WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA F. COX,

Grievant,

v. **Docket No: 2012-0942-BooED**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Donna F. Cox ("Grievant") was engaged in a service contract as a substitute cook and teacher aide with the Boone County Board of Education ("Board" or "Respondent"). Grievant's service contract was terminated for violation of the Board's policy regarding declination of service calls. The termination was effective February 24, 2012 after a hearing by the Board, as requested by Mrs. Cox, on the proposed termination.[1] (*See* Respondent Ex. 6 at 2; *see also* Respondent Ex. 7 at 2.) Thereafter, Mrs. Cox filed a Statement of Grievance with the West Virginia Public Employees Grievance Board on March 9, 2012, stating that her service contract[2] was wrongfully terminated and, as relief, Grievant sought to have her service contract reinstated and payment for days missed.

A Level I conference was held on March 19, 2012, wherein Grievant asserted that her service contract was wrongfully terminated and requested that she be paid for the days

[1] Respondent has been represented throughout the proceedings by Timothy R. Conaway, Conaway & Conaway, PLLC.

[2] The grievance identifies Mrs. Cox's job title or classification that she is grieving as that of substitute teacher aide. The evidence supports, however, that she was engaged in a service agreement for both substitute teacher aide and substitute cook. (*See* Respondent's Ex. 3.)

such termination caused her to miss. *See* March 30, 2012 Letter to Grievant from John Hudson, Superintendent Boone County Schools. The grievance was denied at Level I and on April 11, 2012, Mrs. Cox appealed to Level II, requesting mediation by an Administrative Law Judge. An unsuccessful mediation session was had on August 30, 2012, at the Public Employees Grievance Board. On September 11, 2012, Grievant appealed to Level III and requested a hearing, adopting the grounds for her grievance from the Level I and II Statements of Grievance.

Thereafter, the matter was transferred for administrative reasons to the undersigned. On October 24, 2012, Respondent filed a motion to dismiss for failure to state a claim. In a letter dated November 4, 2012, Grievant addresses the motion to dismiss and, for the first time, alludes to other aides not being fired for being in violation of Board policy. Grievant did not, however, amend her statement of grievance at any time prior to the Level III hearing. On November 29, 2012, Respondent provided Grievant with substitute statistics for the months of October, November, and December 2011, under the auspices of the Freedom of Information Act.

A Level III Hearing was convened on December 5, 2012. At the outset of the hearing, Respondent's counsel, Mr. Conaway, addressed the motion to dismiss. The undersigned granted the motion in part and denied in part. The undersigned ruled that the original statement of grievance could stand as setting forth a claim upon which relief could be granted, that is, that the Board wrongfully terminated Grievant's service contract for violation of Board policy. The undersigned further found, however, that Grievant's attempt to re-characterize her grievance as a discrimination claim would not be allowed given that the foundation for such a claim, by her own admission, was discovered well in

advance of the Level III Hearing and Grievant had never attempted to amend her statement of grievance to reflect such a claim.

The grievance became mature on January 7, 2012 after receipt of the parties' submissions on proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent has proven by a preponderance of the evidence that Grievant was in violation of the Guidelines for Substitute Teachers and Service Personnel policy and that her contract was not wrongfully terminated as a result thereof.

Findings of Fact

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact:

1. Grievant began working for Respondent under a substitute service contract as a teacher aide and cook in the 2009-2010 school year.

2. On June 29, 2010, Respondent revised its policy "Guidelines for Substitute Teachers and Service Personnel" ("GCA"). *See* Respondent Ex. 1.

3. The Board's GCA authorized the Board to terminate a substitute service contract if the substitute declines work on more than five occasions in one school year and further outlined instances in which a declination of work would not be counted against the substitute, such being personal illness, scheduled medical appointments, family illness requiring care of a family member by the substitute, and declination because of a conflict with an existing work assignment with the Board. *Id.* at 1.

4. The Board's GCA policy distinguishes between substitute professional and substitute service personnel, allowing professional substitutes to limit their availability to

work as a substitute in certain schools. *Id.* at 3.

5. Grievant worked for the Board under a substitute service contract in the 2010-2011 school year.

6. The Board did not enforce its revised GCA policy during the 2010-2011 school year.

7. On September 26, 2011, Ms. Shawn L. Hawkins, Respondent's Director of Human Resources, sent a letter to all service substitutes outlining the Board's GCA policy. *See* Respondent Ex. 2. The GCA policy was attached to the memo as well as a "Substitute Service Request for 2011-2012". *Id.* The GCA policy did not modify existing substitute service contracts.

8. The "Substitute Service Request 2011-2012" required all substitute service personnel to acknowledge they wanted to continue to be a substitute for Respondent and that they had read and understood the GCA policy. *Id.*

9. On October 3, 2011, Grievant signed the "Substitute Service Request 2011-2012", indicating that she wanted to continue to be considered for substitute service work as a teacher aide and cook. Respondent Ex. 3. She also verified that she had received a copy of the GCA policy and that she understood the policy. *Id.*

10. Grievant attached a letter to her signed "Substitute Service Request 2011-2012", requesting the she be exempt from all cook jobs other than at Jeffrey Spencer Elementary, an elementary school near her house, and requested that she be removed from the cook list if such exemption was not an option. *Id.* She further requested that she not serve as a substitute teacher aide in any high school or middle school or Whitesville Elementary. *Id.* She requested to be advised if the exemption from certain

schools was not allowed. *Id.*

11. Ms. Hawkins called Grievant on October 6, 2011, on her number identified in the October 4, 2011 letter, and left her a message that she was not allowed to exempt herself from certain schools unless she were retired. *Id.*

12. Grievant states that she did not receive the message, but does not challenge that such a message was left.

13. Grievant was called for a variety of jobs during October, November, and December of 2011, and declined all middle school, high school, and cook jobs during that timeframe. Respondent Ex. 4. During this timeframe, Grievant's declination of call outs exceeded the maximum amount allowed per the GCA policy. *Id*.

14. The Board undertook an evaluation of substitute service call-outs and declinations during the months of October, November, and December 2011. Respondent Exs. 4, 5.

15. The Board determined that Grievant, along with a number of other substitute service workers, was in violation of the GCA policy. *Id.*

16. In a letter dated February 1, 2012, Mr. Hudson, Boone County School Superintendent, advised Grievant that he was recommending termination of her substitute service contract for violation of the GCA policy, that removal from the substitute list would be in accordance with W. Va. Code §§ 18A-2-2, 6, 8 and 8a, and gave her an opportunity for a hearing on such prior to termination. Respondent Ex. 2.

17. Grievant requested a hearing on the proposed termination and such was held on February 15, 2012. *See* Respondent Ex. 8.

18. Thereafter, at a meeting of the Boone County Board of Education, it was

recommended that Grievant's substitute service contract be terminated for violation of the GCA policy. *See* Respondent Exs. 4, 9.

Discussion

The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant asserts that her substitute service contract was wrongfully terminated because she requested to be exempt from certain schools for the 2011-2012 school year based upon the October 4, 2011 letter she attached to her signed "Substitute Service Request 2011-2012." *See* Respondent Ex. 3.

The Board revised its GCA policy in the summer of 2010 governing declination of call outs and ability to exempt oneself from certain schools. *See* Respondent Ex. 1. The revised GCA policy establishes guidelines for accepted reasons to decline a service call and advises service personnel of grounds for termination of a substitute service contract. *Id.* The GCA policy is not a modification of any existing contract but is instead an iteration of Board policy. The Board did not enforce the revised GCA policy during the 2010-2011 school year. Prior to enforcement of the policy, the Board sent out a letter advising service personnel that it would be enforcing the policy in the 2011-2012 school year

beginning in October 2011. The Board gave substitute service personnel the opportunity to decline to be considered for further substitute service worker jobs upon advising that it would be enforcing the GCA policy.

Grievant acknowledged her understanding of the GCA policy and her wish to continue to be considered for substitute service call outs during the 2011-2012 school year. *See* Respondent Ex. 3. She attempted to exempt herself from certain schools, in contravention of the GCA policy, via the October 4, 2011 letter. *Id*. Ms. Hawkins left Grievant a message that the requested exemptions were not allowed, though Grievant contends she did not receive such message. *See* Respondent Ex. 3; *see also* Grievant's testimony at Level III hearing.

Grievant asserts that she believed she was exempted from such service calls pursuant to her October 4, 2011 request. Throughout the fall of 2011, however, Grievant continued to get call outs for schools from which she requested exemption yet she did not contact Ms. Hawkins, or anyone within the Board, to inquire as to why she continued to receive call outs to schools from which she had requested an exemption, and from which she believed herself to be exempt. At the end of December 2011, the Board determined that Grievant had declined more than 5 service calls in the fall of that year and began the process of terminating her service agreement[3].

A letter dated March 30, 2012 denying Grievant's Level I grievance details what dates were considered to be in violation of the GCA policy and acknowledges that the cook call outs would not be considered in the analysis of the Board's termination determination.[4]

[3] Grievant does not challenge the propriety of the process employed to terminate her agreement.
[4] Grievant has admitted throughout this grievance process that the chosen reason for declination of a

Given that Grievant requested to be removed from the cook list if an exemption were not allowed, the undersigned finds that the Board rightfully recognized that cook calls should not be considered in the analysis of the declination of service calls as relevant to this grievance proceeding. Evidence adduced at the Level III Hearing, however, supports that Grievant was still in violation of the GCA policy in the number of declinations of substitute service calls even when cook jobs were not considered. *See* Grievant Exhibit 1; *see* March 30, 2012 Letter.

The Board set forth a policy and advised all service personnel of the policy when it began to enforce said policy. *See* Respondent 1, 2. By her own admission through both testimonial and documentary evidence, Grievant was in violation of the policy because she declined more than 5 call outs in the fall of 2011. Grievant erroneously relies upon the October 4, 2011 letter requesting exemption from the policy as her defense[5]. The undersigned **FINDS** that Respondent has proven by a preponderance of the evidence that Grievant was in violation of the GCA policy and that her contract was not wrongfully terminated as a result thereof.

Conclusions of Law

1. The burden is on the employer to prove that the action taken in this matter was justified. Any party asserting the application of an affirmative defense bears the

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service call in the Board's electronic system did not always comport with the actual reason, *i.e.* if the call out were for a high school or middle school, Grievant may have chosen lack of transportation or lack of child care as a reason for her declination of such call. *See* March 30, 2012 letter; *see also* Level III Hearing.

[5] The undersigned recognizes that had Ms. Hawkins sent a letter to Grievant, rather than leave a phone message, there would have been clear understanding between the parties as to Grievant's requested exemption and the Board's denial of such. Therefore, the undersigned would urge Respondent to consider such modes of communication in the future as to avoid similar misunderstandings. Testimonial and documentary evidence supports, however, that Grievant should have been put on notice that her request had been denied even though she did not receive the phone message denying such in that she continued to receive call outs for schools from which she had requested an exemption.

burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Respondent has proven by a preponderance of the evidence that Grievant was in violation of the GCA policy and that her contract was not wrongfully terminated as a result thereof.

Accordingly, the 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 West Virginia 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).

February 25, 2013

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Heather D. Foster Kittredge
Administrative Law Judge