THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ARLIE MYERS,
Grievant,

v. **DOCKET NO. 2012-0981-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Arlie Myers, filed a grievance against his employer, the Monongalia County Board of Education, on March 19, 2012. The statement of grievance, as set forth in the appeal to level three, reads:

> Respondent terminated Grievant's contract of employment in order to delete the Foreman classification title from it and to eliminate the supplement/extra compensation that Grievant received as a result of holding the Foreman classification title. Before the elimination of the classification title took effect; i.e., July 1, 2012, Respondent reclassified another employee to the classification title of Foreman with the supplement/compensation entailed by that classification title. Grievant alleges retention of a less senior employee in the foreman classification title is a violation of W. Va. Code 18A-4-8 and 8A-4-8g.

As relief Grievant sought, "(a) reclassification by addition of the Foreman classification title with the supplement/extra compensation that comes with that classification title effective July 1, 2012; (b) compensation for all lost wages and benefits, pecuniary or nonpecuniary, and; (c) interest on all sums of money to which he is entitled."

A hearing was held at level one on September 7, 2012, and a level one decision denying the grievance was issued on September 27, 2012. Grievant appealed to level two on October 11, 2012. A mediation session was held on February 7, 2013. Grievant

appealed to level three on February 18, 2013. A level three hearing was held before the undersigned Administrative Law Judge on May 31, 2013, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on July 5, 2013, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserted that he should not have been reduced in force as a Foreman, because an employee less senior than he held that classification title, and she should have been reduced in force, not him. Grievant is also classified as an Electrician 2, and was Foreman over the other Electricians. The less senior employee classified as a Foreman was also classified as a Custodian, and was Custodian Foreman over the 95 Custodians in the County, performing duties completely different from those performed by Grievant. Grievant has no expertise in custodial work or supervision of Custodians. The statutory definition of Foreman recognizes that the person in this position will be skilled in the particular area of repair or maintenance over which the employee exercises supervisory authority. Grievant did not demonstrate that he should not have been reduced in force in the Foreman classification.

The following Findings of Fact are properly made from the record developed at levels one and three.[1]

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[1] The record was left open for the parties to provide the minutes of the March 12, 2012, meeting of the Board of Education. Respondent provided a copy of the "Agenda

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") for over nine years. Grievant works in the Maintenance Department, and is multi-classified as an Electrician 2/General Maintenance. Grievant was multi-classified as an Electrician 2/General Maintenance/Foreman until June 30, 2012.

2. As a Foreman, Grievant handed out work orders to other Electricians employed by MBOE, and obtained cost estimates for electrical jobs. MBOE employs four experienced Electricians, all of whom are capable of determining what materials will be needed for a job and obtaining cost estimates. The decision was made to reorganize the Electrician assignments, so that each Electrician would be assigned to work in eight or nine schools and obtain cost estimates for all the electrical work to be done in those schools. MBOE personnel determined that a Foreman was not needed for the Electricians.

3. In December 2011, Grievant was notified that he was being reduced in force in the Foreman classification for lack of need. This action was effective July 1, 2012.

4. Grievant's supervisor, Kermit Hess, now hands out the work orders to all the Electricians, and each employee obtains cost estimates for each job he is assigned.

5. At a meeting of MBOE on March 12, 2012, Judy Sickles was reclassified from a Custodian/Crew Leader to a Custodian/Custodian Foreman. She was reclassified because MBOE believed that her duties had evolved to the point that Foreman was the proper classification, rather than Crew Leader.

Item: Personnel List for that meeting to be placed in the record instead, which has been marked as Joint Exhibit A. The record was also left open for the parties to provide the Job Description for the Foreman of the Custodians, which has been marked as Joint Exhibit B. Joint Exhibits A and B are Ordered admitted into evidence.

6. Ms. Sickles' seniority date as a Foreman is June 15, 2009, reflecting her service as a Custodian Foreman during that summer. Grievant's seniority date as a Foreman is January 1, 2008. No other MBOE employee is classified as a Foreman.

7. Ms. Sickles has worked for MBOE since 1992, and was a Custodian before she assumed supervisory duties many years ago. She was classified as a Crew Leader for many years. Ms. Sickles supervises all 95 Custodians employed by MBOE, and the Custodian IV's that are assigned to each building. She spends 98% of her time supervising and giving direction to Custodians, inspecting buildings for cleanliness and making corrections, training Custodians, and ordering and delivering supplies. In emergency situations, she assists in performance of custodial duties.

