

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**NATHANIEL OWEN PEACE,
Grievant,**

v.

Docket No. 2019-0667-OhIED

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

DECISION

Grievant, Nathaniel Owen Peace, filed this action on December 10, 2018, challenging the hiring and selection for the newly created position of Director of Operations. Grievant seeks to have the position reposted or to be placed in the position. This grievance was denied following a Level One conference on January 7, 2019. A Level Two mediation session was conducted on April 11, 2019. Grievant perfected his appeal to Level Three on May 7, 2019. A Level Three evidentiary hearing was conducted before the undersigned on September 24, 2019, at the Grievance Board's Westover office. Grievant appeared in person and by his attorney, David L. Delk, Grove, Holmstrand & Delk, P.L.L.C. Respondent appeared by its counsel, Denise M. Spatafore, Dinsmore & Shohl, LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 15, 2019.

Synopsis

Grievant challenged the hiring and selection for Respondent's newly created position of Director of Operations. Grievant contends that, after the retirement of the prior

Director of Transportation, Respondent illegally combined those duties with those of Director of Maintenance, and that the successful applicant was not properly qualified. Record established that Respondent may redefine the duties of a school service personnel position, or combine them with the duties of another position. Grievant failed to prove by a preponderance of the evidence that the selection process for the Director of Operations was illegal or improper. Record established that the successful applicant was the most senior, qualified applicant and was properly hired.

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

Findings of Fact

1. In the fall of 2018, Respondent's administration was notified by David Ziegler, Director of Transportation, that he was retiring.
2. The administration decided to incorporate the duties of the Director of Transportation into a newly created position, Director of Operations, a service personnel position.
3. The Director of Operations position would be responsible for directing several departments of the school system, including transportation, bond construction, facilities maintenance, and custodial services. A construction bond had recently passed which would involve many building and construction projects, requiring specific oversight by an administrator.
4. At the time of the posting for Director of Operations, Brian Harto had been employed by Respondent for approximately thirty-four years. For the preceding four years, Mr. Harto had been the Director of Maintenance, a service personnel position.

5. Because the maintenance department would be absorbed into the departments supervised by the Director of Operations, the administration consulted Mr. Harto regarding his opinion on the propriety of combining those departments. Mr. Harto was not asked whether he would be interested in the position or whether he would apply if it were posted.

6. On November 26, 2018, Respondent posted the new position of Director of Operations, which would be responsible for the direction and operation of all work and employees in the areas of transportation, construction, maintenance, and custodial services for the school system.

7. The assigned responsibilities of the position included all aspects of building and construction, budgeting and purchasing for all the departments, working with outside agencies and entities, coordination of all work in each department, and supervision of all projects and employees.

8. Mr. Harto was the only applicant who was currently classified as a Director, so he was given priority in being hired for the position as the most senior, qualified applicant.

9. Mr. Harto's previous experience included years of work in the maintenance department in various positions, including years of serving as an emergency substitute bus operator, and supervising the maintenance department.

10. Grievant has four years of experience as a regularly employed bus operator. At the time of the posting of Director of Operations, Grievant was employed as a bus operator and had never been classified as a director.

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 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). "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).

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). West Virginia Code § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." In turn, the same statute defines "qualifications" as meaning that "the applicant *holds* the classification title in his or her

category of employment . . . and shall be given first opportunity for . . . filling vacancies.”
(Emphasis added.)

Grievant’s contention is that, because the new Director of Operations position was assigned duties encompassed within the statutory definition of “Supervisor of Transportation,” Respondent was required to follow the legal qualifications attached to that job title, and to create and post a position separately and only for the transportation department. Respondent’s position is that these demands are not legally required of the Board of Education. Respondent has used its discretion in personnel matters to determine the needs of the school, combined positions to utilize available resources, and hired the most qualified applicant for the position.

It is well established that “[a] board may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate a position entirely.” *Fry v. Mercer County Bd. of Educ.*, Docket No. 07-27-011 (July 31, 2007). “A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools’ best interest requires the elimination of some service personnel jobs.” *Richardson v. Putnam Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997) *citing Lucion v. McDowell County Bd. of Educ.*, 195 W. Va. 297, 446 S.E.2d 487 (1994). “This same reasoning applies to creating and combining position.” *Fry, supra*.

The record of this case, as set out by the Human Resources Director, indicated that the retirement of the Transportation Director presented an opportunity for Respondent to determine more efficient methods for utilizing its resources to serve the

schools and the students, resulting in the decision to combine several departments under the new position of Director of Operations. The need for an administrator over the transportation department was not the only reason for the creation of the new position of Director of Operations. The numerous construction projects resulting from the recent passage of a bond also created the need for an administrator to oversee those projects, in addition to the usual duties associated with directing the ordinary maintenance activities of the county.

