

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DARVON LITTLE,
Grievant,**

v.

Docket No. 2017-2212-WayED

**WAYNE COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Darvon Little, is employed by Respondent, Wayne County Board of Education. On May 22, 2017, Grievant filed this grievance against Respondent stating, "Mr. Little has worked as a substitute mechanic far more than 20 consecutive working days during the 2015-2016 and 2016-2017 school years. He has not received rights, privileges and benefits pertaining to the position pursuant to WV Code 18A-4-15[(a)(2)](C)(iii)." For relief, Grievant seeks "[t]o be made whole through reimbursement of medical expenses/penalties, equipment allowances, clothing/shoe allowances and any applicable interest. Also to receive all accrued sick days for the 2015-2016 and 2016-2017 school years."

Following the September 13, 2017 level one conference, an unsigned level one decision was rendered on October 4, 2017, denying the grievance. Grievant appealed to level two on October 13, 2017. Following mediation, Grievant appealed to level three of the grievance process on March 8, 2018. A level three hearing was held on November 26, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Rod Stapler, WV School Service Personnel Association. Respondent was represented by counsel, Leslie K. Tyree, Esquire. At the conclusion of the level three hearing, the undersigned ordered the

parties to submit written Proposed Findings of Fact and Conclusions of Law (“PFFCL”) by January 10, 2019, extending beyond the statutory timeframe at the request and at the agreement of the parties due to the holidays. Grievant, by representative, timely filed his PFFCL on January 14, 2019.¹ Respondent, by counsel, submitted its PFFCL by email on February 14, 2019. By email dated February 15, 2019, Grievant, by representative, objected to the late submission of the PFFCL. By email of the same date, Respondent, by counsel, withdrew its PFFCL. Therefore, this matter became mature for decision on January 14, 2019, upon final receipt of the Grievant’s written Proposed Findings of Fact and Conclusions of Law, and this decision is based on the record of this case excluding Respondent’s PFFCL.

Synopsis

Grievant is employed by Respondent as a substitute mechanic. Grievant grieves Respondent’s failure to provide him with certain benefits arguing he is entitled to the same due to the number of days he worked as a substitute, an agreement made between Respondent and its service personnel, and state board rule. Grievant also asserted he is entitled to reimbursement of the tax penalty he suffered because Respondent failed to provide him health insurance under the Affordable Care Act. Grievant failed to prove he was entitled to the benefits he seeks or reimbursement of the tax penalty. 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:

¹ Submissions were to be either post-marked or hand-delivered by January 10, 2019. Grievant’s submission was received by the Grievance Board on the 14th but was timely-filed because it was postmarked January 10, 2019.

Findings of Fact

1. Grievant is employed by Respondent as a substitute mechanic and has been so employed since 2015.

2. Grievant worked 97 days in school year 2015 – 2016 and 234.5 days in school year 2016 – 2017.

3. For approximately one year of that time, Grievant was substituting for his brother-in-law, Clifford Wilson, who had suffered a heart attack.

4. Mr. Wilson's position was eventually posted but Grievant was not selected to fill the position.

5. In 1997, Respondent and several unions entered into an agreement: *Agreement Between Wayne County, West Virginia Board of Education and West Virginia Education Support Personnel West Virginia Education Association West Virginia School Service Personnel Association.*

6. In relevant part, the agreement states,

"All mechanics will be provided, by the School Board, \$400 per year for the purchase of and/or replacement of special tools to be used on school buses. The purchases, and/or replacement of these tools shall be approved by the Transportation Director or appropriate supervisor at the Wayne County Bus Garage.

. . .

The School Board shall provide \$300.00 to a new regular employee (Maintenance, Mechanic, Driver) for the purchase of uniforms and \$250.00 per year thereafter for replacement uniforms to all drivers and maintenance.

Agreement at 6.

