WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SUSAN LAYNE,
Grievant,

v. **Docket No. 2009-0328-BooED**

BOONE COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Susan Layne, filed this grievance against Respondent Boone County Board of Education ("BCBOE"), on September 6, 2008, protesting her non-selection for a posted half-time regular bus operator position. The grievance statement reads:

> Grievant is a regularly employed half-time cook and substitute school bus operator. She was certified as a school bus operator during the 2007-2008 school year as she worked as a substitute school bus operator. Grievant held all requirements for certification as a school bus operator for the 2008-2009 school year except for the physical examination. The Grievant did not have a physical examination or submit the form because she was advised by the secretary in Respondent's transportation department that it was fruitless to do so as Grievant was temporarily taking insulin. As a consequence of this failure, Grievant did not receive a bus operator's vacancy on or about August 19, 2008. This position was awarded to a substitute school bus operator who is inferior in employment status and seniority to the Grievant.
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> Under a recent amendment to West Virginia Code §18A-2-4, Grievant could have been certified, subject to certain conditions, even if she had continued taking insulin. Grievant contends she had reasonably relied, to her detriment, upon incorrect information from her employer and that such reliance lead to the failure to obtain a physical examination. The lack of the physical examination was the reason that she was not certified as a school bus operator. Grievant also alleges a violation of West Virginia Code §18A-4-8b and § 18A-4-8g.

As relief, Grievant seeks the regular bus operation position (in discussion) with seniority, backpay and other benefits retroactive to the 2008-2009 school term.

Subsequent to the parties agreeing to an extension of the timelines, a hearing was held at level one on October 31, 2008, and the grievance was denied at that level by a

decision dated December 4, 2008. Grievant appealed to level two on December 17, 2008, and a mediation session was held on February 20, 2009. Grievant appealed to level three on February 26, 2009. A level three hearing was held before the undersigned Administrative Law Judge ("ALJ") on June 26, 2009, in the Grievance Board's Charleston office. Grievant Layne appeared in person and through counsel, John Roush, Esq., WV School Service Personnel Association. Respondent was present by Steve Bradley, Director of Transportation, and its counsel Timothy R. Conaway, Esq., Conaway & Conaway. This case became mature for decision on or about July 24, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant asserts she is entitled to a posted one-half time regular bus operator position which was awarded to a substitute bus operator, with a lower priority employment status than Grievant. Grievant, at the time the position in discussion was filled, had not supplied Respondent with necessary documentation needed to be eligible for selection. Grievant contends that her failure to comply with certain prerequisites was due to her detrimental reliance upon the representation of Respondent's agent(s), and but for the inaccurate information conveyed, she would have been the selected applicant for the position at issue. Grievant contends her failure to timely take a mandatory physical and acquire newly enacted waiver documentation should be excused.

Respondent had a reasonable and legal obligation to require Grievant to verify she was able to safely drive a bus. Grievant did not establish that the actions of Respondent's agent(s) or Respondent were improper. Respondent's selection of an applicant/candidate

who met all the requirements for a position at the time of selection is reasonable. The actions of Respondent in the facts of this case are not arbitrary, capricious or clearly wrong. This grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time this grievance arose, Grievant was employed by Boone County Board of Education, Respondent, as a one-half time cook at Nellis Elementary School and as a substitute bus operator. Grievant had approximately three years seniority as a substitute bus operator and one year as a regular cook.

2. Grievant has been diagnosed with Diabetes Mellitus.

3. Pursuant to authority granted in W. VA. CODE § 17C-14-12, the West Virginia Department of Education has promulgated extensive regulations concerning bus drivers. These regulations are set out in 126 CSR 92.

4. Among numerous other requirements, a school bus operator is required to pass a physical examination from a Medical Examiner to qualify for service. This examination shall be conducted no earlier than April 1 to receive certification for the following school term.[1] *See* W. VA. CODE St. R. § 126-92-17 (Physical Examination for School Bus Operators).

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[1] There is language of the regulations which deals comprehensively with the elements of the physical examination. 17.3 provides that, "The physical examination for all school bus operators shall insure that .... There is no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control unless the West Virginia Department of Transportation provides an intrastate waiver.

5. Prior to June 7, 2008, a West Virginia school bus driver who was taking insulin was disqualified from driving a school bus.

6. In May of 2008, Grievant called Steve Bradley, Director of Transportation, and told Mr. Bradley that she was taking insulin for diabetes mellitus, and advised that because of her diabetes she could not drive a bus. Grievant submitted a statement from her treating physician advising that she would not be able to drive a bus because of the diabetes. Resp. Ex. 2.

7. Grievant also informed Janet Epling, the secretary in the Transportation office of her condition and ceased accepting substitute assignments in the late winter, early spring of 2008.

