

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBRA J. DEMPSEY,
Grievant,

v.

Docket No. 2017-0491-KanED

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Debra J. Dempsey, Grievant, filed this grievance against her employer the Kanawha County Board of Education ("KCBE"), Respondent on September 15, 2016.

The grievance statement provides:

In January of 2016, I was informed that my 261 day Buyer position was being cut to 220 days, effective with the 2016-2017 School Year. I requested a hearing to ask that my 261 days continue. At the hearing my request was denied. When a 261 day Inventory Supervisor position was advertised, I applied for it. I was told I had to start the Inventor Supervisor position on April 25, 2016. As of today's date, my former Buyers position has not been filled.

The relief requested:

I request back pay at my former pay scale, up to and including the date this grievance is settled.

A hearing was held at level one on November 13, 2016, and the grievance was denied at that level on December 12, 2016.¹ Grievant appealed to level two on December 19, 2017, and a mediation session was held on March 7, 2017. Grievant appealed to level three on March 20, 2017. A level three hearing was held before the undersigned Administrative Law Judge on June 8, 2017, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by Joe Spradling, Esquire, WV School

¹ The December 12, 2016 Level One Decision also provided that the KCBE violated W. VA. CODE § 18A-4-15(a)(4) when it did not proceed to fill the Buyer vacancy within twenty working days from the commencement of the vacancy.

Service Personnel Association. Respondent was represented by James W. Withrow, General Counsel. Both parties submitted post-hearing written Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about July 7, 2017, upon receipt of the last of these fact/law proposals.

Synopsis

Grievant transferred out of a 261-day position with the knowledge that the position was going to be reduced to a 220-day position. To avoid the loss of benefit(s) Grievant sought and accepted employment in an alternate position (Inventory Supervisor), preserving 261-day employment terms, but compensation at a lower pay rate. The Buyer position was transformed; however, Respondent did not timely pursue a permanent fix to the vacancy, after Grievant's departure. Grievant contends she is entitled to the pay difference between the two positions for the time period of her departure till the Buyer position actually became a 220-day position.

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 currently employed by Respondent as an Inventory Supervisor, Pay Grade D, with a 261-day employment term.
2. Around the beginning of the 2015-2016 school year, prior to securing her current position, Grievant had been employed as a Buyer for Respondent. The position had a 261-day employment term.

3. Alan Cummings, Director of Purchasing and the immediate supervisor of the Buyer position, worked with the payroll department to establish a work schedule for the Buyer position that would coincide with the demands of the position and also fit into the payroll schedule.

4. Grievant received timely notice in accordance with W. Va. Code § 18A-2-6 that the Buyer position would be reduced to a 220-day employment term for the 2016-2017 school year.

5. Grievant bid out of the Buyer position and into her current position, Inventory Supervisor, to preserve a 261-day employment term. Grievant moved to the Inventory Supervisor position on or about April 25, 2016.

6. An Inventory Supervisor position has a lower pay grade than a Buyer position.

7. The Buyer position was not posted immediately after Grievant vacated it in April, 2016.

8. Upon Grievant's departure, Respondent neither posted nor abolished the Buyer position. A retired employee who had formerly held the Buyer position, Lola Eastwood, was brought in to work the position as a substitute for the remainder of the 2015-2016 school year.

9. On June 23, 2016, Kanawha County experienced severe and devastating flooding, which resulted in the destruction of two school buildings and damages to two other school buildings, as well as a significant amount of equipment, supplies and materials inside these buildings

10. Ms. Eastwood, employed in the Buyer position, worked several days beyond a 220-day calendar for the 2016-2017 school year. See G Ex 1.

11. The Buyer position has been posted and an individual is now working in the position under a 220-day contract.²

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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.*

Grievant transferred out of a 261-day position with the knowledge that the position was going to be reduced to a 220-day position. The Inventory Supervisor position, which

² It is not disputed that the Board did not post the Buyer position until October 2016. The December 12, 2016 Level One Decision determined that Respondent's violation W. VA. CODE § 18A-4-15(a)(4). Respondent failed to proceed to permanently fill the Buyer vacancy within twenty working days from the commencement of the vacancy. This issue is not perceived to be in dispute. The Level One Decision further found that "the relief sought by Grievant, to receive the difference in pay between the Buyer Position and the Inventory Supervisor position is not warranted by this violation. The relief is to order the Board to post and fill the vacancy, or eliminate the position." *Id.* at p5. Respondent has posted the position and the position is filled.

Grievant now occupies, has a lower rate of pay than the Buyer position, which she previously held. Grievant contends she is entitled to the difference in pay between the Buyer position and the Inventory Supervisor position from April 25, 2016 until the Buyer position became a permanently filled 220-day position. Respondent acknowledges that it did not address the vacancy created by Grievant's departure with a permanent fix in a timely manner but vehemently denies that Grievant is entitled to additional compensation because of this conduct.

After reviewing the job duties of Grievant's former position, Respondent considered alteration in the employment terms of the position. Respondent determined that the position of "Buyer" could be performed over the course of a 220-day employment term. Grievant did not want to accept the reduction in salary associated with the reduction in the employment term and sought another 261-day position with Respondent, which she assumed on April 25, 2016. To avoid the loss of the equivalent of two months' pay, Grievant bid out of the Buyer position and into her current position, i.e. Inventory Supervisor. See Grievant's PFOF-COL. Grievant choose to seek and accept alternate employment opportunity.

W. Va. Code 18-A-4-8b(g) provides, in pertinent part:

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.... All vacancies in existing or newly created positions shall be filed within twenty working days from the closing date of the job posting for the position.

W. Va. Code 18-4-15 (a) (4) provides that a substitute service employee may be utilized in the following circumstances:

To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight, article two of this chapter, or death of the regular service position. Within twenty working days from the commencement of the vacancy, the county board shall fill the vacancy under the procedures set forth in section eight-b of this article and section five, article two of this chapter. The person hired to fill the vacancy shall have and be accorded all rights, privileges and benefits pertaining to the position.

Respondent hired a substitute for the remainder of the 2015-2016 school year. Respondent also tends to indicate that the viability of the position was still being analyzed. Nevertheless, Respondent did not proceed to fill the vacancy within twenty working days from the commencement of the vacancy. See W. Va. Code 18-4-15 (a) (4); also see Level One Decision. Further, on or about June 23, 2016, an unanticipated disaster struck Kanawha County and other regions of West Virginia. Devastating floods caused damage and alterations in the operations of Kanawha County schools. Several Kanawha County schools were affected by the floods and associated damage. Due to situation(s) stemming from the flood, the person filling in the buyer's position worked additional days not contemplated before the flood occurred.³ The flood was an unforeseen circumstance and the need for employees to work more was a consequence of the flood. Ultimately, Respondent did indeed post and fill the Buyer position under a 220-day contract.⁴

Grievant has failed to establish a persuasive and/or compelling rationale as to why

³ Books, desks, and other similar items were either purchased or, in some cases, donated. Much of this had to occur before August 8, 2016, the first day for students in Kanawha County Schools.

⁴ Pursuant to Grievant's exhibit, the substitute buyer had worked two days outside of the 220-day calendar at the time the grievance was filled.

she is entitled to the difference in pay for her voluntary acceptance of a job with a lower pay grade when the employment term of her former position was scheduled to be reduced but did not occur as soon as the parties could and/or should have implemented the employment terms.⁵ Respondent failed to proceed to permanently fill the Buyer vacancy within twenty working days from the commencement of the vacancy, a violation of W. VA. CODE § 18A-4-15(a)(4); This conduct does not empower Grievant with prospective wages. The date of the position's reduction was not a condition of Grievant's new position nor was her approval needed to alter the position's status. Grievant's entitlement to the salary after April 25, 2016, is not supported by a viable legal theory. In order to mitigate the loss of salary occasioned by the reduction in the employment term to 220 days, Grievant voluntarily left the position for another position that had 261-day employment terms. Grievant was not tricked or deceived into altering her employment position. Then the flood occurred, which resulted in unforeseen demands on the entire school system, including the purchasing department and the buyers working in that department. It is believed the substitute buyer worked and was paid for twenty-one days which were not included in the 220-day schedule. Grievant has not established a viable claim that Respondent is obligated to compensate her with any additional compensation after she left the position on April 25, 2016.

⁵ Grievant alleges that had she known the position was going to continue as a 261-day position, she would not have bid out of the position in April.

Conclusions of Law

1. 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); "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 of proof. *Id.*

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is 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.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. Respondent violated provisions of W. VA. CODE § 18-4-15(a)(4). The position has been posted and filled, the issue is moot.

4. Grievant has not established that Respondent violated, misapplied, misinterpreted any statute, policy, rule or written agreement applicable to Grievant which entitles Grievant to the compensation rate of her prior position.

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: August 10, 2017

Landon R. Brown
Administrative Law Judge