

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOHN MARK ELBERT,
Grievant,**

v.

Docket No. 2018-1085-HarED

**HARRISON COUNTY BOARD OF EDUCATION,
Respondent and**

**LEONARD L. STONESTREET,
Intervenor.**

DECISION

Grievant, John Mark Elbert, filed this action against his employer, Harrison County Board of Education, on or about March 16, 2018, grieving his non-selection for the position of School Bus Supervisor. Grievant alleges that the successful applicant for this position, Leonard Stonestreet, was not qualified for this position and that Respondent erred by considering Mr. Stonestreet's greater seniority in awarding the position to him. Grievant seeks to be awarded the position and back pay.

This grievance was denied at Level One on April 3, 2018, by Dr. Mark A. Manchin, Superintendent. A Level Two mediation session was conducted on June 27, 2018. Grievant perfected his appeal to Level Three on July 9, 2018. A Level Three evidentiary hearing was conducted before the undersigned on December 7, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by his counsel, Adam Barney, Berry, Kessler, Crutchfield, Taylor & Gordon. Respondent appeared by Dora Stutler and by its counsel, Richard S. Boothby, Bowles Rice LLP. Intervenor, Leonard Stonestreet, appeared in person and by his counsel, George B. Morrone, III, West Virginia School Service Personnel Association. Mr. Stonestreet filed his request to intervene in the case

on or about December 7, 2018. On December 19, 2018, an Order Granting Intervenor Status to Mr. Stonestreet was entered by the Grievance Board. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 4, 2019.

Synopsis

Grievant is employed by Respondent as a bus operator. Grievant applied for the school bus supervisor position currently held by Mr. Stonestreet. Grievant argues that his qualifications were superior to the more senior applicants and that he should have been selected by Respondent. Mr. Stonestreet and Respondent contend that Mr. Stonestreet was properly selected to fill the vacancy, because Mr. Stonestreet met the minimum qualifications for the posted vacancy and Respondent has substantial discretion in making hiring decisions. Respondent has the discretion to select the most senior applicant who meets the minimum qualifications for a posted vacancy, pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-8b. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator.
2. Leonard Stonestreet, before being hired by Respondent as its School Bus Supervisor, was also a bus operator.
3. On February 8, 2018, Respondent posted the School Bus Supervisor position at issue. The minimum qualifications for the position listed only a high school diploma, a valid driver's license to operate a school bus, annual certification by the Department of Education, and Health requirements as the board may require.

4. Grievant and Mr. Stonestreet, among other current employees of Respondent, applied for the posted School Bus Supervisor position.

5. On February 22, 2018, James Lopez, Transportation Director, conducted applicant interviews using the same set of questions. Mr. Lopez explained that one of the purposes of the interview was to make certain that the job applicants understood what would be expected of them. The results of the interview did not play a role in determining who would be recommended for hire.

5. Mr. Stonestreet's seniority date is May 4, 2000.

6. Grievant's seniority date is August 21, 2008.

7. Grievant and Mr. Stonestreet had positive past job performance evaluations.

8. On December 19, 2017, Respondent approved a medical leave for Mr. Stonestreet based on the recommendation of his physician. This leave was scheduled to end on or about March 18, 2018.

9. In addition to his experience as a bus operator and volunteering to cover the vacant bus supervisor duties, Grievant had experience working in a public transportation bus system; no other candidate possessed that experience and training.

10. Since 2016, Grievant has served as the Chairman of the Harrison County Schools Bus Safety Committee.

11. Grievant also has management experience as the Harrison County Schools Summer Custodian/General Maintenance Team Leader; a position which required him to manage and supervise a three to six employee crew on a daily basis. Grievant also has

experience using certain computer software which is used by the Transportation Department, and has a college degree.

12. On March 6, 2018, Grievant and his representative had an informal conference with Superintendent Manchin. Grievant made the argument that he was more qualified for the position because, among other things, Mr. Stonestreet was not able to drive a school bus due to his medical leave. The record of this case contains no evidence that Mr. Stonestreet's license to operate a school bus had been suspended or revoked at any time.

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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). "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).

Grievant argues that, although none of the applicants worked in the position of School Bus Supervisor, Respondent failed to consider any factor set forth in WEST

VIRGINIA CODE § 18A-4-8b other than seniority, making the hire of Mr. Stonestreet a fait accompli. Respondent counters that Grievant is seeking to add one or more mandatory qualifications to the job posting. From the record of the case, Grievant would have added qualifications favoring his own application. Nevertheless, Respondent did not elect to add any qualifications to this job posting, nor was it required to do so.

WEST VIRGINIA CODE § 18A-4-8b(a) provides that:

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.

WEST VIRGINIA CODE § 18A-4-8b(i)(80) provides that:

“School bus supervisor” is defined as “a qualified person:

(A) Employed to assist in selecting school bus operators and routing and scheduling school buses, operate a bus when needed, relay instructions to bus operators, plan emergency routing of buses and promote good relationships with parents, students, bus operators and other employees; and

(B) Certified to operate a bus or previously certified to operate a bus;”

The job posting required no more than is found in the statutory definition of “school bus operator.” The only statutory qualification is that the successful applicant be certified to operate a school bus or have been previously certified to operate a school bus. Both the Intervenor and Grievant met this minimum qualification. As Respondent’s counsel points out, it would have been unfair and unreasonable, for the board of education, after the fact, to consider qualifications not found on the job posting when filing this position. Grievant and Intervenor met the published qualifications, and both had positive

performance evaluations. Intervenor had greater seniority than Grievant. Therefore, as a matter of law, Respondent was required to hire Mr. Stonestreet.

In the instant case, the weighting of the hiring factors is not relevant. The job applicants both met the posted job qualifications and had positive past performance evaluations. In essence, Grievant and Intervenor were tied on job qualifications and past performance. However, it is undisputed that Mr. Stonestreet had greater seniority than Grievant. Regardless of the weight given to any one factor, only one applicant was superior to other applicants under the three statutory hiring factors, and that was Mr. Stonestreet.

It is well-settled that “[c]ounty 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). Nothing about the selection of Mr. Stonestreet for the School Bus Supervisor position, given the posting and the facts developed in this case, can be viewed by the undersigned as unreasonable or arbitrary and capricious.

Respondent exercised its discretion to select the most senior applicant who met the minimum qualifications as identified on the posting for the position of school bus supervisor. Respondent possessed the discretion to do so, pursuant to WEST VIRGINIA CODE § 18A-4-8b(a). The record of this case demonstrated that both Grievant’s and Mr. Stonestreet’s experience and knowledge provided ample basis upon which a reasonable person could conclude that either or both would be successful in performing the duties of

school bus supervisor. As counsel for Mr. Stonestreet correctly notes to the undersigned, if applicants meet the minimum qualifications and have no negative past evaluations, a county board of education properly exercises its discretion when choosing the most senior applicant to fill the vacancy.

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 W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *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).

2. A board of education must fill service personnel positions on the basis of “seniority, qualifications and evaluation of past service.” W. VA. CODE § 18A-4-8b(a).

3. It is well-settled that “[c]ounty 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).

4. The record established that Grievant and Mr. Stonestreet both met the posted job qualifications and had positive past performance evaluations. Mr. Stonestreet had greater seniority than Grievant and was entitled to the position. Grievant failed to meet his burden of proof and establish by a preponderance of the evidence that he was entitled to the position in question.

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 (2018).

Date: March 1, 2019

Ronald L. Reece
Administrative Law Judge