

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAULA BRINKLEY-SIMPKINS,

Grievant,

v.

Docket No. 2015-0429-MerED

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Paula Brinkley-Simpkins, filed a level one grievance against her employer, Respondent, Mercer County Board of Education, dated October 13, 2014, stating as follows: “[o]n September 9, 2014, a retired cook was hired as a substitute cook. The following evening, she taught a child nutrition class, which I had taught in prior school years. Grievant contends that she should have been offered that position pursuant to West Virginia Code 18A-4-8b(c) and 18A-4-16(6).” As relief sought, “Grievant seeks compensation for lost wages with interest and the opportunity to teach such classes in the future.”

A level one hearing was conducted on December 16, 2014, and denied by decision issued January 5, 2015. Grievant appealed to level two on January 16, 2015, and a mediation was conducted on April 15, 2015. Grievant perfected her appeal to level three on April 27, 2015. A level three hearing was conducted by the undersigned administrative law judge on August 24, 2015, at the Raleigh County Commission on Aging in Beckely, West Virginia. Grievant appeared in person and by counsel, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent, Mercer County Board of Education, appeared by counsel, Kermit J. Moore, Esquire, Brewster,

Morhous, Cameron, Caruth, Moore, Kersey & Stafford, PLLC. This matter became mature for decision on October 5, 2015, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a cook. Grievant asserts that Respondent improperly hired an independent contractor to perform a training that had most recently been included in the regular duties of the Nutritional Director, but that Grievant had previously performed as an extracurricular duty. Respondent argues that Grievant was not entitled to the assignment, that it had previously been an extra-duty assignment, and that it was permitted by law to hire an independent contractor to teach the class as it was a one-time assignment. While Grievant proved that the assignment had been extracurricular when she last held it years ago, the evidence demonstrated that the position ceased being an extracurricular assignment when it became the regular responsibility of the Nutritional Director. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, this 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 regularly employed by Respondent as a Cook III at Pikeview High School.
2. In or about the 2009-2010 school year, Grievant bid on a posting for the

job of teaching new and substitute cooks how to perform the functions of the job.¹ Grievant was selected for the position. Grievant taught the class as needed during more than one school year. However, the record is unclear as to the years during which Grievant taught the class. Grievant estimated that she taught the class about six times.²

3. When Respondent hired Pam Reed as its Nutritional Director, she began to teach the instructional class for the cooks. Such became one of Ms. Reed's regular duties, and no one else taught the class during her tenure. The record of this case is silent as to when Ms. Reed was hired by Respondent.

4. Pam Reed unexpectedly resigned from her job as Nutritional Director in August 2014. At that time, an instructional class for new and substitute cooks was scheduled to be held on September 3, 4, 10, and 19, 2014. Upon Ms. Reed's resignation, the Respondent had no one to teach the upcoming class.

5. Respondent contacted Barbara Lambert Powers and hired her to teach the instructional class on September 3, 4, 10, and 19, 2014.³ Ms. Powers was a retired employee who had been employed as a cook and had taught the instructional class to cooks when she worked for Respondent. However, the record is unclear as to when Ms. Powers taught this class in the past.

6. On September 9, 2014, Ms. Powers was hired by Respondent as a

¹ Neither the posting for this position, nor any contract or pay records from this employment was presented at the level three hearing.

² See, Grievant's testimony, lower level hearing.

³ The last name of the person hired to teach the class in September 2014 is apparently disputed. Grievant and Respondent have referred to her as Barbara Hawkins, Barbara Hawks, Barbara Lambert, and Barbara Powers. It is noted that this person was not called as a witness at the level three hearing. However, the pay records associated with her payment for teaching the instructional class identifies her as Barbara E. Powers. Accordingly, such is how she will be identified herein.

substitute cook. It does not appear from the record that Ms. Powers reported to work as a substitute cook during the time she taught the instructional class.

7. Respondent did not post, or otherwise announce, the job of teaching the instructional class. No one applied for the position, and no interviews were conducted. Ms. Powers' name came up when administration was "brainstorming" about who could teach the instructional class. Thereafter, someone from Mercer County Schools contacted Ms. Powers, and offered her the job.⁴ It does not appear from the evidence presented that anyone else was contacted about taking the job. Grievant was not approached about teaching the instructional class.

8. Ms. Powers taught the instructional class from 4:00 p.m. to 8:00 p.m. on September 3, 4, and 10, 2014, and from 9:00 a.m. to 1:00 p.m. on September 19, 2014.⁵

9. Respondent hired a new Nutritional Director to fill the vacancy left by Ms. Reed's resignation in or about October 2014.⁶ It is unknown when such occurred. Nonetheless, the evidence presented suggests that the Nutritional Director remains responsible for teaching the instructional class.

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. § 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,

⁴ See, testimony of Joy Hubbard, Treasurer, lower level hearing.

⁵ See, Grievant's Exhibit 3, pay records.

⁶ See, testimony of Joy Hubbard, Treasurer, lower level hearing.

1988). "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).

