

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRENDA CARPENTER,
Grievant,

v.

Docket No. 2016-1807-LogED

LOGAN COUNTY BOARD OF EDUCATION,
Respondent,

TERRY TURNER,
Intervenor.

DECISION

Grievant, Brenda Carpenter, is employed by Respondent' Logan County Board of Education ("Board") as a Paraprofessional and Autism Mentor.¹ Ms. Carpenter filed a level one grievance form dated June 23, 2016, alleging, "Respondent hired another, less senior employee for a summer aide position in violation of W. Va. Code 18-5-39 & 18A-4-8b." As relief, Grievant seeks "compensation for lost wages and benefits with interest and preference for this position in future summers."

A level one conference was held on August 4, 2016, and a decision denying the grievance was issued on August 25, 2016. Grievant appealed to level two on September 8, 2016. An Order Granting Intervenor Status to Terry Turner, the successful applicant for the contested position, was entered on September 12, 2016. A mediation was conducted on November 9, 2016, and on the next day, an Order was entered placing the matter in abeyance until November 28, 2016, to give the parties time to effectuate a

¹ Both of these titles are specialties within the Aide classification.

settlement. If no settlement was reached by that date, the mediation would be considered unsuccessful. Grievant filed a level three appeal dated December 9, 2016.

A level three hearing was conducted at the Charleston office of the West Virginia Public Employees Grievance Board on February 27, 2017. Grievant appeared personally and through her counsel, John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent was represented by Leslie K. Tyree, Esquire. This matter became mature for decision on March 29, 2017, upon receipt of the last Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is contesting Respondent's decision to select Intervenor for a summer bus aide position serving special needs students attending an elementary school in the Chapmanville area. Grievant claims that she held a similar job in the summer of 2014 and is therefore entitled to this position due to her greater regular seniority in the Aide classification. In fact, this position was different from the position held by Grievant in the summer of 2014, but was identical to the ones held by Intervenor in the summers of 2012 and 2013. Intervenor was therefore entitled to the 2016 position by the mandates of WEST VIRGINIA CODE § 18-5-39.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Brenda Carpenter, is employed by Respondent, Logan County Board of Education, as a Paraprofessional and Autism Mentor. She has been employed

by the Board in the Aide classification for more than forty-five years, and has the most regular seniority in that classification in the Logan County school system.

2. Intervenor, Terry Turner, is also employed by the Board in the Aide classification and has more than thirty-eight years of regular seniority with the Board. She has the third most seniority as an Aide in the Logan County.

3. Grievant has worked for many years as a classroom aide with special needs students. She worked a regular 200-day contract which was extended each year by eighteen days for what was referred to as an extended year program.² These were not posted summer school jobs. While these extensions to her employment term were in place, Grievant did not seek employment as an aide in any summer school programs.

4. In the summer of 2012, Respondent posted two summer bus aide positions in the special needs program. Intervenor was employed to fill the position in the Chapmanville area. Another employee took the bus aide position in the Logan area. The positions were posted as “Bus Aides 2-Positions-Special Needs – (1) Chapmanville area-(1) Logan” (Joint Exhibit 1). Grievant was employed in the extended year program.

5. In the summer of 2013, Respondent again posted two summer bus aide positions in the special needs program. Those summer positions were posted exactly like the ones posted the previous summer. (Joint Exhibit 2). The same employee was hired

² Federal and state law required free instruction for some special needs students beyond the end of the school year, and the curriculum was based upon federal and state policies that require the extended year program to offer individualized instruction. Such extended terms were part of the regular employment term, and not a separate summer school position. For a complete discussion on extended year positions compared to summer school assignments, see *Board of Educ. v. Enoch*, 186 W. Va. 712, 414 S.E.2d 630 (1992).

to fill the position in the Logan area. Intervenor was employed to fill the other bus aide position in the Chapmanville area. Neither Intervenor nor the other employee accompanied the students to their classrooms while working in these positions in either 2012 or 2013. They were strictly bus aides. During the summer of 2013, Grievant again worked as a special needs aide under a contract extension as part of the special education extended year program.

6. After the 2012-2013 school year, the extended leave program was discontinued and the extended contract term was no longer available for Grievant.

7. In June 2014, Respondent posted one position as for a "Summer Program - bus aide/program aide" assigned to the "Logan Bus Garage." The person selected for this position was assigned to "ride the bus and accompany the student while in the summer program." (Joint Exhibit 3, vacancy bulletin). This was the only aide position posted for the summer of 2014. Intervenor and Grievant applied for this position, and Intervenor was selected. Intervenor was the only aide who worked for Respondent during the summer of 2014.

8. In that position, Intervenor began her day at the Logan Bus Garage at or about 6:40 a.m. She then rode the bus to pick up the student and accompanied him to Logan Grade School. Intervenor then worked with the student in his classroom at Logan Grade School until the end of the school day, at or about 2:00 p.m. and accompanied the student on the bus ride to his home after school.

9. Ms. Carpenter filed a grievance alleging that she should have been selected for the 2014 summer aide position rather than Ms. Turner. An Administrative Law Judge for the West Virginia Public Employees Grievance Board ruled that the bus/program aide

position in the summer of 2014 was a different position from the summer bus aide positions Intervenor had filed the previous two summers. The Judge noted most significantly the 2014 summer position required the employee not only to aide with the transportation of the student but also serve the student as classroom aide. Due to this significant difference in duties the Administrative Law Judge concluded that the 2014 summer position was a newly created position, and Ms. Carpenter should have received the position as the employee with the most regular seniority as an Aide. *Carpenter v. Logan County Bd. of Educ. and Terry Turner*, Docket No. 2015-0051-LogED (Sept. 4, 2015).