Despite Grievant's contentions to the contrary, it was within the parameters of Respondent's discretion to create a new service personnel director position to administer several departments. Nevertheless, Grievant contends that, because some of the position's duties may fall within or overlap with the definition of Supervisor of Transportation, a separate posting for that department was required. "Supervisor of Transportation" is defined by WEST VIRGINIA CODE § 18A-4-8 as follows:

[a] qualified person employed to direct school transportation activities properly and safely, and to supervise the maintenance and repair of vehicles, buses and other mechanical and mobile equipment used by the county school system. After July 1, 2010, all persons employed for the first time in a position with this classification title or in a multiclassification position that includes this title shall have five years of experience working in the transportation department of a county board. Experience working in the transportation department consists of serving as a bus operator, bus aide, assistant mechanic, mechanic, chief mechanic or in a clerical position within the transportation department [.]

It should be noted that the Grievance Board has upheld a school system's authority to post a director position, despite the existence of a statutory supervisor job title. In *Gordon v. Nicholas County Bd. of Educ.*, Docket No. 01-34-502 (Jan. 9, 2002), the board of education posted the position of Director of Maintenance, and the grievant claimed the

position should have been posted as Supervisor of Maintenance. As with the current situation involving the posting of a director position, despite there being a statutory title for Supervisor of Transportation, a county board has the discretion to determine the need for administrative personnel:

The posted position, while including supervisory functions, includes the broader more responsible task of “direct[ing] a department or division,” and is properly classified as a “Director of Maintenance.” To hold otherwise would be to ignore the statutory definition of “Director,” and could well serve to penalize employees in smaller counties which do not need, and perhaps cannot afford, both a Director of maintenance department and a Supervisor of Maintenance, and have included Supervisor duties in the department Director position. *Id.*

It stands to reason that it would contradict the established authority of school boards in such matters to require the creation of a specific service personnel supervisory position only for the transportation department, when a director position could perform the usual duties of a supervisor of transportation, along with the more expansive administrative responsibilities of running that department and others. The fact that the “director or coordinator” title is not statutorily attached to any specific department supports this flexibility to a county board in filling its needs for administrative personnel, dependent upon each school system’s needs and circumstances. It is not uncommon for the director title to encompass multiple departments in order to economize and achieve the utmost efficiency in the operations of the school district.

The record supports a finding that Mr. Harto was awarded the position in accordance with the applicable law. WEST VIRGINIA CODE § 18A-4-8b governs the filling of school service personnel positions, as follows:

A county board of education shall make decisions affecting promotion and 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, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service. Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees than must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy.

It would appear that Mr. Harto was entitled to placement in the position as the only applicant currently holding the director classification. As a bus operator, Grievant would be an applicant not holding the classification of the posted position, so he would not have preference in the hiring process over Mr. Harto, a regular employee holding and working in the pertinent classification. WEST VIRGINIA CODE § 18A-4-8g mandates that “[s]ervice personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.” WEST VIRGINIA CODE § 18A-4-8b mandates that applicants for a school service personnel position who hold the pertinent classification must be given preference in the selection process by which the position is filled. The Grievance Board has held that a current director/coordinator of services must be afforded the preference regardless of the area of “services” in which he or she is then engaged. *Gosnell v. Raleigh County Bd. of Educ.*, Docket No. 94-41-112 (Apr. 21, 1995).

The record of this case also establishes that, contrary to Grievant’s contention, Mr. Harto received no special treatment or favoritism during the application process. After the position was posted on November 26, Mr. Harto submitted an online application on November 29, one day before the posting closed. After the posting period ended on November 30, Ms. Nolte contacted Mr. Harto to advise him that he was the successful

applicant. His name was added as an addendum to the board agenda for the following week's meeting, which had previously been prepared. Aside from being the only applicant within the posting category with seniority as a director, Mr. Harto was also the most qualified applicant. Mr. Harto possessed experience and qualifications in school maintenance and construction, budgeting, scheduling, inventory, purchasing, personnel training, bus driving experience, keeping records and preparing reports, supervision of employees, and an established body of work reflecting an ability to work well with others.

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. WEST VIRGINIA CODE § 18A-4-8b is followed in filing vacancies for service personnel positions, and states, in part, as follows:

(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 [§ 18A-4-8] 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 filing vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title relates to the promotion or vacancy, as defined in section eight of this article.

3. “A board may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate a position entirely.” *Fry v. Mercer County Bd. of Educ.*, Docket No. 07-27-011 (July 31, 2007). “A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools’ best interest requires the elimination of some service personnel jobs.” *Richardson v. Putnam Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997) *citing Lucion v. McDowell County Bd. of Educ.*, 195 W. Va. 297, 446 S.E.2d 487 (1994). “This same reasoning applies to creating and combining position.” *Fry, supra*.

4. WEST VIRGINIA CODE § 18A-4-8g mandates that “[s]ervice personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.”

5. Record established that Respondent may redefine the duties of a school service personnel position, or combine them with the duties of another position. Grievant has failed to prove by a preponderance of the evidence that Respondent’s selection process for the Director of Operations position was illegal or improper. The record also established that the successful applicant was the most senior, qualified applicant and was hired in accordance with the applicable statute.

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 (eff. July 7, 2018).

Date: December 13, 2019

**Ronald L. Reece
Administrative Law Judge**