

# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KEVIN L. WASHINGTON,**  
Grievant,

v.

**Docket No. 2014-0407-LogED**

**LOGAN COUNTY BOARD OF EDUCATION,**  
Respondent.

## **DECISION**

Grievant, Kevin Washington, is employed as a custodian by Respondent, Logan County Board of Education ("Board"). By form dated September 30, 2013, Mr. Washington filed a level one grievance alleging the following:

Respondent disregarded Grievant's application for a Custodian position at Man Middle School on the basis that the application did not contain all the necessary information. Grievant contends that the application was sufficient. Grievant alleges a violation of W. VA. CODE 10A-4-8b, 18A-4-8g & 18A-2-12a.<sup>1</sup>

As relief, Grievant seeks the following:

Grievant seeks placement in the Custodian position at Man Middle School with compensation for any wage and/or benefit difference and compensation for additional mileage expense incurred. Grievant also seeks an award of interest on any monetary sums. (In addition, if it is determined that Grievant is tied for seniority with the successful applicant, then Grievant seeks a random selection tie break and relief listed above if he prevails in the tie break).

A level one conference was held on November 4, 2013, and a decision denying the grievance was issued on December 2, 2013. Grievant appealed to level two by form dated December 13, 2013, and the parties participated in a mediation on March 10, 2014. Grievant perfected his appeal to level three on March 17, 2014.

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<sup>1</sup> This is the statement of grievance on the appeal form to level two. This statement was prepared by the Grievant's representative and is a more complete statement of Grievant's claim. The request for relief set out above is also from the appeal form to level two.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on June 18, 2014. Grievant personally appeared and was represented by John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent, Logan County Board of Education, was represented by Shana L. O'Briant Thompson, Esquire, General Counsel for the Board. This matter became mature for decision on July 21, 2014, the date on which the last of the parties' Proposed Findings of Fact and Conclusions of Law were received by the West Virginia Public Employees Grievance Board.

### **Synopsis**

Respondent rejected Grievant's application for a vacant custodial position because Grievant failed to fill in a blank on his application form with the position number. Grievant argues that the Board's decision to reject his application for that reason when it was otherwise obvious the position for which he was applying, was arbitrary and capricious. Grievant met his burden of proof and the grievance is GRANTED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant is employed by the Board as a regular, full-time custodian. At the time of the events that gave rise to this grievance, Grievant was assigned to Logan Middle School.<sup>2</sup>

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<sup>2</sup> While this matter was pending, Grievant applied for and received a custodian position at Man Middle School working the evening shift from 1:30 p.m. until 9:30 p.m.

2. Sometime prior to fall 2012, Grievant and another custodian, Thomas Fields, were employed as substitutes for the Board. The two substitutes participated in a random selection procedure to determine which of the two would have priority in substitute seniority. Grievant prevailed and received substitute seniority priority over Mr. Fields.

3. Both Grievant and Thomas Fields commenced working as regular full-time custodians with the Board on August 15, 2012. Consequently, they have the same seniority start date.<sup>3</sup> There has been no random selection procedure conducted to determine which of these employees has priority for regular full-time seniority.<sup>4</sup>

4. Grievant was assigned to Logan Middle School, and Mr. Fields was assigned to the Man Elementary School evening shift. Grievant has continued to serve in regular full-time positions since August 15, 2012.

5. On March 4, 2013, Mr. Fields bid on and received a temporary assignment at Man Elementary School for the day shift (6:00 a.m. until 1:30 p.m.), until the regular employee returned to that position. Grievant's Exhibit 11.

6. The regular employee who held the Man Elementary School position to which Mr. Fields was temporarily assigned, bid on and received a position at Logan Middle School. Thereafter, the temporary position was posted as a vacancy and Mr. Fields returned to his afternoon shift as custodian at Man Elementary School on May

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<sup>3</sup> Grievant's Exhibit 5, (September 1, 2013, Board Service Personnel Seniority List).

<sup>4</sup> The parties agree that the random selection process is being delayed pending the results of this grievance. This seems odd because the drawing needs to be held at some point and there was a 50% chance that the random selection would render this matter moot. There are two other regular custodians with the same seniority that will participate in the random selection process.

