THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RONALD D. POWELL,
Grievant,

v. **Docket No. 2009-1266-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Ronald D. Powell filed this grievance on or about March 2, 2009 challenging his non-selection for the Truck Driver/Custodian position after Respondent posted that position. Grievant seeks to be placed in the Truck Driver/Custodian position with back pay with interest and all benefits retroactive to the date that the successful applicant was placed in the position.

This grievance was denied at level one on June 17, 2009, following a hearing conducted by the Respondent's designee. Level two mediation was conducted on August 31, 2009. Appeal to level three was perfected on September 15, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on December 10, 2009, at the Grievance Board's Westover office. Grievant appeared in person and by his counsel, John Everett Roush, Esquire, West Virginia School Service Personnel Association. Respondent appeared by its counsel, William T. Fahey, Esquire, Assistant Prosecuting Attorney, Hancock County. This matter became mature for consideration after receipt of the last of the parties' fact/law proposals on January 12, 2010.

Synopsis

Grievant has worked as a substitute service employee for Respondent for a number of years. In the fall of 2007, Respondent posted a position for a substitute truck driver/custodian. While Grievant was qualified for that position, and offered the position, he turned it down when he was informed he would have to give up his employment as a substitute bus operator. Respondent hired Curt Lyons as a substitute truck driver/custodian in the fall of 2008. Grievant neither performed the duties of a substitute truck driver/custodian nor was contracted by Respondent for that position for the 2008 and 2009 school years. Respondent posted a regular truck driver/custodian position. Grievant applied, but the position was given to the more senior employee, Mr. Lyons. Grievant failed to meet his burden of proof that the position should have been offered to him.

The following findings of facts are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is employed by the Hancock County Board of Education as a substitute bus operator and is certified as a substitute truck driver/custodian.

2. In addition to his employment as a substitute bus operator, Grievant has worked for Respondent substituting for the truck driver/custodian in the food services department at least as early as May 2005. Initially, Grievant did not possess the food service handler card nor had he passed the custodian competency test necessary for certification.

3. In the fall of 2007, Respondent posted a position for a substitute truck

driver/custodian. By that time Grievant had acquired the food service handler card and in the application process for the position, he passed the custodian competency test.

4. Grievant was offered the position referenced in finding of fact three, but turned it down when informed he would have to give up his position as a substitute bus operator. Grievant elected to remain on the substitute bus operator list. Respondent has a policy that school service personnel cannot be maintained on two separate regular substitute classifications.

5. Respondent hired Curt Lyons as a substitute truck driver/custodian in the fall of 2008.

6. Respondent posted a regular truck driver/custodian position. Grievant applied, but the position was given to the more senior employee, Mr. Lyons.

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 Board 156 C.S.R. 1 § 3 (2008); *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).

Grievant argues that he was employed as a substitute truck driver/custodian and established a seniority date earlier than that of Mr. Lyons. In addition, Grievant had all the necessary qualifications for the position and had not received negative evaluations of his service. Grievant was on the list of the substitute truck driver/custodian list used by the food service department in the event of need. Finally, Grievant asserts that he actually worked as a substitute truck driver/custodian. Grievant aptly points to W. VA. CODE § 18A-4-8b(a) & (b) which requires that school service personnel positions be posted and filled on the basis of seniority, qualification and evaluations of past service.

Concerning seniority for school service personnel, W. VA. CODE § 18A-4-8g(b) provides, in relevant part, as follows:

> b) Seniority accumulation for a substitute service person:
> (1) Begins on the date the employee enters upon the duties of a substitute as provided in section fifteen of this article, after executing with the county board a contract of employment as provided in section five, article two of this chapter; and
> (2) Continues until the employee enters into the duties of a regular employment contract as provided in section five, article two of this chapter; or employment as a substitute service person with the county board is severed.

While Grievant appears to have agreed to perform on an emergency basis as a truck driver/custodian, the statutory provisions on accumulation of seniority for substitutes are quite detailed in addressing the varying situations during which substitute seniority is earned. "Seniority arises either from statute or from a contract between an employer and an employee." *Hall v. Bd. of Educ.*, 208 W. Va. 534, 541 S.E.2d 624 (2000). W. VA. CODE § 18A-4-8g(b) states that substitute seniority "begins on the date the employee enters upon

the duties of a substitute . . . after executing with the county board a contract of employment."

The facts of this specific grievance demonstrate that Respondent posted a position for a substitute truck driver/custodian in the fall of 2007. By that time, Grievant had acquired the food service card necessary for the position, and in the application process, he passed the custodian competency test. Grievant was offered the position, but turned it down when he was informed he would have to give up his position as a substitute bus operator. The record indicates that Respondent hired Mr. Lyons as a substitute truck driver/custodian in the fall of 2008. Grievant did not have a contract of employment during the 2008-2009 school year for that position. The record is also clear that Grievant did not perform the duties of a truck driver/custodian during the 2008 and 2009 school years. The level one transcript at pages 17 and 18 contain the following exchange to support this conclusion:

> Q During that over a year period, basically I guess because you are full-time school bus operator driving a school bus every day basically for the gentleman's that's been off, have you not driven the food truck during that time period?
>
> A I have not. What happened last year and at the beginning of this year, I was called out at the beginning of both of those years. They called me, you know, a couple, two or three times, and I always tell them, hey, I'm driving bus 13 still and I'm kind of a temporary full time.

The undersigned is not convinced that, based upon the facts of this case, Grievant's seniority is superior to that of Mr. Lyons for the position in question. Respondent's selection of Mr. Lyons is consistent with the statutory intent of recognizing length of service as cited above, and rewarded the employee with the greatest length of service in the classification category of the vacancy.

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 Board 156 C.S.R. 1 § 3 (2008); *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. "Seniority arises either from statute or from a contract between an employer and an employee." *Hall v. Bd. of Educ.*, 208 W. Va. 534, 541 S.E.2d 624 (2000).

3. The statutory provisions on accumulation of seniority for substitutes and regular employees are quite detailed in addressing the varying situations during which substitute or regular seniority is earned. W. VA. CODE § 18A-4-8g(b) states that substitute seniority "begins on the date the employee enters upon the duties of a substitute . . . after executing with the county board a contract of employment."

4. Grievant did not have a contract of employment during the 2008-2009 school year for the truck driver/custodian substitute position. The record is also clear that Grievant did not perform truck driver/custodian duties during the 2008-2009 school year. The successful applicant's substitute seniority in the classification category of the vacancy was superior to that of Grievant.

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, 2008).

Date: March 22, 2010

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Ronald L. Reece
Administrative Law Judge