8. In 2008, the West Virginia Legislature amended § 18A-2-4 of the West Virginia Code. Changes and amendments relevant to this grievance became effective June 7, 2008.

9. W. VA. CODE § 18A-2-4, as amended, allows a bus driver afflicted with diabetes requiring insulin to be a school bus operator if he or she is issued a passenger endorsement for his or her commercial driver's license through the Intrastate Waiver Program pertaining to diabetes of the West Virginia Division of Motor Vehicles.

10. Grievant, among other things, spoke with Ms. Epling a number of times prior to the end of the 2007-2008 school year about taking the physical for bus operator certification for the 2008-2009 school year.

11. Grievant spoke with Janet Epling, Mr. Bradley's secretary, on a total of three (3) occasions concerning her condition, all three of her conversations with Ms. Epling

occurred prior to June 7, 2008. This is prior to the effective date of amendments to W. VA. CODE § 18A-2-4.

12. After the effective date of amended W. VA. CODE § 18A-2-4, a school bus operator who was employed by a county board of education or otherwise subject to state board rules governing school bus operators and diagnosed with diabetes mellitus requiring insulin was no longer ineligible for employment as a school bus operator because of the diagnosis if the operator was issued a passenger endorsement for his or her commercial driver's license through the intrastate waiver program pertaining to diabetes of the West Virginia Division of Motor Vehicles.

13. An individual is not guaranteed an intrastate waiver due to seniority or longevity as a bus operator. There are conditions that must be met for a school bus operator to be eligible and obtain a waiver in accordance with the Intrastate Waiver Program.[2] (A copy of specific information is required to be submitted to the Division of Motor Vehicles for waiver application and proof of passenger endorsement under the waiver program is submitted to an operator's employer, *see* W. VA. CODE St. R. § 91-4-14.)

14. On August 8, 2008, the Boone County School Board posted a position for a one-half time regular bus operator position. The deadline for applications as listed on the posting was August 14, 2008.

15. Grievant applied for the position.

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[2] In order to obtain the waiver, W. VA. CODE St. R. § 91-4-14 requires that the bus driver submit the opinion of a board certified/eligible endocrinologist attesting that the applicant: (1) Is free from insulin reactions and has less than one documented reaction per month; (2) is able to and has demonstrated willingness to properly monitor and manage his or her diabetes; (3) is not likely to suffer any diminution of driving ability due to his or her diabetic condition; and, (4) has not exhibited any incidence of diabetic shock or coma in the year immediately preceding the application for intrastate waiver. *See* 14.7.e.

16. At the time of the filling of the position in issue in this grievance, Grievant had still not submitted evidence to Respondent that she had taken a physical which was required for her certification to drive a school bus.

17. Before the position was filled, Mr. Bradley communicated with Grievant and it was discussed that he had not received any notice of Grievant's physical examination, (attesting to her competence to drive).

18. Grievant did not provide to Respondent evidence of a physical examination or waiver attesting to her competence (eligibility) to drive prior to August 19, 2008.

19. Respondent filled the one-half time position with Sabrina Clevinger, a substitute bus operator, on or about August 19, 2008.

20. On December 9, 2008, Grievant delivered to BCBOE a letter from Dr. Jagannath dated October 22, 2008, opining that Grievant was off insulin and able to drive a bus. *See* Resp. Ex. 7.

21. Grievant was the only regularly employed employee (by virtue of her half time cook job) who applied for the position. Other applications were substitutes. Ms. Clevinger was inferior in seniority/status to Grievant.[3] (Referencing W. VA. CODE § 18A-4-8b).

22. Grievant had not properly qualified herself as a bus operator at the time the position at issue was posted nor did she properly execute required documentation to qualify prior to the position being filled.

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[3] It is recognized by the parties and not a point of controversy that ***if*** Grievant had received a physical and certification (been qualified) in the summer of 2008, her superior employment status (regular employee v. substitute) would have given her the one-half time regular bus operator position over Ms. Clevinger. Referencing W. VA. CODE § 18A-4-8b.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant, with the assistance of legal counsel, claims that she "detrimentally relied" upon the representations of Respondent's agent Janet Epling to the effect that she would not be permitted to drive so long as she was taking insulin. Grievant asserts that "but for" the representations to her that taking her physical while taking insulin would be futile, she would have taken her physical (and sought to obtain the required waivers) so she could obtain certification to operate a school bus while taking insulin.[4] Grievant maintains she is entitled to the posted one-half time regular bus operator position which was awarded to a substitute bus operator, inferior in seniority/status.

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[4] At the level III hearing, Ms. Epling recalled that she had told Grievant to take the physical when Grievant thought that she would be able to pass it. This differs slightly, but not materially, from Grievant's recollection as given at the level I hearing, that she was advised she could not take the physical while taking insulin as that would simply result in an automatic failure on the physical.