29, 2013. Grievant's Exhibit 12. Mr. Fields maintained his regular employee status while filling the temporary position.

7. Wilma Zigmond was Superintendent of Logan County Schools in May 2013. Superintendent Zigmond issued a memorandum to all school service employees employed by the Board. The memorandum was dated May 17, 2013, and was mailed to each employee's home address along with the employee's paycheck or pay stub.<sup>5</sup>

The memorandum stated the following:

We have had a problem with employees not completing job bids correctly. It is not Teresa Dingess' job to try to second-guess what job you are bidding on.

**I've instructed Teresa when the bids are not completely and properly filled out with the job posting number and the job number you are bidding on, the bid will not be considered.** (Emphasis in original).

Grievant's Exhibit 2.

8. A copy of this memorandum is posted in the Board's Central Office, outside the door of the personnel department, near the lockbox where bids are placed by applicants. This memorandum is not a Board policy and there is no evidence in the record that it was considered or authorized by the Board. Ms. Zigmond has retired and the person who was the Board's Personnel Director at the time the memorandum was issued is no longer employed by the Board. The present administration is continuing to follow Ms. Zigmond's directive, and no additional directive has been issued by the new administration.<sup>6</sup>

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<sup>5</sup> Employees who have their paychecks directly deposited into their bank accounts are mailed a pay stub at their home addresses.

<sup>6</sup> While there was no evidence presented on this issue, it seems safe to assume that there have been service personnel employed by the Board subsequent to May 2013,

9. In Job Posting #2014-009, Respondent posted a number of vacancies for the period of September 16 through September 20, 2013. The following vacancy was included in that posting: “10. Man Middle School – custodian (6:00 – 1:30) (new).” Grievant’s Exhibit 3.

10. Twelve people applied for this position including Mr. Fields and Grievant Washington. Mr. Fields was selected as the successful applicant because he was the most senior full-time employee within the classification who submitted a complete application.

11. The Logan County service personnel application form is on a standard 8½ inch by 11 inch page. There is a box located in the top, right corner that is approximately 2 inches wide and 1 ½ inches tall.<sup>7</sup> Within the box are two blanks: one entitled “Posting #” and below it is one entitled “Position #” (beside job).” Under the two blanks is written in bold letters, “one application MUST be completed for each position!” In the blank titled “Posting #” the applicant is supposed to put the posting number, in this instance “2014 – 009.” In the blank titled “Position #” the applicant is supposed to place the number which is listed on the job posting beside the position the applicant is seeking, in this instance “10.”

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who have not received notice of Ms. Zigmond’s directive unless they read the posting in the central office.

<sup>7</sup> This is the type of box seen on a myriad of forms which all seem to state, “for internal office use only.”

12. Grievant's, and one other applicant's,<sup>8</sup> applications were rejected as incomplete because he did not fill in the blank entitled "Position #" with the number "10." Grievant had acceptable evaluations and was tied in regular full-time seniority with Mr. Fields.

13. Grievant filled in accurate responses for every other blank on the form. For the blank entitled "LOCATION," Grievant wrote, "Man Middle School 6 a.m. – 1:30 p.m. JOB # 2014-009." There was only one job on the job posting which fit this description.

14. Respondent's personnel department secretary is Teresa Dingess. Ms. Dingess collected all of the applications from the lockbox and separated those which were for the Man Middle School day shift custodian position. Ms. Dingess had no difficulty recognizing that Grievant's application was for that position because it was stated on the face of the application.<sup>9</sup>

15. When the posting period ends for a particular job posting, the personnel department secretary takes all the applications from the lockbox and sorts them by position. Ms. Dingess utilizes the position number in the box at the top right corner of the applications to sort them. If any application does not have a position number, that space is circled and the application is set aside, but kept.

16. On Job Posting #2014–009 there were thirty-one separate positions posted. See Grievant's Exhibit 3. Out of 179 application sheets received for those positions, seven did not have the position number filled in. All seven of those applications were retained, but rejected. After the applications are sorted, the rejected

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<sup>8</sup> The other candidate whose application was rejected would not have been selected to fill the job because he was a substitute and there were regular full-time custodians who applied for the position. See W. VA. CODE § 18A-4-8b (b).

<sup>9</sup> Level three testimony of Teresa Dingess.

applications are placed with the other applications for each position, unless the secretary cannot discern the specific position from the remaining information on the form.

### **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).

There is no statute which controls the information to be placed on applications for school service personnel positions. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard . . ." *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995) (citing *Dillon v. Board of Educ.*, 351S.E.2d 58 (W.Va. 1986)). See, *Pockl v. Ohio County Bd. of Educ.*, 406 S.E.2d 687 (W.Va. 1991); *Moses v. Mercer County Bd. of Educ.*, Docket No. 93-27-001 (April 8, 1993)). See also, *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995); *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007).

Grievant argues that Respondent's rejection of his application, merely because it did not have the specific position number, exalts form over substance and is arbitrary

and capricious. The position Grievant applied for was clearly identified on the face of the application. Since the personnel department secretary admitted that she recognized the position for which Grievant had applied, the omission of the position number was meaningless. Additionally, Grievant notes that W. VA. CODE § 18A-2-12a(b)(7) requires that:

All official and enforceable personnel policies of a county board must be written and made available to its employees.

Superintendent Zigmond's memorandum is not a policy approved by the Board and it is likely that it has not been made available to employees who were hired after the memorandum was issued. Further, Grievant testified that he does not remember receiving the Zigmond memorandum. This testimony is supported by the fact that Grievant wrote on the face of his application "Job # 2014 – 009." Apparently, Grievant was confused concerning the difference between the position number and the posting number.

Respondent counters that the Board receives large numbers of applications each year, as demonstrated by the fact that they received 179 applications for the thirty-one positions in this single job posting. Superintendent Zigmond established the job number requirement because employees were not completely filling out their application forms and it was difficult for the secretary to accurately discern the position for which each employee was applying. Respondent argues that this directive is reasonable. Additionally, Respondent points out that the Grievance Board has held that an applicant is responsible to "not only completely fill out the information on the application but also to ensure that the application is submitted to the proper personnel in charge of



reviewing the application.”<sup>10</sup> Respondent cites four cases for that proposition: *Sickles v. Monongalia County Bd. of Educ.*, Docket No. 96-30-207 (Nov. 18, 1996) (involving a substitute secretary who could not prove that she actually filed a bid sheet for a vacant position); *Merritt v. Kanawha County Bd. of Educ.*, Docket No. 91-20-439 (Feb. 5, 1992) (involving an applicant for an extended summer secretarial position who alleged that the board lost her application); *Mills v. Doddridge County Bd. of Educ.*, Docket No. 90-09-402 (Nov. 26, 1990) (involving an applicant for a Home Economics Teacher position who alleged that the board lost her application letter); and, *Delaney v. Harrison County Bd. of Educ.*, Docket No. 89-17-352 (Sept. 25, 1989) (involving an employee who alleged he hand-delivered an application for a Principal position which the board allegedly lost).

These cases are clearly not applicable to the present situation. In each one of them, the person who alleged that they applied for the position was not considered for the job because the board did not have their application. In this case, the Board received the application and admittedly knew what position Grievant was applying for. Grievant’s application was rejected and not considered merely because he failed to place the specific position number in a blank on the form. More importantly, the error was meaningless because the personnel secretary could readily identify the position for which Grievant was applying without the number.<sup>11</sup>

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<sup>10</sup> *Delaney v. Harrison County Bd. of Educ.*, Docket No. 89-17-352 (Sept. 25, 1989).

<sup>11</sup> As further support for its position, the Board points out that it consistently follows the procedure of rejecting all applications that do not list the position number regardless of whether the position applied for is apparent from the rest of the application. However, consistently following an arbitrary and capricious practice does not make it acceptable. As noted by an American philosopher, “A foolish consistency is the hobgoblin of little minds . . .” *Self-reliance*, Ralph Waldo Emerson.

As stated before, the Board's action is reviewed according to the arbitrary and capricious standard. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the administrative law judge may not substitute his judgment for that of the board of education. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

This case presents a classic example of an arbitrary decision. The Board did not rely on factors such as seniority, qualification, and evaluations for determining whether Grievant met the qualifications for the job. Rather, the Board rejected his application because he left out a specific number that was unnecessary to determine the position for which he was applying. This is clearly not a factor intended for consideration by W. VA. CODE §18A-4-8b for filling school service personnel positions.<sup>12</sup> Accordingly, the Board's rejection of Grievant's application was arbitrary and capricious. And the grievance is GRANTED.

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<sup>12</sup> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.  
W. VA. CODE §18A-4-8b.

The issue of Grievant's seniority vis-à-vis the seniority of Mr. Fields remains. Grievant and Mr. Fields were hired at the same time as substitute custodians. A random drawing was used to establish the initial order of seniority by which they would be assigned their first substitute positions. W. VA. CODE § 18A-4-15(f) states the following:

(f) The following method shall be used to establish a fair, equitable and uniform system for assigning service personnel substitutes to their duties for the first time:

(1) The initial order of assigning newly-employed substitutes is determined by a random selection system established by the affected substitute employees and approved by the county board; and

**(2) The initial order is effective only until the substitute service personnel have begun their duties for the first time.** (Emphasis added).

Pursuant to the clear language of this statute, the initial random selection undertaken by Grievant and Mr. Fields related only to substitute positions. Grievant did not gain any priority from this selection once they were both regular full-time employees.

Respondent's records indicate that Grievant and Mr. Fields have identical regular full-time seniority dates of August 15, 2012. Mr. Fields did accept a temporary assignment in a different custodial position in March 2013. However, Mr. Fields was a regular full-time employee when he took the temporary position and he continued to do regular full-time work while in the temporary position. Respondent considered Mr. Fields to be a regular full-time employee during that time. Accordingly, Mr. Fields earned regular seniority while serving in the temporary position. Grievant and Mr. Fields remain tied in regular seniority. When two or more regular service personnel hold identical seniority in a job classification, W. VA. CODE § 18A-4-8g(i) requires the following:

(i) If two or more service personnel accumulate identical seniority, the priority shall be determined by a random selection system established by the service personnel and approved by the county board.

(1) A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date. All service personnel with an identical seniority date within the same class title or classification category shall participate in the random selection.

Since the Board's decision to reject Grievant's application was arbitrary and capricious it must now consider Grievant's application for the position. Because Grievant and Mr. Fields have identical seniority, a random selection process must be utilized to determine who has priority. If Grievant prevails he must be awarded the position. If Mr. Fields prevails nothing further needs to be done.

### **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). 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. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard . . ." *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327/300 (Nov. 30, 1995) (citing *Dillon v. Board of Educ.*, 351 S.E.2d 58 (W.Va. 1986). See, *Pockl v. Ohio County Bd. of Educ.*, 406 S.E.2d 687 (W.Va. 1991); *Moses v. Mercer County Bd. of Educ.*,

Docket No. 93-27-001 (April 8, 1993)). See also, *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327/300 (Nov. 30, 1995); *Carr v. Tucker County Bd. of Educ.*, Docket No. 06- 47- 376 (May 7, 2007).

3. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the administrative law judge may not substitute his judgment for that of the board of education. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

4. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

5. The Board's rejection of Grievant's application merely for omitting the position number when the position for which he was applying was obvious from the remainder of the application, was arbitrary and capricious.

6. Grievant and the successful applicant for the contested position have identical regular full-time seniority. The board must conduct a random selection process to determine which of these two applicants has priority. W. VA. CODE § 18A-4-8g(i).

Accordingly, the grievance is GRANTED. Respondent is ORDERED to hold a random selection to determine seniority priority between Grievant and Mr. Fields. If

Grievant prevails, Respondent is ORDERED to place Grievant in the contested position immediately.<sup>13</sup> If Mr. Fields prevails, nothing further needs to be done.<sup>14</sup>

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: OCTOBER 15, 2014.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**

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<sup>13</sup> The day shift position that Grievant seeks pays the same or less than the position he now holds. Therefore, there is no difference in pay or benefits to be awarded.

<sup>14</sup> If there are other regular full-time custodians who have identical seniority as Grievant and Mr. Fields, they may also participate in the random selection to determine their priority position for regular full-time seniority. However, the only participants' results which matter with regard to this grievance are Grievant and Mr. Fields since the other employees did not apply for the position.