.

20. Respondent's refusal to allow Grievant to withdraw his bid caused him to lose his Maintenance position when he was forced to perform the Bus Operator job.

21. Grievant has had no interruption of employment as he transferred from the Maintenance position to Bus Operator and has remained employed as a Bus Operator with Respondent.[10]

Discussion

Respondent argues the grievance should be dismissed as Grievant failed to timely file his grievance at level one. The burden of proof is on Respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

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 limits for filing a grievance and states:

> Within fifteen days[11] following the occurrence of the event upon which the grievance is based, or within fifteen days of

[9] Grievant's Exhibit No. 2 and testimony of Moss Burgess.
[10] Respondent's Exhibit No. 4.

> 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). *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W.Va. 634, 378 S.E.2d 843 (1989).

Respondent argues Grievant was officially notified he received the Bus Operator position on January 15th, so that is the date his time began to run to file the instant grievance. Contrary to Respondent's assertion, "the overwhelming weight of authority supports the general rule that in the computation of time prescribed by a statute of limitations, the first day or the day upon which the cause of action accrued is to be excluded." *Steeley v. Funkhouser*, 169 S.E.2d 701, 703, 153 W.Va. 423, 427 (1969) (citations omitted). Therefore, day one for the fifteen-day count was actually January 19th, the first full day excluding weekends and holidays, making the deadline to file the grievance February 8th. As the grievance was filed on February 8th, the grievance was timely filed.

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[11] Pursuant to W. VA. CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny 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."

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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant asserts he should have been allowed to rescind his bid because he requested to do so prior to the Board taking action on his bid and others had been allowed to rescind their bids. Respondent asserts that it was too late for Grievant to rescind his bid because he had already been awarded the job, the Board has no

authority to rescind a bid, the personnel schedule was already finalized, and the personnel department has the discretion to decide that once a personnel schedule is finalized it is not to be changed.

Respondent's assertion that it was simply too late for Grievant to withdraw his bid must fail. Grievant had not actually been awarded the job. He had only been selected by the personnel secretary as the winning bid and been approved by the superintendent. Pursuant to W.VA. CODE sections 18-4-10 and 18A-2-7(a), the superintendent's decision, however, is subject to the Board's approval. Therefore, Grievant had not been awarded the job until the Board met to approve him. Respondent cites no authority for the proposition that the Board cannot rescind a bid, and the evidence shows that the Board has, in fact, entertained rescission actions.[12] Further, Respondent had discretion in this matter only insofar as its actions are reasonable, in the best interests of the schools, and not arbitrary and capricious.

Respondent's actions were arbitrary and capricious. Respondent had no policy instructing employees on the timeframe to withdraw a bid. Without any such policy it is impossible for an employee to know precisely how to withdraw a bid. Even the Respondent's personnel department staff, superintendent and counsel appear to be confused on that issue. In testimony none were able to answer precisely when a bid might be withdrawn. Furthermore, Respondent had previously allowed other employees to withdraw their bids. While the circumstances of those prior withdrawals may not have been exactly the same, again, that simply furthers the capriciousness of Respondent's

[12] Grievant's Exhibit No. 2.

actions because it is impossible to tell under which circumstances Respondent would accept a withdrawal.

Additionally, Respondent's actions were certainly unreasonable and not in the best interests of the schools. It defies logic why an employer would wish to force an employee to accept a job the employee clearly stated he no longer wanted when there were other applicants available to fill the position. It appears that members of the personnel staff felt it would be too inconvenient for them to allow the withdrawal. Significant evidence was presented about the timing and nature of the paperwork presented to the Board when seeking Board approval of the applicant. Several witnesses testified about how difficult it would be to redo the paperwork so late in the process. However, it appears that the additional paperwork would have been no more than changing two small lines on the two-page personnel schedule. Conversely, the refusal to accept the bid withdrawal required Respondent to completely repost the position when the Grievant bid into another job three weeks later.

Despite the testimony of Superintendent Zigmond, it does not appear it would have been difficult to determine the next applicant in line to be chosen for the job. Presumably, in determining who was the most qualified and senior applicant, the bids should have been ranked, making it fairly easy to identify the next applicant in line, especially since the determination had only been made a few days prior. Even if there was not enough time to select a new winning bid on the day of the Board meeting, a new candidate could have been presented to the Board at the next meeting. Alternatively, since rescission actions obviously have been decided by the Board

despite the testimony of Respondent's employees, the issue could have been presented to the Board to approve or deny.

In absence of a specific policy or law governing when an employee may withdraw a bid, it would have been reasonable for Respondent to refer to the general principles of contract law. That law is clear that an offer may be withdrawn before acceptance and cannot be accepted once withdrawn. Grievant's bid was an offer of his services. Acceptance of that offer could only be made by the Board. Therefore, since Grievant notified Respondent before the Board met that he was rescinding his bid, there was no longer an offer for Respondent to accept. Under this principle, the Respondent should not have forced Grievant to accept the position for which he had withdrawn his bid.

The West Virginia Supreme Court has addressed comparable circumstances in another grievance case. See *West Virginia Dep't of Env't. Prot. v. Falquero*, No. 11-0629 (W.Va. March 22, 2012)[13]. In that case, the question was whether a state employee could withdraw her resignation. The Court made clear that the general principles of contract law do apply and that the resignation could be withdrawn because the employer had not yet accepted the resignation. *See Id*. While the facts of the case are different, the legal analysis involved is certainly applicable to this case and would further mandate Respondent allow Grievant to withdraw his bid and remain in his Maintenance position.

[13] In this recent decision, the West Virginia Supreme Court affirmed the decisions of the West Virginia Public Employees Grievance Board and Circuit Court finding the grievant should have been allowed to withdraw her resignation and reinstating her to her former position.

Conclusions of Law

1. The burden of proof is on Respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

2. 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 limits 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. . . .

3. 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). *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W.Va. 634, 378 S.E.2d 843 (1989).

4. "[T]he overwhelming weight of authority supports the general rule that in the computation of time prescribed by a statute of limitations, the first day or the day upon which the cause of action accrued is to be excluded." *Steeley v. Funkhouser*, 169 S.E.2d 701, 703, 153 W.Va. 423, 427 (1969) (citations omitted).

5. Grievant timely filed his level one grievance.

6. 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

7. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

8. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

9. Grievant proved by a preponderance of the evidence that Respondent's refusal to accept the withdrawal of his bid was arbitrary and capricious and an unreasonable abuse of discretion.

Accordingly, the grievance is **GRANTED**. The Logan County Board of Education is Ordered to immediately reinstate Grievant Howes to his former Maintenance position for the Logan County Board of Education. Respondent shall pay Grievant the difference between his Maintenance pay and his Bus Operator pay, if any, plus statutory interest. Respondent shall also reinstate to Grievant all benefits to which he would have been entitled as Maintenance, including seniority.

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: July 31, 2012

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Billie Thacker Catlett
Administrative Law Judge