CORA COMBS AND ROGER CASTO,

Grievants,

v. Docket No. 01-40-529

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent, and,

GARY BOWLES,

Intervenor.

DECISION

These grievances were filed by Grievants, Cora Combs and Roger Casto, against Respondent, Putnam County Board of Education ("PBOE"), on or about June 7, 2001, challenging the selection of Intervenor, Gary Bowles, for a summer bus painter position, and alleging PBOE violated W. Va. Code §§ 18A-4-8b and 18-5-39. As relief, both Grievants seek to be placed in the position for the summer of 2001, and "any compensation due." (See footnote 1)

The parties agreed to submit this grievance for decision based upon the record developed at Level II, with Intervenor submitting documents for admission into evidence at Level IV, to which no other party objected. Intervenor submitted a copy of his substitute contract for the 2000-2001 school year, which will be marked as Intervenor's Exhibit Number 1, and admitted into evidence. Intervenor also submitted copies of his summer employment contracts for the years 1986, 1987, 1988, 1989, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001. These documents will be marked as Intervenor's Exhibit Number 2, and admitted into evidence.

The following Findings of Fact necessary to the decision reached, are made based upon the evidence presented at Level II, and the exhibits submitted by Intervenor at Level IV.

Findings of Fact

1. Grievant Combs has been employed by PBOE as a regular bus operator since 1986. She

has worked for PBOE as a painter during the summer since 1994, including the summer of 2001, painting buildings.

2. Grievant Casto has been employed by PBOE as a regular bus operator since 1986. He is more senior than Grievant Combs. He worked as a substitute bus painter during the summer of 1997. He worked on the bleachers crew during the summer of 2001.

3. On May 3, 2001, PBOE posted two summer bus painter positions. The deadline for application was May 9, 2001. Grievants applied for the positions.

4. Intervenor was employed by PBOE as a regular bus operator until his retirement on August 21, 2000. He had been employed by PBOE as a bus painter during the summer for 17 years, including the summer of 2000. He was hired by PBOE as a substitute bus operator on May 21, 2001, "for the school year commencing July 1, 2001." His employment contract was entered into by Intervenor and PBOE on May 22, 2001. 5. PBOE voted on May 21, 2001, to place Intervenor in one of the bus painter positions. Roger Doneff was placed in the other bus painter position. Mr. Doneff had served in the position the preceding summer.

6. Intervenor's contract states the summer bus painter assignment is "for the 2001 summer only (July 9, 2001, for thirty (30) working days)."

Discussion

The burden of proof is upon Grievants to prove the elements of their grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95- 29-476 (Mar. 28, 1996). Grievants are not contesting Mr. Doneff's placement in one of the two positions. Grievants argued Intervenor was not employed by PBOE when he applied for the posted position, and when he retired, he lost all his seniority with PBOE, and could not be placed in the position.

Respondent argued simply that a substitute is an employee, citing McClung v. Nicholas County Bd. of Educ., Docket No. 99-34-376 (Dec. 17, 1999), and Intervenor had held the position for 18 years, and was entitled to retain the position as an employee.

Intervenor argued Grievants had not presented evidence to establish that they had more summer seniority than all the other applicants, or that they had good evaluations. Intervenor submitted that he was entitled to the position based upon his many years of summer service in this same position. In response to Grievants' argument that he was not an employee, Intervenor pointed to his status as a

substitute employee, and argued this was sufficient to earn him employee status, and the right to return to the position he had held in previous summers. He also argued that, as summer employment is separate from regular employment, he did not need to be employed as a regular employee in order to retain his summer employment. Finally, he argued whether he was an employee at the time the position was posted was irrelevant, as he was clearly an employee when the job began on July 9, noting this Grievance Board has found that, "'[e]stablished summerpositions are to be filled through competitive posting in accordance with W. Va. Code § 18A-4-8b only if the employee who held the position during the preceding summer is "unavailable." See, Lilly v. Fayette County Board of Education, Docket No. 96-10-481 (Sept. 15, 1997).' Cecil v. Kanawha County Board of Education, Docket No. 97-20-366 (October 31, 1997)." He pointed out the Cecil case stated the summer employment statute "'gives an employee who works in a previous summer school position, a "right of first refusal" to that same job (if it exists) in any succeeding summer, until he or she declines to accept the position.'"

W. Va. Code § 18-5-39 governs the employment of school service personnel in summer positions, providing as follows:

> Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in section eight, article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer. If such employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code. When any summer employee who is employed in a summer position is granted a leave of absence for the summer months, the board shall give regular employment status to such employee for that summer position which shall be filled under the procedure set forth in section eight-b, article four, chapter eighteen-a of this code. The summer employee on leave of absence shall have the option of returning to that summer position if such exists the succeeding summer or whenever such position is reestablished if it were abolished. The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed.
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> 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 such position in previous summers, such reductions in force and priority in reemployment to such summer positions shall be based upon the length of service time in the particular summer program or classification.
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> For the purpose of this section, summer employment for service personnel shall be

> defined, but not limited to, filling jobs and positions as defined in section eight, article four, chapter eighteen-a of this code and especially established for and which are to be predominantly performed during the summer months to meet the needs of a county board of education. This Grievance Board has previously determined that a regular employee who has also served in a summer position, who retires and is later hired as a substitute employee, may retain a summer position he held the preceding summer, prior to his retirement. "A substitute employee is an employee within the meaning of W. Va. Code § 18-5-39." McClung v. Nicholas County Bd. of Educ., Docket No. 99-34-376 (Dec. 17, 1999). The undersigned finds Intervenor was an employee at the time this summer job began, and was entitled under the provisions of W. Va. Code § 18-5-39 to retain the position he had held the previous summer.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievants bear the burden of proving the elements of their grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. A regular employee who has also served in a summer position, who retires and is later hired as a substitute employee, may retain a summer position he held the preceding summer. "A substitute employee is an employee within the meaning of W. Va. Code § 18-5-39." McClung v. Nicholas County Bd. of Educ., Docket No. 99-34-376 (Dec. 17, 1999).

3. "W. Va. Code § 18-5-39 gives service employees who have held summer school positions during the previous summer the option of retaining that same position during the following summer. Essentially, this statute gives an employee who works in a summer school position, a 'right of first refusal' to that same job (if it exists) in any succeeding summer, until he or she declines to accept the position. See Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sept. 15, 1997)." Cecil v. Kanawha County Bd. of Educ., Docket No. 97-20-366 (Oct. 31, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Putnam County or the Circuit Court of Kanawha County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 3, 2002

Footnote: 1

The grievances were denied at Level I on June 14, 2001. Grievants appealed to Level II on July 2, 2001, where a hearing was held on August 29, 2001. Level II decisions denying the grievances were issued on September 28, 2001. Grievants bypassed Level III, appealing to Level IV on October 3, 2001. The parties agreed to submit this grievance for decision based upon the record developed at Level II. Grievants were represented by Susan E. Hubbard, Respondent was represented by John A. Grafton, Esquire, and Intervenor was represented by Kimberly A. Levy. This grievance became mature for decision on November 14, 2001, upon receipt of the last of the parties' written arguments.