

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JONATHAN ESCUE,
Grievant,

v.

Docket No. 2018-1328-LinED

LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jonathan Escue, is employed by Respondent, Lincoln County Board of Education. On June 13, 2018, Grievant filed this grievance against Respondent stating, "Respondent filled a summer school classroom teacher position which required certification for K – Adult (a) with a less qualified and/or less senior applicant and (b) without proper application of the matrix in W.Va. Code 18A-4-7a. Grievant also alleges a violation of W.Va. Code 18-5-39(e)." For relief, Grievant seeks "(a) reinstatement into the summer classroom teacher position; (b) compensation for all lost wages with interest; (c) all attendant benefits of the position, both pecuniary and nonpecuniary; (d) summer seniority and (e) any other relief necessary to make Grievant 'whole'."

On an unspecified date, a level one conference was held and a level one decision was rendered on October 22, 2018, denying the grievance. Grievant appealed to level two on October 31, 2018. Following mediation, Grievant appealed to level three of the grievance process on February 28, 2019. A level three hearing was held on June 13, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent was represented by counsel, Leslie K. Tyree, Esquire. This matter became

mature for decision on July 23, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a classroom teacher. Grievant was not selected to fill a summer program position when Respondent determined both Grievant and the successful applicant held the appropriate certification and that the successful applicant had a greater length of service in the summer program. Grievant failed to prove Respondent's hiring decision was arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a full-time classroom teacher at Lincoln County High School teaching science.
2. On May 3, 2019, Respondent posted a summer school position for a "Credit Recovery Teacher Science" requiring certification of "5 – AD," which is the West Virginia Department of Education's "5 – Adult" certification.
3. Grievant applied for the position but the position was awarded to William McCloud, a math teacher.
4. Both Grievant and Mr. McCloud hold the Science "5 – 12" certification rather than the "5 – Adult" certification.
5. The numbers of the certification represent grade levels.

6. Both Grievant and Mr. McCloud had taught the credit recovery summer course in the past as substitute teachers. Grievant substituted during one year for two days and Mr. McCloud substituted a total of twenty days over six years.

7. Respondent considered both Grievant and Mr. McCloud to have held the appropriate certification and made the selection decision based on the number of years each had worked in the summer school program.

8. The West Virginia Department of Education previously changed the “5 – 12” certification to the “5 – Adult” certification. The “5 – 12” certification no longer exists but teachers holding the “5 – 12” certification remain qualified to teach those grade levels.

9. Teachers who were certified as “5 – 12” prior to the change may extend their certification to “5 – Adult” by submitting a form.

10. Credit recovery courses are offered to students grades nine through twelve who have failed classes to allow the student to make up the credit. Credit recovery courses are only taken by grade-level students and not adults.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

“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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). County school boards are required to fill summer school professional positions as follows:

Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. In the event that no employee who has been previously employed in the summer school program holds a valid certification or licensure, a board shall fill the position as a classroom teaching position in accordance with section seven-a, article four, chapter eighteen-a of this code.

W.VA. CODE §18-5-39 (e).

Grievant argues that neither he nor the successful applicant held the proper certification for the position, thus, Respondent was required to make the selection decision using the criteria contained in West Virginia Code § 18A-4-7a, which requires consideration of the relative qualifications of the candidates. Respondent asserts Grievant and the successful applicant both held the proper certification for the position and the hiring decision was proper based on comparison of Grievant's and the successful applicant's days of service in the summer program.

Both Grievant and the successful applicant hold the “5 – 12” certification for Science. “5 – 12” refers to grade levels. The posting listed the necessary certification for the position as “Science 5 – AD.” “AD” stands for “Adult.” “5 – 12” is a legacy

certification that was replaced by “5 – Adult” and is no longer issued. Teachers who hold the “5 – 12” certification can extend their certification to “5 – Adult” by filing a form with the West Virginia Department of Education, without the requirement for any additional training. Dr. Robert Hagerman, Executive Director of the West Virginia Department of Education Office of Certification and Professional Preparation, testified without contradiction that teachers holding only the “5 – 12” certification remain qualified to teach students of grade levels five through twelve but are not qualified to teach adult students.

Credit recovery courses are offered to students grades nine through twelve who have failed classes to allow the student to make up the credit. Assistant Superintendent Bill Linville testified without contradiction that credit recovery courses are only taken by grade-level students and not adults. Although Grievant appears to argue that twelfth grade students taking the course in the summer in order to fulfill graduation credit requirements would be an “adult,” Grievant cites no authority for this proposition.

As Respondent considered both Grievant and Mr. McCloud to be certified to teach the course, Respondent looked to their length of time employed in the summer program to determine who would be awarded the position. Both had only previously served as substitutes in the summer program. Mr. McCloud had worked a total of twenty days in six different summers. Grievant had worked only two days in one summer.

Grievant has failed to prove Respondent acted arbitrarily and capriciously in the hiring decision. Respondent’s choice to view both Grievant and the successful applicant as certified is not unreasonable given that the “5 – 12” certification was the

existing certification before the change in the certification and the change made was only to include adults. As the course cannot be taken by adults, Grievant and the successful applicant were both still certified to teach the course. Respondent's choice to count substitute experience is also not arbitrary and capricious. The statute does not distinguish between regular summer employees and substitute employees. The statute refers only to "length of time the professional has been employed in the county's summer school program" and substitutes are still employed in the program. The Grievance Board has previously upheld summer professional hiring decisions based on substitute service in *Kimble v. Kanawha County Bd. of Educ.*, Docket No. 90-20-459 (Nov. 29, 1990) and *Boone v. Cabell County Bd. of Educ.*, Docket No. 07-06-386 (Dec. 18, 2007). Therefore, Respondent's decision to consider substitute service was reasonable.

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. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

3. County school boards are required to fill summer school professional positions as follows:

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W.VA. CODE §18-5-39 (e).

4. Grievant failed to prove Respondent’s hiring decision was 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: August 30, 2019

Billie Thacker Catlett
Chief Administrative Law Judge