WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

GAIL BOONE,

Grievant,

v.

Docket No. 07-06-386

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Gail Boone, employed by the Cabell County Board of Education ("CCBOE") as a teacher, filed this grievance on June 12, 2007, after her non-selection for the position of teacher for the summer program at Cabell Alternative Center. For relief, Grievant requests reinstatement to the position, back pay, and benefits. Grievant elected to bypass consideration at Level I. The grievance was denied at Level II, and Grievant filed a Level IV appeal on August 27, 2007. Grievant requested a Level IV decision be made on the lower level record, and Respondent requested a Level IV hearing to supplement the record. Accordingly, a Level IV hearing was conducted on November 9, 2007, at the Grievance Board's Charleston Office. Grievant was represented by Rosemary Jenkins, AFT-West Virginia, and Respondent was represented by Rebecca Tinder, Esq. The grievance became mature for decision on December 5, 2007, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is a teacher who held a position in the extended year math program for three years. When the job was posted for the summer of 2007, it was awarded to Althea Buchanan, a retired teacher who was on the substitute list. Ms. Buchanan had retired inJune 2002 and had more years in the summer math program, nevertheless, she had not actually worked in the program since 2003. Ms. Buchanan had taken a full-time position with a private employer in 2005 and continued to work for them at the time she applied for the summer position. After obtaining private employment, she had requested to be placed on the inactive substitute list, however, due to an administrative error, she remained on the active sub list. Pursuant to the provisions of 18A-4-7c, current employees are given preference when hiring for positions in summer school programs. If not for Respondent's error in failing to place Ms. Buchanan on the inactive list, she would not have been considered a current employee. Therefore, Grievant was entitled to preference and should have been placed in the position.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by CCBOE for approximately three years as a summer math program teacher and is a current full-time professional educator certified in math.

2. In 2007, CCBOE posted two positions for the summer math program. One of the two successful applicants for the positions was Althea Buchanan.

3. In 2007, Grievant applied for this same position with CCBOE.

4. Ms. Buchanan had not worked in the summer math program since 2003.

5. Ms. Buchanan worked full time for Prestera Center, a private entity, from 2005to 2007. (See footnote 1) Ms. Buchanan requested her name be placed on the no-call list as a substitute after starting her employment with Prestera because she was unavailable.

6. Notwithstanding this request to be placed on the no-call list, Personnel left Ms. Buchanan's name on the active substitute list.

7. Customarily, a substitute teacher is removed from the substitute list by the CCBOE after being inactive for a period of one year or more. See Level II transcript, page 23.

8. Grievant and Ms. Buchanan possessed the proper certification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears 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 (2004); *Howell v. W. Va. Dep't of Health & Human Resources*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6*. See also 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). "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 Resources*, Docket No. 92-HHR-486 (May 17, 1993). (See footnote 2) In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2004); *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

Grievant asserts that Respondent violated W. Va. Code . 18-5-39 in filling the math teacher position for the Cabell County summer school program. W. Va. Code . 18-5-39(e) provides the following guidance for filling 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.

In addition, Grievant asserts that Respondent violated W. Va. Code . 18A-4-7c in filling the summer school program position. That Code section provides:

> A county board shall hire professional educators for positions in summer school programs in accordance with section thirty-nine [. 18- 5-3], article five, chapter eighteen of this code or section seven-a [.18A-4-7] of this article, as applicable, except that a professional educator who

> is currently employed by the county board shall be given employment preference over applicants who are not current employees.

CCBOE asserts that the position of summer school math teacher was properly filled under the provisions of W. Va. Code . 18-5-39, and that the “most qualified” criteria of W. Va. Code . 18A-4-7a need only be applied if there are not applicants with proper certification, and in-county summer school employment experience. CCBOE concludes that because Ms. Buchanan was the applicant who held the required certification, was currently employed, and possessed the greatest length of service in the summer school program, she was correctly awarded the position for the summer 2007.

This Board has addressed W. Va. Code . 18-5-39 under a number of scenarios. It was held in *Muncy v. Mingo County Bd. of Educ.*, 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. Accordingly, CCBOE was correct in taking into consideration Ms. Buchanan's summer school years of experience.

In addition, 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 Ms. Buchanan had participated in summer school eleven years, andGrievant had only three years experience in summer school, Ms. Buchanan did possess more service in the summer program.