7. Grievant did not receive an allowance for tools or uniforms and was not reimbursed for safety shoes.

8. Grievant did not receive any benefits of a regular school employee, including health insurance.

9. Grievant paid a \$200 tax penalty because he did not have health insurance.

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.*

Grievant argues the grievance should be granted as Respondent “didn’t have anyone attend the Level III hearing to show why this grievance should not be awarded...” Grievant further argues he is entitled to the relief he seeks per West Virginia Code § 18A-4-15(a)(2)(C)(i), (iii), per an agreement made between Respondent and its service personnel, or by West Virginia Board of Education regulations². Grievant also asserted he is entitled to reimbursement of the tax penalty he suffered because Respondent failed to provide him health insurance under the Affordable Care Act.

Grievant’s argument regarding Respondent’s decision to have only its counsel appear at the level three hearing is without merit. Grievant has the burden of proof in

² Although Grievant argued that he is entitled to safety shoes per state board policy, that policy has been codified in the state board regulations and it is the regulations that will be cited in this decision.

this matter. It is his responsibility to provide evidence to prove his claims. Respondent is not required to present evidence. Respondent did not fail to appear at the hearing, as Respondent was represented by counsel at the hearing. It is not improper for Respondent to choose not to have any other representative appear at the level three hearing.

Grievant asserts he was entitled to certain benefits available to regular employees because of the number of days he substituted during the school year. Substitute employees are only entitled to the benefits of a regular employee under the provisions of West Virginia Code § 18A-4-15(a)(2):

The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

(2) To fill the position of a regular service person as follows:

(A) If the regular service person requests a leave of absence from the county board in writing and is granted the leave in writing by the county board; or

(B) If the regular service person is on workers' compensation and absent.

(C) If an absence pursuant to paragraph (A) or (B) of this subdivision is to extend beyond thirty working days, the county board shall post the position of the absent employee under the procedures set forth in section eight-b of this article. If a substitute service person is employed to fill the position of the absent employee and is employed in the position for twenty or more working days, the substitute service person:

(i) Acquires regular employment status with the exception of regular employee job bidding rights;

(ii) Does not accrue regular seniority; and

(iii) Is accorded all other rights, privileges and benefits pertaining to the position until the regular employee returns to the position or ceases to be employed by the county board. . . .

Therefore, under this statute, several conditions must be met before a substitute employee is entitled to the “rights, privileges and benefits of the position.” First, the regular service person for whom the substitution is being made must either be absent on a requested and approved leave of absence or be on workers’ compensation. W. VA. CODE § 18A-4-15(a)(2)(A)-(B). Second, if the absence from approved leave of absence or workers’ compensation is to last for more than thirty working days, the position must be posted. W. VA. CODE § 18A-4-15(a)(2)(C). Third, the substitute employee selected to fill the posted position must be employed for twenty or more working days in the position. *Id.*

Grievant testified that he substituted for Mr. Wilson for approximately a year during the time-period relevant to the grievance.³ Grievant further testified that Mr. Wilson’s position was eventually posted, but that he was not selected to fill the position. The entitlement to benefits under the statute is not tied to the total number of days worked as a substitute. A substitute must be hired from the posting of a regular

³ Testimony was also offered regarding a position in the current school year, for which Grievant also substituted on a long-term basis. However, that position was not part of the instant grievance and Grievant cannot be awarded any relief in this grievance based on that position.

employee's absence and then work more than twenty days in that position to be entitled to benefits. As Grievant was not selected to fill Mr. Clifford's position after it was posted, he was not entitled to the benefits of the position.

Grievant further argued he was entitled to benefits under the agreement between Respondent and its service personnel relating to payments for uniforms and tools. Grievant is not entitled to relief based on this agreement. The terms of the agreement pertaining to uniforms and tools do not apply to Grievant as a substitute. The agreement provides an allowance of \$400 per year to "all mechanics" for the purchase of tools. Grievant was not a mechanic; he was a substitute and substitutes are not mentioned in this provision. Substitutes are specifically mentioned in other places in the agreement and are addressed separately as substitutes. The agreement also provides \$300 to "a new regular employee" (emphasis in the original) and \$250 per year thereafter for uniforms. Clearly, this provision applies only to regular employees, not substitute employees.

Grievant further argues he was entitled to safety shoes pursuant to state board rule, *West Virginia School Bus Transportation Policy and Procedures Manual (Policy 4336)*. In pertinent part, section twenty-three of the rule, *Recommendations for County School Bus Transportation Systems*, states: "In addition to the pertinent sections of the West Virginia Code and the preceding regulations, the WVBE recommends the following: 23.1. School bus maintenance center equipment shall include: . . . 23.1.6. Protective equipment." W. VA. CODE ST. R. § 126-92-23 (2018). This rule is clearly only a recommendation to county boards of education and does not provide Grievant entitlement to reimbursement for safety shoes he purchased.

Grievant also argues he is entitled to reimbursement of the tax penalty he paid because Respondent failed to offer him health insurance under the Affordable Care Act. The Affordable Care Act “requires certain large employers to offer health insurance to their employees and requires all individuals who do not meet a statutory exemption to purchase and maintain health insurance.” *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 618 (W.D. Va.), *vacated on other grounds, Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (4th Cir. 2010). “According to the ‘Requirement to Maintain Minimum Essential Coverage,’ § 1501 (adding 26 U.S.C. § 5000A) . . . every ‘applicable individual’ must obtain ‘minimum essential coverage’ for each month or pay a penalty, which is included with the individual’s tax return. Act § 1501(a)-(b).” *Id.* at 619 (W.D. Va. 2010). “[I]f an ‘applicable large employer . . . fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan . . . for any month’ and at least one full-time employee receives a ‘premium tax credit or cost-sharing reduction’ through a health benefit exchange, then a civil fine is imposed on the employer. Act § 1513(a), (d).” *Id.* at 618-19. It is not necessary to determine whether Respondent was required to provide Grievant health insurance under the Act, as the penalty for failure to provide such health insurance is payment of a fine, not reimbursement of the employee’s tax penalty as Grievant requests.

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. Substitute employees are only entitled to the benefits of a regular employee under the provisions of West Virginia Code § 18A-4-15(a)(2):

The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

(2) To fill the position of a regular service person as follows:

(A) If the regular service person requests a leave of absence from the county board in writing and is granted the leave in writing by the county board; or

(B) If the regular service person is on workers' compensation and absent.

(C) If an absence pursuant to paragraph (A) or (B) of this subdivision is to extend beyond thirty working days, the county board shall post the position of the absent employee under the procedures set forth in section eight-b of this article. If a substitute service person is employed to fill the position of the absent employee and is employed in the position for twenty or more working days, the substitute service person:

(i) Acquires regular employment status with the exception of regular employee job bidding rights;

(ii) Does not accrue regular seniority;
and

(iii) Is accorded all other rights,
privileges and benefits pertaining to the
position until the regular employee
returns to the position or ceases to be
employed by the county board. . . .

3. In pertinent part, section twenty-three of the rule, *Recommendations for County School Bus Transportation Systems*, states: “In addition to the pertinent sections of the West Virginia Code and the preceding regulations, the WVBE recommends the following: 23.1. School bus maintenance center equipment shall include: . . . 23.1.6. Protective equipment.” W. VA. CODE ST. R. § 126-92-23 (2018).

4. The Affordable Care Act “requires certain large employers to offer health insurance to their employees and requires all individuals who do not meet a statutory exemption to purchase and maintain health insurance.” *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 618 (W.D. Va.), *vacated on other grounds*, *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611 (4th Cir. 2010). “According to the ‘Requirement to Maintain Minimum Essential Coverage,’ § 1501 (adding 26 U.S.C. § 5000A) . . . every ‘applicable individual’ must obtain ‘minimum essential coverage’ for each month or pay a penalty, which is included with the individual’s tax return. Act § 1501(a)-(b).” *Id.* at 619 (W.D. Va. 2010). “[I]f an ‘applicable large employer . . . fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan . . . for any month’ and at least one full-time employee receives a ‘premium tax credit or cost-sharing reduction’ through a health benefit exchange, then a civil fine is imposed on the employer. Act § 1513(a), (d).” *Id.* at 618-19.

5. Grievant failed to prove he was entitled to the benefits he seeks or reimbursement of the tax penalty he paid.

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: February 25, 2019

Billie Thacker Catlett
Chief Administrative Law Judge