THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DREAMA SCARBROUGH,

Grievant,

v. DOCKET NO. 08-10-004

FAYETTE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Dreama Scarbrough filed a grievance on June 15, 2007, in which she claimed that Respondent, Fayette County Board of Education, awarded a summer school position to another teacher that Grievant should have been awarded. As relief, she is seeking seniority credit and back pay for the position she should have held.

This grievance was denied at levels one and two, level three was waived, and the matter was submitted for decision at level four (See footnote 1) by the Grievance Board based on the record developed below. The matter became mature for decision on May 1, 2008, following the submission by the parties of their proposed findings of fact and conclusions of law. Grievant was represented by Sidney Fragale of AFT-WV, and Respondent was represented by counsel, Erwin L. Conrad, Esq.

Synopsis

This grievance is essentially about the proper interpretation of W. Va. Code § 18-5- 39(e), which controls the hiring of professional personnel for summer school positions based on seniority. Incident to the application of that statute for this particular case, there also arises a question of exactly how much summer school seniority credit Grievant should have earned prior to the selection for a particular position. Grievance is GRANTED.

Findings of Fact

Based on a preponderance of the evidence contained in the record developed below, I find the following material facts have been proven:

1. Grievant is regularly employed by Respondent as a Kindergarten teacher at Mount Hope Elementary School with 15 years of regular professional employment service.

2. On or about May 8, 2007, Respondent posted two, 17-day positions for summer school Title I teacher at Scarbro Elementary School, for which Grievant applied.

3. The posting improperly stated, “Preference given to those previously employed at Scarbro Elementary for past summer school and/or extended day programs.”

4. Two other teachers were hired for the Scarbro Positions: Maddy Daniels and Judith Burns.

5. One of the teachers, Maddy Daniels, had 36 years of regular seniority, and had taught in the Scarbro Elementary summer class in the past. Grievant had never taught in the summer school at Scarbro, but was otherwise qualified for the job.

6. Bryan Parsons, Personnel Director for Respondent, referred to the records in his office and determined that Grievant had 6 days of summer school seniority, compared to Ms. Daniels's 41 days.

7. Prior to the time this grievance arose, the Personnel Department did not have the seniority records from all the summer school courses that had been held in the county. Each school kept records for the summer courses that had been taught there, but the central administrative office did not have copies of those records.

8. Grievant's actual summer school seniority was 66 days, although none of that had been earned teaching in a summer class at Scarbro Elementary.

9. Grievant had greater summer school seniority than Ms. Daniels.

Discussion

Grievant bears the burden of proving that she should have been a successful applicant for the position in question. That allegation must be proven by a preponderance of the evidence. (See footnote 2) “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” (See footnote 3) Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The main issue here is the question as to whether summer school seniority is counted based on experience teaching in a particular program at a particular school. Professional positions for summer school programs must be filled on the basis of certification and length of time the professional has been employed in the county's summer school program. (See footnote 4) Both candidates here were certified, so the deciding factor is length of time employed in the county's summer school program.

Although Grievant is a professional employee, Respondent interprets W. Va. Code § 18-5-39(e) to be consistent with the hiring requirements for service personnel in summer positions, W. Va. Code § 18-5-39(f). The latter subsection was “intended to give service employees of educational institutions the right to a continuing employment contract . . . if the same job position were still in existence the following summer.” (See footnote 5) The level two decision repeatedly emphasizes the word “the” in Code § 18-5-39(e), going so far as to make it bold and underlined each time it is cited. Under Respondent's interpretation, even with Grievant's 66 days of summer school credit compared to the successful applicant's 41 days, Ms. Daniels nevertheless must be selected because her credit was earned in “the” program she was applying for, whereas Grievant's experience was earned at a different school, teaching a difference course.

Respondent's argument does not acknowledge the context of the subsection, and ignores the rules of statutory construction. Summer school programs are authorized and controlled by W. Va. Code §§ 18-5-39(a) - (h). Subsections (a) and (b) state,

> Inasmuch as the present county school facilities for the most part lie dormant and unused during the summer months, and inasmuch as there are many students who are in need of remedial instruction and others who desire accelerated instruction, it is the purpose of this section to provide for the establishment of a summer school program, which is to be separate and apart from the full school term as established by each county.

> The board of any county has the authority to establish a summer school program utilizing the public school facilities and to charge tuition for students who attend the summer school. The tuition may not exceed in any case the actual cost of operation of the summer school program: Provided, That any deserving pupil whose parents, in the judgment of the board, are unable to pay the tuition, may attend the summer school program at a reduced charge or without charge. The county board may determine the term and curriculum of the summer schools based upon the particular needs of the individual county. The curriculum may include, but is not limited to, remedial instruction,accelerated instruction and the teaching of manual arts. The term of the summer school program may not be established in such a manner as to interfere with the regular school term.

