

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**JOHNNY P. ADKINS,  
Grievant,**

**v.**

**Docket No. 2016-1817-WayED**

**WAYNE COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

Grievant, Johnny P. Adkins, is employed by Respondent as a Custodian II at Wayne High School. Grievant filed this action on June 23, 2016, alleging that he “was wrongfully and unlawfully not awarded the position of custodian at Spring Valley High School when the position returned during the Summer of 2016.” Grievant claimed that a summer position he was awarded for the summer of 2013 at Spring Valley High School should have given him the right to a summer position at Spring Valley High School for the summer of 2016 under WEST VIRGINIA CODE § 18-5-39(f). Grievant seeks to be awarded the position, any back pay due with interest, summer seniority, and all other benefits he is entitled.

Chanda Perry, the designee of the county superintendent, conducted a conference on October 6, 2016. The grievance was denied by decision dated October 12, 2016. Grievant appealed to Level Two on October 31, 2016. A mediation session was conducted on January 31, 2017. Grievant appealed to Level Three on February 14, 2017. A Level Three evidentiary hearing was conducted before Administrative Law Judge Carrie LeFevre on May 16, 2017. This case became mature for consideration upon receipt of the last of the parties’ fact/law proposals on July 3, 2017. This case was reassigned to the

undersigned on August 31, 2017, for administrative reasons. Grievant appeared in person and by his counsel, John Everett Roush, AFT-WV/AFL-CIO. Respondent appeared by its counsel, Leslie K. Tryree.

### **Synopsis**

Grievant is employed by Respondent as a Custodian. Grievant argued he should have been placed in a half-time summer custodian position in the summer of 2016, because it was a position that he held in the summer of 2013. The facts of this case do not meet the statutory requirement that an employee be given the option of retaining a job that they held during the previous summer. Respondent correctly returned the employee who held the position in the summer of 2015 to the position in the summer of 2016.

The following Finding of Facts are based upon the record of this case.

### **Finding of Facts**

1. Grievant is regularly employed by the Respondent as a Custodian at the Wayne High School.
2. On May 15, 2012, Respondent hired Vernon Parsons for a one-half time summer custodian position at Vinson Middle School. The position ran from June 11, 2012 through July 12, 2012 for four days per week from 9:30 a.m. through 1:00 p.m.
3. Respondent posted a position for a one-half time summer custodian at Vinson Middle School from March 20, 2013 through March 26, 2013. The position ran from June 3, 2013 through July 3, 2013 for four days per week from 9:30 a.m. through 1:00 p.m. Vernon Parsons was the successful applicant for this position.

4. Respondent posted a position for a full-time summer custodian at Spring Valley High School from April 17, 2013 through April 24, 2013. The position ran from June 3, 2103 through June 28, 2013 for three days per week from 8:00 a.m. through 4:00 p.m. Grievant was the successful applicant for this position.

5. Respondent posted a position for a one-half time summer custodian at Vinson Middle School from April 23, 2014 through April 29, 2014. The position ran from June 3, 2014 through July 3, 2014 for four days per week from 9:30 a.m. through 1:00 p.m. Vernon Parsons was the successful applicant for this position.

6. Respondent posted a position for a one-half time summer custodian at Vinson Middle School from May 8, 2015 through May 14, 2015. The position ran from June 8, 2015 through July 9, 2015 for four days per week from 9:30 a.m. through 1:00 p.m. Vernon Parsons was the successful applicant for this position.

7. Due to budget cuts, Respondent conducted its summer school program in only two locations during the summer of 2016, those locations being Spring Valley High School for the northern half of the county and Tolsia High School for the southern half of the county.

8. Respondent posted a one-half time summer custodian at Spring Valley High School from April 29, 2016 through May 5, 2016. The position ran from June 1, 2016 through July 7, 2016 for a twenty day employment term from 9:30 a.m. through 1:00 p.m.

9. Seven applications were received for the position at Spring Valley High School and the position was awarded to Vernon Parsons, who had held a similar summer school custodian's assignment at Vinson Middle School for the four preceding summers.

## 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 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 relies upon WEST VIRGINIA Code § 18-5-39(f) which provides, in pertinent part, the following:

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.

Service employees who worked during the prior summer in a position that still exists in the coming summer are entitled to retain that position. Second, if there will be fewer

service positions in the upcoming summer in a particular program or classification than there were last summer, boards are required to retain service personnel in these positions based upon the length of service time in the particular summer program or classification. Third, when a summer service position is newly created or the employee who served in the position last summer is unavailable to work this summer, such positions must be posted and filled pursuant to WEST VIRGINIA CODE § 18A-4-8b. Finally, if the service employee who worked in the position last summer is on a board-approved leave of absence, his or her position must be posted and filled in accordance with WEST VIRGINIA CODE § 18A-4-8b.<sup>1</sup>

Grievant argued that the custodian position at Spring Valley High School for the summer of 2016 was more closely related to the position Grievant held at the school in summer of 2013 than those held by Mr. Parsons in the summers of 2012 through 2015. The Grievance Board has made clear that when determining whether a summer assignment is the same as the one held in a prior summer, the location of the assignment is not a key factor. “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 remains 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).”

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<sup>1</sup>*Howard and Brooks v. Marshall County Bd. of Educ.*, Docket No. 2015-1630-CONS (July 27, 2016).

*Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010); *Radabaugh v. Monongalia County Bd. of Educ.*, Docket No. 2013-1996-MonED (Sept. 22, 2014).

The record reflects that Vernon Parsons bid upon and was awarded the same posted summer school custodian's position at Vinson Middle School for each of the summers of 2012, 2013, 2014 and 2015. This summer position at Vinson Middle School was for 3.5 hours per day, Monday through Thursday of each week, 8:30 a.m. to 1:30 p.m., with summer school for students being held from Monday through Thursday of each such week at Vinson Middle School. Due to financial reasons in the summer of 2016, Respondent reduced the county wide summer school program from three locations down to two locations and eliminated Vinson Middle School. The summer school custodian's schedule and work duties posted for the Spring Valley High School position for the summer of 2016 were the same that Mr. Parsons had at Vinson Middle School for the previous four summers. Contrary to Grievant's assertion, WEST VIRGINIA CODE § 18-5-39(f) would apply to Mr. Parsons and his previous assignment and the assignment at issue in the instant case. It appears to the undersigned that Respondent correctly awarded Mr. Parsons the posted position of summer school custodian at Spring Valley High School for the summer of 2016.

Finally, Grievant's argument that Respondent erred in not notifying him of this posted position is without merit. Grievant concedes in his proposals that he did, in fact, bid on the position at issue in this case, thereby negating any assertion that Respondent was under an obligation to notify him of a service position he held in one year that was posted

in subsequent years. Wayne County Board of Education properly returned Mr. Parsons to the position at issue in the summer of 2016.

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 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. WEST VIRGINIA CODE § 18-5-39(f) which provides, in relevant part, as follows:

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.

3. The Grievance Board has made clear that when determining whether a summer assignment is the same as the one held in a prior summer, the location of the assignment is not a key factor. “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 remains 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).” *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010); *Radabaugh v. Monongalia County Bd. of Educ.*, Docket No. 2013-1996-MonED (Sept. 22, 2014).

4. The position at issue and the summer program were the same in 2015 and 2016, and Grievant was not entitled to be placed in the position based on his summer seniority.

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 13, 2017**

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**Ronald L. Reece**  
**Administrative Law Judge**