THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KELLY MARIE BUCHANAN,
Grievant,

v. **Docket No. 2019-0051-MerED**

MERCER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Kelly Marie Buchanan, Grievant, is employed as a full-time cook by Respondent, Mercer County Board of Education. She filed a grievance dated July 7, 2018, alleging that she received a summer cook assignment in May 2018 and went to training to learn the particulars of the program. She was informed on July 7, 2018, by the Personnel Director that Respondent had made a mistake in the selection process for the summer school cook position and a different employee was going to take her place in that job. Grievant alleges that she gave up other summer employment opportunities to take this job and the loss of income caused her financial hardship.[1] As relief Grievant seeks "work or pay for the three weeks I was given."[2]

At the hearing, Grievant and Respondent expressed that they agreed that the matter could go directly to Level Three as authorized by W. VA. CODE § 6C-2-4(a)(4)[3].

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[1] This is a summary of Grievant's statement which was attached to her grievance form and is part of the record.

[2] Since summer school program has ended for 2018, the "work" portion of Grievant's request for relief is no longer an option.

[3] W. VA. CODE § 6C-2-4(a)(4) States: "An employee may proceed directly to level three upon the agreement of the parties . . ."

A Level Three hearing was conducted in Beckley, West Virginia, on September 5, 2018. Grievant appeared *pro se.*[4] Respondent was represented by Kermit J. Moore, Esquire. This matter became mature on October 4, 2018, upon receipt of the last Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant received a summer job assignment as a cook for a summer program the Board was operating. She received the assignment in May but was told in July that another employee was entitled to the position. Grievant had turned down other summer work believing she would be working for the Board and seeks pay for the lost opportunity to take other summer jobs. The Board is obligated to fix mistakes in personnel matters as soon as possible. The Grievance Board does not award tort-like or speculative damages. 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.

Findings of Fact

1. Grievant, Kelly Marie Buchanan, is employed by Respondent, Mercer County Board of Education, as a regular full-time Cook 3. She has been employed by the Board for seven years and is assigned to Pikeview Middle School.

[4] "*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.

2. On May 22, 2018, the Board voted to place Grievant in an extracurricular position participating in the 2018 Summer Learning Academy as a Cook at Whitethorn Primary School. She participated in training regarding this position on June 27, 2018.

3. Grievant had not previously worked in the summer school program.

4. At some point after Grievant was awarded the job, Respondent received a complaint from another applicant who had worked in previous summers. That applicant asserted that she should have been selected for the position ahead of Grievant.

5. Upon investigating the claim, Respondent ascertained that the complainant was correct. Because she had "summer seniority," she should have been placed in the position instead of Grievant.

6. Respondent's Human Resources Director, Kristal Filipek, called Grievant on July 7, 2018, and told her that a mistake had been made. Dr. Filipek told Grievant that the other cook would be taking the summer job at Whitethorn Elementary School instead of Grievant.

7. When Grievant learned that she was going to be working in the Summer Learning Academy, she turned down other jobs she was offered for the summer to be available for the summer cook position.[5] The lack of summer employment caused Grievant to experience financial difficulties.[6]

[5] Grievant included in her grievance statement that she turned down an opportunity to sit with a special needs student, clean houses, and work as a cashier at Walmart.

[6] Grievant's Exhibit 2. A letter from Grievant's landlord stating that her rent payments were in arrears.

8. Grievant did not contest the determination that the other applicant should have originally been selected for the position. She believes that decision would have been proper.[7] She contests the fact that Respondent did not tell her in time for her to take alternative summer employment.

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 seeks to be compensated for her loss of pay for summer employment due to Respondent's mistake. She does not contest that another applicant had more seniority and should have been picked for the position. Rather, she points out that she missed opportunities for work and pay she could have received had Respondent not made the mistake, or if the mistake had been discovered in time for her to get a different summer job. In short, she does not feel she should have to suffer through no fault of her own.

Respondent acknowledges the original mistake and sincerely apologized for it. Dr. Filipek testified that she did not discover the mistake until it was brought to her attention. As soon as she verified that the claimant was correct, she informed Grievant. This all

[7] Since Grievant conceded the propriety of the determination that the other applicant was originally entitled to be selected for the job the evidence regarding that decision was sparse and is not addressed herein.

occurred in two or three days. It is apparent that Respondent reacted as quickly as could reasonably be expected under the circumstances. This is a difficult situation for all involved. This is not the first instance that a mistake has been made by a public employer that had unfortunate effects on one or more employees.

The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997). *Toney v. Lincoln County Bd. of Educ.,* Docket No. 2008-0533-LinED (Oct. 31, 2008). Additionally, it has been established that prior mistakes do not create an entitlement to continuing incorrect compensation. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-7-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995). *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006)." *Mullins v. McDowell County Bd. of Educ.*, Docket No. 07-33-076 (Oct. 20, 2008); *Dinger v. Mercer County Bd. of Educ.,* Docket No. 2013-1047-MerED (Sept. 19, 2013). *Bailey, et al. v. Mingo County Bd. of Educ*., Docket No. 2015-1551-CONS (Jan 8, 2016). As stated in these cases, it was incumbent upon the Board to correct the selection error and discontinue paying Grievant for the position.

Grievant is seeking compensation from the Board for the mistake made by its agent. This type of damages for negligent actions is typically not available through the grievance procedure. The Grievance Board has consistently held that "tort-like" damages are unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection,* Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Board*

of Education, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ*., Docket No. 97-20-007 (June 30, 1997); *Stalnaker v. Div. of Corrections,* Docket No. 2013-1084-MAPS (Mar. 26, 2014).

Finally, to assess damages in this case, more evidence regarding the summer jobs which may have been available to Grievant, such as duration and rate of pay, would be necessary. Without this evidence, any award of damages would be based upon speculation. Speculation is not sufficient to meet the proof burden. *See, Coleman v. Dep't of Health & Human Res.,* Docket No. 03-HHR-318 (Jan. 27, 2004); *Thacker v. Dep't of Health & Human Res*., Docket No. 2017-1422-DHHR (Sep. 7, 2018).

It appears that Grievant is a hard working and reliable employee. It would be very hard not to be sympathetic to her in this situation. Unfortunately, the remedy she seeks in not available in the grievance procedure under the present circumstances. 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. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd.*

of Educ., Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997). *Toney v. Lincoln County Bd. of Educ.,* Docket No. 2008-0533-LinED (Oct. 31, 2008).

3. It has been established that prior mistakes do not create an entitlement to continuing incorrect compensation. *See Stover v. Div. of Corr.*, Docket No. 04-CORR-259 (Sept. 24, 2004); *Ritchie v. Dep't of Health and Human Res.*, Docket No. 96-7-HHR-181 (May 30, 1997); *Pugh v. Hancock County Bd. of Educ.*, 95-15-128 (June 5, 1995). *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006)." *Mullins v. McDowell County Bd. of Educ.*, Docket No. 07-33-076 (Oct. 20, 2008); *Dinger v. Mercer County Bd. of Educ.,* Docket No. 2013-1047-MerED (Sept. 19, 2013). *Bailey, et al. v. Mingo County Bd. of Educ*., Docket No. 2015-1551-CONS (Jan 8, 2016).

4. The Grievance Board has consistently held that "tort-like" damages are not unavailable under the Grievance Procedure. *Dunlap v. Dep't of Environmental Protection,* Docket No. 2008-0808-DEP (Mar. 10, 2009). *Spangler v. Cabell County Board of Education*, Docket No. 03-06-375 (March 15, 2004); *Snodgrass v. Kanawha County Bd. of Educ*., Docket No. 97-20-007 (June 30, 1997); *Stalnaker v. Div. of Corrections,* Docket No. 2013-1084-MAPS (Mar. 26, 2104).

5. Speculation is not sufficient to meet the proof burden. *See, Coleman v. Dep't of Health & Human Res.,* Docket No. 03-HHR-318 (Jan. 27, 2004); *Thacker v. Dep't of Health & Human Res*., Docket No. 2017-1422-DHHR (Sep. 7, 2018).

6. Grievant did not prove by a preponderance of the evidence that she was entitled to the remedy she is seeking from Respondent.

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: October 11, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE