SHARON L. WILLIAMS,

Grievant,

v. **Docket No. 01-20-058**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sharon L. Williams, employed by the Kanawha County Board of Education (KCBOE) as a Cafeteria Manager, filed a level one grievance on July 18, 2000, in which she alleged violations of W. Va. Code §§ 18-5-39 and 18A-4-8b when she was not offered employment in Summer 2000. Grievant seeks instatement into, and priority for, a summer assignment in 2001, back pay with interest, and benefits lost for the summer of 2000. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced her appeal to level four on February 19, 2001. An evidentiary hearing was convened in the Grievance Board's Charleston office on April 12, 2001, at which time Grievant was represented by John E. Roush, Esq. of WVSSPA, and KCBOE was represented by James Withrow, Esq. The parties determined that the matter could be submitted on the record, supplemented with additional documentation. The grievance became mature for decision on April 30, 2001, the due date for KCBOE's response to Grievant's proposed findings of fact and conclusions of law.

The essential facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by KCBOE as a Cook III since 1985, and has been assigned as Cafeteria Manager at Clendenin Elementary School at all times pertinent to this decision.

2. From 1994 through 1999, Grievant was employed during the summer as a Cook in a federally-funded lunch program which provides meals for students under the age of eighteen at various locations throughout the county.

3. The program was not offered at Clendenin Elementary School during the summer of 2000, and Grievant was advised that she could apply for other posted positions.

4. Grievant was not employed by KCBOE during the summer of 2000.

5. KCBOE employed thirty-eight Cooks in the Summer 1999 food service program, and employed eleven Cooks during Summer 2000.

6. Ten of the Cooks employed by KCBOE during Summer 2000 had less summer seniority than Grievant, and one had the same number of years of summer experience.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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). See W. Va. Code §18-29-6.

Grievant argues that when there are fewer jobs available in a summer than there are available employees from the previous summer, reemployment is decided on the basis of the number of summers each employee has worked. KCBOE asserts that when a particular school summer lunch program has been eliminated, it has been the practice to notify thecooks assigned to that school that they will not be reemployed. Both parties rely upon W. Va. Code §18-5-39 in support of their positions. The statute states in pertinent parts:

(f) Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. . . .

* * *

(g) If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.

KCBOE characterizes each school site as a separate “program” for purposes of this grievance. However, the testimony of Karen Williams, whose position was not identified, and Gary Hendricks,

KCBOE Director of Child Nutrition, does not support a finding that separate lunch "programs" exist at the numerous locations throughout the county. On the contrary, it appears that there is only one lunch program, but that the sites may change from summer to summer. See Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sept. 15, 1997). Specifically, there is no indication that separate programs exist for federal or state programs such as Head Start, or for students identified by any particular characteristic other than age. There is no indication of separate funding, bookkeeping, or any other evidence to establish that each school was a separate program. Further, it does not appear that KCBOE has acted consistently in this matter, as evidenced by the testimony that because there were not enoughstudents to require that a preparation cook be on site, the cooks from Bridgeview Elementary School were moved to Dunbar Junior High School in Summer 2000. (L.II Trans. p. 47.) Because KCBOE operates only one lunch program during the summers, and because Grievant has more seniority than other cooks, the language of W. Va. Code § 18-5-39 required her reassignment to another school for Summer 2000.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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). See W. Va. Code §18-29-6.

2. W. Va. Code §18-5-39 provides that "[a]n employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer" and, "[i]f a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification."

3. KCBOE operated only one lunch program during the Summers of 1999 and 2000, with sites located throughout the county. 4. Grievant was entitled to assignment as a Cook during

Summer 2000 as she had more summer seniority than other employees in that classification who were employed by KCBOE during Summer 2000.

Accordingly, the grievance is **GRANTED**, and KCBOE Ordered to compensate Grievant for the Summer 2000 earnings she would have received, with interest.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State 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 record can be prepared and properly transmitted to the appropriate circuit court.

Date: May 10, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE