

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MELINDA CURRY and REBECCA CRONE,
Grievants,**

v.

DOCKET NO. 2016-1524-CONS

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

DECISION

Grievants, Melinda Curry and Rebecca Crone, filed a grievance against their employer, the Boone County Board of Education, on or about April 11, 2016. The statement of grievance reads:

On April 5, 2016, Respondent filled a full-time cook position at Madison Elementary School without posting the vacancy. A cook from the Madison Elementary Pre-K Center was simply placed in the position. Grievants allege a violation of W. Va. Code 18A-4-8b and 18A-4-8g. In addition, they assert detrimental reliance upon past assertions by the administration.

As relief Grievants seek “posting of the position of full-time cook at Madison Elementary School and, if either Grievant receives the position, they seek compensation for all lost wages and all benefits, pecuniary and nonpecuniary.”

A conference was held at level one on May 5, 2016, and level one decisions were issued for each Grievant on June 10, 2016, denying the grievance. Grievants appealed to level two on June 16, 2016, and a mediation session was held on August 2, 2016. Grievants appealed to level three on August 16, 2016, and a level three hearing was held before Administrative Law Judge Landon R. Brown on November 2, 2016, at the Grievance Board’s Charleston office. Grievant was represented by John Everett Roush, Esquire,

West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLC. This matter became mature for decision on December 2, 2016, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law, and was subsequently transferred to the undersigned Administrative Law Judge for administrative reasons.

Synopsis

Grievants argued that a Cook position should have been posted when a Madison Elementary School Pre-K Center was closed and the Cook III was moved to the main building housing Madison Elementary School. The Pre-K Center was not a free-standing school, but rather a building housing Pre-Kindergarten students enrolled at Madison Elementary School. When those students were moved to the main building, the staff assigned to the Pre-K Center was also moved. This did not create any new positions which Respondent was required to post. Although the duties of the position at issue have been changed since the move, this did not result in a change in the job title or an increase in compensation. Grievants did not demonstrate that a new position was created which Respondent was required to post. Grievants also failed to demonstrate that any false representation or concealment of material facts caused them to forego bidding on the position at issue when it was posted in December 2015, such that the doctrine of equitable estoppel should be applied.

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

Findings of Fact

1. Grievants are employed by the Boone County Board of Education (“BBOE”) as Cooks.

2. Grievant Curry has been a regular employee in the Cook classification since January 2012, and was a substitute employee for about two years prior to January 2012. During the 2015-2016 school year she was a half-time Cook at Van Elementary School. During the 2016-2017 school year she was a half-time Cook at Brookview Elementary School for one month before being placed in a full-time Cook position at Van Elementary School.

3. Grievant Crone has been a regular employee in the Cook classification since April 2012, and was a substitute employee for some period of time prior to April 2012. During the 2015-2016 school year she was a half-time Cook at Madison Elementary School, and remains in that position.

4. On December 1, 2015, BBOE posted a position for a 200-day, Cook III/Cafeteria Manager at “Madison Elementary (Based at Pre-K Center).” The posting indicated that the schedule would be for the employee to be present at the Pre-K Center Monday through Thursday, and at Madison Elementary School on Fridays.

5. The Madison Elementary School Pre-K Center is the name of the facility where Pre-K students enrolled at Madison Elementary School attend classes. The Pre-K Center is located about four miles from Madison Elementary School, and is not a stand-alone school. It is considered an annex of Madison Elementary School. Prior to June 2003, the Pre-K Center facility was considered a school separate from Madison

Elementary School, but it closed in June 2003. Pre-K students attend school four days a week, Monday through Thursday.

6. Neither Grievant applied for the posted Cook III/Cafeteria Manager position at Madison Elementary School. Both Grievants are more senior than the successful applicant for the position.

7. The Madison Elementary School Pre-K Center facility was closed at the end of the 2015-2016 school year, and the students and staff were moved to the Madison Elementary School main facility. Enrollment had been declining at Madison Elementary School, and BBOE personnel determined that Pre-K students could be served at the main facility, thereby saving the cost of maintaining a separate facility.

8. None of the staff working at the Pre-K Center was placed on transfer. The staff was moved to the main facility at Madison Elementary School, and none of these positions were posted. After the Pre-K Center was closed, the same number of Cooks were employed at Madison Elementary School as before the Pre-K Center closed.

9. Because the Cook III/Cafeteria Manager position (Head Cook) at the Pre-K Center was moved to the main facility at Madison Elementary School, Madison Elementary School is the only facility in the county with two Head Cooks, even though two Head Cooks are not needed at the facility. The person in the Cook III position which was moved from the Pre-K Center to Madison Elementary School has been assigned duties normally associated with a Cook I or Cook II position. BBOE personnel did not realize that there would be two Cook III's after the closure of the Pre-K Center until after the deadline had passed for placing service employees on transfer during the Spring of 2016.

10. During the 2015-2016 school year there were rumors that the Pre-K Center would close at the end of the school year. Both Grievants contacted Denise Banks, Executive Secretary to the Personnel Department, in December 2015, to ask what would happen to the Cook III/Cafeteria Manager Position at the Pre-K Center which had been posted, if the Pre-K Center closed. Both Grievants knew that Ms. Banks had no authority to make any decisions about personnel issues and that she was not in charge of the Personnel Department. Grievant Curry believed after her conversation with Ms. Banks that the position would not be transferred to Madison Elementary School, and that it would have to be posted again for the 2016-2017 school year. Grievant Crone believed after her conversation with Ms. Banks that, if she were awarded the posted position, she would not automatically keep the Cook III/Cafeteria Manager position. Neither Grievant applied for the posted position because of the conclusions they drew from their conversations with Ms. Banks.

11. Ms. Banks did not tell either Grievant that the Cook III/Cafeteria Manager position at the Pre-K Center would, in fact, not be transferred to Madison Elementary School or that it would be reposted if the Pre-K Center closed. Ms. Banks was aware that there were a number of variables, including the seniority of the successful applicant, and that no decisions had been made, and was her practice to tell employees that the answer would depend on such decisions and variables when this was the case. Ms. Banks always makes clear to those who ask her questions about personnel issues that she is not the one who makes personnel decisions.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

Grievants argued that the position posted in December 2015 was not the same position the successful applicant held when she was moved to the Madison Elementary School main facility, but rather was a newly created position. Respondent argued it had the discretion to move the location of the assignment to a different building within the school, which it did. The number of cooks did not change, and there was no newly created position to be filled.

WEST VIRGINIA CODE § 18A-4-8b states that a "[c]ounty board 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." It is clear that the person in the Cook III position assigned to work four days a week at the Pre-K Center was an employee of Madison Elementary School. The act of moving the Cook III location to the main facility at Madison Elementary School, when the number of Cooks employed by

Madison Elementary School remained the same, did not result in a newly created position. *Conner v. Mingo County Bd. of Educ.*, Docket No. 95-29-476 (Mar. 28, 1996); *Mullins v. Logan County Bd. of Educ.*, Docket No. 94-23-283 (Sept. 25, 1995).

However, in addition to the change in location, the duties of the position at issue changed. The Grievance Board has addressed the issue of whether a change in assignments constitutes a newly created position, finding, generally, that it is within a board of education's discretion to change the duties assigned to an employee, so long as the new duties are consistent with the employee's classification,¹ and that such a change in assignments does not result in a newly created position. *Child v. Berkeley County Bd. of Educ.*, Docket No. 96-02-025 (Oct. 29, 1996). However, the Grievance Board stated in *Mullins, supra.*, that "[t]he only time that a duty assignment might convert an existing position into a newly created position would be when the nature of the duty assignment is outside the statutory definition of the service personnel position in question." In *Fleming, et al., v. Fayette County Board of Education*, Docket No. 07-10-066 (May 8, 2008), the Administrative Law Judge found that the employee was promoted, requiring the posting of the new position, when she was reclassified from Cook II to Cook III immediately after she was assigned new duties during a reconfiguration of an elementary school.

¹ Some Grievance Board cases seem to indicate that when duties outside the classification are assigned to an employee with the employee's consent, and no additional compensation is involved, this does not create a new position. *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997), *aff'd* Cir. Ct. of Putnam County, Civil Action No. 97-C-372 (June 29, 1998); *Payne v. Fayette County Bd. of Educ.*, Docket No. 94-10-144 (Sept. 28, 1994). However, these cases provide no discussion of this issue, so it does not appear that any consideration was given to whether the duties were within the classification in rendering the decision.

In this case the change in duties of the position at issue did not result in any salary increase. To the contrary, if the position title is changed by Respondent, it appears it will result in a decrease in salary, as Cook I and Cook II are both in a lower pay grade than Cook III. W. VA. CODE § 18A-4-8a. At this point, the position title has not changed, and the person in the position at issue has apparently agreed to the change in duties. Until some change is made in the class title, Grievants challenge is to the position's classification. While an employee generally cannot grieve another employee's classification, it may be possible to do so if that classification somehow affects the grievant. However, Grievants have not asserted a challenge to the classification of the position at issue, and the undersigned has not been presented with evidence of the daily duties of the position sufficient to make a determination that the position at issue is misclassified. Grievants did not demonstrate that the position at issue was a newly created position which Respondent was required to post.

Finally, Grievants argued they relied to their detriment on the representations of Ms. Banks when they chose not to bid on the position at issue when it was posted in December 2015. "[W]here the act is not in violation of rule or statute, *or* where justice so requires, the doctrine of equitable estoppel may apply." *Underwood v. Dep't of Health & Human Res.*, Docket No. 2008-1254-DHHR (May 5, 2009), *citing*, *Herland v. Dep't of Health & Human Res.*, Docket No. 92-HHR-416 (Aug. 9, 1993), *and* *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(*per curiam*).

In *Hudkins v. Public Retirement Bd.*, *supra*, the West Virginia Supreme Court of Appeals applied the doctrine of equitable estoppel to a state agency where the agency's employee made assertions to a beneficiary regarding benefits and those assertions were contrary to DOP rules. These statements

misled the beneficiary to take certain actions related to retirement that she would not have made if not for the incorrect information she was provided. In their analysis of the doctrine of estoppel the Supreme Court noted:

“‘[t]he doctrine of estoppel should be applied cautiously, only when equity clearly requires that it be done, and this principle is applied with especial force when one undertakes to assert the doctrine against the state.’ Syllabus Point 7, *Samsell v. State Line Development Company*, 154 W.Va. 48, 174 S.E.2d 318 (1970).” Syl. Pt. 3, *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711.

The Court then set forth the elements that must exist in a particular case for the doctrine of equitable estoppel to apply by noting the following:

“‘[t]he general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.’ Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956).” *Id.* at Syl Pt. 4.

Upon analyzing the elements, the Court balanced “injury and injustice” caused to the beneficiary against “public interest” of the state agency in protecting state funds. *Hudkins, supra*.

Nuzum v. Div. of Nat. Res., Docket No. 2010-1354-DOC (Mar. 23, 2011).

Here there was no false representation or concealment of material facts. Ms. Banks made clear to Grievants that she did not make personnel decisions, and believed she had couched her responses in terms of the outcome would depend on a number of variables, as is her practice. Grievants made the choice not to bid on the posted position at issue because they were not given any guarantee that the position would continue to exist, and

that was their choice. Grievants did not prove the essential elements necessary to invoke the doctrine of equitable estoppel.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. WEST VIRGINIA CODE § 18A-4-8b states that a "[c]ounty board 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."

3. The act of moving the Cook III location to the main facility at Madison Elementary School, when the number of Cooks employed by Madison Elementary School remained the same, did not result in a newly created position. *Conner v. Mingo County Bd. of Educ.*, Docket No. 95-29-476 (Mar. 28, 1996); *Mullins v. Logan County Bd. of Educ.*, Docket No. 94-23-283 (Sept. 25, 1995).

4. It is within a board of education's discretion to change the duties assigned to an employee, so long as the new duties are consistent with the employee's classification, and that such a change in assignments does not result in a newly created position. *Child v. Berkeley County Bd. of Educ.*, Docket No. 96-02-025 (Oct. 29, 1996). However, the Grievance Board stated in *Mullins, supra.*, that "[t]he only time that a duty assignment might convert an existing position into a newly created position would be when the nature of the duty assignment is outside the statutory definition of the service personnel position in question."

5. Grievants did not demonstrate that the position at issue was a newly created position which Respondent was required to post.

6. "[W]here the act is not in violation of rule or statute, or where justice so requires, the doctrine of equitable estoppel may apply." *Underwood v. Dep't of Health & Human Res.*, Docket No. 2008-1254-DHHR (May 5, 2009), citing, *Herland v. Dep't of Health & Human Res.*, Docket No. 92-HHR-416 (Aug. 9, 1993), and *Hudkins v. Public Retirement Bd.*, 220 W.Va. 275, 647 S.E.2d 711 (2007)(*per curiam*).

7. "[t]he general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.' Syllabus Point 6, *Stuart v. Lake Washington Realty Corp.*, 141 W.Va. 627, 92 S.E.2d 891 (1956)." *Id.* at Syl Pt. 4.

Upon analyzing the elements, the Court balanced “injury and injustice” caused to the beneficiary against “public interest” of the state agency in protecting state funds. *Hudkins, supra*.

Nuzum v. Div. of Nat. Res., Docket No. 2010-1354-DOC (Mar. 23, 2011).

8. Grievants did not demonstrate that there was any false representation or concealment of material facts, or that the doctrine of equitable estoppel should be applied.

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: April 4, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge