

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**KENZIE CONLEY,
Grievant,**

v.

DOCKET NO. 2016-1034-LogED

**LOGAN COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Kenzie Conley, filed a grievance against his employer, the Logan County Board of Education, on November 12, 2015. The statement of grievance reads: “[a]s per state law: Posting # 2016-286. Was available October 22, 2015 to October 29, 2015. Was available at the Board’s office, phone hotline and online via Board’s website. As per past practice; postings have always been available at each garage. Employees were never notified of the changes.” As relief Grievant sought, “[r]epost job posting #2016-286 and add to county policy requiring job postings to be made available at each garage (Logan, Chapmanville and Man, WV) behind the already available, lockable, glass bull[e]tin boards. Grievant wishes to ammend [sic] grievance to ask for back pay to the date that grievant should have been awarded shop run.”

A conference was held at level one on December 1, 2015, and a level one decision denying the grievance was issued on December 21, 2015. Grievant appealed to level two on January 6, 2016, and a mediation session was held on March 21, 2016. Grievant appealed to level three on March 28, 2016, and a level three hearing was held before Chief Administrative Law Judge Billie Thacker Catlett on June 8, 2016, at the Grievance Board’s

Charleston, West Virginia, office. Grievant was represented by Patrick K. Maroney, Esquire, Maroney, Williams, Weaver & Pancake, PLLC, and Respondent was represented by Shana L. O'Briant Thompson, Esquire, Partain Law Office. This matter became mature for decision on July 15, 2016, on receipt of the parties' written Proposed Findings of Fact and Conclusions of Law, and was then reassigned to the undersigned Administrative Law Judge for administrative reasons on October 24, 2016.

Synopsis

Grievant failed to apply for a posted extracurricular assignment, and did not receive that assignment, because he was not aware of the posting. The assignment was posted at the county central office in the postings notebook, on the county website which links to the State Department of Education website, and on the county hotline which is accessible to all employees by telephone. The assignment was not physically posted at the bus garage where Grievant is assigned, as is normally the case. Grievant knew the assignment would be posted and checked the bulletin board at the bus garage to which he is assigned every day. Grievant did not check the county or state website, the county automated calling system, or at the county central office, although he was aware that the county uses these mechanisms to post vacancies. Respondent posted the assignment in conspicuous places as it is required to do by statute.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Logan County Board of Education ("LBOE") as a bus operator since 1996, and was employed as a substitute bus operator for several years prior to being hired as a regular employee.

2. On September 4, 2015, LBOE posted an extra-curricular assignment, job posting number 2016-228, for an overflow shop bus run for the 2015-2016 school year only, as needed, at a rate of \$30 per day. Grievant did not apply for this assignment, and it was awarded to another bus operator.

3. The bus operator who was awarded job posting number 2016-228 resigned from this assignment on October 20, 2015. Grievant was asked by an unidentified person if he wanted to drive this assignment until it was filled by posting, and he did so.

4. From October 23, 2015, through October 29, 2015, LBOE posted the extra-curricular assignment at issue, job posting number 2016-286, for an overflow shop bus run, beginning at 11:05 a.m. taking students from Ralph R. Willis to Chapmanville Regional High School and back, ending at 2:05 p.m., for the 2015-2016 school year only, as needed, at a rate of \$30 per day. LBOE posted this assignment by placing it in the posting notebooks maintained at LBOE's central office, putting the information on the LBOE website which links to the State Department of Education website, and putting the information into LBOE's automated calling system, which is accessible by all employees. LBOE Personnel Director Elizabeth Thompson also has all vacancy notices sent to all schools and bus garages in the county.

5. LBOE has in the past placed notices of vacancies on the bulletin boards at the bus garages. Job posting number 2016-286 was not posted at the bus garage where

Grievant works. The record does not reflect whether the assignment was posted at either of the other two bus garages in the county, or at any schools in the county.

6. Grievant knew the assignment would be posted, and checked the bulletin board at the bus garage to which he is assigned every day. Grievant does not own a computer, and he did not check the LBOE website, nor did he check the postings maintained at the central office, but was aware he could check postings at that location. Grievant was aware that vacancies are put into the automated calling system, and he knew how to access this system to check for postings, but he did not utilize this system to look for this posting.

7. Grievant was not aware that the assignment had been posted, and he did not apply for the assignment. There were two applicants for the assignment, and the assignment was awarded to a bus operator with less seniority than Grievant who submitted an application.

8. LBOE's 2015-2016 Employee Handbook states at page 8 that, "[a]ll job vacancies are posted in conspicuous places at all job sites. The vacancies are also available through the county hotline at 752-7409. In addition, all vacancies can be accessed through <http://wvde.state.wv.us> or logancountyschoolswv.com.

