WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOHN FREDERICK LOCKARD
Grievant,

v. **Docket No. 2012-0655-MinED**

MINGO COUNTY BOARD OF EDUCATION.
Respondent.

D E C I S I O N

John Frederick Lockard, Grievant, filed this grievance against his employer the Mingo County Board of Education ("MCBE"), Respondent, on October 31, 2011. Grievant's level one statement of grievance states, "was told to cut grass at Mingo Central High School when a groundsman is employed at the school [.] W. VA. CODE § 18A-4-8 (43)." For relief, Grievant indicates he wanted Respondent to, "hire some handyman to cut all the grass[.]"[1]

A level one conference was held with the Superintendent's Designee, Rob Bobbera, Mingo County Schools Assistant Superintendent, on December 6, 2011. On December 29, 2011, the level one decision issued denied Grievant's claim. Grievant appealed to level two on December 23, 2011, apparently prior to receipt of the written level one decision.

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[1] Grievant's grievance form is worded differently at level two and level three. The difference between the wording at level one and two is not significantly different. However, the statement of grievance and relief sought as presented at level three is more pronounced. Respondent takes exception with the alteration(s) of the grievance, noting the difference is more than semantics. Grievant's level three Statement of Grievance changed to, "Grievant alleges that Respondent is violating W.Va. Code 18A-4-8 by assigning him duties (grass mowing), which fall outside his classification title (General Maintenance)." The relief sought changed to "Grievant seeks relief from the out of classification duties (grass mowing) by employment of additional employees as Handyman/Groundsman to perform necessary grass mowing or assignment of those duties to employees who hold a classification title for which grass mowing is appropriate." Respondent's objection is noted, see discussion *infra.*

Level two mediation was conducted on May 14, 2012. Grievant appealed to level three on May 15, 2012. A level three hearing was held before the undersigned Administrative Law Judge on October 29, 2012, in the Grievance Board's Charleston office. Grievant appeared in person and with his representative, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent, Mingo County Board of Education, appeared by its counsel, Rebecca Tinder, Esquire, Bowles Rice, LLP. This matter became mature for consideration on December 3, 2012, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals.

Synopsis

Grievant maintains that care of grounds does not fit with the duties of a general maintenance employee. Grievant contends he should not be required to cut grass and that said activity is the prescribed duties of a designated classification. Grievant contends the amount of grass cutting he performs goes well beyond "incidental" and grass cutting is not a "crossover" duty, i.e., one that fits within the duties of his classification. Respondent maintains it is within its purview to assign various duties to a maintenance employee which includes cutting grass.

Respondent has consistently construed grass mowing duties as part of general building maintenance. All Maintenance Department employees cut grass, some employees more than others, but all classifications participate in mowing activities of Respondent's properties, from time to time, as other priority duties allow. Respondent's assignment of grass cutting duties is not found to be unlawful. This Grievance is DENIED.

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

Findings of Fact

1. Grievant is employed by Respondent as a General Maintenance employee.

2. Grievant transferred from his employment with Respondent as a Custodian to a General Maintenance employee beginning July 1, 2010. Grievant is employed as a 261 day General Maintenance employee, which means he works year round.

3. From the time that Grievant transferred into his duties under the General Maintenance classification, grass mowing of almost all school board property was, from time to time, assigned to Grievant.

4. Grievant performed his various grass mowing assignments without complaint from July 1, 2010 until October 31, 2011.

5. Grievant's immediate supervisor, Ricky Hinkle, is the Foreman of the Maintenance Department.

6. Ricky Hinkle works closely with the Secretary in the Maintenance Department, Melissa Endicott, in determining the maintenance needs of the county school system and the assignment of duties. Grass mowing duties are considered part of general building maintenance.

7. The duties of Grievant since July 1, 2010, when he became employed in General Maintenance, have never changed. Those duties include helping the skilled maintenance employees, such as the masons, plumbers, electricians, carpenters and foremen, perform their specialized duties; and performing more generalized maintenance

duties such as delivering supplies to schools, lawn mowing and snow removal during "down time". "Down time" refers to the time when there is not a need to assist a skilled maintenance employee, or time when there are no specific work orders for the day.

8. The grass mowing season begins sometime in March or April and usually ends in October of each year.

9. Grievant had been assigned grass mowing duties at several of Respondent's properties between July 1, 2010 and October 31, 2011, that he completed without recognized objection. Among other duties, there were approximately thirteen (13) school properties where Grievant had occasion to cut the grass on a rotating cycle.

