THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ANGELA ANN DUNCAN,
Grievant,

v. **DOCKET NO. 2009-1650-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION and
DEPARTMENT OF EDUCATION,
Respondents.

DECISION

Grievant, Angela Ann Duncan, filed a grievance against her employer, the McDowell County Board of Education, on June 9, 2009. The statement of grievance reads: "Grievant contends that she should have received a 4-week summer cook position at Iaeger Middle School. The Respondent hired Sharon Meadows, who holds less seniority and/or status than the Grievant, in this position. Grievant alleges a violation of W.Va. Code 18A-4-8b, 18A-4-8g, and 18-5-39." As relief Grievant sought, "compensation, benefits, and an award of interest on all monetary sums. Grievant also seeks instatement into this position if such exists in the summer of 2010."

A hearing was held at level one on September 29, 2009, and a level one decision denying the grievance was issued on October 29, 2009. Grievant appealed to level two on November 5, 2009. A mediation session was held on January 11, 2010. Grievant appealed to level three on January 22, 2010, requesting a level three hearing. The parties then agreed to submit this matter for decision on the record developed at level one. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service

Personnel Association, and Respondent was represented by Kathryn Reed Bayless, Esquire, Bayless Law Firm, PLLC. This matter became mature for decision on April 29, 2010, upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law, and was assigned to the undersigned Administrative Law Judge for decision.

Synopsis

Grievant had three years of summer seniority as a Cook. She worked both the summer of 2008 and the summer of 2009, but for six weeks in 2008 and two weeks in 2009. She argued that, due to her greater regular seniority, she should have been allowed to bump another specific employee who also had three years of summer seniority as a Cook, and who was returned to same school and program in the summer of 2009 as the preceding summer, in a four week position. Grievant did not demonstrate that there was a reduction in force which would result in Grievant being allowed to bump anyone, or that it was the identified employee who would be bumped.

The following Findings of Fact are properly made from the record developed at level one, supplemented by Grievant's Exhibit 1 submitted by Grievant at level three.[1]

Findings of Fact

1. Grievant is employed by the McDowell County Board of Education ("MBOE") as a Cook II. Grievant has been employed by MBOE for three years as a full-time regular employee. Prior to her full-time employment, she worked as a substitute employee for MBOE for seven years.

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[1] Respondent did not object to the admission of Grievant's Exhibit 1, which is ORDERED admitted into the record.

2. Grievant has also been employed in summer Cook positions with MBOE for three years, 2006, 2007, and 2008. Each summer she worked for six weeks.

3. During the summer of 2008, MBOE posted ten Cook positions, one of which was for a half day. Six positions were posted for the Title I program at Anawalt, Bradshaw, Iaeger, Kimball, Southside, and Welch Elementary Schools. One position was posted for the Energy Express program, which is a reading program, to be located at Fall River Elementary School. Two positions were posted for summer school at the Career and Technology Center, and one position was posted at the Career and Technology Center providing satellite lunches to football camps.

4. During the summer of 2008, Grievant worked as a Cook III/Cafeteria Manager at Fall River Elementary School as part of the Energy Express Program.

5. MBOE posted nine summer positions for Cooks for the summer of 2009, and Grievant applied for all nine positions. Four positions were posted for the summer Title I program at Anawalt, Iaeger, Kimball, and Welch Elementary Schools. One position was posted for the Energy Express Program to be located at Southside K-8.[2] One position was posted for the 21st Century program at Sandy River Middle School. Two positions were posted for summer school at the Career and Technology Center, and one position was posted to be at the Career and Technology Center providing satellite lunches to football camps.

6. MBOE did not have a summer program located at Fall River Elementary School during the summer of 2009.

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[2] The record does not reflect who was placed in this position.

7. Grievant was hired to work in one of the posted positions, which was for two weeks at Sandy River Middle School in the 21st Century Program.

8. Sharon Meadows is employed by MBOE as a substitute Cook. Ms. Meadows has also worked in summer positions for MBOE as a Cook for three years, 2006, 2007, and 2008. She worked all three summers in the Title I program at Iaeger Elementary School. Ms. Meadows was returned to the Title I program summer Cook position at Iaeger Elementary School for four weeks during the summer of 2009, because she had held that position the preceding summer.

9. The record does not reflect how many people applied for summer Cook positions for the summer of 2009, or whether a reduction in force was necessary.

10. MBOE has not taken any action to break the tie in summer seniority between Grievant and Ms. Meadows.

11. MBOE's summer programs are funded in part from the Summer Feeding Program and from other sources. MBOE believes it operates several different summer programs.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued that because there were fewer summer Cook positions available during the summer of 2009 than there were for the summer of 2008, Grievant should have been allowed to bump a lesser senior Cook in order to obtain a six week position. The only person she argued was less senior than she was Ms. Meadows. Grievant asserted that her regular employment seniority should have been considered, making her more senior than Ms. Meadows, and that as the more senior employee, she should have had the four week position, rather than the two week position. Grievant argued in the alternative that MBOE should have conducted a tiebreaker to break the tie in seniority. Respondent did not address Grievant's argument that she should have been allowed to bump a less senior Cook; rather Respondent argued that Ms. Meadows was not less senior than Grievant, because both had been employed during the summer for three years, and that Grievant did not seek as relief in her statement of grievance that a tiebreaker be conducted.

W. VA. CODE § 18-5-39 provides, in pertinent part, as follows:

> (f) 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 section eight [18A-4-8], article four, chapter eighteen-a 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. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [18A-4-8b], article four, chapter eighteen-a of this code.

* * *

> (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.

This CODE Section "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 (Sept. 9, 1999). "'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). "The seniority granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. VA. CODE §§ 18-5-39; 18A-4-8b; & 18A-4-8g. *Bowmen v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039B (Mar. 31, 1999)." *Beane v. Kanawha County Bd. of Educ.*, Docket No. 03-20-008 (April 30, 2003).

"The 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. By way of example, bus operators' positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ.*, Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v. Fayette*

County Bd. of Educ., Docket No. 99-10-435 (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 00-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ.*, Docket No. 01-30-016 (June 21, 2001)." *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010).

Grievant argued that it is irrelevant "which particular summer cook position Grievant or any of the other employees performed in past summers," citing *Williams, supra.* In that case, the Administrative Law Judge found that Kanawha County operated one lunch program during the summer at numerous locations throughout the county, and that the sites may change from summer to summer. In making this determination the Administrative Law Judge considered that "there is no indication that separate programs exist for federal or state programs such as Head Start, or for students identified by any particular characteristic other than age. There is no indication of separate funding, bookkeeping, or any other evidence to establish that each school was a separate program." *Williams* does not stand for the proposition that *all* counties always operate one summer lunch program.

In this case, the record was not developed regarding the funding, bookkeeping, or any other aspect of the lunch program or programs offered by MBOE. However, during the summer of 2008, Grievant worked as a Cook in the Energy Express program at Fall River Elementary School.[3] During the summer of 2008, Ms. Meadows worked as a Cook in the Title I program at Iaeger Elementary School. During the summer of 2009, Ms. Meadows was returned to a Cook position at the same school where she had been employed the

[3] The record does not reflect why Grievant was not allowed to retain a Cook position with the Energy Express program, since she had held a Cook position with that program the preceding summer, even though the location had changed.

preceding three summers, all in the Title I program, while Grievant had not been employed in the Title I program or at Iaeger Elementary during the summer. Notwithstanding the flexibility in determining the meaning of "same assignment," as has been developed through case law, the undersigned concludes that Ms. Meadows had acquired a statutory right to return to this exact same position during the summer of 2009.

Finally, the record does not reflect the seniority of any of the other individuals employed as summer Cooks, nor does the record reflect whether the application pool for the summer of 2009 was such that a reduction in force was necessary. Grievant argued that the reduction in force provisions were triggered by "the 6 week position that she held did not exist for the summer of 2009[4] and that respondent employed fewer cooks in the summer of 2009 than it employed in the summer of 2008." The undersigned cannot reach this conclusion. First, the reduction in force provisions are initially triggered by a reduction in "the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers." A reduction in the length of a summer program is of no relevance. In fact, the undersigned would expect summer programs to vary in length from summer to summer as funding allows. Grievant cited to *Berry v. Kanawha County Board of Education*, 191 W. Va. 422, 446 S.E.2d 510 (1994), for the proposition that the reduction in the number of days in a contract is a reduction in force. However, the record does not reflect that summer employees sign a contract which sets forth a particular number of days for which their services are engaged, as do employees during the school year. Further, in *Berry*, although

[4] No information was provided regarding the length of any of the Cook positions for the summer of 2009.

the Court discussed the difference in the number of days in the grievant's contract versus the number of days in the contract of a less senior employee, the grievant's position was actually eliminated, and it was this action which the Court found to be a reduction in force. The undersigned does not find the ruling in *Berry* to be applicable here.

Second, just because there were fewer positions available, this does not mean that a reduction in force was, in fact, necessary. If there was one less person interested in working the summer as a Cook, and it was that person's position which was eliminated, then there would be no need to implement the reduction in force. Finally, even if a reduction in force were necessary, the undersigned could not possibly determine whether it was Ms. Meadows whom Grievant could bump without information on the seniority of the other Cooks employed during the summer, or that Grievant should bump anyone. Grievant has not demonstrated that she was entitled to the position Ms. Meadows held during the summer of 2009.

The parties did not address whether the provisions of W. VA. CODE § 18A-4-8g regarding breaking a tie in seniority by random selection apply to summer seniority. Neither W. VA. CODE § 18-5-39, nor W. VA. CODE § 18A-4-8g speak to this issue. Given the lack of legal argument on this issue, and the fact that a determination on this issue will have no bearing on this grievance, this issue should be left until another day. The undersigned would note, however, that the use of a drawing to break ties in summer seniority when a reduction in force was necessary, was not found to be in error in *Prickett/Sizemore v. Monongalia County Board of Education*, Docket No. 03-30-227 (December 22, 2003).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. W. VA. CODE § 18-5-39(f) "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 (Sept. 9, 1999). "'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).

3. W. VA. CODE § 18-5-39(f) provides that "[i]f 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."

4. Grievant did not demonstrate that there was a reduction in force, or that she was entitled to bump Ms. Meadows from her position for the summer of 2009.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: August 23, 2010