8. The job description for the Custodian Foreman states that the employee "must have successfully completed the WV Service Personnel test for custodians," "must have comprehensive knowledge of custodian duties, techniques, and work practices," and "[f]ive years experience in all phases of custodian work practices and techniques."

9. Grievant has no experience supervising Custodians or performing custodial work, but was sure he could learn the job. Grievant has not passed the service personnel test for Custodians.

10. When Grievant obtained the classification of Foreman, the position was not posted. Grievant was one of two Electricians, and he was offered the position of Foreman of the Electricians by his supervisor when the previous Foreman resigned.

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 Public

Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

At the time Ms. Sickles was reclassified to Custodian Foreman, Grievant's reduction in force had not taken effect. Grievant argues he should not have been reduced in force in the Foreman classification because he was more senior than Ms. Sickles in that classification. He asserts that he should have been placed in Ms. Sickles' Custodian Foreman position. Grievant asserts that he is capable of learning the ins and outs of supervision of the 95 Custodians, even though he has no such experience, and put forth no evidence that he knows anything about how to train and supervise this many Custodians.

The reduction in force provisions relied on by Grievant are found in WEST VIRGINIA CODE SECTIONS 18A-4-8b and 18A-4-8g. The provisions pertinent to this grievance are as follows:

> All decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section. W. VA. CODE §18A-4-8b(h).
>
> If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply: (1) The employee within that classification with the least amount of seniority within the classification or grades of classification is properly released and

> employed in a different grade of that classification if there is a job vacancy. W. VA. CODE §18A-4-8b(j).
>
> For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e [18A-4-8e] of this article. W. VA. CODE §18A-4-8g(d).
>
> When implementing a reduction in force, the service person with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. The particular classification title held by a service person within the classification category may not be considered when implementing a reduction in force. W. VA. CODE §18A-4-8g(e).

Grievant relies on these provisions to claim that, at the time his reduction in force was effective, a less senior employee was allowed to retain the classification of Foreman rather than him, which was contrary to the foregoing statutory provisions.

While there is indeed only one Foreman classification title, Grievant ignores the statutory definition of this classification title. WEST VIRGINIA CODE SECTION 18A-4-8(i)(42) defines "Foreman" as, "a *skilled person* employed to supervise personnel who work in the areas of repair and maintenance of school property and equipment." (Emphasis added.) Rick Williams, MBOE's Assistant Manager of Human Resources, testified that Respondent has always assigned a person from within the classification to be supervised as the Foreman over the other employees in the classification, for the simple reason that it would be extremely difficult for an Electrician, for example, to assign work to and supervise the work of Plumbers or HVAC Technicians. This was what occurred when Grievant was placed in the Foreman classification. The job description for Ms. Sickles' position likewise indicates that the Custodian Foreman must have expertise in custodial work. The definition of Foreman itself recognizes this when it uses the words "skilled person." While the statutory definitions and the reduction in force provisions could stand to be more clear, it

is obvious that the definition does recognize that there will be an Electrician Foreman, a Custodial Foreman, a Plumbing Foreman, a Carpenter Foreman, and so on, for purposes of application of the statutory provisions regarding filling vacancies, reduction in force, etc. It is likely that no one imagined that an employee with no expertise in an area would assert that they should be placed in the position of supervising other employees skilled in a particular area of repair or maintenance. Grievant has no expertise in custodial work, and his duties as a Foreman over Electricians bore no resemblance to those of Ms. Sickles. Grievant is not a skilled person as it relates to the position of Foreman over the Custodians.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "When implementing a reduction in force, the service person with the least seniority within a particular classification category shall be properly released and placed

on the preferred recall list. The particular classification title held by a service person within the classification category may not be considered when implementing a reduction in force." W. VA. CODE §18A-4-8g(e).

3. "Foreman" is defined as "a *skilled person* employed to supervise personnel who work in the areas of repair and maintenance of school property and equipment." W. VA. CODE § 18A-4-8(I)(42). (Emphasis added.) This definition recognizes that the person serving as a Foreman will have expertise and training in the particular area over which he is the Foreman, and that there will be an Electrician Foreman, a Custodial Foreman, a Plumbing Foreman, a Carpenter Foreman, and so on, for purposes of application of the statutory provisions regarding filling vacancies, reduction in force, etc.

4. Grievant did not demonstrate that he was not properly reduced in force in the Foreman classification.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 14, 2013