Prior to June 7, 2008, a West Virginia school bus driver who was taking insulin was disqualified from driving. In 2008, the legislature amended W. VA. CODE § 18A-2-4 to permit school bus drivers taking insulin to drive a bus if the driver is issued a passenger endorsement for his or her commercial driver's license through the West Virginia Division of Motor Vehicles intrastate waiver program pertaining to diabetes. The amended code provision [§ 18A-2-4] in pertinent part, regarding Commercial driver's license for school personnel states:

> (c) A school bus operator who is currently employed by a county board of education or who is otherwise subject to state board rules governing school bus operators and who is diagnosed with diabetes mellitus requiring insulin is not ineligible for employment as a school bus operator because of the diagnosis if the operator is issued a passenger endorsement for his or her commercial driver license through the intrastate waiver program pertaining to diabetes of the West Virginia Division of Motor Vehicles, subject to the following:
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> (1) A copy of the information required to be submitted to the Division of Motor Vehicles for waiver application and proof of passenger endorsement under the waiver program is submitted to his or her employer; and
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> (2) The operator remains in compliance with the stipulations of and grounds for eligibility for the intrastate waiver.

W. VA. CODE St. R. § 91-4-14 sets forth pertinent conditions of the Intrastate Waiver Program. In relevant part:

> 14.7.e. Diabetes: The Division shall not issue an intrastate waiver to an applicant disqualified from an interstate license because of diabetes unless a board certified/eligible endocrinologist attests that the applicant:
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> 1. Is free from insulin reactions which means the applicant does not have severe hypoglycemia or hypoglycemia unawareness, and has less than one documented, symptomatic hypoglycemic reaction per month;
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> 2. Is able to and has demonstrated willingness to properly monitor and manage his or her diabetes;

3. Is not likely to suffer any diminution in driving ability due to his or her diabetic condition; and

4. Has not exhibited any instances of diabetic shock or coma in the year immediately preceding the application for an intrastate waiver.

Reading W. VA. CODE § 18A-2-4 with W. VA. CODE St. R. § 91-4-14, it is evident that after June 7, 2008, if a driver with diabetes who takes insulin is to continue to drive, he or she must obtain the waiver and must also copy the Board with the opinion of the endocrinologist that is submitted to the Department of Motor Vehicles in order to obtain the waiver. The operator must also remain in compliance with the stipulation and grounds for eligibility contained in the Intrastate Waiver.

Grievant relies upon the principles of detrimental reliance to excuse her failure to comply with these applicable conditions of employment at the time the position in discussion was posted and filled. In earlier decisions of the grievance board, detrimental reliance has been identified with the doctrine of equitable estoppel.[5] A key feature of the doctrine of detrimental reliance, relevant to the instant case, is whether the individual asserting the doctrine acted or failed to act based upon misinformation from the board of education *or its agents.* To establish detrimental reliance in the employment context, the West Virginia Supreme Court of Appeals has stated:

> Equitable estoppel cannot arise merely because of action taken by one on a misleading statement made by another. In addition thereto, it must appear that the one who made the statement intended or reasonably should have expected that the statement would be acted upon by the one claiming the benefit of estoppel, and that he, without fault himself, did act upon it to his prejudice.

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[5] Grievant's counsel cites *Daniels v. Greenbrier County Board of Education*, Docket No. 96-13-132 (Jul 31, 1996) and *Stroud v. Mingo County Board of Education*, Docket No. 94-29-621 (Jun 30, 1995), however, there is no clear statement in prior grievance decisions concerning detrimental reliance.

(Citations omitted) *Hatfield v. Health Management Associates of West Virginia,* 223 W.Va. 259, 672 S.E.2d 395 (2008) (per curiam). The undersigned is not persuaded that Grievant's inactions allegedly due to her reliance upon the representations of Respondent's agent constitutes actionable detrimental reliance.

It is noted that Grievant testified that all her communications with Ms. Epling occurred prior to June 7, 2008, the effective date of relevant amendments to W. VA. CODE §18A-2-4. The case at hand is not an example of fraud or misrepresentation by Respondent's agent or Respondent. The information as discussed was correct when it was discussed.

Assuming that Grievant relied upon the words of Ms. Epling as the definitive analysis of her situation, the information allegedly imparted by Ms. Epling was not false when it was shared. Further, it has not been established that Grievant was justified in solely relying upon the legal advice of a secretary. There is no evidence that Ms. Epling has been delegated the responsibility of advising employees as to the law. The question becomes, and it may have always been, to what degree if any, is Respondent liable for Grievant's inaction.

