THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GREGORY KEITH BROCK,
Grievant,

v. **DOCKET NO. 2010-0770-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Gregory Keith Brock, filed a grievance against his employer, the Monongalia County Board of Education, on December 9, 2009. The statement of grievance reads: "Grievant contends that he should have been hired for a painter position (extracurricular assignment) based upon his work as a painter in past summers. Grievant alleges a violation of W. Va. Code 18A-4-16 & 18-5-39." As relief Grievant sought, "instatement into the position if and when it is available in the future and compensation for lost wages with back pay. Grievant also seeks an award of interest on all sums to which he is entitled."

A hearing was held at level one on March 12, 2010, and a decision denying the grievance was issued on April 8, 2010. Grievant appealed to level two on April 22, 2010, and a mediation session was held on July 23, 2010. Grievant appealed to level three on August 3, 2010, and a level three hearing was held before the undersigned Administrative Law Judge on October 27, 2010, at the Grievance Board's Westover, West Virginia, office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jason S. Long, Esquire,

Dinsmore & Shohl, LLP. This matter became mature for decision on November 23, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Truck Driver, and has also been employed by Respondent as a Bus Operator. He has worked as a Painter for Respondent during two summers. Respondent posted six extracurricular Painter assignments for the period December through April, or until the project was completed. Grievant applied for the assignment, as did several other employees, none of whom had regular seniority as a Painter. Six applicants had more regular seniority than Grievant and were selected for the assignments. Grievant's argument that summer assignments are the same as extracurricular assignments is without merit. Summer assignments are governed by a specific statute which makes clear that it applies only to assignments that do not occur during the school year. Respondent properly awarded the extracurricular assignments to the applicants with the most regular seniority.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") since January 1998, and is a full-time Truck Driver during the school year. Prior to becoming employed as a Truck Driver, Grievant was a Bus Operator for MBOE. His work hours are 6:00 a.m. to 2:00 p.m., Monday through Friday.

2. Grievant was employed by MBOE during the Summers of 2007 and 2009 as a Painter. Grievant has never worked during the school year as a Painter and has no regular seniority in that classification.

3. On November 17, 2009, MBOE posted six extracurricular Painter assignments to work in two crews, from December 14, 2009, through approximately April 15, 2010, or until the project was completed. The first crew would work on Wednesdays and Thursdays from 9:30 a.m. to 1:00 p.m., and on Saturdays from 8:00 a.m. to 4:00 p.m. The second crew would work on Wednesdays and Thursdays from 5:30 p.m. to 9:00 p.m., and on Saturdays from 8:00 a.m. to 4:00 p.m.

4. Grievant applied for one of the posted extracurricular Painter assignments, as did several other employees. The six assignments were awarded to Danette Jones, Gerald Marshall, Michelle Marshall, Mark Myers, Jeanne Strader, and Connie Tharp. All six of the successful applicants have more regular seniority than Grievant. None of the applicants held the Painter classification title, and none had any regular seniority in the Painter classification. Ms. Strader, Ms. Tharp, and Ms. Jones all had more summer seniority as Painters than Grievant, and Mr. Marshall had the same amount of summer seniority as a Painter as Grievant. Ms. Marshall had less summer seniority as a Painter than Grievant, and Mr. Myers had no summer seniority as a Painter.

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 argued that "a summer job is merely a subset or particular type of extracurricular assignment," pointing to the fact that both summer and extracurricular assignments are performed outside the employee's regular work hours, and that a summer job is by definition performed only "predominantly" during the summer, not exclusively during the summer. Respondent argued that summer seniority cannot be commingled with regular seniority, and that it could not consider Grievant's summer seniority when it filled these assignments.

WEST VIRGINIA CODE § 18-5-39 provides the basis for assigning summer employment. That CODE SECTION begins by stating that "[i]nasmuch as the present county school facilities for the most part lie dormant and unused *during the summer months*, . . . 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 the county." (Emphasis added.) With regard to the hiring of service personnel for summer employment, WEST VIRGINIA CODE § 18-5-39 provides 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.

WEST VIRGINIA CODE §18A-4-16 defines extracurricular duties to "mean, but not be limited to, activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis." It could not be more clear that summer assignments bear no relationship to extracurricular assignments. There exist specific statutory provisions governing extracurricular assignments and summer assignments. Further, this assignment ran from December to April, clearly not the summer months. Even if the assignment ran into June, so does the regular school term. Grievant's argument is without merit and need not be further addressed.

WEST VIRGINIA CODE § 18A-4-16(5) provides as follows:

> The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

WEST VIRGINIA CODE § 18A-4-8b(a) provides that school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service."[1] "Qualifications means that the applicant holds a classification title in his or her category of employment as provided in this section and shall be given first opportunity for promotion and filling vacancies." W. VA. CODE § 18A-4-8b(b).

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[1] The evaluations of the applicants are not at issue in this grievance, nor did Grievant argue that any of the applicants was not qualified.

"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). When WEST VIRGINIA CODE § 18A-4-8b states that the selection shall be made based on evaluations, qualifications and seniority, the seniority referred to is the employee's regular seniority, not his summer seniority. *Id.* Summer seniority is not a consideration when determining which employee should be placed in a posted regular or extracurricular position.

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 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).

2. WEST VIRGINIA CODE § 18-5-39 provides the basis for assigning summer employment. That CODE SECTION begins by stating that "[i]nasmuch as the present county

school facilities for the most part lie dormant and unused *during the summer months*, . . . 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 the county." (Emphasis added.)

3. WEST VIRGINIA. CODE §18A-4-16 defines extracurricular duties to "mean, but not be limited to, activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis." It could not be more clear that summer assignments bear no relationship to extracurricular assignments.

4. WEST VIRGINIA CODE § 18A-4-8b(a) provides that school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service."

5. "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).

6. Summer seniority is not a consideration when determining which employee should be placed in a posted regular or extracurricular position.

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: April 28, 2011