9. LBOE Policy Number 4132, in effect since at least 2013, states that vacancy notices "shall be posted in conspicuous working places including on any website maintained by or available for use by the Board for all service personnel to observe for at least five (5) working days. This shall include the County website and the West Virginia Department of Education Job Bank Website. However, should there be any discrepancy

between or among the postings, the printed postings in the working places of service personnel employees shall remain the official posting to which all applicants must comply.”

10. LBOE Policy Number 1230.01 states that the county Superintendent may issue administrative handbooks, which “will be considered to be an extension of the policy manual and binding upon all employee,” “[a]s long as the provisions of these administrative guidelines and handbooks are not inconsistent with Board policies, or with Federal/State law.”

11. LBOE policies are available on the county website.

Discussion

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).

WEST VIRGINIA CODE § 18A-4-8b(g) provides as follows:

County boards shall post and date notices of all job vacancies of existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days.

(1) Posting locations include any website maintained by or available for the use of the county board.

The Grievance Board has stated that this statutory “provision does not require postings at every working location” to meet the requirement of posting in conspicuous places.” *Shinn v. Harrison County Bd. of Educ.*, Docket No. 89-17-290 (June 28, 1990). This issue was addressed more thoroughly in *Quintrell v. Lincoln County Board of Education*, Docket No. 91-22-452 (April 30, 1992), *affirmed per curiam*, 195 W. Va. 347, 465 S.E.2d 618 (1995). In *Quintrell*, the extracurricular assignment was not posted at the bus garage to which the grievant was assigned, although the practice was to post vacancies at that bus garage, and the grievant did not see the posting. The assignment was posted at a vocational school where the grievant underwent in-service training, and at two schools where the grievant dropped off and picked up students. The administrative law judge found that the failure to post the vacancy at the grievant’s assigned bus garage did not violate the statutory requirement, which at that time required posting in “conspicuous *working* places.” (Emphasis added.) The Supreme Court of Appeals of West Virginia agreed, stating that “the purpose of the notice requirement is to insure that notices of vacancies be displayed where interested and qualified persons might readily see them.” *Id.*, 195 W. Va. at 349, 465 S.E.2d at 620

Since the decision in *Quintrell, supra.*, the statute has been changed to delete the word “working” as an identifier of the places where the vacancy must be posted, and the sentence has been added which makes clear that a website is considered an appropriate posting location. This case also differs from *Quintrell* in that there is no evidence as to whether the assignment was posted at any other bus garage or school in the county. Also,

the posting was readily available to all employees in two additional, accessible places, on the county website and via use of the telephone to call the automated calling system.

It is clear that Respondent was not required by statute to post the assignment at the bus garage to which Grievant was assigned, either by any policy adopted by the board of education, or by statute. Grievant, however, pointed to the Employee Handbook, which informs employees that vacancies are posted at “all” job sites. This Handbook does not correctly state the adopted county policy. “All personnel policies must be in writing, distributed to all employees, and formally adopted and approved by the board of education to be valid and enforceable. State Board of Education Policy 5300; *Teller and Nelson v. Hancock County Bd. of Educ.*, Docket No. 98-15-299 (Nov. 28, 1998).” *Higgins, et al., v. Marion County Bd. of Educ.*, Docket No. 02-24-040 (Aug. 21, 2002). Further, the record does not reflect that Grievant relied on the Employee Handbook, or was misled by it. What Grievant relied on, as did the grievant in *Quintrell, supra.*, was the past practice of posting assignments on the bulletin board at the bus garage. While it is unfortunate for Grievant that the past practice was not followed in this case, the holding in *Quintrell* indicates that this is of no relevance. The question is whether the posting met the statutory requirement that the assignment be posted in conspicuous places. The undersigned concludes that it did. Respondent put the posting out where every employee had access to it on the website and on the automated calling system, and Grievant was well aware of this. As Ms. Thompson pointed out, she did what she could to make sure the posting was available to everyone, and she had no control over whether the assignment was physically posted once it was sent to the bus garage. Grievant knew he could call the automated calling system or check the county website, but made the choice to do neither.

The following Conclusions of Law support the Decision reached.

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. 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).

2. A county board of education is required to post all job vacancies "in conspicuous places for all school service personnel to observe for at least five working days." A "website maintained by or available for the use of the county board" is considered a "posting location." W. VA. CODE § 18A-4-8b(g).

3. "W. VA. CODE § 18A-4-8b[(g)] does not require the posting of job vacancies at every working location." *Quintrell v. Lincoln County Bd. of Educ.*, Docket No. 91-22-452 (Apr. 30, 1992); *aff'd per curiam*, 195 W. Va. 347, 465 S.E.2d 618 (1995).

4. Respondent posted the assignment at issue in conspicuous places where it was available for all employees to view, in compliance with the statutory requirements.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 16, 2016

BRENDA L. GOULD
Deputy Chief Administrative Law Judge