Arguing Grievant's failure to "timely"[6] take a required physical (*see* 126 CSR 92) is excused as a result of the representations of the board of education and/or its agents does not establish all the necessary elements to determine that Grievant is entitled to the position at issue. E.g., It is not known whether or not Grievant would have been able to secure the proper documentation necessary to acquire a waiver in accordance with the

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[6] "Timely" is established as prior to July 28, 2008 as outlined in Resp. Ex 1.

Intrastate Waiver Program. It is not established that at the time Grievant applied for the position at issue, an endocrinologist would have certified that Grievant was (1) free from insulin reactions and has less than one documented reaction per month; (2) was able to and had demonstrated willingness to properly monitor and manage her diabetes; (3) was not likely to suffer any diminution of driving ability due to her diabetic condition; and, (4) had not exhibited any incidence of diabetic shock or coma in the year immediately preceding the application for intrastate waiver. It simply isn't known whether or not any of these things are true. There is no evidence as to any of these things. Without such documentation and without a successful physical examination, Grievant could not have driven a bus for BCBOE. Whether or not such documentation could have been obtained, indeed whether or not Grievant could have passed a physical, is simply speculation. "The general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." Syl. Pt. 1, *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S. E. 2d 720 (1968). Grievant has the burden of proving her grievance by a preponderance of the evidence. *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). Grievant has not met her burden of proof. It is not established that the accurate information discussed, three months prior to the filling of the one-half time regular bus operator position, in discussion, was the cause of any damage to Grievant.

Grievant's attempt to transfer responsibility for her inaction to Respondent was not convincing. To the extent that Ms. Epling made representations to Grievant regarding the requirements of certification of bus drivers with diabetes, her representations are not, in

the facts of this case, found to be a proper basis to find Respondent responsible for Grievant's inactions.

On the weekend before the position was filled, Grievant told Mr. Bradley, the Director of Transportation, that she was going to go off insulin. But Grievant had not submitted to a readily acknowledged physical examination, nor obtained the waiver, required to qualify for the position in discussion. The last medical documentation that Respondent was privy to indicated that Grievant was *unable* to drive because she had diabetes. Resp. Ex. 2. In May of 2008, Grievant told Respondent she was taking insulin. Grievant did not drive a bus in the spring of 2008 because, by her own admission, her diabetes prevented her from doing so. In June, she related that she was unable to take a certification test because her vision was so poor. *See* Resp. Ex. 4. In August of 2008, Respondent had reasonable grounds to question whether or not Grievant was able to safely drive a bus.

_____Necessary documentation establishing that Grievant qualified to operate a school bus was not furnished until December 9, 2008, when Grievant delivered to the Board a letter from Dr. Jagannath dated October 22, 2008, opining that Grievant was off insulin and able to drive a bus. *See* Resp. Ex. 7. But, at the time the position was filled, such medical documentation was absent.

_____It is clear, that while Grievant was interested in the posted one-half bus driver position, she had not taken the necessary steps to qualify herself to assume such a position. Further, by the time Respondent was properly informed that Grievant qualified to operate a school bus, the position was no longer vacant. Respondent filled the position on or about August 19, 2008. This being months prior to Grievant properly qualifying

pursuant to applicable W. VA. CODE and governing rules and regulations. *See* W. VA. CODE § 18A-2-4; W. VA. CODE St. R. §§ 91-4-14 and 126-92-17.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Public Employees Grievance Board Procedural Rules 156 C.S.R. 1 § 3 (2008).

2. School service personnel positions must be posted and filled on the basis of seniority, evaluations, and qualification. Regularly employed service personnel have first preference in filling service personnel positions; followed by employees on the preferred recall list, substitute service personnel and new applicants. W. VA. CODE §§ 18A-4-8b and 18A-4-8g.

3. After June 7, 2008, a bus operator may be certified while taking insulin if the appropriate waivers are obtained. W. VA. CODE §18A-2-4.

4. Grievant was not properly qualified as a bus operator at the time the position at issue was posted nor did she properly document she was qualified prior to the position being filled. W. VA. CODE § 18A-2-4; W. VA. CODE St. R. §§ 91-4-14 and 126-92-17.

5. Grievant did not establish by a preponderance of the evidence that "but for" the representations to her by Respondent's agent, Grievant would have qualified to operate a school bus for BCBOE at the time the position in discussion was posted and/or filled.

6. It was not established, pursuant to the principal(s) of detrimental reliance, as applicable, in this employment context that Respondent is responsible for Grievant's inactions and/or any damages which may have stemmed from such inaction by Grievant.

7. Grievant failed to establish any detrimental reliance which would excuse her failure to comply with applicable W. VA. CODE, rules and regulations governing school bus operators. *See* W. VA. CODE § 18A-2-4; W. VA. CODE St. R. §§ 91-4-14 and 126-92-17.

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 (2008).

Date: January 12, 2010

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Landon R. Brown
Administrative Law Judge