THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBRA HAYHURST,
Grievant,

v. **Docket No. 2010-1456-WebED**

WEBSTER COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Debra Hayhurst, filed this grievance on May 13, 2010, against her employer, the Webster County Board of Education, contending that, "Respondent employed two teacher's aides with less summer and regular seniority for summer positions rather than Grievant. Grievant alleges a violation of W. Va. Code 18-5-39 & the settlement agreement from a prior grievance." Grievant seeks, "instatement into the summer assignment in future summers, summer seniority for the summer of 2010, and compensation for lost wages with interest."

This grievance was denied at level one by letter dated August 5, 2010. A level two mediation session was conducted on November 10, 2010. Appeal to level three was perfected on November 19, 2010. A level three hearing was conducted by Administrative Law Judge M. Paul Marteney on March 31, 2011, at the Grievance Board's Charleston office. Grievant appeared in person and by her counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Howard Seufer, Jr., Bowles Rice McDavid Graff & Love LLP. The case was reassigned to the undersigned Administrative Law Judge for administrative reasons on September 12,

2011. This case became mature upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 4, 2011.

Synopsis

Grievant is employed by the Webster County Board of Education as a 200-day aide. She alleges that the Respondent employed, in summer 2010 assignments, two aides with less regular and summer seniority than Grievant. The two aides that Grievant identifies were properly restored to the same positions for the summer of 2010 that they held in the summer of 2009. Grievant did not meet her burden to demonstrate that Respondent breached the agreement by which her prior grievance was settled. Grievant was given the opportunity to bid on all summer 2010 aide positions; however, she chose not to apply for an aide position at Webster Springs Elementary/Middle School.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is employed by Respondent as an aide. Respondent employed four aides during the summer of 2009 and 2010.

2. Both summers, Angela Hayes and Marie Diane Carpenter worked in two of the four assignments as Extended Year Aides in the middle school extended year program for students at Glade Middle School. The Extended Year Program is for students with exceptionalities whose IEPs require extended year programming. The extended year program is intended to help the students maintain their educational progress between school years.

3. Both summers, the third aide assignment was an Extended Year Aide in the extended year program at Webster Springs Elementary/Middle School. Donnis Davis, one of Respondent's regular aides, applied for and received this assignment for the summer of 2009 and the summer of 2010.

4. The fourth aide assignment changed between the two summers. In the summer of 2009, it was a Title I Summer School Aide assigned to a reading program for students at Glade Middle School. The Title I Summer School program was different from the Extended Year program. It was not a service confined to students with exceptionalities. Rather, the Extended Year Program was designed to improve the reading skills of students. In the summer of 2010, it was an Extended Year Aide assigned to Webster Springs Elementary/Middle School. The reason for the change was that the Respondent conducted a Title I Summer School reading program in 2009; but not in 2010, therefore it had no need for a Summer School Aide for the summer of 2010. Respondent did need an additional Extended Year Aide in the Extended Year program at Webster Springs Elementary/Middle School in the summer of 2010.

5. Grievant worked in the reading program in the summers of 2008 and 2009. Grievant, Ms. Hayes, and Ms. Carpenter were assigned to Webster County High School in the summer of 2009. This was done because Glade Springs Elementary School was being remodeled in the summer of 2009. Ms. Hayes and Ms. Carpenter received a ½-day salary for half of the employment term and a full day's salary for the other half, Grievant only received ½-day salary for her entire summer employment term.

6. Grievant filed a grievance concerning the assignments for the summer of 2009. The grievance was settled and the Respondent agreed in November of 2009 that,

"if a summer position or assignment is available next year, Grievant would be given the opportunity to apply for and perform such position or assignment." Grievant's Exhibit 1, level one.

7. Respondent posted two aide positions for the summer of 2010 at Glade Elementary School for the Extended Year program. Respondent also posted two summer aide positions at Webster Springs Elementary/Middle School for the summer of 2010.

8. Respondent gave Grievant the opportunity to apply for all of the aide positions posted for the summer of 2010. Grievant applied for the two Extended Year Aide assignments at Glade Middle School, but chose not to apply for the two Extended Year Aide assignments at Webster Springs Elementary/Middle School. Grievant indicated that Webster Springs Elementary/Middle School was too far from her home to make the assignment worthwhile.

9. Respondent hired Ms. Hayes and Ms. Carpenter for the two Extended Year Aide positions at Glade Elementary School.

10. Grievant has worked for more summers and has more regular seniority as an aide than Ms. Hayes and Ms. Carpenter.

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is

evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 begins her argument at § 18-5-39 which provides, in relevant 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.
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> (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 summer, the reduction 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.
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> (h) For the purpose of this section, summer employment for service personnel includes, but is not limited to, filling jobs and positions as defined in section eight [18A-4-8], article four, chapter eighteen-a of this code and especially established for and which are to be predominantly performed during the summer months to meet the needs of a county board.

Although subsection (a) of W. VA. CODE § 18-5-39 states: "it is the purpose of this section to provide for the establishment of a summer school program," subsection (f) broadens the scope of allowable employment for service personnel through its "any related duties" language, and subsection (h) expressly includes jobs "which are to be predominately performed during the summer months to meet the needs of a county board."

"W. VA. CODE § 18-5-39, which addresses the employment of service personnel for summer school programs, 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).

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 are 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).

In the instant case, Angie Hays and Diane Carpenter were employed as Extended Year Aides in the middle school program at Glade Middle School in the summer of 2009.

Therefore, they were entitled under the above statute to continue in those same assignments during the summer of 2010, and Grievant had no right to bump them from those assignments. The undersigned does not agree with Grievant's argument that, "a summer aide position in any program located at any school throughout the county goes to the aide in the county with the most summer seniority."[1] In addition, Respondent did not reduce the number of aide positions between the summers of 2009 and 2010. Grievant, who in 2009 was a Title I Summer School Aide at Glade Middle School, had no right under the above statute, based upon her longer service time as an aide, to displace aides Ms. Hays or Ms. Carpenter from the same Extended Year Aide assignments they held in the summer of 2009.[2]

Had the Grievant applied for the posted Extended Year Aide positions at Webster Springs Elementary/Middle School for the summer of 2010, she would have received one of them because, apart from Ms. Hays and Ms. Carpenter, she and aide Donnis Davis were the only aides who had worked in aide positions during the preceding summer. Although Grievant had no statutory right to either of the Extended Year Aide positions at Glade Middle School, she would have received one of the two Extended Year Aide positions at Webster Springs Elementary/Middle School had she only applied. The record also demonstrated that the Webster Springs Elementary/Middle School assignments were

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[1]Grievant's proposals, page 5.

[2]*See Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010); *Crisel v. Wayne County Bd. of Educ.*, Docket No. 2010-0311-WayED (Oct. 8, 2010).

for the same number of hours per day and the same number of days during the summer as the Extended Year Aide assignments at Glade Middle School.

Finally, Grievant has not met her burden to show that the Respondent breached the agreement by which her prior grievance was settled. The agreement provided that, "if a summer position or assignment is available next year, Grievant would be given the opportunity to apply for and perform such position or assignment." Grievant was given the opportunity to bid on all summer 2010 aide positions and does not dispute that, had she applied, she would have been awarded one of the Extended Year Aide positions at Webster Springs Elementary/Middle School.

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. "W. VA. CODE § 18-5-39, which addresses the employment of service personnel for summer school programs, provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. *Tuttle v. Marion County Bd. of Educ.*, Docket No. 96-24-412 (Feb. 28, 1997). *See Chaffins v. Wayne County Bd. of Educ.*, Docket No. 97-50-092 (Sept. 3, 1997). *See generally Mooney v. Mercer County Bd. of Educ.*, Docket No. 94-27-582 (July 31, 1995); *Panrell v.*

Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995); *Cooke v. Logan County Bd. of Educ.*, Docket No. 92-23-031 (Oct. 9, 1992)." *Lemley v. Wood County Bd. of Educ.*, Docket No. 99-54-198 (Sept. 9, 1999); *See also Carr v. Tucker County Bd. of Educ.*, Docket No. 01-47-469 (Dec. 27, 2001).

3. "'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)." *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010); *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 27, 1997).

4. Grievant has not demonstrated that she enjoyed any preference for the summer assignments in question over employees who worked the summer assignment in the previous year.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: September 26, 2011

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Ronald L. Reece
Administrative Law Judge