THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARILYN COOK,
Grievant,

v. **Docket No. 2010-1538-LogED**

LOGAN COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant, Marilyn Cook, filed a grievance against Respondent on June 7, 2011. The statement of grievance reads:

> Violation of WV State Code 18A-4-7a. Logan County BOE did not post a true vacancy at South Man Grade School. Principal was allowed to realign teachers between Kindergarten and 3rd grade, when a realignment was not needed. Kindergarten position was vacant due to retirement.

Relief sought: "Position at South Man Grade posted for Kindergarten Teacher for 2010-2011 school year. Logan County BOE be required to post all subsequent open positions in accordance with WV State Code." A level one conference was held and this grievance was denied at that level on October 2, 2010.[1] A level two mediation was held on January 10, 2011. A level three hearing was held on September 20, 2011, before Administrative Law Judge Carrie LeFevre at the Grievance Board's office in Charleston,

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[1]The level one letter denying the grievance does not state the date the level one conference was held.

West Virginia.[2] Grievant was represented by Ben Barkey, West Virginia Education Association. Respondent was represented by counsel, Leslie Tyree, Esq. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on October 21, 2011.[3]

Synopsis

Grievant asserts that the position for a kindergarten classroom teacher at South Man Elementary School should have been posted as a vacancy upon the previous employee's retirement. Grievant argues that Respondent violated W.VA. CODE § 18A-4-7a when it realigned another teacher to fill the kindergarten teaching position instead of posting the vacancy. Because a new kindergarten teacher was needed to fill the vacancy created after a teacher retired, there was no need for Respondent to realign its teachers in this instance. The vacancy was created by a teacher's retirement, not by an influx or decline of students, therefore, W.VA. CODE § 18A-4-7a requires that such a vacancy be posted and filled competitively.

Findings of Fact

1. Grievant is currently employed as a Title 1 teacher at Man Elementary. Grievant has been employed by Respondent, Logan County Board of Education, for

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[2]For administrative purposes, this case was reassigned to the undersigned on December 14, 2011.

[3]Respondent did not submit proposed findings of fact and conclusions of law. All parties agreed upon the due date for proposals at the level three hearing. Respondent did not inform ALJ LeFevre at the hearing that it would not be submitting proposals. The Grievance Board was not informed at any time that Respondent would not be submitting proposals. The undersigned can only infer at the current date that Respondent elected not to submit proposals.

approximately twenty years.

2. At the end of the 2009-2010 school year, the only kindergarten classroom teacher at South Man Elementary, Cheryl Basham, retired.

3. Respondent did not increase or decrease the number of kindergarten teaching positions for the 2010-2011 school year.

4. Respondent did not post the vacant kindergarten teaching position.

5. Respondent placed Penny Johnson, the only third grade teacher at South Man Elementary, in the vacant kindergarten position, effective the beginning of the 2010-2011 school year. Ms. Johnson has kindergarten teaching experience.

6. Respondent did not increase or decrease the number of third grade teaching positions for the 2010-2011 school year.

7. Respondent posted the vacant third grade teacher position.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

W.VA. CODE § 18A-4-7a provides, in pertinent part:

> Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working

> places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the job performance of the job.
> ...
> Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted; Provided, That the employee and the county board of education mutually agree to the reassignment.

Grievant argues that this matter involves a "true vacancy" governed by the former provision, not a "realignment" governed by the latter provision, because a teacher retired. According to Grievant, Respondent should have posted the vacant kindergarten position. The undersigned can only surmise that Respondent's argument is that the burden is on Grievant to prove her assertion. Respondent did not give an opening or closing statement at the level three hearing. Respondent did not cross examine either of Grievant's witnesses at the level three hearing. Respondent did not call any witnesses at the level three hearing. Respondent did not introduce any exhibits into the record. Respondent did not submit proposed findings of fact and conclusions of law.

This Grievance Board has previously addressed a similar situation where an elementary kindergarten teacher transferred out of the school. In *Adkins v. Logan County Board of Education*, Docket No. 95-23-406 (September 26, 1996), the elementary school realigned a second grade teacher to fill the vacated kindergarten teaching position. This Grievance Board held that because the elementary school did not experience a change in the number of teachers needed at the school, that the empty kindergarten position

created by a teacher transferring should have been filled as a vacancy instead of realigning the other teachers at the school. The Grievance Board held that if an influx or decline in students had occurred, creating the need for an additional kindergarten teacher, then the respondent elementary school could have realigned teachers.

In the present case, Ms. Basham's retirement left Respondent with a vacant kindergarten teaching position. The number of teaching positions for third grade and kindergarten classes did not change. Because the number of teaching positions were not changing due to a change in the amount of student enrollment, the vacancy should have been posted and filled competitively.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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. W. Va. Dep't of Health and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. In *Adkins v. Logan County Board of Education*, Docket No. 95-23-406 (September 26, 1996), this Grievance Board held that because the elementary school did not experience a change in the number of teachers needed at the school, that the empty kindergarten position created by a teacher transferring should have been filled as a vacancy instead of realigning the other teachers at the school.

3. Because the number of teaching positions were not changing due to a change in the amount of student enrollment, the kindergarten vacancy created by Ms. Basham's retirement should have been posted and filled competitively.

According, this grievance is GRANTED and Respondent is ORDERED to post and fill the kindergarten position vacancy as required by W.VA. CODE § 18A-4-7a. Posting shall be delayed until the end of the current school year to avoid disruption in classrooms. If Ms. Johnson is not the successful applicant for the posted kindergarten vacancy, Respondent is ORDERED to return her to the third grade teaching position at South Man Elementary at the end of the current school year.

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 13, 2012

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Jennifer Lea Stollings-Parr
Administrative Law Judge