Grievant argues that the job of teaching the instructional class for cooks was an extracurricular assignment, and as she was the last service personnel employee to hold that position, she was entitled to the same in September 2014 instead of Ms. Powers. Respondent, however, argues that the instructional class was a one-time, special assignment, and that it had the right to hire an independent contractor to teach it. Respondent further argues that the position was never an extracurricular assignment, and that Grievant was not entitled to the assignment. Respondent characterized the position as an extra-duty assignment when Grievant held the same years ago.

The parties do not dispute that the Nutritional Director has taught the instructional class as part of her duties for several years. The parties also do not dispute that Grievant was the last employee to teach the class before that responsibility was given to the Nutritional Director, and that she taught the class until she resigned her employment in August 2014. The parties dispute, however, the type of assignment teaching the instructional class was in September 2014, and when Grievant last taught the class. Respondent asserts that it was an extra-duty assignment when Grievant last taught the class, but Grievant argues that it was an extracurricular assignment. Respondent further

argues that in September 2014, teaching the class was a one-time, special assignment given that the position of Nutritional Director was vacant. Neither party disputes that the new Nutritional Director has taught the class at all times after September 2014.

The designation given to this assignment is important because it affects how the position was to be filled. No documents pertaining to Grievant being hired to teach the class in or about the 2009-2010 school year were presented as evidence at the level three hearing. As such, the undersigned does not know how the position was identified, if Grievant had a contract for the assignment, and how Grievant was paid for this work. Further, this lack of evidence is why the undersigned does not know exactly when Grievant bid on and received the position, and how long she held the position. However, Grievant argues that when she held the position, it was an extracurricular assignment. The job was posted, she bid on it, and was selected for it because she had the greatest seniority. Grievant further argues that she taught the class as needed over the course of several years, and it was never reposted. Grievant also asserts that she was the only employee who taught the class from the time she was selected until the Nutritional Director took over that responsibility. The West Virginia Code defines “extracurricular assignments,” as follows:

. . . [e]xtracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

W. Va. Code § 18A-4-16(1). Further, regarding the filling of extracurricular assignments, the West Virginia Code states the following:

The board shall fill extracurricular assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

W. Va. Code § 18A-4-16(5). The Code further states that,

[a]n employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b of this article.

W. Va. Code § 18A-4-16(6).

Respondent argues that the position Grievant had teaching the instructional class for cooks was an extra-duty assignment, not an extracurricular assignment, and that she was not entitled to the position in September 2014. The Code states the following regarding extra-duty assignments:

(f) Extra-duty assignments-

(1) For the purpose of this section, “extra-duty assignment” means an irregular job that occurs periodically or occasionally such as, but not limited to, field trips, athletic trips, proms, banquets and band festival trips.

(2) Notwithstanding any other provisions of this chapter to the contrary, decisions affecting service personnel with respect to extra-duty assignments are made in the following manner:

(A) A service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments. The cycle is then repeated.

(B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used if the alternative procedure is approved both by the county board and by an affirmative vote of two-thirds of the employees within that classification category of employment.

W. Va. Code § 18A-4-8b(f).

Based upon the evidence presented, it appears that when the Grievant held the assignment of teaching the instructional class for the cooks, it was an extracurricular assignment. Respondent did not dispute that years ago Grievant was awarded the assignment after it was posted and she bid on the same. Further, Respondent does not dispute that Grievant taught the class during evening hours multiple times over the course of several years without having to bid on it again. It is also undisputed that no other employee taught the class while Grievant had the assignment of teaching it. While no contract or posting was presented as evidence at the level three hearing, the position, as described, is consistent with the definition of an extracurricular assignment as set forth by statute. See, *Wilt and McMillan v. Marshall County Bd. of Educ.*, Docket No. 2014-1757-CONS (Aug. 20, 2015). Moreover, the description of the assignment Grievant held is inconsistent with that of an extra-duty assignment. For example, the assignment was

posted, it was not given to other employees on a rotating basis, and it does not appear to have been an irregular job.

However, while the assignment was once an extracurricular assignment, it ceased to be when the duty of teaching the instructional class became a regular responsibility of the Nutritional Director. The assignment was no longer a stand-alone position. Grievant did not dispute that the Nutritional Director became responsible for teaching the class, and Grievant did not file a grievance when the assignment was taken from her years ago. The Nutritional Director taught the class each time it was offered during her tenure. Then, the Nutritional Director abruptly resigned shortly before the class was to be held. Such is when the Respondent contracted with Ms. Powers to teach the class in September 2014. A new Nutritional Director was hired in October 2014, and that person resumed the responsibility of teaching the class. Upon information and belief, only the Nutritional Director has taught the class each time it was offered since that time. Therefore, the lack of a Nutritional Director in September 2014 caused there to be a one-time need to hire someone to teach the instructional class for the cooks.

