BYRON FREELAND,

Grievant,

v. Docket No. 05-25-259

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Byron Freeland ("Grievant"), employed by the Marshall County Board of Education ("MCBE") as a principal, filed a level one grievance on May 17, 2005, after his nonselection for the position of principal for the summer program at McNinch Elementary School. For relief, Grievant requested instatement to the position. This remedy was later modified to request back pay and benefits. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, and filed a level four appeal on July 28, 2005. Grievant's counsel, James F. Wallington of Baptiste & Wilder, and MCBE counsel Richard S. Boothby of Bowles, Rice, McDavid, Graff & Love, agreed to submit the grievance for decision based upon agreed stipulated facts which supplemented the lower- level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law on or before October 17, 2005.

The following facts have been derived from a preponderance of the evidence made part of the record at level two.

Findings of Fact

1. Grievant has been employed by MCBE for approximately thirty-six years, and has served as a principal in the county for the past twenty-seven years.

2. In April 2005, MCBE posted a position vacancy for "Elementary Principal -Summer School at McNinch Elementary School." The position was for a period of twenty- five days, including the July 4 holiday.

3. Grievant applied for the principal's position; however, Ms. Connie Young was selected for the assignment.

4. In addition to his years of seniority, and his administrative experience, Grievant has approximately eight years of full-time summer experience, and he worked an additional number of days as a substitute teacher eight additional summers. From 2001 through 2004, Grievant had completed a total of six days of substitute work in the summer program.

5. At the time of the selection, Ms. Young had been employed by MCBE as an administrator four years, and had accrued thirteen years of experience in the summer school program.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); 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. "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). In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant. Dillonv. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993).

W. Va. Code § 18-5-39(e) provides the following guidance for the filling of professional summer school positions:

Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. In the event that no employee who has been previously employed in the summer school program holds a valid certification or licensure, a board shall fill the position as a classroom teaching position in accordance with section seven-a, article four, chapter eighteen-a of this code.

Grievant first argues that MCBE erred in not crediting his twenty-seven years of

administrative experience. Grievant asserts that because W. Va. Code § 18-5-39 requires the selection to be based on certification and length of time of professional employment in the summer school program, application of Section W. Va. Code § 18A-4-7a factors is not contrary to Section 39 positions. Grievant further suggests that there is no express rejection of general administrative experience criteria in W. Va. Code § 18-5-39. Grievant also argues that MCBE erred in acknowledging his actual professional work experience during sixteen years of summer programs at McNinch Elementary School. Grievant argues that "length of time" of employment does not refer to a calculation of daily seniority, nor does it authorize a board of education to ignore substitute teaching service.

MCBE asserts that the position of summer school principal was properly filled under the provisions of W. Va. Code § 18-5-39, and that the "most qualified" criteria of Code §18A-4-7a need only be applied only if there are no applicants with proper relevant certification, and in-county summer school employment experience. MCBE concludes that because Ms. Young was the applicant who held the required administrative certification and the greatest length of service in the summer school program, she was correctly awarded the position for Summer 2005.

W. Va. Code § 18-5-39 has been addressed under a number of scenarios; however, two level four decisions are applicable in this grievance. First, it was held in Muncy v. Mingo County Board of Education, Docket No. 95-29-336 (Dec. 21, 1995), that overall seniority was not considered for summer school positions. This holding was based on the specific statutory language directing that positions be filled on the basis of certification and the "length of time the professional has been employed in the county's summer school program." Therefore, MCBE correctly did not consider Grievant's twenty-seven regular school years of administrative experience.

However, the Grievance Board has also determined that W. Va. Code § 18-5-39 speaks only of service in a summer program, and does not delineate between regular and substitute work. Kimble v. Kanawha County Bd. of Educ., Docket No. 90-20-459 (Nov. 29, 1990). Because Grievant had participated in summer school sixteen years, and Ms. Young had only thirteen years of experience in summer school, Grievant was entitled to the position of principal.

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 his 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 (2004); 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. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993).

3. W. Va. Code § 18-5-39(e) provides that professional positions for summer school be filled on the basis of certification and length of time the professional has been employed in the county's summer school program.

4. Seniority earned during regular school terms is not considered for summer school positions. Muncy v. Mingo County Board of Education, Docket No. 95-29-336 (Dec. 21, 1995).

5. W. Va. Code § 18-5-39 speaks only of service in a summer program, and does not delineate between regular and substitute work. Kimble v. Kanawha County Bd. of Educ., Docket No. 90-20-459 (Nov. 29, 1990).

6. Grievant has proven by a preponderance of the evidence that he held more years of service in the summer school program than the successful applicant, and was entitled to the position. Accordingly, the grievance is GRANTED, and MCBE Ordered to compensate Grievant for all back pay and benefits he would have earned in Summer 2005.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marshall 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 Board with the civil action number so that the record can be

prepared and properly transmitted to the appropriate circuit court.

DATE: NOVEMBER 29, 2005

_____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE