ARTHUR D. CARR

Grievant,

v.

DOCKET NO. 01-47-469

TUCKER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Arthur D. “Sonny” Carr filed this grievance at Level I on July 12, 2001 alleging violations of W. Va. Code §§ 18A-4-8b and 18A-4-8g. He stated: “Seniority accumulation for a regular school service employee begins on the date the employee enters upon regular employment duties pursuant to a contract as provided in section five 18A-2-5.” As relief, he seeks “Payment of all wages incurred by less senior workers as a result of a temporary Custodial [sic] III job posting, final date for application June 12, 2001 at the highest pay grade paid the employees hired.”

This grievance was denied by Grievant's immediate supervisor, Bradley J. Ramsey, at Level I because he was without authority to grant the relief sought. A Level II hearing was held on July 24, 2001 at the Tucker County Board Office, and the Level II Decision again denied the grievance. Level III was waived, and a Level IV hearing was held at the Grievance Board's Elkins Office on September 25, 2001, at which Tucker County Superintendent of Schools Cynthia Phillips Kolsun represented Respondent, and WVSSPA Representative John E. Roush, Esq. represented Grievant. The parties agreedthat Grievant should submit his proposed findings of fact and conclusions of law by October 25, 2001, and Respondent should submit its brief by November 26, 2001, whereupon Grievant would have until December 10, 2001 to submit a reply brief if desired. No reply brief having been filed, this matter became mature for a Level IV decision on December 10, 2001.

This grievance arises from a pair of Custodian job postings by Respondent for short- term

positions in the summer of 2001. The first posting, dated June 5, was for two custodians for “10 days or as needed” to move furniture and clean at Tucker County High School (TCHS). The second posting, dated June 19, 2001, was for “up to two” custodians for “10 days or as needed,” also at TCHS. Grievant applied for both, and was selected to fill one of the openings in the second posting. His contention is that his seniority and prior summer work should have entitled him to be hired for one of the jobs in the first posting, and that he should have been able to work both jobs. He also contends that the seniority of one of the other employees was incorrectly attributed. Respondent maintains that the positions were filled by the applicants with the most seniority, and that the seniority hierarchy was correct. Based on the lower-level record and evidence adduced at the Level IV hearing, the undersigned makes the following factual findings.

FINDINGS OF FACT

1. Grievant is regularly-employed by Respondent in a service position as a bus operator, with bus operator seniority from August 25, 1997. Grievant has no regular seniority as a custodian.

2. On June 5, 2001, Respondent posted two Custodian positions, “Specifically for TCHS: Moving furniture and equipment and cleaning; Run [sic] floor machine.” Theterm of employment was listed as “10 days or as needed,” and successful applicants were to be paid Custodian III wages. There was an application deadline of June 12, 2001. This job is referred to herein as the “first job.”

3. On June 19, 2001, Respondent posted “up to” two Custodian positions, “Specifically for TCHS: Moving furniture and equipment and cleaning; Run [sic] floor machine.” The term of employment was listed as “10 days or as needed,” and successful applicants were to be paid Custodian III wages. There was an application deadline of June 26, 2001. This job will be referred to as the “second job.”

4. Grievant was one of nine applicants for the first job; Samuel Blosser, Jr. and Sharon Eye were selected.

5. Mr. Blosser is regularly-employed by Respondent as a bus operator. Sharon Eye is regularly employed as a cook.

6. The Tucker County Service Personnel Seniority roster for 2001-2002 shows that Mr. Blosser's bus operator seniority is calculated from August 25, 1998 and that he also has Custodian seniority from September 3, 1997. Ms. Eye is credited with cook seniority from November 30, 1998 and Custodian seniority from July 1, 1997.

7. Of the six applicants for the second job, Grievant and Keith Knotts were hired. Neither Mr. Blosser nor Ms. Eye were among the applicants for this posting, however, both were still working at the first job when Grievant began working at the second job. 8. Two similar, short-term summer postings were used in the summer of 2000. (See footnote 1) Grievant, Mr. Blosser and Ms. Eye all applied and were selected for both jobs, which ran consecutively and in different locations. Mr. Blosser was called in to work beginning one day earlier than Grievant and Ms. Eye for one of these jobs, so Respondent credited him with summer-job seniority beginning one day earlier than Grievant's.