10. In October of 2011, Grievant, along with another maintenance employee, was assigned grass mowing duties at Mingo Central High School (MCHS). Grievant objected to mowing grass at MCHS.

11. At the time relevant to Grievant being assigned to mow grass at MCHS, there was a Custodian/Groundsman employee specifically assigned to MCHS.

12. Employee, Mark Miller, is multi-classified as a Custodian/Groundsman. Mark Miller is a service personnel employee assigned to MCHS.

13. For the summer months of June and July, the period of greatest need for grass mowing, Respondent hires a summer grass cutting crew to mow grass at all of the Board's schools, including MCHS, as well as "weed-eat," or trim, the peripheral areas and hillsides of the Respondent's properties.

14. Assignments for grass cutting and other maintenance jobs to be performed by the maintenance employees assigned to the Maintenance Department are made by Mr. Hinkle and Ms. Endicott.

15. Assignments for grass cutting, groundsman activities and custodial work to be performed by Mark Miller, the Custodian/Groundsman at MCHS, are made by the MCHS principal.

16. Because of the size of the school and the school grounds at MCHS, including the athletic complex, Mark Miller would be unable to keep up with all the grass mowing duties at MCHS and complete the other duties he is responsible to perform.

17. During the grass cutting season, Grievant was assigned to cut grass during a significant portion of his time on the job.

18. Outside the summer months, it is Respondent's longstanding practice to assign grass mowing duties to service personnel in the maintenance department. At times skilled maintenance employees, including the masons, plumbers, electricians, carpenters and foremen, also perform grass mowing duties, as needed, during their "down time," or time when they are not needed to complete a work order requiring their particular skilled labor.

19. In addition to the prior practices of Respondent in assigning duties to service personnel, as outlined above, there are no written job descriptions for the General Maintenance, Handyman or Groundsman classifications other than the definitions found in WEST VIRGINIA CODE § 18A-4-8.

20. Respondent has consistently construed grass mowing duties as part of general building maintenance. The phrase, "repairs to equipment and buildings" has been interpreted by Respondent to mean "keeping up the facilities," which include the grounds of Respondent's properties.

21. All Maintenance Department employees cut grass, some employees more than others, but virtually all classifications participate in mowing activities of Respondent's properties as other priorities allow.[2]

22. General Maintenance employees are compensated at a higher pay grade than those in the Handyman and Groundsman classifications. Grievant was and is compensated at his general maintenance rate while mowing grass.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

The first issue to address is whether Grievant has raised a new grievance at level three over the objection of Respondent. The distinction between the level one grievance statement and the level three statement can be interpreted differently by reasonable individuals. The difference may or may not be semantics.

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[2] There may be isolated exceptions, but it was generally recognized as accurate that all Maintenance Department employees cut grass.

Grievant performed his assignment without complaint from July 1, 2010 until October 31, 2011. Not until Grievant was assigned to assist in mowing the grass at MCHS on or about October 31, 2011, did he initiate a formal complaint. Pursuant to the original grievance statement, Grievant did not grieve any grass mowing assignment other than that at MCHS. The level three grievance statement contests Respondent's ability to assign Grievant "any" grass mowing duties, contending the work is outside his classification. Respondent objects to alteration in the grievance. The alteration in the grievance statements and relief requested changes "the scope" of the grievance, as well as the defenses which Respondent can logically raise.

Respondent argues the alteration in the grievance is substantial. Respondent highlights that an employee may not "bootstrap" a challenge to an earlier personnel action that was not timely grieved by timely challenging a subsequent personnel decision and arguing that it somehow relates back to the earlier action. *Redd v. McDowell County Bd. of Educ.*, Docket No. 2012-0419-McDED (July 18, 2012). Respondent extrapolates, Grievant cannot bootstrap a challenge to all grass mowing duties when his complaint, and testimony concerning his complaint, clearly indicated that his level one grievance was <u>only</u> complaining about the assignment of grass mowing duties at MCHS.[3]

The undersigned is uniquely aware that the grievance process should not be a legal quagmire, such would inhibit the intent of this administrative review process. Further, it is also proper for a grievant to provide adequate notification of issue(s) in dispute. Prior to

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[3] Further, Respondent highlights that this Grievance Board is without authority, statutory or otherwise, to order the Respondent to, "hire some handyman to cut all the grass," as requested by Grievant in his level one grievance form.

the 2007 and 2008 legislative change to the grievance procedure, the bar to materially altering a grievance was recognized as stated in the West Virginia Supreme Court of Appeals ruling in *Hess v. West Virginia Department of Health and Human Resources*, 189 W.Va. 357, 432 S.E.2d 27 (1993).[4] No court of competent jurisdiction has ruled on the issue subsequent to the sweeping 2007 Legislative changes to West Virginia Public Employees Grievance Procedure.[5] The changes to the grievance procedure were extensive; no definitive ruling has been issued setting forth the finite point that a grievant is barred from significantly altering his stated grievance under the current grievance procedure.

With regard to the instant grievance, the alteration in the stated grievance forms can be viewed as the difference between a layman's attempt to state the dispute and that of a trained legal mind. It is perceived that Grievant's intent has always been to bring forth a grievance regarding his obligation to perform grass cutting assignments at Respondent's discretion. Grievant did not elegantly put forth a legal argument as to why he should not have to cut grass on the form he completed, *pro se*.[6] While Respondent was aware of the

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[4] The West Virginia Supreme Court of Appeals ruling in *Hess v. West Virginia Department of Health and Human Resources*, 189 W.Va. 357, 432 S.E.2d 27 (1993), states, "the final level of the grievance procedure where alteration of the substance of a grievance under W. VA. CODE § 29-6A-3(j) can occur is at Level III." At the time of this decision, the grievance process had four levels. This case sheds limited light on the issue relevant to current procedure. It is not clear at what stage of the current grievance process a grievant is barred from materially altering a grievance claim.

[5] In 2007, W. VA. CODE §§ 18-29-1 to 18-29-11 and W. VA. CODE §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. VA. CODE §§ 6C-2-1 to 6C-2-7 and W. VA. CODE §§ 6C-3-1 to 6C-3-6 (2007). The 2007 legislation abolished the former Education and State Employees Grievance Board, replacing it with the current West Virginia Public Employees Grievance Board. Changes to the grievance procedure were extensive.

[6] Grievant's level one form was written in first person, hand written and signed by Grievant. No representative is identified on the form. It is perceived that this form was completed by Grievant *pro se.*

nucleus of Grievant's contention, the scope of the legal argument was not illuminated until the level three grievance form.[7] A primary concern is whether there is a significant difference in the grievance originally filed at level one and the claim Grievant, by counsel, seeks to litigate at level three. The undersigned is persuaded in the circumstances of this case no injustice or material harm transpires as a result of the alterations in Grievant's statement of grievance.

Respondent was aware of each of Grievant's statements of grievance. There is no undue surprise. Respondent had notice and opportunity to seek clarification and/or a declaratory judgment as to the scope of issue(s) in dispute. Grievant's intent has always been clear, while the legal rationale has matured with the assistance of legal counsel. The central issue of the instant grievance is substantially similar as stated by all the grievance forms. In the facts of this case, Respondent had ample time to prepare a defense for the grievance set forth by Grievant's level three form. The distinction between the grievance forms relevant to the instant grievance is not found to be a bar from proceeding with a proper decision on this matter.

Grievant maintains that care of grounds does not fit with the duties of a general maintenance employee, plain and simple. Further, Grievant contends the amount of grass cutting he performs goes well beyond "incidental" and grass cutting is not a "crossover" duty, i.e., one that fits within Grievant's classification as well as others. Respondent disagrees. Respondent maintains its actions are lawful, reasonable and well within the recognized purview of its authority.

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[7] The level three form is typed and signed by Grievant's legal counsel. The form was faxed from counsel's office. It provides legal cites in the statement of grievance and identifies a relief which is more readily achieved within the authority of the PEG Board.