These establishing subsections refer to a county's summer school program overall as a "program," or "the program." However, the very next subsection which speaks to hiring teachers refers to individual classes as "summer courses of instruction." Subsection (g), which addresses reductions in force, uses the language "the particular summer program." The semantic contrast between these references and the one in question here from subsection (e), ("the county's summer school program") is obvious and favors Grievant's interpretation: "the" modifies "county," not "program." The Title I course at Scarbro Elementary should more properly be called a "summer course of instruction" rather than "a summer program."

The West Virginia Supreme Court of Appeals, although it has not been called upon to make this particular distinction, would seem to agree. In *Board of Education of County of Wood v. Enoch* 186 (See footnote 6) , the court distinguishes between "the traditional summer school" authorized by Chapter 18, Article 5 and a special program created under a Federal statute. The Grievance Board has also not previously made this particular distinction, but has apparently recognized it in several cases, notably *Freeland v. Marshall County Board of Education* *(See footnote 7)* , where an applicant's summer seniority was calculated based on prior employment as a substitute, when he was applying for a summer principal position. *Muncy v. Mingo County Board of Education* (See footnote 8) likewise failed to distinguish between summerseniority earned teaching a particular course of instruction and general summer teaching experience.

The general rule that "School personnel regulations and laws are to be strictly construed in favor of the employee," (See footnote 9) does not really apply here, as any interpretation of the statute in question is going to favor one employee over another. A canon of statutory construction called *noscitur a sociis*, which holds that a word is known by the company it keeps, is pertinent here. (See footnote 10) In this case, the article "the" upon which Respondent so heavily relies must be interpreted by reference to the overall purpose of the section to establish a summer school program, and by the fact that the particular subsection at issue inserts the word "county's" between "the" and "program." Respondent therefore had no basis in law for distinguishing between summer seniority earned teaching a particular summer class and seniority earned teaching summer school in general.

The summer hiring rules for service personnel, which very explicitly do make reference to re-hiring into a particular position, throw the professional personnel hiring rule into deeper contrast, because they very specifically provide for rehiring into a particular job, where no such language exists

in the professional rule. Had the legislature intended the professional and service personnel rules to be the same, it would not have written them differently.

The issue of Grievant's total summer seniority is a much simpler matter and does not appear to be in great dispute. Prior to Respondent's forming a central personnel office, records were kept at each school. The fact that Mr. Parsons did not have all theinformation at the time he made the decision to award this position, crediting Grievant with just six days of summer seniority, does not negate the summer seniority Grievant earned. Grievant presented credible evidence of 66 total days of summer school teaching, and she should be credited with that. It should be noted, however, that the six days of credit Mr. Parsons attributed to Grievant _ none of which was earned at Scarbro in the reading class at issue _ makes Respondent's justification that it counted seniority “only in the position applied for” seem somewhat pretextual.

The following Conclusions of Law support this decision:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so 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. C. S. R. 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 Res.*, 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. West Virginia 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. *Boone v. Cabell County Bd. of Educ.*, Docket No. 07-06-386 (Dec. 18, 2007); *Freeland v. Marshall County Bd. of Educ.,* Docket No. 05-25-259 (Nov. 29, 2005); *Muncy v. Mingo County Bd. of Educ*., Docket No. 95-29-336 (Dec. 21, 1995). 3. A school board must calculate summer program seniority for professional personnel based on service in any summer position in the county rather than service in a particular course of instruction or at a particular school.

For the foregoing reasons, this grievance is **GRANTED**. Grievant is awarded summer school teaching seniority of 17 days, as well as any salary and benefits she would have earned had she

been properly awarded the position, plus interest on all sums from the date of her filing of this grievance.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. (See footnote 1) 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

September 5, 2008

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. 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 being 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. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

See, W. Va. Code § 18-29-6 (See footnote 11) *, 156 W. Va. C. S. R. 1 § 3.*

Footnote: 3

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Footnote: 4

W. Va. Code § 18-5-39(e); Boone v. Cabell County Bd. of Educ., Docket No. 07-06-386 (Dec. 18, 2007).

Footnote: 5

Adkins v. Gatson, 192 W. Va. 561, 567; 453 S.E.2d at 395, 401.

Footnote: 6

186 W. Va. 712, 414 S.E.2d 630 (1992).

Footnote: 7

Docket No. 05-25-259 (Nov. 29, 2005).

Footnote: 8

Docket No. 95-29-336 (Dec. 21, 1995).

Footnote: 9

Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

Footnote: 10

Darlington v. Mangum, 192 W. Va. 112, 450 S.E.2d 809 (1994); Banner Printing Co. v. Bykota Corp., 182 W. Va. 488, 388 S.E.2d 844 (1989); Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975).

Footnote: 11

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. 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