Grievant, a regular full-time employee who has held the summer position the past three sessions, is understandably concerned that a retired teacher was chosen over her for the position. W. Va. Code § 18-5-39 does not require Respondent fill professional summer school positions automatically with individuals who held the same positions in the previous year. That requirement only applies to school service personnel: "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". W. Va. Code § 18-5-39(f).

There is no corresponding language in the statute applicable to professional employees. W. Va. Code § 18-5-39 only requires county boards of education to apply Code § 18A-4-7a in hiring professional employees when "no employee who has been previously employed in the summer school program holds a valid certification or licensure" [for the position]. Thus, for a given summer

school job, only if there are no applicants with proper relevant certification and in-county summer school employment experience, must a county board of education utilize the "most qualified" selection standard set forth in Code § 18A-4-7a. *Baisden v. Logan County Bd. of Educ.*, Docket No. 94-23-549 (Jan. 13,1995). (See footnote 3) Due to the above statutory construction, Ms. Buchanan maintains her summer seniority status that is separate from regular seniority. (See footnote 4)

Grievant relies on the recently enacted language of W. Va. Code . 18A-4-7c as the cornerstone of her argument in support of the grievance. As referenced above, this statute became effective June 8, 2007, and gives preference to current employees over applicants who are not current employees when county boards are filling summer school programs.

Grievant is astute to assert this new statutory language is the deciding factor in this grievance. It does appear from the record that Ms. Buchannan was not a current employee when hired as the summer math teacher.

Ms. Buchanan had worked for Prestera Center from 2005 to 2007. This employment is separate from her employment with CCBOE. Ms. Buchanan requested her name be placed on inactive status as a substitute after starting her employment with Prestera. (See footnote 5) Notwithstanding this request to be placed on inactive status, Personnel did leave Ms. Buchanan's name on the substitute list due to using her as an employee in the past. This was error by CCBOE. Due to the length of time Ms. Buchanan was voluntarily on the no-call list, and being employed full time by Prestera, she should have beenremoved from the substitute list. The only tenuous basis on which Ms. Buchanan could be considered a current employee was a one-half paid day from the CCBOE for training on Westest that she administered to her Prestera students. Accordingly, Ms. Buchanan cannot be considered a current employee under this set of facts. Grievant and Ms. Buchanan possess the proper certification and while Ms. Buchanan has more employment time in the county's summer school program, she is not a current employee. Grievant should have been the successful applicant since she was currently employed by the county board.

The following conclusions of law support this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving their 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); *Howell v. W. Va. Dep't of Health & Human*

Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6*. See also 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). "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 Resources*, Docket No. 92-HHR-486 (May 17, 1993).

2. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particularposition rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2004); *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

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

4. For a given summer school job, only if there are no applicants with proper relevant certification and in-county summer school employment experience, must a county board of education utilize the "most qualified" selection standard set forth in W. Va. Code § 18A-4-7a. *Baisden v. Logan County Bd. of Educ.*, Docket No. 94-23-549 (Jan. 13, 1995).

5. W. Va. Code . 18A-4-7c provides that a county board shall hire professional educators for positions in summer school programs in accordance with . 18-5-39 or . 18A- 4-7A, as applicable, except that a professional educator, who is currently employed by the county board shall be given employment preference over applicants who are not current employees.

Accordingly, this grievance is **GRANTED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Cabell County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed) (*but see Executive Order No.2-07*, May 8, 2007). 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: December 18, 2007

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Prestera Center provides mental health and substance abuse treatment to clients and family ranging from outpatient services to twenty-four hour emergency care and residential substance abuse treatment.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees GrievanceBoard. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case.

Footnote: 3

But see, Bd. of Educ. of County of Wood v. Enoch, 414 S.E.2d 631 (W. Va. 1992) wherein the Supreme Court held that the hiring requirements for a special education summer school program established pursuant to the Assistance for Education of All Handicapped Children Act, 20 U.S.C. . 1400, et seq., are governed by W. Va. Code . 18A-4-7a.

Footnote: 4

Simply stated, W. Va. Code . 18A-4-7a is not applicable to this set of facts.

Footnote: 5

The only way Personnel takes a name off the list is in the event they are totally inactive a year or more. Following this period of inactivity, the Board of Education must take formal action to remove the name completely from the substitute list.