9. Prior to the summer of 2000, Grievant, Ms. Eye and Mr. Blosser had not worked in summer positions.

10. Both the first job and the second Summer 2001 job lasted longer than the initial ten days anticipated by the postings.

11. In making the hiring decision for the 2001 summer jobs, Respondent considered summer seniority first, then overall seniority if summer seniority was the same. Mr. Blosser was selected over Grievant for the first job because of the extra one day of summer seniority he earned in 2000 by starting the job one day earlier than Grievant. Ms. Eye had greater overall seniority than Grievant but the same summer seniority, so she was also selected for the first job.

12. Grievant incorrectly believed that he had greater overall seniority than Ms. Eye. The list he had referred to did not show her seniority in all classifications, but only in her current classification.

DISCUSSION

This is a non-disciplinary grievance in which the Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. CSR 1 § 4.21. Grievant's argument rests in part on an event that happened in the Summer of 2000, when Mr. Blosser was called to work one day earlier than Grievant. Grievant did not challenge this incident at the time. His testimony indicates that he asked a Mr. Ramsey, Tucker County Schools Transportation Coordinator and Grievant's and Mr. Blosser's supervisor for their regular positions, what effect Mr. Blosser's one-day head start on the summer 2000 job would have on future summer positions. Mr. Ramsey told him it would have no effect, because Mr. Blosser would quit one day earlier, and they both would work the same number of days. As it turned out, Mr. Blosser's job did not end one day earlier, and he accumulated an extra day of summer seniority.

Grievant now contends that, but for his good faith reliance on Mr. Ramsey's assurances, he would have grieved Mr. Blosser's early start, before he experienced the negative effect in the summer of 2001. Unfortunately, Mr. Ramsey was not in a position to make such an assurance relating to a custodian job he was in no way connected with. Grievant should have taken the issue up with then-superintendent Tauna Cole, who was listed as the contact person on the summer, 2000 job postings. Further, the Statement of Grievance filed in this matter, as set forth above, does not mention that Grievant is contesting this event. Instead, his claim is that seniority should be calculated based on regular employment dates. Given that the issue has not been properly raised, it cannot now be decided whether Grievant and Mr. Blosser should have started on the same date.

Given that, when the first job was posted, Mr. Blosser had one more day of summer seniority than Grievant and Ms. Eye, and that Ms. Eye had greater overall seniority than Grievant, who had more than Mr. Blosser, the issue becomes one of whether Respondent's hiring decision was properly made. While Grievant contends that regular seniority should be the deciding factor, Respondent relies on W. Va. Code § 18-5-39 as its authority to consider summer seniority first, then regular seniority. That section states in relevant part:

> (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.

W. Va. Code § 18-5-39(g) (2000).

Normally, “[t]he employment term for service personnel may be no less than ten months.” W. Va. Code § 18A-4-8(a). However, an exception exists for employment in connection with a summer program. West Virginia Code § 18-5-39(f) provides in part that,

> 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 [§ 18A-4-8] 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.

Although subsection (a) of W. Va. Code § 18-5-39 states: “it is the purpose of this section to provide for the establishment of a summer school program,” subsection (f) broadens the scope of allowable

employment for service personnel through its “any related duties” language, and subsection (h) expressly includes jobs “which are to be predominately performed during the summer months to meet the needs of a county board.” Thus, thesummer seniority provisions in W. Va. Code § 18-5-39 have been found to apply to bus drivers working in summer positions as painters (See footnote 2) , and to an Aide seeking a summer maintenance position. (See footnote 3)

“W. Va. Code § 18-5-39, which addresses the employment of service personnel for summer school programs, provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. [citations omitted]” Lemley v. Wood County Bd. of Educ. Docket No. 99-54-198 (Sep. 9, 1999). This Grievance Board has also determined that some flexibility exists in the definition of “same assignment.” It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. Thus, bus operator positions remain the same even though the routes change from summer to summer, (See footnote 4) school lunch programs at different schools are part of one overall summer lunch program, (See footnote 5) and a summer transportation program employing aides remains the same program even though the routes change from summer to summer. (See footnote 6)

In the instant case, Grievant worked in the summer of 2000 in two separate summer jobs, both of which were classified as custodial. Despite the facts that Respondent filledthe summer jobs through two separate postings, that some of the work was performed in different locations, and that the employees signed separate contracts for each job, the jobs were part of Respondent's overall summer maintenance program. Respondent renewed its summer maintenance program the following summer, and employed service personnel who had been employed in the same program the previous summer in the same manner.

