

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

PAUL H. TOWNSEND,
Grievant,

v.

DOCKET NO. 2016-1702-KanED

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent, and

MARK R. HUMPHREYS,
Intervenor.

DECISION

Grievant, Paul H. Townsend, filed a grievance against his employer, the Kanawha County Board of Education, on May 27, 2016. The statement of grievance reads: "Grievant [sic] employed a less senior applicant for the position of Crew Leader in violation of the W.Va. Code 18A-4-8b & 18A-4-8. Grievant passed the test that Respondent was directed to provide for him in the level I decision in a previous grievance, i.e., Townsend v. Kanawha CBOE, 2016-0880-KanED. Notwithstanding this, Respondent retained the less senior applicant." As relief Grievant sought, "compensation for all lost wages with interest and benefits, pecuniary and nonpecuniary, to whuicuh [sic] he would have been entitled if employed in the Crew Leader position."

A hearing was held at level one on July 25, 2016, and a level one decision was issued on August 11, 2016, denying instatement into the Crew Leader position, but granting the remedy that the Crew Leader position be reposted, and recommending that Respondent "recalculate the scores of the applicants, and make a selection based upon seniority, qualifications, and past evaluations." Grievant appealed to level two on August

23, 2016, and a mediation session was held on November 14, 2016. Grievant appealed to level three on November 18, 2016, and a level three hearing was held before Administrative Law Judge Carrie H. LeFevre on February 2, 2017, at the Grievance Board's Charleston, West Virginia office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by James W. Withrow, Esquire, its General Counsel. This matter became mature for decision on March 8, 2017, 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 May 2, 2017. Intervenor declined to submit verbal or written argument.

Synopsis

Grievant was not selected for a Crew Leader position because he had not passed the blueprint test and because he did not have five year's experience "in the craft." He filed a grievance and a level one decision was issued requiring that the position be reposted, that applicants be allowed to train for and take the blueprint test, and that the selection be based on qualifications, seniority, and evaluations, after a finding that Respondent could not add an experience requirement to the posting. Grievant did not appeal that decision. By agreement of the parties, Respondent did not post the position, but allowed Grievant to take the blueprint test, which he passed. Respondent still did not place Grievant in the position, even though he had more seniority than the successful applicant, because Respondent asserted Grievant did not meet the experience requirement. Respondent is bound by the first level one decision, which rejected the argument that Respondent could include an experience requirement in the selection process, and cannot relitigate the

issues decided therein. Respondent was required by the first level one decision to base its decision on seniority, qualifications, which is defined as holding the class title or passing the Crew Leader competency test, and evaluations. Grievant was the most senior remaining applicant, and should have been placed in the position.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Kanawha County Board of Education ("KBOE") for approximately 30 years, and has been a Mechanic for about 3 years, assigned to the KBOE facility at Crede, West Virginia. As a Mechanic, Grievant performs maintenance on all types of county vehicles and equipment, except buses.

2. KBOE posted a Crew Leader/General Maintenance vacancy on July 13, 2015. The posting required that the successful applicant have five years' experience "in the craft," and the ability to read and interpret blueprints. The posting also stated that the knowledge, skill, and/or ability required to perform the duties of the position included the ability to plan and estimate jobs, schedule, purchase and expedite parts, identify the tools needed to complete the jobs, coordinate support equipment, and report to the supervisor if problems arose.

3. Terry Hollandsworth, KBOE's Executive Director of Maintenance, made the decision that the successful applicant must have five years' experience in the craft. He based this decision on a desire to ensure that the successful applicant had an understanding of the job, and he believed that someone who had been working as part of the Roads and Grounds Crew, which was what he had designated as "the craft," would

know what needed to be done as the Crew Leader, and be capable of directing a crew to properly perform the many different tasks. Mr. Hollandsworth did not explain how he arrived at the determination that five years' experience was needed for this position, rather than some lesser number of years of experience.

4. None of the applicants for the position held the Crew Leader Job Title. Grievant applied for the Crew Leader position, and passed the state competency test, but was not offered the blueprint reading test.

5. The most senior applicant for the position at issue withdrew his application, and the second most senior applicant was offered the position at issue, but declined to accept the position. Grievant was the third most senior applicant.

6. Intervenor Mark Humphreys was the successful applicant, and was placed in the position in November 2015. Grievant then filed a grievance. Mr. Humphreys was made an Intervenor at level one. A level one decision was issued on December 29, 2015, requiring Respondent to repost the position, "and that the appropriate blueprint test be given, after the proper statutory training for the test is provided, to any applicant who desires it. Thereafter, Respondent *shall* recalculate the scores of the applicants, and *make a selection based upon seniority, qualifications, and past evaluations.*" (Emphasis added.) The decision found that the Crew Leader position was not a supervisory position, and accordingly, that Respondent could not add the requirement to the posting that the successful applicant have five years' experience in the craft. Grievant did not appeal the level one decision.

7. By agreement of Grievant and Respondent, the Crew Leader position was not reposted as required by the level one decision, but Grievant was allowed to take the

blueprint test and he passed that test.¹ KBOE reevaluated Grievant's application, but again awarded the position to Mr. Humphries, based on a conclusion that Grievant did not have five years of experience in the craft.

8. Prior to his employment as a Mechanic, Grievant worked for KBOE as a Head Custodian for 21 years, and as a Custodian prior to that. As Head Custodian Grievant supervised approximately 5 Custodians. Prior to his employment by KBOE, Grievant worked at a service station for approximately 14 years, and was responsible for scheduling employee work shifts. When Grievant began working as a Custodian, he was responsible for mowing the grass at the school to which he was assigned, which was about seven years. He also mulched areas at schools as needed for KBOE on weekends for some period of time.

9. Grievant has received good evaluations of his performance.

10. Mr. Humphreys has worked for KBOE for approximately 27 years. He was a Bus Operator for KBOE for 7 years, a Roofer/Sheet Metal Mechanic for about 12 years, which was considered part of the Roads and Grounds Crew, and most recently was employed by KBOE as Locksmith for about 7 years, which was also considered part of the Roads and Grounds Crew for several years. Mr. Humphries did not supervise or direct the work of any employees at any time as a KBOE employee, nor did he help to maintain the grounds at any KBOE location. He had passed the Crew Leader competency test and the blueprint reading requirement.

¹ The record does not reflect whether Intervenor was consulted on this issue. The parties did not indicate that a settlement was reached by the parties that the level one decision would not be binding on the parties in any other way.

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).

The level one decision in this case raised the issue of *res judicata*, which was pointed out by Administrative Law Judge LeFevre during the level three hearing. Despite this, neither party addressed this legal issue in their written proposals, except for one sentence in KBOE's written argument which reads, "[t]he first Level I decision requiring the grievant be given the opportunity to bec[o]me qualified for the position, was contrary to law and exceeded the grievance evaluator's authority." No further explanation or legal support was cited for this statement.

Before a legal claim may be barred on the basis of *res judicata*, three elements must be satisfied.

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.

Second, the two actions must involve either the same parties or persons in privity with those same parties.

Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.”

Decapio/Beauty v. Dep’t of Transp., Docket No. 06-DOH-329 (Nov. 15, 2006).

“In cases where the elements for *res judicata* are present, *res judicata* should nonetheless not be applied where a change in circumstances may have altered the rights of the parties:

The doctrine of *res judicata* does not prevent a re-examination of the same question between the same parties when, subsequent to the judgment, facts have arisen which may alter the rights of the litigants.

Syl. pt. 2, *Blethen v West Virginia Dept. Of Revenue/State Tax Dept.*, 219 W. Va. 402, 633 S.E.2d 531 (2006)(per curiam); *quoting* Syllabus, *Huntington Brick & Tile Co. V. Public Service Commission*, 107 W. Va. 569, 149 S.E. 677 (1929).” *DeCapio/Beauty v. W. Va. Dep’t of Transp., Div. of Highways*, Case No. 06-AA-6, Cir. Ct. of Hancock County (June 19, 2008).

This is the second grievance filed by Grievant because he was not selected for the very same Crew Leader position by Respondent. All the parties to this grievance were parties to the first grievance. A level one decision was issued after the first grievance was filed, which ruled on many of the legal issues. That decision required that the position be reposted, that the applicants be provided training for and be allowed to take the blueprint test, and it then stated clearly that, “Respondent *shall* recalculate the scores of the applicants, and *make a selection based upon seniority, qualifications, and past evaluations.*” (Emphasis added.) The decision made clear that Respondent could not add the requirement to the posting, or to the job description, that the successful applicant have

five years' experience in the craft. This ruling, however, was not followed by Respondent. This second grievance arises out of Respondent's failure to abide by the first level one decision, which Respondent apparently believes it is not required to do.

WEST VIRGINIA CODE § 6C-2-4(b)(1) allows a grievant to move a grievance forward from level one to level two "[w]ithin ten days of receiving an adverse written decision at level one." The grievance statute, however, does not provide a mechanism for a respondent to appeal a level one decision. The old grievance procedure was replaced with a new procedure in 2007, and under the prior law, WEST VIRGINIA CODE § 18-29-3(t), a board of education could appeal an adverse level two decision, which was the equivalent of the current level one decision, if it believed the decision

(1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§ 18-29-4] of this article and provided both parties in section seven [§ 18-29-7] of this article.

As noted earlier, Respondent argued that the level one grievance evaluator had exceeded her authority and the decision was contrary to law, which would have provided Respondent with the ability to appeal to the next level of the grievance procedure under prior law. Respondent's appeal rights under the old procedure were limited to these listed assignments of error. *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct. 16, 1997)(standard of review is found in W. VA. CODE § 18-29-4(t)).

Under the current grievance procedure, the level one decision is issued by the chief administrator, which "includes a designee, *with the authority* delegated by the chief

administrator, appointed *to handle any aspect of the grievance procedure* as established by this article.” W. VA CODE §§ 6C-2-2(b) and 6C-2-4(a)(3). (Emphasis added.) The Legislature in enacting the current grievance procedure eliminated Respondent’s ability to appeal a level one decision for any reason. Respondent can no longer challenge the level one decision on the grounds that the decision is contrary to law, exceeds the evaluator’s statutory authority, is clearly wrong, or is arbitrary or capricious or an abuse of discretion, as this statutory right was specifically removed by the Legislature. Respondent is bound by the decision of the level one grievance evaluator in the first grievance, which was not appealed by Grievant. The issues in this grievance were decided by the level one grievance evaluator in the decision issued in the first grievance, and cannot be revisited by Respondent. See, *Spurlock v. Lincoln County Bd. of Educ.*, Docket No. 97-22-019 (May 29, 1997).

As discussed in the first level one decision, selection of school service personnel is governed by statute:

(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. . . .

W.VA. CODE §18A-4-8b. Grievant was the most senior remaining applicant, he was qualified for the position of Crew Leader, and he had good evaluations. Grievant should have been placed in the position.

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. Before a legal claim may be barred on the basis of *res judicata*, three elements must be satisfied.

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.

Second, the two actions must involve either the same parties or persons in privity with those same parties.

Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the

prior action or must be such that it could have been resolved, had it been presented, in the prior action.”

Decapio/Beauty v. Dep’t of Transp., Docket No. 06-DOH-329 (Nov. 15, 2006).

3. The provision in the old grievance procedure which allowed Respondent to challenge the decision of the grievance evaluator on the grounds that the decision was contrary to law, exceeded the evaluator’s statutory authority, was clearly wrong, or was arbitrary or capricious or an abuse of discretion was specifically removed by the Legislature when it revised the grievance procedure in 2007. Respondent is bound by the decision of the level one grievance evaluator if it is not appealed by the grievant.

4. A service personnel position must be filled based on seniority, qualifications and evaluation of past service. W.VA. CODE §18A-4-8b.

5. Grievant was the most senior remaining applicant, he was qualified for the position of Crew Leader, and he had good evaluations. Grievant should have been placed in the position at issue.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to place Grievant in the Crew Leader/General Maintenance position at issue, and to pay him backpay, plus interest, from the date Intervenor was first placed in the position, in the amount of the difference between his salary for that period of time and the salary he would have earned as a Crew Leader, to adjust his seniority as a Crew Leader to that date, and to bestow on Grievant any other benefits to which he would have been entitled had he been placed in the position, retroactive to that date.

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).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: May 22, 2017