THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PHIL COSS,
Grievant,

v. **DOCKET NO. 2010-0996-CONS**

OHIO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Phil Coss, filed a grievance against his employer, the Ohio County Board of Education, on February 2, 2010. The statement of grievance reads: "Respondent notified Grievants that they[1] would not automatically return to their summer assignments in the summer of 2010 pursuant to W. Va. Code 18-5-39. Instread [sic], the positions would be filled by competitive bidding pursuant to W. Va. Code 18A-4-8b. Grievants allege a violation of W. Va. Code 18-5-39 & 18A-4-8b." As relief Grievant sought, "instatement in the summer of 2010 into the [position he] held in the summer of 2009. [Grievant seeks] compensation for any lost wages with interest and the right to return to [his] summer [position] in [sic] pursuant to W. Va. Code 18-5-39 in the summer of 2011 and subsequent summers as long as the [position exists]."

The parties agreed to waive levels one and two, and a level three hearing was held on September 24, 2010, at the Grievance Board's Westover, West Virginia, office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service

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[1] At the time this grievance was filed there were two Grievants, but one of the Grievants later withdrew from the grievance.

Personnel Association, and Respondent was represented by Kathy M. Finsley, General Counsel, Ohio County Board of Education. This matter became mature for decision on October 20, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was a regularly employed Bus Operator for Respondent until his retirement in December of 2008. In January of 2009 he was hired as a substitute Bus Operator by Respondent. When Grievant retired, he lost all his seniority with Respondent, including his right to retain summer assignments. During the summer of 2009, Respondent mistakenly allowed Grievant to retain the summer assignment he held during the preceding summer. When it discovered this mistake as to the law, Respondent notified Grievant that he would not retain the summer assignment. The summer assignment Grievant held during the summer of 2009 was posted, and it was awarded to a regular employee. Grievant acquired no right to retain this assignment by virtue of being placed in the assignment in violation of the law, regardless of whether anyone grieved this illegal act, and Respondent acted properly in correcting its error. Respondent then properly filled the assignment in accordance with the applicable statute, which requires that regular employees be considered for summer assignments ahead of substitute employees.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant was employed by the Ohio County Board of Education ("OCBOE") for 23 years as a Bus Operator. He retired effective December 31, 2008. Grievant was then hired by OCBOE as a substitute Bus Operator on January 12, 2009, and has been so employed since that time.

2. During the summer of 2008, and during other previous summers, Grievant held a summer Bus Operator assignment in connection with the Special Education ARC Program.

3. After his retirement, during the summer of 2009, Grievant was allowed by OCBOE to retain the summer assignment he held the preceding summer solely because he had held the assignment the preceding summer.

4. During a training session in the Fall of 2009, an employee asked whether a bus operator who had retired and was reemployed as a substitute could legally retain the summer assignment he had held prior to his retirement. Grievant's attorney was in attendance and responded to the question, stating that the retired bus operator would not be entitled to retain the summer assignment he had held prior to his retirement. Personnel employed by Respondent conducted research into this issue and determined that Grievant should not have been allowed to retain his summer assignment for the summer of 2009, after he retired.

5. On January 12, 2010, Grievant was notified that OCBOE had voted to terminate his summer assignment at the end of the 2009-2010 school year.

6. Respondent posted a number of bus operator summer assignments for the summer of 2010. Grievant bid on some of these assignments, including the assignment he had held during the summers of 2008 and 2009.

7. During the summer of 2010, Jaletta Moore bid on and was awarded the summer assignment Grievant had held during the summer of 2009, based upon her status as a regular employee. Ms. Moore had no summer seniority prior to being awarded this assignment.

8. Grievant was awarded a summer assignment for the summer of 2010, based upon his seniority as a substitute employee, but its duration was two weeks less than the assignment he had previously held.

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 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 made several arguments. The first issue which should be addressed is the argument that Grievant did not lose his summer seniority or the right to retain the summer

assignment he had held in previous summers when he retired. Respondent relies upon *McClung v. The Board of Education of the County of Nicholas,* 213 W. Va. 606, 584 S.E.2d 240 (2003), for its position that Grievant lost all his seniority and his right to retain his summer assignment when he retired.

W. VA. CODE § 18-5-39 provides the basis for assigning summer employment, stating with regard to the hiring of service personnel for summer employment 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.

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).

Prior to his retirement and subsequent reemployment as a substitute Bus Operator, Grievant had held a particular summer assignment for several summers. The Supreme Court of Appeals of West Virginia addressed the issue of whether an employee who retires and is rehired as a substitute may retain his summer assignment pursuant to WEST VIRGINIA CODE § 18-5-39, in a *per curiam* opinion, *McClung, supra,*[2] finding that the employee did not. While none of the Syllabus Points address this issue, the holding cannot be ignored, as it is directly on point.