“'Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years [. . .]' Kennedy v. Marion County Bd. of Educ., Docket No. 91-24-427 (Dec. 30, 1991).” Panrell v. Monongalia County Bd. of Educ., Docket No. 96-30-408 (April 27, 1997). Grievant and the other employees who worked in the summer maintenance program in 2000 each established seniority in those positions that Respondent was required to consider when filling the summer 2001 positions. Because fewer positions were offered in the summer of 2001 than in 2000, Respondent was forced to compare the summer seniority of the employees pursuant to the requirement in W.Va. Code § 18-

5- 39(g) that, “priority in reemployment to that summer position shall be based upon the length of service in the particular summer position or classification.”

One of those employees, Mr. Blosser, began accruing his summer seniority one day earlier than the others, including Grievant, when he was called to work a day earlier in the summer of 2000, and so accumulated greater summer seniority than Grievant. Thus, when Respondent compared Mr. Blosser's summer seniority to Grievant's in 2001, Mr. Blosser's summer seniority entitled him to hiring over Grievant for the first 2001 posting. Grievant incorrectly contended that Ms. Eye, the other employee selected to fill the first 2001 posting, had less regular seniority than he, because the information he had at the time only showed seniority for her current classification, not overall seniority. She in fact had greater regular seniority and the same summer seniority as Grievant, so she was properly preferred over Grievant.

Conclusions of Law

1. This is a non-disciplinary grievance in which the Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. CSR 1 § 4.21. "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. Normally, “[t]he employment term for service personnel may be no less than ten months.” W. Va. Code § 18A-4-8(a). However, an exception exists for employment in connection with a summer program. West Virginia Code § 18-5-39(f) provides in part that,

> 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 [§ 18A-4-8] 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.

Although subsection (a) of W. Va. Code § 18-5-39 states: “it is the purpose of this section to provide for the establishment of a summer school program,” subsection (f) broadens thescope of allowable employment for service personnel through its “any related duties” language, and subsection (h)

expressly includes jobs "which are to be predominately performed during the summer months to meet the needs of a county board."

3. "W. Va. Code § 18-5-39, which addresses the employment of service personnel for summer school programs, provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. Tuttle v. Marion County Bd. of Educ., Docket No. 96-24-412 (Feb. 28, 1997). See Chaffins v. Wayne County Bd. of Educ., Docket No. 97-50-092 (Sept. 3, 1997). See generally Mooney v. Mercer County Bd. of Educ., Docket No. 94-27-582 (July 31, 1995); Panrell v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995); Cooke v. Logan County Bd. of Educ., Docket No. 92-23-031 (Oct. 9, 1992)." Lemley v. Wood County Bd. of Educ. Docket No. 99-54-198 (Sep. 9, 1999).

4. "'Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years [. . .]' Kennedy v. Marion County Bd. of Educ., Docket No. 91-24-427 (Dec. 30, 1991)." Panrell v. Monongalia County Bd. of Educ., Docket No. 96-30- 408 (April 27, 1997).

5. Grievant's summer seniority was properly calculated, and he was properly denied an appointment to the fist job for the Summer 2001program.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Tucker County. Any such appeal must be filed within thirty (30) days ofreceipt 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: December 27, 2001 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The first of these was posted July 10, 2000 and was a five-day term for four persons in the Custodian III classification; Greivant testified that the job actually lasted 10 days. The second posting was dated August 3, 2000 and

was for five Custodians "specific for TCHS," for an unspecified length of time.

Footnote: 2

Stewart v. Brooke County Bd. of Educ., Docket No. 96-05-394 (April 10, 1997); Panrell v. Monongalia County Bd. of Educ., Docket No. 96-30-408 (April 27, 1997).

Footnote: 3 *Lemley v. Wood County Bd. of Educ. Docket No. 99-54-198 (Sep. 9, 1999).*

Footnote: 4

Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sep. 15, 1997), Lilly v. Fayette County Bd. of Educ. Docket No. 99-10-435 (Mar. 17, 2000).

Footnote: 5

Williams v. Kanawha County Board of Education, Docket No. 00-20-058 (May 10, 2001).

Footnote: 6 *Costello v. Monongalia County Bd. of Educ., Docket No. 01-30-016 (June 21, 2001).*