West Virginia Code § 18A-2-5 provides that a school service employee's duties correspond with his/her classification title as defined in WEST VIRGINIA CODE § 18A-4-8. According to West Virginia Code § 18A-4-8:

> (43) "*General 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;
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> (46) *"Groundsman"* means a person employed to perform duties that relate to the appearance, repair and general care of school grounds in a county school system. Additional assignments may include the operation of a small heating plant and routine cleaning duties in buildings;
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> (47) "*Handyman*" means a person employed to perform routine manual tasks in any operation of the county school system;

Service workers cannot be assigned to perform duties not contemplated by the statutory description of their currently-held classifications or not stated in their official job descriptions. *See Britton v. Preston County Bd. of Educ.*, Docket No. 90-39-015 (Aug. 31, 1990). However, "county boards of education may expand upon the W. VA. CODE §18A-4-8 classification definitions in a manner which is consistent with those definitions. *Brewer v. Mercer Co. Bd. of Educ.*, Docket No. 91-27-002 (March 30, 1992)." *Pope and Stanley v. Mingo County Bd. of Educ.*, Docket No. 91-29-068 (July 31, 1992); *Grugin v. Marion County Bd. of Educ.*, Docket No.02-24-244 (Dec. 4, 2002). There is no formal job description utilized by Respondent for Grievant's position. Thus, in the facts of this case, the question becomes whether Grievant's grass cutting duties are inconsistent with the statutory classification definition of his job title.

The undersigned is not persuaded that the grass mowing activities performed must be classified as anything other than that of "general maintenance." "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. VA. CODE § 18A-4-8." *Fogus v. Greenbrier County Bd. of Educ.*, Docket No. 89-13-604 (Apr. 30, 1990), citing *Smith v. Mingo County Bd. of Educ.,* Docket No. 29-88-204 (Feb. 23, 1989). *See* also *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999).

Relevant statutory classification descriptions do not reserve the lawn mowing duties to the Groundsman or Handyman classifications, nor exempt the Grievant from performing those duties. *See Walker v. Fayette County Bd. of Educ.*, Docket No. 2009-0195-FayED (Oct. 20, 2009). The practice of Respondent has been to interpret grass mowing duties to be included in the general maintenance classification and the same is not inconsistent with the definition found in W. VA. CODE § 18A-4-8.

The long and short of this matter is that the phrase, "repairs to equipment and buildings" has been interpreted by Respondent to mean "keeping up the facilities," which includes the grounds of Respondent's properties. Respondent has consistently construed grass mowing duties as part of general building maintenance. All Maintenance Department employees cut grass, some employees more than others, but all classifications participate in mowing activities of Respondent's properties as other priority duties allow. It is not established that Respondent has expanded upon Grievant's duties to the degree so inconsistent with his classification as to be incompatible with the statutory description of

the classification.[8] Respondent has not provided Grievant with an official job description. Such a document might have eliminated this grievance. Nevertheless, the facts of this grievance do not demonstrate that Grievant is unlawfully being required to perform duties outside of his classification. The job responsibilities of Grievant include grass mowing, as time permits, when there are insufficient employees to complete the work, including grass mowing at MCHS.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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.

[8] With regard to the sweeping ramifications on Respondent's future conduct, Grievant's position is ill-advised relevant to long term effect. If Grievant is correct and grass mowing can only be assigned to service personnel classified in the Handyman or Groundsman classifications, those positions, which are paid at a lower pay grade than that of general maintenance, it is conceivable that Respondent would be motivated or required, to implement changes during personnel season to reduce the number of general maintenance employees and increase the number of employees in the Handyman and/or Groundsman classifications.

92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. "A county board of education may utilize its own expanded job descriptions for various service personnel positions but those descriptions must be consistent with and not contrary to those contained within W. VA. CODE § 18A-4-8." *Fogus v. Greenbrier County Bd. of Educ.*, Docket No. 89-13-604 (Apr. 30, 1990), citing *Smith v. Mingo County Bd. of Educ.,* Docket No. 29-88-204 (Feb. 23, 1989). See also *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999).

3. Relevant statutory classification descriptions do not reserve lawn mowing duties to the Groundsman or Handyman classifications, nor exempt Grievant from performing those duties. *See Walker v. Fayette County Bd. of Educ.*, Docket No. 2009-0195-FayED (Oct. 20, 2009).

4. Grievant's assigned duties are encompassed within the job description of General Maintenance, as set forth in the statute and Respondent's longstanding interpretation of the responsibilities outlined in the statute. It has not been established that the grass mowing activities performed must be classified as anything other than that of general maintenance.

5. Grievant is appropriately classified to be assigned grass mowing duties.

6. Grievant has failed to establish that Respondent is in violation of any applicable code, rule or regulation.

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 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: May 10, 2013

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Landon R. Brown
Administrative Law Judge