THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARSHA SIEGLE,
Grievant,

v. **Docket No. 2010-0071-WayED**

WAYNE COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Greivant Marsha Siegle filed a grievance against her employer, Wayne County Board of Education on March 17, 2009. Her statement of grievance reads, "I did not have option to bid on the Cafeteria Managers position at Spring Valley High School. It was never posted as Cafeteria Manager. A cook was moved up. I had the most seniority at SVHS. County is out of compliance with 6C-2-4 deadlines for holding level 1. Hearing requested by conference held."[1]

For relief, Grievant seeks, "Post all Cafeteria Manager Positions that have not been posted to be posted. I have been very patient for an answer and have lost money in the process. I ask for the lost pay I would have received if the job had been appropriately posted and filled, granting me the position."

This grievance was denied at level one, and Grievant timely appealed to level two where mediation was held on November 2, 2009. Grievant then appealed to level three. A hearing was held in the Grievance Board's Charleston Office on January 28, 2010. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by David Lycan, Esquire. This case became mature on

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[1]At the level three hearing, both parties agreed the timelines for level one was no longer an issue. Therefore, it will not be discussed.

February 26, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant asserts the position of Cafeteria Manager/Cook should have been posted when the Cafeteria Manager portion became available.

Respondent avers there was no position available, as the employee who was serving in the Cafeteria Manager/Cook position only resigned the Cafeteria Manager portion. Respondent argues it then went to the next senior cook at the school. Respondent further asserts that as employees retire or resign from the dually classified positions of Cafeteria Manager/Cook, they are being posted. Respondent avers that it would be a financial hardship to post the position, as it employs more positions than allowed by state formula.

Grievant has met her burden in this matter. Therefore, this grievance is Granted.

Findings of Fact

1. Grievant is employed by Respondent as a Cook II at Prichard Elementary School. At the time this grievance was filed, Grievant was 45th in order of most seniority of cooks employed by Respondent.

2. During the 2000-2001 school year, Respondent decided to implement Cafeteria Managers at each of the county's schools. Because there were no vacant Cook positions, and since Respondent was well over the state formula with regard to service personnel positions, Respondent initially offered the additional duties of Cafeteria Manager to the most senior cooks at each particular school. If the most senior cook at the school

did not accept the additional duties, Respondent then continued asking each school's cooking staff in order of seniority.

3. Each employee who accepted the additional duties of Cafeteria Manager was compensated at a higher paygrade for as long as they accepted the duties.

4. Diana Cole was employed as a Cook II at Spring Valley High School. At the beginning of the 2007-2008 school year, Ms. Cole accepted the additional duties of Cafeteria Manager for which she was compensated accordingly.

5. At the Board meeting held on February 19, 2008, Ms. Cole's resignation of her position as Cafeteria Manager was accepted and effective back to January 25, 2008. Ms. Cole, however, still remained at Spring Valley High School as a Cook II. Under this fact pattern, the position of Cafeteria Manager was a vacant position at the time of Ms. Cole's resignation.

6. After Ms. Cole's relinquishment of the Cafeteria Manager duties, Beth Browning was awarded that position, as she was the most senior cook at Spring Valley High School willing to accept the duties.

7. The Cafeteria Manager position was never posted.

8. Spring Valley High School does not have the need for a full-time Cafeteria Manager.

9. Respondent has in excess of 57 service personnel positions over the state formula.

10. As employees in the Cafeteria Manager/Cook classification retire or resign from both positions, Respondent is posting the positions. Once an employee is hired for

the position from the posting, that employee cannot resign as Cafeteria Manager without resigning the Cook portion of the position.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

W.VA. CODE §18A-4-8b states in pertinent part:

> (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 of this article, on the basis of seniority, qualifications and evaluation of past service.
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> (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 filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order: (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy.

According to W. VA. CODE §18A-4-8b(d)(2)(A), the Cafeteria Manager class title is included in the same classification category as Cooks.

Grievant asserts that, as a Cook II, she is in the same classification category as needed for Cafeteria Manager, and the position should have been posted so that she

would have had an opportunity to bid on it. Respondent argues that it is only required to post and award positions for job vacancies of established, existing or newly created positions pursuant to W. VA. CODE §18A-4-7a(o). Respondent also asserts that it would be a financial hardship to have to post the position.

It is disingenuous for Respondent to assert there was no position vacant when Ms. Cole resigned as Cafeteria Manager. Clearly, Respondent means for the position of Cafeteria Manager/Cook to be multi-classified, in which case, the undersigned ponders the reason an employee would be permitted to quit one portion of the position. Be that as it may, Respondent permitted it. Therefore, when Ms. Cole resigned, there was an existing position of Cafeteria Manager that should have been posted pursuant to W. VA. CODE §18A-4-7a(o).

Respondent next relies on *Collins v. Wayne Co. Bd. of Educ.*, Docket No. 99-50-535 (Feb. 23, 2000) which permitted Wayne County Board of Education to make adjustments to the number of minutes in a planning period due to financial constraints. Respondent attempts to extend this holding so that the Cafeteria Manager position need not be posted due to the financial implications of the school system. While the undersigned is sympathetic to the plight in which Respondent finds itself, the holding in *Collins* is limited to the issue of planning periods, and therefore it is not persuasive.

The position of Cafeteria Manager, even when designated as a multi-classified position, allows an employee to receive a higher salary than someone who holds only the Cook classification. Also, it allows employees to obtain seniority in that classification, thus giving them preference to future openings in this classification. Out of fundamental fairness, this position must be posted. Whether it is posted as a multi-classified position

or as a position in and of itself is left up to Respondent. Therefore, this grievance must be Granted.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

2. W.VA. CODE §18A-4-8b requires Boards fill service personnel positions on the basis of seniority, qualifications, and evaluation of past service.

3. According to W. VA. CODE §18A-4-8b(d)(2)(A), the Cafeteria Manager class title is included in the same classification category as Cooks.

4. Boards of education are required to post and award positions for job vacancies of established, existing or newly created positions pursuant to W. VA. CODE §18A-4-7a(o).

5. The position of Cafeteria Manager is an existing position. This position must be posted.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to post the position of Cafeteria Manager at Spring Valley High School.

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: July 20, 2009

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Wendy A. Elswick
Administrative Law Judge