THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BETTY JO LITTLE,
Grievant,

v. **DOCKET NO. 2013-1425-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Betty Jo Little, filed a grievance against her employer, the Monongalia County Board of Education, on or about February 19, 2013. The statement of grievance reads:

> Grievant asserts that the Respondent failed to timely post and fill a vacancy in bus route #281. Performance of this route entails greater compensation than Grievant's route at the time that this grievance was filed. (Grievant has subsequently received bus route #281.) Grievant alleges a violation of W.Va. Code 18A-4-8b,18A-4-8g & 18A-4-15.

As relief Grievant sought, "compensation for lost wages and benefits. Grievant also seeks an award of interest on all monetary sums."

A conference was held at level one on March 4, 2013, and a level one decision denying the grievance was issued on March 5, 2013. Grievant appealed to level two on March 18, 2013, and a mediation session was held on May 20, 2013. Grievant appealed to level three on June 5, 2013, and a level three hearing was held before the undersigned Administrative Law Judge on October 11, 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, LLC. This matter became mature for decision on November 14, 2013, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued that a bus route should have been posted when an employee took a leave of absence. The first leave of absence did not extend beyond 30 working days, and as such, there was no requirement that it be posted. The second leave of absence also did not extend beyond 30 working days, and a few days into the absence, the employee retired, thereby negating the leave of absence, so that no posting was required. Grievant then argued that Respondent had to fill the vacancy within 20 working days of the date of the retirement. Respondent posted the vacancy and then withdrew the posting in order to reassess the lengthy bus route to try to reduce the amount of time students spent on the bus, and the amount of overtime required. Respondent eventually was able to reduce the length of the route immediately prior to the time Grievant was awarded the route. It was not the same route that the employee who retired had been assigned, and was not a vacant position which had to be posted within 20 working days of the retirement while Respondent was trying to reconfigure the route.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a regular bus operator since 2004.

2. Bus operator contracts in Monongalia County are based on a six-hour day. Bus operators who work more than six hours a day are paid for that additional time at their hourly rate.

3. MBOE bus operator Ida Osecky held a bus route assignment that took around ten hours per day to complete.

4. Ms. Osecky requested an unpaid medical leave of absence from November 28, 2012, through January 1, 2013, and MBOE approved this request on December 11, 2012.

5. School was not in session in Monongalia County from December 24, 2012, through January 1, 2013, a period of seven working days. Ms. Osecky's request for a leave of absence was for 18 working days.

6. Ms. Osecky requested an extension of the unpaid medical leave of absence from January 2 through 31, 2013, and this request was approved by MBOE on January 8, 2013. Grievant's second request for a leave of absence was for 22 working days.

7. Ms. Osecky then submitted her retirement request, effective January 9, 2013, and this request was approved by MBOE on January 22, 2013.

8. On January 23, 2013, MBOE posted Ms. Osecky's bus run. Grievant bid on this run. The posting was rescinded on January 25, 2013, before it was filled.[1]

9. The reason for rescinding the posting was to allow the Transportation Department time to examine other bus routes and determine whether changes could be

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[1] Respondent's records did not indicate that Grievant had bid on the posting. However, given that the posting was withdrawn within two days, and that Grievant testified she did bid on the position, Grievant's testimony that she bid on the position is accepted as more accurate in this situation.

made to Ms. Osecky's run to decrease the length of time required to complete the route. This would reduce the amount of time students would be on the bus, and reduce overtime costs to MBOE.

10. On March 1, 2013, MBOE again posted Ms. Osecky's bus run. Grievant bid on this run, and was awarded the run effective April 1, 2013, as she was the bidder with the most seniority.

11. Immediately prior to April 1, 2013, changes were made to this route resulting in a reduction in the amount of time to complete the route by about two hours, to around eight hours per day.

12. From the beginning of the 2012-2013 school year, the bus run assigned to Grievant was a lengthy run, and she regularly worked seven hours a day completing this assignment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

Grievant argued that Ms. Osecky's bus route should have been posted when she requested a leave of absence. Respondent pointed out that neither leave of absence request exceeded 30 working days.

WEST VIRGINIA CODE § 18A-4-15 provides, in pertinent part, that:

> (a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
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> (1) To fill the temporary absence of another service employee;
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> (2) To fill the position of a regular service person as follows:
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> (A) If the regular service person requests a leave of absence from the county board in writing and is granted the leave in writing by the county board; or
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> (B) If the regular service person is on workers' compensation and absent.
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> (C) If an absence pursuant to paragraph (A) or (B) of this subdivision *is to extend beyond thirty working days*, the county board shall post the position of the absent employee under the procedures set forth in section eight-b [§ 18A-4-8b] of this article. . . .