The issue now becomes whether Respondent was permitted to contract with a non-employee to teach the four-day class that one time. “A board of education is a quasi public corporation, existing only under statute, having only the powers given by statute and such implied powers as are absolutely necessary to execute such express powers. It cannot engage in business or make contacts outside its functions touching education.’ *Herald v. Bd. of Educ.*, 65 W. Va. 765, 65 S.E. 102 (1909). Pursuant to W. Va. Code § 18-5-5 boards of education have the right to enter into contracts.” *Jones v. Braxton County Bd. of Educ.*, Docket No. 00-04-090 (July 28, 2000). “However, ‘[t]he contractual

scheme of employment for school personnel does not allow for the hiring of independent contractors to perform the full-time regular duties of school service personnel positions. See [*State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176, 475 S.E. 2d 176 (1996)]; *Ganoe v. Hampshire County Bd. of Educ.*, Docket No. 97-14-229 (July 30, 1997); *Dempsey v. Fayette County Bd. of Educ.*, Docket No. 98-10-357 (Dec. 8, 1998).’ *Jones, supra.*” *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003).

“There is nothing in Code §§ 18A-4-8 or 18A-4-8b which requires a board of education to guarantee overtime work assignments to service personnel, nor is there anything which prevents a board of education from contracting out [such] services. W. Va. Code § 18-5-5; *Barnisky/Shafer v. Pocahontas County Bd. of Educ.*, Docket No. 93-38-027 (Nov. 22, 1993), citing *Herald v. Board of Educ.*, 65 W. Va. 765, 65 S.E. 102 (1909).’ *Dempsey v. Fayette County Bd. of Educ.*, Docket No. 98-10-357 (Dec. 8, 1998). *Dempsey* specifically found that the holding in *Boner, supra*, did not apply to situations where the work to be performed by the contract employees did not amount to ‘full-time regular duties’ of school service personnel.” *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003). Further, “[b]oards of education do not have to offer short term, specialized assignment to regular or substitute employees where it can present a sound reason for not doing so.” *Kirk, et al., v. McDowell County Bd. of Educ. and W. Va. Dep’t of Educ.*, Docket No. 2010-0603-CONS (Dec. 1, 2011), citing *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003).

Respondent hired Ms. Powers as an independent contractor to teach the instructional class that one time in September 2014. She was not hired to perform any

other duties of the Nutritional Director, or any other employee. The class was taught after regular school hours on four days in September. Ms. Powers was paid for twenty hours of work, including four hours of prep time. Ms. Powers was not employed by the Respondent at the time she contracted to teach the class. Ms. Powers was paid \$383.20, in one installment, for her work, as demonstrated by copies of her invoice and pay record.⁷ Given that teaching the instructional class for cooks in September 2014 was a one-time, specialized, short-term assignment created only by the abrupt resignation of the Nutritional Director who was solely responsible for it, Respondent was permitted to contract with Ms. Powers to teach the class. Accordingly, the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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).

2. “Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight

⁷ See, Grievant’s Exhibit 3.

[§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.” W. Va. Code § 18A-4-16(1).

3. “An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b of this article.” W. Va. Code § 18A-4-16(6).

4. Grievant proved that years ago she held the extracurricular assignment of teaching the instructional class for the cooks. However, Grievant failed to prove that she was entitled to teach the class in September 2014 when the school lacked a Nutritional Director.

5. “The contractual scheme of employment for school personnel does not allow for the hiring of independent contractors to perform the full-time regular duties of school service personnel positions. See [*State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176, 475 S.E. 2d 176 (1996)]; *Ganoe v. Hampshire County Bd. of Educ.*, Docket No. 97-14-229 (July 30, 1997); *Dempsey v. Fayette County Bd. of Educ.*, Docket No. 98-10-357 (Dec. 8, 1998).’ *Jones, supra.*” *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003).

6. “There is nothing in Code §§ 18A-4-8 or 18A-4-8b which requires a board of education to guarantee overtime work assignments to service personnel, nor is there anything which prevents a board of education from contracting out [such] services. W. Va. Code § 18-5-5; *Barnisky/Shafer v. Pocahontas County Bd. of Educ.*, Docket No. 93-38-027 (Nov. 22, 1993), citing *Herald v. Board of Educ.*, 65 W. Va. 765, 65 S.E. 102 (1909).’ *Dempsey v. Fayette County Bd. of Educ.*, Docket No. 98-10-357 (Dec. 8, 1998). *Dempsey* specifically found that the holding in *Boner, supra*, did not apply to situations where the work to be performed by the contract employees did not amount to ‘full-time regular duties’ of school service personnel.” *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003).

7. “Boards of education do not have to offer short term, specialized assignments to regular or substitute employees where it can present a sound reason for not doing so.” *Kirk, et al., v. McDowell County Bd. of Educ. and W. Va. Dep’t of Educ.*, Docket No. 2010-0603-CONS (Dec. 1, 2011), citing *Goins v. Mercer County Bd. of Educ.*, Docket No. 02-27-317 (Jan. 15, 2003).

8. Teaching the instructional class for the cooks ceased being a stand-alone extracurricular assignment when it became one of the regular responsibilities of the Nutritional Director. The abrupt resignation of the Nutritional Director in August 2014 created the one-time, specialized, short-term assignment of teaching the instructional class for the cooks in September 2014. As such, Respondent was permitted to contract with Ms. Powers, an independent contractor, to teach the class that one time.

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 (eff. July 7, 2008).

DATE: November 6, 2015.

Carrie H. LeFevre
Administrative Law Judge