The Court first cited *Hazelwood v. Mercer County Board of Education*, 200 W. Va. 205, 488 S.E.2d 480 (1997), for the proposition that

> a school service employee who voluntarily resigns his or her employment does not retain any of the seniority rights accumulated during his or her employment period. *See* W. VA. CODE § 18A-4-8g(a) ("Seniority accumulation for a regular school service employee. . . continues until the employee's employment as a regular employee is severed with the county board. . . .") Consequently, the former service employee's subsequent re-employment by a county board does not operate to resurrect or revive the seniority credit accumulated during the service employee's previous period of employment. *Hazelwood, supra.* (Footnotes omitted.)

The Court then noted that seniority accumulated as a regular employee "shall be calculated separately and shall not be combined for any purpose" with seniority accumulated as a substitute employee, citing W. VA. CODE § 18A-4-8g(h).

The Court pointed out that the facts in the case were unique, however, "our determination that Mr. O'Dell is not entitled to the summer position in this case is driven by

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[2] Grievant's attorney in this matter represented Mr. McClung in the appeal.

the nature of the change in his employment status - from regular employee, to retiree, to substitute." *McClung, supra.* This is precisely what occurred with Grievant. The Court concluded that the employee's "previous summer employment as a school bus operator, for purposes of awarding the summer position at issue, was a 'seniority credit,' which was lost upon his retirement from the School Board in August 1998, and which was not resurrected when he became re-employed by the School Board on a substitute basis." *Id.* (Footnotes omitted.) Grievant should not have been awarded the same assignment for the summer of 2009 that he had held the preceding summer based solely upon the fact that he had previously held the assignment in prior summers. Respondent awarded Grievant the summer assignment during the summer of 2009 in error, based upon a mistake as to the law.

Grievant next argued that because no one complained about Grievant retaining his assignment during the summer of 2009, he is now entitled to retain that assignment for the summer of 2010 and into the future, pursuant to W. VA. CODE § 18-5-39. Grievant proposes that even though he received the position in violation of law, by mistake, he acquired all the statutory rights to retain the position. Grievant suggests that Respondent cannot correct its mistakes.

"The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008). Just because no one filed a grievance complaining of the mistake doesn't mean Respondent cannot and should not correct the error it made.

Grievant lost his right to retain his summer assignment when he retired, and he had no entitlement to that assignment for the summer of 2009. Respondent acted properly in not allowing Grievant to continue to retain this improperly awarded assignment.

However, Grievant is entitled to retain the summer seniority he earned during the summer of 2009, even though he was not entitled by law to be placed in the assignment. *Hall v. The Bd. of Educ. of the County of Mingo County*, 208 W. Va. 534, 541 S.E.2d 624 (2000). Grievant argues that this gave him more summer seniority than the person placed in the assignment at issue during the summer of 2010, and that for that reason he should have been awarded that assignment.

As outlined above, WEST VIRGINIA CODE §18-5-39 provides that when the employee who previously held a summer assignment is not available, as is the case when an employee retires, that assignment is to be filled in accordance with the provisions of WEST VIRGINIA CODE §18A-4-8b, which states that such decisions are to be based on "seniority, qualifications and evaluation of past service." This CODE SECTION then states in section (b) that applicants are to be considered in the order set forth, with regularly employed service personnel considered first, and substitute service personnel fourth in the order list, which is what Respondent did in this case. Grievant would have the undersigned ignore the fact that the employee's employment status must be considered before *any* consideration is given to seniority. Grievant was a substitute employee, while the successful applicant for the assignment at issue was a regular employee. Regular employee status trumps substitute employee status, by statute.[3]

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[3] Grievant cited *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010), in support of his argument. Interestingly, Grievant's counsel

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).

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represented the grievant in that case at level three, and the grievant appealed the level three decision to the Circuit Court of Kanawha County. That appeal is pending. While summer seniority was addressed in the *Eisentrout* decision, the outcome of that decision turned on the determination that the successful applicant had held the same assignment in a prior summer. Further, neither the grievant nor the successful applicant in that case was a substitute employee.

3. An employee's statutory entitlement to retain a summer assignment is a "seniority credit," which is lost upon retirement, and is "not resurrected when he became re-employed by the School Board on a substitute basis." *McClung v. The Board of Education of the County of Nicholas,* 213 W. Va. 606, 584 S.E.2d 240 (2003).

4. Respondent awarded Grievant the summer assignment during the summer of 2009 in error, based upon a mistake as to the law.

5. "The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).

6. Respondent acted properly in correcting its error by removing Grievant's right to retain the summer assignment he was awarded in error during the summer of 2009.

7. WEST VIRGINIA CODE §18-5-39 provides that when the employee who previously held a summer assignment is not available, as is the case when an employee retires, that assignment is to be filled in accordance with the provisions of WEST VIRGINIA CODE §18A-4-8b, which states that such decisions are to be based on "seniority, qualifications and evaluation of past service."

8. Applicants for service personnel positions are to be considered in the order set forth in WEST VIRGINIA CODE §18A-4-8b, with regularly employed service personnel considered first, and substitute service personnel fourth in the order list.

9. For purposes of filling the summer assignment at issue, by statute, the successful applicant's regular employee status took priority over Grievant's status as a substitute employee.

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: February 28, 2011