(Emphasis added.)

Ms. Osecky requested a leave of absence for a period of less than 30 working days on two separate occasions. Neither absence triggered the requirement that the position be posted. Even if the undersigned were to somehow conclude that the two absences should be combined, Ms. Osecky retired immediately after the second leave of absence was approved, thereby negating the remainder of the leave of absence, and putting the vacancy in a different posture.

Grievant next argued that Respondent had to fill the vacancy within 20 working days of the effective date of Ms. Osecky's retirement, and Grievant should have received additional compensation from February 6, 2013, through March 31, 2013, as she would

have been awarded the run when it was first posted. Respondent argued that it was within its discretion to rescind the initial posting in order to reevaluate the bus route, and that Grievant could not demonstrate she would have received the route the first time it was posted.

WEST VIRGINIA CODE § 18A-4-15(a)(4) provides that a substitute employee may be assigned to fill a position vacated by the retirement of an employee. However, that statute further provides that "[w]ithin twenty working days from the commencement of the vacancy, the county board *shall fill the vacancy* under the procedures set forth in section eight-b [§ 18A-4-8b] of this article and section five [§ 18A-2-5], article two of this chapter." (Emphasis added.) Additionally, WEST VIRGINIA CODE § 18A-4-8b(g)(3) requires that, "[a]fter the five-day minimum posting period, all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of existing or newly created positions."

"[T]he Grievance Board has long held that Respondent had the authority to withdraw the posting prior to filling the assignment, and Grievant acquired no right to the assignment merely by her application for it. *Hackney v. Jackson County Bd. of Educ.*, Docket No. 00-18-113 (June 9, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998). *See Otto v. Berkeley County Bd. of Educ.*, Docket No. 89-02-369 (Dec. 28, 1990)." *Powroznik-Hess v. Monongalia County Bd. of Educ.,* Docket No. 2010-0498-MonED (Feb. 10, 2011). Certainly, Respondent also had the authority to modify the assignment prior to filling it. *Smith v. Hancock County Bd. of Educ.,* Docket No. 07-15-329 (Oct. 22, 2007). The question, however, is whether the decision to reevaluate the bus

route at issue had to be accomplished within the 20-day time period set forth in the above-cited statute. The answer to this question turns on the determination of whether the assignment constituted a "vacancy" while Respondent was trying to reconfigure the route. Respondent presented testimony that, given the constraints placed on a county board of education to change bus routes once they are filled, the best time to make changes is when the bus operator assigned to the route vacates the assignment. The undersigned concludes that while Respondent was studying the situation and trying to reconfigure the route in order to reduce the amount of time the students were on the bus, Ms. Osecky's route no longer existed as a vacant position to be filled. In fact, Respondent did eventually find a way to reconfigure the route prior to Grievant being placed in the posted assignment. While it took Respondent some period of time to determine what changes should be made, and Grievant's observations were that no changes to the route were made until right before she began performing the assignment, this was still accomplished within less than two months during the winter months when it is not unusual for school to be canceled many days, which does not seem unreasonable.

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 her 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. WEST VIRGINIA CODE § 18A-4-15 provides that when "a regular service person requests a leave of absence from the county board in writing and is granted the leave in writing by the county board," and the absence will "extend beyond thirty working days, the county board shall post the position of the absent employee."

3. Respondent was not required to post Ms. Osecky's position during the first leave of absence because it did not extend beyond thirty working days. Respondent was not required to post Ms. Osecky's position during the second leave of absence because it did not extend beyond thirty working days, and Ms. Osecky retired a few days into the second leave of absence.

4. WEST VIRGINIA CODE § 18A-4-15(a)(4) requires that vacancies created by retirement be filled within 20 working days from the "commencement of the vacancy."

5. "[T]he Grievance Board has long held that Respondent had the authority to withdraw the posting prior to filling the assignment, and Grievant acquired no right to the assignment merely by her application for it. *Hackney v. Jackson County Bd. of Educ.*, Docket No. 00-18-113 (June 9, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998). *See Otto v. Berkeley County Bd. of Educ.*, Docket No. 89-02-369 (Dec. 28, 1990)." *Powroznik-Hess v. Monongalia County Bd. of Educ.,* Docket No. 2010-0498-MonED (Feb. 10, 2011).

6. Respondent had the authority to modify the assignment prior to filling it. *Smith v. Hancock County Bd. of Educ.,* Docket No. 07-15-329 (Oct. 22, 2007).

7. While Respondent was studying the situation and trying to reconfigure the bus route in order to reduce the amount of time the students were on the bus, the bus route no longer existed as a vacant position to be filled.

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: December 17, 2013