WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAMELA J. SCHWARZ,
Grievant,

v. **Docket No. 2012-0816-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

Grievant, Pamela Schwarz, is employed by Respondent, Department of Health and Human Resources, as an Economic Support Specialist in the Mason County office of the Bureau for Children and Families. Ms. Schwarz filed a level three grievance form dated February 14, 2012, alleging that she was "Placed on unpaid leave beginning 2/6/12 without good cause." As relief, Grievant seeks "To be made whole including back pay with interest & all benefits restored."

On August 7, 2012, Respondent filed a Motion to Dismiss alleging that Grievant failed to raise a claim for which any relief could be granted by the West Virginia Public Employees Grievance Board. Grievant filed a Response to the Motion to Dismiss on August 9, 2012. On August 10, 2012, a telephonic hearing was held by the undersigned Administrative Law Judge to hear arguments on the motion. Grievant was represented at the telephonic hearing by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Michael Bevers, Assistant Attorney General. By Order dated August 14, 2012, the undersigned noted that at the hearing, the parties agreed that the facts in this grievance were not in dispute. The parties agreed to submit the matter for a level three decision based upon the facts

stipulated at the telephonic hearing, in addition to Proposed Findings of Fact and Conclusions of Law. The Motion was held in abeyance pending those submissions. Both parties submitted fact/law proposals, the last of which was received by the West Virginia Public Employees Grievance Board on September 21, 2012. This matter became mature for decision on that date.

Synopsis

Grievant filed a certificate of candidacy for the office of Mason County Board of Education. Because Grievant is a classified state employee, Respondent required her to take an unpaid leave of absence while she ran for a "paid public office" as required by state statute and rule. Grievant argues that this office is not actually a paid office as contemplated by statute because board of education members do not receive a salary. County board of education members receive pay for attending meetings and are paid public officials. The grievance is DENIED.

The following facts are stipulated as true by the parties, and are proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Pamela Schwarz, is employed by the Department of Health and Human Resources ("DHHR") as an Economic Support Specialist in the Mason County office of the Bureau for Children and Families ("Bureau").

2. Grievant filed a certificate of candidacy to run for the Mason County Board of Education.

3. Upon learning of Grievant's candidacy for office, Respondent informed Grievant that she was allowed to run for political office, but was required to take an unpaid leave of absence from her classified employment while she was a candidate.[1]

4. Grievant requested and received an unpaid leave of absence from February 7, 2012, to February 15, 2012.

5. On February 14, 2012, Grievant Schwarz withdrew her candidacy, filed this grievance, and returned to work for the Bureau the next day.

6. County board of education members may be paid up to $160 per meeting they attend, not to exceed fifty meetings per year. Board members are also paid "all necessary traveling expenses, including all authorized meetings, incurred on official business."[2] Mason County Board of Education members are paid $160 per meeting.[3]

7. Mason County Board of Education members are considered "employees" for income tax withholding purposes. Accordingly, federal income tax, social security payments and Medicare tax are withheld for the payments they receive for attending meetings.[4]

8. For the 2010-2011 fiscal year, Mason County Board of Education Members were paid the following amounts for attending meetings:

- Two members were paid $8,320;
- Two members were paid $8,160;
- One member was paid $8,000.[5]

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[1] Respondent cited W. VA. CODE § 29-6-20 and *West Virginia Division of Personnel Administrative Rule* 143 C.S.R.1 § 16.
[2] *See* W. VA. CODE § 18-5-4 (e) & (f).
[3] *See* Joint Exhibit 2. Mason County Board Of Education Supplemental Salary Expenditures or the Fiscal Year Ended June 30, 2011.
[4] *See* Joint Exhibit 1, a memorandum to all county school systems from Joe Panetta, Assistant State Superintendent of Schools, citing Internal Revenue Code § 3201(c).
[5] Joint Exhibit 2.

9. A county board of education member is considered an "employee" for purposes of West Virginia Public Employees Insurance Act ("PEIA"). The board member must pay the entire cost of the premium if he or she chooses to accept coverage under the act.[6]

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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).

Respondent argues that Grievant had to take an unpaid leave of absence when she filed a certificate for candidacy for the Board of Education because that is a paid political office. W. VA. CODE §§ 29-6-29 (e) and (g) provide the following:

> (e) Notwithstanding any other provision of this code, no employee in the classified service shall:
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> > (3) Be a candidate for any national or state paid public office or court of record; or hold any paid public office other than as a paid poll clerk or worker; or be a member of any national, state or local committee of a political party, or a financial agent or treasurer within the meaning of the provisions of section three [§ 3-8-3], four [§ 3-8-4] or five-e [§ 3-8-5e], article eight, chapter three of this code. Other types of partisan or nonpartisan political campaigning and management not inconsistent with the provisions of this subdivision and with the provisions of subsection (d) of this section shall be permitted.

[6] *See* W. VA. CODE § 5-16-2

> (g) Any classified employee who becomes a candidate for any paid public office as permitted by this section shall be placed on a leave of absence without pay for the period of such candidacy, commencing upon the filing of the certificate of candidacy.

Respondent notes that county boards of educations are nonpartisan offices for which a classified employee may run under W. VA. CODE §29-6-29 (e). However, pursuant to subsection (g) of the statute, Grievant has to take a leave of absence to seek that position if it is a "paid public office." Respondent also points to *West Virginia Division of Personnel Administrative Rule* 143 C.S.R.1 § 16 which reflects the statute at subsection (g) by stating the following:

> (g) Any classified employee who becomes a candidate for any paid public office as permitted by this subdivision shall request and receive a leave of absence without pay for the period of the candidacy, commencing upon the filing of the certificate of candidacy. If the employee withdraws his or her candidacy, he or she shall return from the leave of absence immediately upon such withdrawal.

Grievant does not contest that the foregoing statute and policy requires a classified employee to take an unpaid leave of absence if she becomes a candidate for a paid public office. Rather, Grievant argues that county boards of education are not paid as contemplated by these provisions. Consequently, the only issue to be decided is whether a board of education position is a paid public office.

Respondent points to the fact that Mason County Board of Education members are paid $160 per meeting and received at least $8,000 in one fiscal year in addition to any travel expenses they may have incurred. They note that income taxes, social security and Medicare payments are withheld from these per meeting payments under the provisions of the United States Internal Revenue which consider them to be income. They also note that the Board members are considered "employees" under the West

Virginia Public Employees Insurance Act and are eligible for insurance coverage like other public employees.

Grievant contends that the term "paid" as used in the statute refers to a salary like that which is paid to such officials as the County Prosecuting Attorney or County Clerk. She argues that the per meeting payments are simply stipends for attendance rather than a salary which would make the position paid. In support of this position, Grievant notes that the member does not receive payment for a meeting he or she does not attend. She also points out that, unlike actual public employees, board members must pay the the entire cost of the premium to receive PEIA coverage.

The West Virginia Supreme Court of Appeals decision, *Fraley v. Civil Serv. Comm'n,* 177 W. Va. 729; 356 S.E.2d 483 (1987), is instructive on this issue. In *Fraley,* the Court was asked to determine if the office of county coroner is a paid public office. In making that determination the Court stated:

> Among the criteria to be considered in determining whether a position is an office or mere employment are whether the position was created by law; whether the position was designated as an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether one occupying the position has been constituted a representative of the sovereign.

Id. The Court examined the statute related to the creation of the position of county coroner, W. VA. CODE § 61-12-14 and found:

> The statute designates the position of county coroner as a public office, and provides that the person holding the office must take the same oath of office prescribed for other county officers. Although the statute does not prescribe the qualifications, duties, tenure, or salary of the office, the statute does mandate how those matters shall be prescribed. Clearly, the position of coroner is a paid public office.

Fraley, supra.

A county board of education member is an elected office created by statute. W. VA. CODE § 18-5-1. The qualification for the office are prescribed in W. VA. CODE § 18-5-1a and the term of office is established in section 1b of that article. Board members are required by W. VA. CODE § 18-5-3, to take an oath of office. There can be no doubt that the county board of education is a public office.

With regard to compensation for coroners, W. VA. CODE § 61-12-14 states that the coroner "shall be paid such fees or amounts for such services as may be fixed by the chief medical examiner." *Id.* The statute does not require that the coroner receive a salary. It is possible for the coroner to be paid on a fee basis whenever his or her services are necessary. Based upon this compensation provision, the Court found the coroner to be a *paid* public office.

The Grievant is correct in noting that, if statutory construction is necessary, personnel regulations and laws are to be strictly construed in favor of the employee. *Smith v. W.Va. Div. Rehab. Ser.*, 208 W. Va. 284, 540 S.E.2d 152 (2000) (citing *Syllabus Point 1, Morgan v. Pizzino,* 163 W. Va. 454, 256 S.E.2d 592 (1979)). However, "Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. Pt. 7 Fraley, supra; Syl. Pt. 2, State v. Elder,* 152 W. Va. 571, 165 S.E.2d 108 (1968). In this case there is no need for statutory construction. The statue refers to "paid" public offices. As demonstrated, in *Fraley, supra,* the statute does not require the method or amount of such payments. Since county board of education members are compensated pursuant to statute,[7] they are paid public offices. Accordingly, the

[7] *See* W. VA. CODE § 18-5-4 (e) & (f).

Respondent properly required Grievant to take a leave of absence and the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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).

2. W. VA. CODE §§ 29-6-29 (e) and (g), and *West Virginia Division of Personnel Administrative Rule* 143 C.S.R.1 § 16, require a classified employee who becomes a candidate for any paid public office to request and receive a leave of absence without pay for the period of the candidacy, commencing upon the filing of the certificate of candidacy.

3. "Among the criteria to be considered in determining whether a position is an office or mere employment are whether the position was created by law; whether the position was designated as an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether one occupying the position has been constituted a representative of the sovereign." *Fraley v. Civil Serv. Comm'n,* 177 W. Va. 729; 356 S.E.2d 483 (1987).

4. "Where the language of a statute is clear and without ambiguity, the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. Pt. 7 Fraley, supra; Syl. Pt. 2, State v. Elder,* 152 W. Va. 571, 165 S.E.2d 108 (1968).

5. Since county board of education members are compensated pursuant to statute, they are paid public offices. Grievant did not prove that it was improper for Respondent to require her to take a leave of absence when she filed a certification of candidacy for that office.

Accordingly, the grievance is DENIED.[8]

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: FEBRUARY 20, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE

[8] Since the grievance is denied there is no need to rule on the Motion to Dismiss.