THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARLA SUE MARTIN,

Grievant,

v. **Docket No. 2011-1876-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Carla Sue Martin, filed a grievance on October 24, 2011, against her employer, Respondent Kanawha County Board of Education, stating as follows: "Respondent called out a less senior substitute for summer maintenance work rather than Grievant. Grievant alleges a violation of W. Va. Code 18-5-39." As relief sought, "Grievant seeks compensation for lost wages with interest."

The grievance was denied at Level One by decision dated September 2, 2011. Grievant perfected her appeal to Level Two on September 17, 2011. A Level Two mediation was conducted on November 17, 2011. Grievant appealed to Level Three on November 28, 2011. A Level Three hearing was held on April 9, 2012, before the undersigned administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person, and by counsel, John E. Roush, Esq., WVSSPA. Respondent appeared by counsel, James W. Withrow, Esq. This matter became mature for decision on May 17, 2012, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant, a 200-day school service employee, alleges that Respondent improperly denied her the opportunity to substitute on certain dates during the summer of 2011. Grievant was not entitled to first opportunity to substitute under West Virginia Code § 18-5-39 for the positions she sought because the positions were not summer positions and because the positions were not within the same classification category as Grievant's regular employment contract. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as an aide/autism mentor at George C. Weimer Elementary School, holding a 200-day contract as such, during the regular school year. Grievant has been employed in this position for two years.

2. During the summers of 2010 and 2011, Grievant was employed as a substitute general maintenance employee. Respondent lists Grievant's seniority date as a general maintenance summer substitute as February 2, 2008, which is the date she passed the general maintenance test.[1]

3. Respondent's employees hold contracts of employment for varying lengths from summer only, to school term only, to year-round. For school term (200-day) employees, their employment responsibilities conclude at the end of the regular school year, around June. Therefore, those employees would be available for other employment during the summer.

[1] *See*, Grievant's Exhibit 5, page 1.

4. Regular (200-day) employees who are not under contract for the summer are entitled to be substitutes during the summer under certain circumstances. Different school boards have different procedures in place to allow these employees to substitute. Respondent has set up a process whereby any regular employee, not under contract for the summer, may "sign up" to be a "summer substitute." Respondent keeps this list separate from regularly-hired substitutes who substitute year-round. Therefore, there are two lists from which substitutes are called.

5. Regular substitutes are hired specifically as substitutes, are hired based on a posted position for a substitute position, and hold a contract as a substitute.

6. Regular (200-day) employees holding a less than year-round contract may also seek to obtain a contract for regular summer employment.

7. When a year-round (261-day) employee is absent during the summer, Respondent calls a regular substitute to cover the absence. When a summer employee is absent, Respondent calls a substitute from the summer substitute list to cover the absence. The summer substitutes are called out on a seniority and rotating basis. During the summers, Respondent's automated call-out system calls out regular substitutes for regularly employed year-round employees. To get substitutes for those working as summer employees, Terry Hollandsworth, telephones people listed on the printed summer substitute list in order of seniority.

8. For summer 2011, Grievant signed up to be a summer substitute, and she was only the fourth most senior person on the list. Three individuals, Charlotte Turnes, Patricia Morris, and Melissa Young, each possessed greater seniority than Grievant.[2]

[2] *See*, Grievant's Exhibit 5, page 1.

9. Debra Pennington is employed by Respondent as a bus operator, which is a regular (200-day) employee, during the school term.[3] During the summer of 2011, Ms. Pennington was employed by Respondent as a summer substitute in the maintenance department as a general maintenance worker and as a painter. However, because she has less seniority than Grievant, her name was lower on the summer substitute list than Grievant's.[4]

10. Paula Jarrett is employed as a regular substitute, year round.[5] She also signed up to be a general maintenance summer substitute.[6]

11. Olive Abbott is employed as a regular substitute, year round.[7] She did not sign up to be a summer substitute and is not on the summer substitute list.[8]

12. Grievant was called out to substitute for a summer maintenance worker on June 9 and 10, 2011. Grievant was not called out to substitute for any regularly employed service personnel employee who held a 261-day contract.

13. Under Respondent's process, because Ms. Jarrett and Ms. Abbott are regular substitutes, they received assignments that Grievant, a summer substitute, was not offered, specifically, on June 13, 14, and 21, 2011. On these dates, Ms. Jarrett and Ms. Abbott were substituting for employees who held 261-day contracts. Ms. Jarrett and Ms. Abbott were called for these assignments through the automated call-out system.

---

[3] *See*, Grievant's Exhibit 1.
[4] *See*, Grievant's Exhibit 5, page 1.
[5] *See*, Grievant's Exhibit 2.
[6] *See*, Grievant's Exhibit 5, page 1.
[7] *See*, Grievant's Exhibit 3.
[8] *See*, Grievant's Exhibit 5.

14. Ms. Pennington worked as a summer substitute maintenance employee on June 9 and 10, 2011. On these dates, Mr. Hollandsworth telephoned her and offered her the assignments. She worked as a substitute for a regularly employed maintenance employee on June 21, 2011. For that assignment, Ms. Pennington was called out by the automated call-out system.

15. Grievant was not offered an assignment for June 21, 2011.

16. Ms. Pennington had somehow been able to get her name placed on the list of regular substitutes to be called out for regularly employed service personnel. This was improper under Respondent's procedure, or process.

17. Once Respondent discovered that Ms. Pennington's name was on the regular substitute list, Respondent removed it.

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).

Respondent's employment of service personnel substitutes is governed by statute. "The county board shall employ and the county superintendent, subject to the

approval of the county board, shall assign substitute service personnel on the basis of seniority…" W.VA. CODE § 18A-4-15(a) (2011). The statute further describes the manner in which substitutes must be assigned:

> (1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b of this article…
> (2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

W. VA. CODE § 18A-4-15(b). Additionally, W. VA. CODE § 18-5-39, entitled "Establishment of summer school programs; tuition," also discusses substitutes. In subsection (f) it reads:

> When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

Grievant asserts she was entitled to substitute on June 13, 14, and 21, 2011, rather than Ms. Jarrett, Ms. Abbott, and Ms. Pennington, because WEST VIRGINIA CODE § 18-5-39 entitles her as a regular employee to first opportunity to substitute for any position for which she qualifies during the summer. In support of this assertion, Grievant argues that the plain meaning of "summer employee" in § 18-5-39 is any employee who is working during the summer, including year-round employees. This is not the plain meaning of the statute. Although the statute does not define "summer employee," it does define "summer employment" as follows:

> (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."

Summer employment is defined as filling jobs "especially established for and which are to be predominately performed during the summer months." To define a "summer employee" as any employee working during the summer, as proposed by Grievant, is inconsistent with the definition of "summer employment." *See Melissa Lynn Young v. Kanawha County Board of Education*, Docket No. 2011-1845-KanED (Nov. 19, 2012). Furthermore, WEST VIRGINIA CODE § 18-5-39 clearly deals with summer programs only, so it would not make sense for the provision for summer substitutes to be applied to year-round employee absences when there is an entire code section, 18A-4-15, dealing only with substitutes. *See, Id.* If the legislature did not intend a different rule specifically for summer employee substitutes, then there would have been no need to discuss substitutes in § 18-5-39, it could simply have referred to § 18A-4-15 or omitted reference to substitutes completely.

It is clear that the provisions in § 18-5-39 grant a specific exception to the normal assignment of substitutes per § 18A-4-15. Although Grievant cites previous cases of the Grievance Board to support her reading of the statute, these cases are not binding precedent on that issue. *See Jamison v. Monongalia County Board of Education*, Docket No. 2008-0293-MonED (Aug. 27, 2008) (position to be substituted was for an absent 261-day employee, but the meaning of "summer employee" was not argued and the grievance was denied because the grievant did not prove she was next in line);

Jamison v. Monongalia County Board of Education, Docket No. 05-30-338 (Jan. 20, 2006) (Position to be substituted was for an absent 261-day employee, but the meaning of "summer employee" was not argued and grievance was denied because the grievant did not prove she was next in line); *Saddler v. Raleigh County Board of Education*, Docket No. 02-41-420 (Apr. 29, 2003) (it is unclear whether the position to be substituted was for an absent 261-day employee or not, but the meaning of "summer employee" was not argued and grievance was denied because the grievant did not prove she was next in line). In none of these cases was the interpretation of the statute at issue and all three cases were decided on other issues. Therefore, based on strict statutory construction, Grievant was not entitled to substitute for the general maintenance positions that Ms. Jarrett and Ms. Abbott were assigned on June 13, 14, and 21, 2011, because they were year-round positions and not summer positions. *See Melissa Lynn Young v. Kanawha County Board of Education*, Docket No. 2011-1845-KanED (Nov. 19, 2012). Further, Grievant was not entitled to substitute for the position that Ms. Pennington was assigned on June 21, 2011, because it was a year-round position and not a summer position.[9] *See Id.*

Grievant also failed to meet the second requirement for a substitute under WEST VIRGINIA CODE § 18-5-39, because she does not hold the same classification category as the positions she seeks. The statute clearly states that a regular employee unemployed during the summer is to be given first opportunity to substitute "within the

[9] It is noted that Ms. Pennington received this assignment in error under the process that Respondent uses. Under Respondent's process for calling out substitutes, Ms. Pennington's name should not have been included in the automated call-out system. Further, under the applicable statutes, neither Ms. Pennington nor Grievant would have been entitled to substitute for that position. Accordingly, this assignment will not be further addressed herein.

same classification category." Grievant holds the aide/autism mentor classification. In this situation, it was general maintenance positions for which Grievant believes she should have been called to substitute. As an aide/autism mentor, Grievant would only be granted first priority, if she had the most seniority, to substitute for summer aides/autism mentors.

Grievant further argues that even if she were not entitled under § 18-5-39 to substitute, she was entitled to substitute simply due to her greater seniority. This argument also fails because, pursuant to the aforementioned statutes, the only classification for which Grievant would have been able to substitute would have been aides/autism mentors. None of the positions at issue were such.

Therefore, this grievance is DENIED.

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. W. VA. CODE ST. R. § 156-1-3 (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. Respondent's employment of service personnel substitutes is governed by statute. "The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority…" W.VA. CODE § 18A-4-15(a) (2011). The statute further describes the manner in which substitutes must be assigned:

> (1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b of this article…
> (2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

W. VA. CODE § 18A-4-15(b). Additionally, W. VA. CODE § 18-5-39 (2011), entitled "Establishment of summer school programs; tuition," also discusses substitutes. In subsection (f) it reads:

> When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis.

3. Although the statute does not define "summer employee," it does define "summer employment:"

> (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."

4. It is clear that the provisions in § 18-5-39 grant a specific exception to the normal assignment of substitutes per § 18A-4-15. Therefore, the right to substitute under § 18-5-39 is only for absences of employees hired specifically for the summer and not for absences of year-round employees.

5. Grievant is not entitled to substitute under § 18-5-39 in this instance because the positions at issue were not summer employees and they were not in the same classification category Grievant holds.

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 (eff. July 7, 2008).

DATE: December 14, 2012.

_____
Carrie H. LeFevre
Administrative Law Judge