THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD E. SHAFFER,
Grievant,

v. **Docket No. 2016-1063-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Ronald Shaffer, was employed by Respondent Kanawha County Board of Education as a heavy equipment operator. Grievant filed a grievance against Respondent, at Docket No. 2016-1063-KanED, asserting that an "unauthorized mason" was operating equipment on overtime at Sissonville Elementary School on December 10, 2015. The relief sought was payment of four hours of overtime with the same pay as a mason and, "Stop employees from operating the equipment, that [sic] have not taken the test and do not have a class A, CDL license per qualifications."

A Level I hearing on this grievance was held on March 29, 2016, and a Level II mediation was held on October 4, 2016. A Level III hearing was held on January 10, 2017, before the undersigned in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared at the hearing and was represented by Mr. John Roush, Esq., and Respondent was represented Mr. James Withrow, Esq. Grievant testified on his own behalf and Respondent called Mr. Walter ("Eddie") Hancock, Mr. Anthony Kidd and Mr. Jeff Gibson as witnesses. The transcript of the Level I hearing was made part of the record of this grievance. At the conclusion of the Level III hearing, the

parties agreed to submit post-hearing arguments, the last of which was received on February 14, 2017, upon which date this matter became mature for consideration.

Synopsis

Grievant, who was classified as a "heavy equipment operator," asserts that Respondent improperly provided extra-duty work, operating heavy equipment, to personnel who were not classified as "heavy equipment operators," but as "masons," in violation of W. W. VA. CODE § 18 A-4-8b and that, as such, he is entitled to compensation for the hours of work they performed out of their classification on that date. Respondent argues that simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, that does not necessarily render him misclassified. Thus, Respondent contends that if someone only occasionally performs duties outside of his classification, this should not entitle the individual who holds the classification, who usually performs those duties, to receive payment for those occasional instances, as Respondent would be required to "pay twice for the same work." However, even assuming Grievant proved Respondent improperly gave extra-duty heavy construction work to the masons, entitling him to compensation for the hours of work they performed, Grievant failed to establish that he was "next in line" for the work and, thus, failed to meet his burden of proof against Respondent.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter. Grievant was the sole witness who testified at the Level III hearing.

Findings of Fact

1. Grievant was employed as a heavy equipment operator for Respondent, and had been employed by Respondent for on or about seven (7) years.

2. In his work as a heavy equipment operator for Respondent, Grievant generally used a small excavator, which Respondent rented.

3. Respondent employs Mr. Walter Hancock and Mr. Anthony Kidd as masons.

4. Mr. Jeff Gibson is a Supervisor of Maintenance for Respondent, who supervises Grievant, Mr. Hancock, Mr. Anthony Kidd and Mr. Nathan Looney, among others.

5. On December 10, 2015, Kanawha County Schools' maintenance department was working on projects at Sissonville Elementary Schools, including installing a new drain line and spreading gravel to create a new entrance road to the school.

6. Mr. Hancock, Mr. Kidd and Mr. Looney, in addition to some plumbers, were assigned to install the new drain line at Sissonville Elementary School. In order to accomplish installation of the new drain line, it was necessary to break up the sidewalk and pour concrete once the installation was completed.

7. Mr. Gibson also instructed Mr. Looney to remove old boiler parts from the Sissonville Elementary School grounds at the end of the workday on December 10, 2015. In order to remove the old boiler parts, it would be necessary to use the small excavator at the site, as the parts were too heavy for individuals to lift into the truck.

8. Grievant and Mr. Looney are the only heavy equipment operators employed by Respondent.

9. Mr. Kidd and Mr. Hancock are classified as “masons.”

10. On December 10, 2015, Mr. Gibson assigned Grievant to deliver a scissor lift to Point Harmony Elementary School. Further, Mr. Gibson specifically instructed Grievant to call him after his delivery of the lift, so Mr. Gibson could give Grievant his next assignment.

11. Rather than calling Mr. Gibson, as instructed by his direct supervisor, Grievant then drove to Sissonville Elementary School.

12. When Grievant appeared at Sissonville Elementary School on December 10, 2015, he took over operation of the excavator that Mr. Looney had been operating when Mr. Looney left the excavator for brief a period of time. Mr. Looney returned to unexpectedly find Grievant operating the equipment.

13. At approximately 9:00 AM on the morning of December 10, 2015, Mr. Looney called Mr. Gibson to ask why Grievant had come to the Sissonville Elementary School job site, where Mr. Looney alone had been assigned to operate the excavator to assist in the installation of the new drain line.

14. Mr. Gibson did not know why his instruction to Mr. Schaffer had been ignored. Mr. Gibson tried repeatedly to call Grievant while Grievant was at the Sissonville work site, but did not receive an answer. In an attempt to communicate with Grievant, Mr. Gibson left a message for Grievant, which Grievant failed to return.

15. Grievant worked at the Sissonville Elementary School job site for the rest of the day, as did Mr. Looney. Mr. Looney left at the end of the regular workday, 2:00 PM, without hauling the boiler parts away.

16. At the end of the workday, Grievant handed the keys to the excavator to other workers, said he had something he needed to do and left the job site.

17. Grievant also left the trailer that he had brought with him, which had been used to transport the scissor lift to Point Harmony Elementary School.

18. The concrete for the project had arrived somewhat late on December 10, 2015, it was still not fully set at the end of the workday and, therefore, Mr. Gibson authorized Mr. Kidd and Mr. Hancock to remain at the school for extra-duty work, to insure the students did not disturb the concrete.

19. After Grievant left the job site, the principal of Sissonville Elementary asked Mr. Hancock and Mr. Kidd to look at something inside the building. A floor in a classroom had become hot, as first noted by one of the students. It was determined that a steam line had burst, and the steam to that line was turned off.

20. The principal then asked Mr. Hancock and Mr. Kidd to remove the large, heavy, boiler parts that had been left at the school after the boiler had been replaced.[1]

21. Mr. Gibson arrived at Sissonville sometime after the workday ended, to investigate the broken steam pipe and address its prompt repair.

[1] None of the witnesses testified that the boiler parts constituted a hazard requiring emergency removal of the old boiler parts. The principal did not appear to testify at hearing concerning why he wanted the boiler equipment removed that day.

22. Mr. Hancock and Mr. Kidd used the excavator to load the boiler parts onto the trailer that Grievant brought to the job and Mr. Gibson had them take the loaded trailer with them when they returned to the warehouse at the end of the day.

23. Mr. Kidd and Mr. Hancock worked a total of 2 hours overtime on December 10, 2015, and most of that time was spent in dealing with the broken steam line. Loading the boiler parts onto the trailer took approximately 15 to 20 minutes in total.

24. December 10, 2015, fell on a Thursday and the full repair of the broken steam pipe was quickly planned for Saturday, December 12, 2015.

25. Mr. Gibson approved of further overtime for Mr. Kidd and Mr. Hancock at the end of the day because, as masons, they needed to know exactly what had to be "cut up," to permit HVAC personnel and plumbers access to the steam pipe to perform the necessary repairs on Saturday, December 12, 2015.

26. Mr. Gibson did not call Grievant or Mr. Looney back to work at Sissonville Elementary School after they had both been gone from the worksite for close to two hours. Rather, Mr. Gibson also approved having Mr. Kidd and Mr. Hancock clear away the remains of the boiler, about which the principal was apparently concerned,

Discussion

As this grievance does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §3 (2008); *Toney v. Lincoln County Bd. of Educ*., Docket No. 99-22-046 (Apr. 23, 1999); *Bowen v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039 (Mar. 31, 1999); *Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997). "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 and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

School personnel laws and regulations must be strictly construed in favor of the employees that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979). Grievant contends that Respondent improperly allowed personnel classified as masons to load the boiler using heavy equipment on December 10, 2015, in violation of W. VA. CODE §18A-4-8b and that Respondent should have permitted him to perform the work the next day. W. VA. CODE § 18 A-4-8b provides, in pertinent part:

> 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 events, 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 then is 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 by both the county board and by an affirmative vote of two-thirds of the employees within that classification category of employment.

W. VA. CODE § 18 A-4-8(i) provides, in pertinent part:

> (55) "Heavy equipment operator" means a person employed to operate heavy equipment;[2]

[2] W.VA. CODE §18A-4-8 does not further define "heavy equipment."

...

> (64) “Mason” means a person employed to perform tasks connected with brick and block laying and carpentry tasks related to these activities;

Firstly, the undersigned notes that "heavy equipment" is not specifically defined at W. VA. CODE § 8A-4-8(i) and there was some debate on whether the equipment in question qualified as "heavy equipment.” However, given that the Respondent's personnel who are designated as heavy equipment operators typically operated the “mini” excavator in question, it appears that Respondent generally considered it to be "heavy equipment.” Thus, the excavator in question is properly categorized as "heavy equipment" for the purposes of this grievance.

Respondent further contends that neither Grievant nor Mr. Looney were available to perform this assignment. Mr. Shaffer handed the keys to the excavator to the other employees, and left the premises. Mr. Looney was present on the job site and could have performed the assignment within his classification, but apparently left the site with out attempting to move the old boiler parts.[3] However, Grievant responds that his supervisor could have directed him to remove the boiler parts the next day, rather than permit the masons to remove it. The testimony provided indicated that the school principal may have been concerned about having the old boiler parts on the school premises. Yet, the evidence of record is insufficient to show that the old boiler parts presented a safety

[3]It is unclear from the record whether Mr. Looney informed Grievant of Mr. Gibson's directive to remove the boiler parts from the school at the end of the day. However, one might reasonably assume that Mr. Looney did not perform the assigned task because Grievant, absent instruction from his supervisor, took over the operation of the mini excavator Mr. Looney had been using.

hazard that required personnel to remove them from the school premises immediately, i.e., after school on the day in question.

Additionally, Respondent argues that this Grievance Board has held in numerous instances that simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, that does not render him misclassified *per se*. *Hatfield v. Mingo County Bd. of Educ.,* 91-29-077*,* (April 15, 1991); *Carver v. Kanawha County Bd. of Educ.*, Docket No. 01-20-057, (Apr. 13, 2001); and *Shaffer v. Kanawha County Bd. of Educ*. Docket No. 2011-1773-KanEd, (December 13, 2012). Respondent therefore contends it stands to reason that if someone only occasionally performs duties outside of his classification, this should not entitle the individual who holds the classification, who usually performs those duties, to receive payment for those occasional instances, as the Respondent would be required to pay twice for the same work.[4]

However, the undersigned need not address this issue in this matter, because in order for a Grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was next in line. *Jamison v. Monongalia Co. Bd. of Educ*., Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. Bd. of Educ*., Docket No. 99-20-108 (May 26, 1999; *Clark v. Putnam County Bd. of Educ*.,

[4]Respondent essentially argues that it should be permitted to give extra-duty assignments to service personnel, which assignments are consistent with lower-paid classifications than the ones to which they are presently assigned, thereby permitting personnel working out of classification to perform less skilled or complex work than that which they have been hired to perform, while still maintaining their higher rate of pay, but fails to consider the issue of whether this practice would unlawfully operate to deny work and compensation to the personnel who are actually hired to perform it.

Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ*., Docket No. 96-20-352 (Apr. 30, 1997). *See also, Jamison v. Monongalia County Bd. of Educ*., Docket No. 2008-0293-MonED (Aug. 27, 2008). W. Va Code § 18 A-4-8b provides, in pertinent part:

> Extra-duty assignments ...
> (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 then is repeated.

Grievant did not establish he was the next in line to have this assignment over Mr. Looney, who was also a heavy equipment operator. Therefore, even assuming Grievant proved that Respondent improperly assigned the extra-duty work in question to the other two employees, Grievant did not offer evidence to establish he was the next in line in the "rotation," prescribed at W. VA. CODE §18A-4-8b, over Mr. Looney, to receive the work. As such, Grievant did not finally establish that he was entitled to assignment of the extra-duty work at issue and has failed to meet his burden of proof in this grievance.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, the grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §3 (2008); *Toney v. Lincoln County Bd. of Educ*., Docket No. 99-22-046 (Apr. 23, 1999); *Bowen v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039 (Mar. 31, 1999); *Holly v. Logan*

County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). "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 and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

2. School personnel laws and regulations must be strictly construed in favor of the employees that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

3. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was next in line. *Jamison v. Monongalia Co. Bd. of Educ*., Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. Bd. of Educ*., Docket No. 99-20-108 (May 26, 1999; *Clark v. Putnam County Bd. of Educ*., Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ*., Docket No. 96-20-352 (Apr. 30, 1997). See also *Jamison v. Monongalia County Bd. of Educ*., Docket No. 2008-0293 MonED (Aug. 27, 2008). The grievant did not establish he was the next in line to have this assignment.

4. W. VA. CODE § 18 A-4-8b provides, in pertinent part:

> Extra-duty assignments...
> (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 then is repeated.

5. Even assuming Grievant proved that Respondent improperly assigned the extra-duty work in question to the other two employees, Grievant did not offer evidence to establish he was the next in line in the "rotation," prescribed at W. VA. CODE §18A-4-8b, over Mr. Looney, to receive the work. As such, Grievant did not finally establish that he was entitled to assignment of the extra-duty work at issue and has failed to meet his burden of proof in this grievance.

Accordingly, the 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* W. VA. CODE § ST. R. § 156-1-6.20 (2008).

DATE: March 29, 2017

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Susan L. Basile
Administrative Law Judge