

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TINA BISHOP,

Grievant,

v.

Docket No. 2017-2272-RalED

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent, and

KIMBERLY CALI RUTH DOTSON,

Intervenor.

DECISION

Grievant, Tina Bishop, is employed by Raleigh County Board of Education, ("Board") in the Secretary III classification and assigned to the attendance department.

Ms. Bishop filed a Level One grievance form dated May 19, 2017, alleging that

Respondent:

[V]iolated 18A-4-8c: Competency Testing for Service Personnel, by refusing to accept passing score of a test administered by an adjoining county and refusing to place the most senior employee in vacant position violating 18A-4-8b.

As relief, Grievant wants Respondent to rescind the prior action filling the job and to assign her to the position.

A Level One conference was held on July 20, 2017, and a decision denying the grievance was issued on August 29, 2017. Kimberly Dotson was joined as an Intervenor at Level One. Grievant appealed to Level Two on September 1, 2017. A mediation was conducted on November 30, 2017. Grievant applied an appeal to Level Three on December 7, 2017.

On April 9, 2017, a Level Three hearing was conducted in Beckley, West Virginia. Grievant personally appeared and was represented by Rich McGervy, Esquire, WVSSPA.

Respondent was represented by Jason S. Long, Esquire, Dinsmore & Shohl, LLP. Intervenor appeared *pro se*.¹ Counsel for Respondent's Proposed Findings of Fact and Conclusions of Law were received by the West Virginia Public Employees Grievance Board on May 14, 2018. Intervenor did not submit post hearing proposals. Counsel for Grievant was granted three extensions for filing proposals, the last one setting the due date as July 31, 2018. A different attorney, George B. Morrone III, Esquire, assumed representation of Grievant after Mr. McGervy left employment with the WVSSPA. Mr. Morrone filed Proposed Findings of Fact and Conclusions of Law on August 24, 2018. The undersigned was not obligated to accept this document but did so and considered it in deciding the grievance.

Synopsis

Grievant believes that she should have been selected for a multiclassified Secretary III/Accountant III position because she had passed the competency test for the Accountant classification and had more seniority than the successful applicant as a Secretary III. Respondent had reclassified the successful applicant's position to a multiclassified position because a significant portion of her duties were in the Accountant classification. Since Intervenor was working in the same multiclassification category as the vacant position she received statutory preference for filling the position. Accordingly, the grievance is denied.

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.

¹ "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

Findings of Fact

1. Grievant, Tina Bishop, is employed by Raleigh County Board of Education, ("Board") in the Secretary III classification. She has been employed by the Board for approximately sixteen years. She is presently assigned to the Attendance Department.

2. The Board posted a position for a 261-day employee at the Board's Academy of Careers and Technology. This was a multiclassified position of Secretary III/Accountant III. It was posted for applications from May 1, 2017, to May 8, 2017.

3. Among the applicants for the Secretary/Accountant position were: Tina Bishop, Grievant; Kimberly Dotson, Intervenor; and Shanna Casto.

4. Grievant has more seniority than Intervenor in the Secretary classification.

5. Grievant has never worked in the Accountant classification nor requested to take the Accountant competency test in Raleigh County. The position she occupies in the Attendance Department has little or no accounting duties.

6. On May 9, 2017, Grievant took and passed the Accountant Classification competency test in Fayette County. This test is the same state-wide for all county boards of education.

7. Intervenor took and passed the Accountant competency test in 2006.

8. In August 2013, Intervenor Dotson inquired with her supervisor whether her position was properly classified as Secretary III because she believed she was doing a significant amount of duties which were found in the Accountant classification. Her supervisor did not follow up on her request and Grievant did not initiate any further steps to contest the classification of her position at that time.

9. During the posting period for the Secretary/Accountant position, Intervenor more insistently inquired² with her immediate supervisor, Network Administrator, Jeff Webb, about whether the classification of Accountant should be added to her position and render it multiclassified Secretary III/Accountant III.

10. Mr. Webb spoke with Superintendent C. David Price about Intervenor's position and was directed by the superintendent to provide supporting documentation if he believed the classification should be changed.

11. Administrator Webb reviewed Intervenor's duties and determined that the position should be classified to include the Accountant classification because Intervenor was performing a substantial amount of accounting duties. He also determined that she had been performing all of those duties since she took the job in August 2013. Mr. Webb wrote a letter to Superintendent Price outlining the various accounting duties Intervenor had been performing during the entire time she had held her position and stated that he believed her position should be reclassified.³

12. Superintendent Price made an additional review of Intervenor Dotson's duties, discussed the duties with other administrators, and took Mr. Webb's recommendation into consideration, and concluded that Intervenor was performing significant accounting duties requiring her position to be reclassified to include the Accountant classification.

² Level Three testimony of Intervenor.

³ Respondent Exhibit 2. Mr. Webb listed the following accounting duties: solely responsible for the department payroll; reconciling bank statements; process purchase order requests; review and approve equipment and services invoices; placing orders with vendors; and, invoicing all broken/lost/stolen devices for which the department is reimbursed.

13. Superintendent Price put on the agenda for approval by the Board at their May 23, 2017, meeting, the reclassification of Intervenor's position with an effective date of August 7, 2013. The Board approved Superintendent Price's recommendation and reclassified Intervenor's position to Secretary III/ Accountant III effective August 7, 2013, when she took that job.

14. At the regular board meeting held May 23, 2017, the Board approved Superintendent Price's recommendation to add the Accountant classification to Intervenor's position making it a Secretary/Accountant position effective August 7, 2013, the day she began working that job.

15. Shanna Casto was working in both classifications when she applied for the position. Because she had the more seniority than any other candidate in both classification she was offered the Secretary/Accountant position on May 9, 2017. However, she declined to take the position.

16. Once Ms. Casto declined, Superintendent Price recommended Intervenor for the Secretary III/Accountant III position at the May 23, 2017, meeting, since her position had been reclassified she was the only remaining candidate holding the multiclassification title required for the position.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. *Id.*

Grievant claims that Respondent failed to give her credit for passing the Accountant classification competency test in neighboring Fayette county. She opines that had she been given credit for passing that examination her superior seniority would have required that she be the successful applicant for the multiclassified Secretary III/Accountant III position for which Intervenor was hired.

Respondent counters that Grievant's passage of the competency test in Fayette County, though commendable, was not relevant to the filling of the position in question because Intervenor was already working in a position that held the same multiclassification as the posted position. That being the case, the Board was statutorily required to select her.

It is useful to note that "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner, which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

The analysis of most county board selection cases must start with the controlling statute. For service personnel positions that is W. VA. CODE § 18A-4-8b which states:

(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. **Qualified applicants shall be considered in the following order:**

- (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;**
- (2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;
- (3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;
- (4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;
- (5) Substitute service personnel who hold a classification title within the classification category of the vacancy;
- (6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and
- (7) New service personnel. (Emphasis added).

Respondent argues that Intervenor was in a position which held the classification of Secretary III/Accountant III even though it was posted and listed in the classification of Secretary III only. Because Intervenor's position was in the required multiclassification category, the Board was required by statute to give her the job ahead of Grievant. While this makes sense, the fact that Intervenor's position was not recognized as being in the multiclassification category until the meeting when the position was filled calls for the situation to be closely examined.

W. Va. Code § 18A-4-8 (l) requires county boards of education to “review each service personnel employee's job classification annually and . . . reclassify all service employees as required by such job classifications.” A board of education is obligated to classify school service personnel according to the duties performed by said employees. *Taflan v. Hancock County Bd. of Educ.*, Docket No. 15-86-099-2 (Jan. 12, 1987). When a worker regularly performs work in her own and another classification, multi-classification is required. *Bailey v. Mercer County Bd. of Educ.*, Docket No. 91-274-158 (Jan. 31, 1992). Secretaries who perform banking and related bookkeeping duties have been deemed to be entitled to multi-classification as Secretary/Accountant. See *Higgins v. Randolph County Bd. of Educ.*, Docket No. 94-42-1111 (Dec. 27, 1995); *Ellison v. Fayette County Bd. of Educ.*, Docket No. 97-10-258 (Sept. 18, 1997); *Akers v. Raleigh County Bd. of Educ.*, Docket No. 97-41-301 (Oct. 30, 1997).

Intervenor had requested that her position be reviewed for multiclassification about four years earlier and her supervisor did not follow through on the request. Intervenor did not press the issue at that time. However, with the posting of the position in question she pressed the issue with her supervisor with more urgency because it would have a significant impact on her application. Once her supervisor reviewed her duties he found that a significant part of her duties fit into the Accountant classifications including payroll, purchasing, bank accounts reconciliation, and oversight of invoices (Respondent Exhibit 2).⁴ He recommended that her position be reclassified to accurately reflect her duties and the superintendent agreed. Once those facts were determined Respondent had a

⁴ W. VA. CODE § 18A-4-8 (i) lists such duties as payroll records and management, process related to purchasing, billing, and budgets, and accounts payable, as Accountant classification duties. *Id.* at paragraphs (4), (5) and (6).

statutory obligation to reclassify Intervenor's position to reflect her duties. W. Va. Code § 18A-4-8 (I). While it is not controlling in this matter it was not arbitrary or capricious the effective date of the reclassification to the date Intervenor began performing the duties of the multiclassified position. Accordingly, Grievant did not prove by a preponderance of the evidence that Respondent's action of reclassifying Intervenor's position as multiclassified Secretary III/Accountant III was arbitrary and capricious.

Once that issue is decided, the next question is whether it was appropriate for Respondent to select Intervenor for the posted position even though Grievant had passed the competency test for the Accounting classification and had more seniority as a Secretary III than Intervenor. The answer must be yes. W. VA. CODE § 18A-4-8b (b) requires that the Board give first preference to "(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy." After her position was properly reclassified and Ms. Casto declined the position, Intervenor was the only candidate left actually working in the multiclassification of the vacant position. Respondent was required to offer Intervenor the position. Grievant's passage of the Accountant competency test insures that she is qualified to be selected for such positions but does not put her on equal footing with applicants who are actually working in the classification.

Grievant did not prove by a preponderance of the evidence that Respondent's action of hiring Intervenor for the Secretary III/Accountant III position instead of her was unlawful or arbitrary and capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. *Id.*

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. W. Va. Code § 18A-4-8 (l) requires county boards of education to "review each service personnel employee's job classification annually and . . . reclassify all service employees as required by such job classifications."

4. A board of education is obligated to classify school service personnel according to the duties performed by said employees. *Taflan v. Hancock County Bd. of Educ.*, Docket No. 15-86-099-2 (Jan. 12, 1987). When a worker regularly performs work in her own and another classification, multi-classification is required. *Bailey v. Mercer County Bd. of Educ.*, Docket No. 91-274-158 (Jan. 31, 1992).

5. Secretaries who perform banking and related bookkeeping duties have been deemed to be entitled to multi-classification as Secretary/Accountant. See *Higgins*

v. Randolph County Bd. of Educ., Docket No. 94-42-1111 (Dec. 27, 1995); *Ellison v. Fayette County Bd. of Educ.*, Docket No. 97-10-258 (Sept. 18, 1997); *Akers v. Raleigh County Bd. of Educ.*, Docket No. 97-41-301 (Oct. 30, 1997).

6. Grievant did not prove by a preponderance of the evidence that Respondent's action of reclassifying Intervenor's position as multiclassified Secretary III/Accountant III was arbitrary and capricious.

7. W. VA. CODE § 18A-4-8b (b) requires that the Board give first preference to "(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy."

8. After her position was properly reclassified and Ms. Casto declined the position, Intervenor was the only candidate left actually working in the multiclassification of the vacant position. Respondent was required by W. VA. CODE § 18A-4-8b (b) to offer Intervenor the position.

9. Grievant did not prove by a preponderance of the evidence that Respondent's action of hiring Intervenor for the Secretary III/Accountant III position instead of her was unlawful or arbitrary and capricious.

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* 156 C.S.R. 1 § 6.20 (2018).

DATE: August 28, 2018.

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**