10. As a result of the decision Grievant was awarded the following:

. . . the earnings she would have received had she been placed in the bus aide/program aide position during the summer of 2014, plus interest. Further, Grievant shall be granted any and all benefits she would have received, including seniority, had she been properly placed in the position in June 2014.

Id. For all future purposes, Grievant is to be treated as if she had been awarded and served in the 2014 summer position.

11. On or about May 26, 2016, Respondent posted a position entitled "Itinerant Bus Aide for Summer Program – 2016." The location for the position was the Chapmanville Bus Garage, and the job description was listed as "The School Bus Aide assists with the transportation of students with special needs." (Grievant's Exhibit 2). The employee would only facilitate transporting the students to the Chapmanville Elementary School at the start of the day and home after the instructional day was completed. The Aide was not responsible for going into the classroom with the students to help with the educational program like the 2014 summer aide position.

12. At least nine people applied for the Sumer Bus Aide position for 2016, including Ms. Carpenter and Ms. Turner. Ms. Carpenter was the most senior aide to apply. Ms. Turner was selected for the position and held it throughout the 2016 summer session.

Discussion

This grievance does not involve a disciplinary matter. Therefore, 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). "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).

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

The position in question was a summer school job. How service personnel are selected for those positions is controlled by WEST VIRGINIA CODE § 18-5-39 which states, in part:

(f) Notwithstanding any other provision of this code to the contrary, the 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. . .

Id. “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 25, 1997).” *Radabaugh v. Monongalia County Bd. of Educ.*, Docket No. 2013-1996-MonED (Sept. 22, 2014). “‘The seniority granted to regular employed workers and the ‘seniority’ granted to summer employees in their positions is controlled by separate statutes and is not meant to be comingled. W. Va. Code §§ 18-5-39; 18A-4-8b; & 18A-4-8g, *Bowmen [sic] 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).” *Cowan, et al., v. Ritchie County Bd. of Educ.*, Docket No. 2010-1537-CONS (Jan. 20, 2012).

“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 remain[s] 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. 99-10-433 (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 01-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ.*, Docket No. 01-30-016 (June 21, 2001).” *Eisentrout v. Preston County Bd. of Educ.*, Docket No. 2010-0022-PreED (Apr. 16, 2010). See also *Radabaugh v. Monongalia County Bd. of Educ.*, Docket No. 2013-1996-MonED (Sept. 22, 2014).

In this situation, it is abundantly clear that the position posted for the summer of 2016, was the same as the summer jobs Intervenor worked in 2012 and 2013. The postings for the 2012 and 2013 positions read, “Bus Aides 2-Positions-Special Needs – (1) Chapmanville area-(1) Logan” (Joint Exhibit 1). The posting for the 2016 position read, “Itinerant Bus Aide for Summer Program – 2016.” All three were for a bus aide³ only. The Aide had no responsibility for assisting the students in the classroom as the job in 2014 which should have gone to Grievant. The 2016 summer position was also located in the

³ These positions are sometimes referred to as Transportation Aides as well.

Chapmanville area and involved students attending the elementary school in that area. That is also the type of position Intervenor held in the summers of 2012 and 2013.

In her grievance contesting the 2014 summer positions, Grievant prevailed by demonstrating that the 2014 position was different from the positions Intervenor held in 2012 and 2103 because it involves assisting the students in the classroom in addition to the bus aide positions Intervenor previously held. She cannot now prevail by claiming that the bus aide only position offered in the summer of 2016 is the same as her position in 2014. To paraphrase the Bard of Avon, Grievant is "hoist with [her] own petard"⁴

Since the 2016 summer position was the same job which Intervenor held in 2012 and 2013, and is now being offered "during a succeeding summer," Respondent followed the dictates of WEST VIRGINIA CODE § 18-5-39 in awarding the position to Ms. Turner. Accordingly, the Grievance is DENIED.⁵

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Therefore, 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) "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).

⁴ This is an idiom meaning to fall into one's own trap, or to be blown up by one's own bomb, utilized by William Shakespeare in *Hamlet*.

⁵ There was some evidence indicating that some, but possibly not all of the summer Bus Aide positions were funded by a program entitled Energy Express. However, it is the nature of the duties which is controlling pursuant to the statute, not the funding source.

2. How service personnel are selected for summer school positions is controlled by WEST VIRGINIA CODE § 18-5-39 which states, in part:

(f) Notwithstanding any other provision of this code to the contrary, the 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. . .

Id.

3. WEST VIRGINIA CODE § 18-5-39 provides that any employee who accepts a summer assignment is entitled to the same assignment if it exists “during any succeeding summer.” *Id. 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 25, 1997).” *Radabaugh v. Monongalia County Bd. of Educ.*, Docket No. 2013-1996-MonED (Sept. 22, 2014).” *Carpenter v. Logan County Bd. of Educ. and Terry Turner*, Docket No. 2015-0051-LogED (Sept. 4, 2015).

4. “‘The seniority granted to regular employed workers and the ‘seniority’ granted to summer employees in their positions is controlled by separate statutes and is not meant to be comingled. W. Va. Code §§ 18-5-39; 18A-4-8b; & 18A-4-8g, *Bowmen [sic] 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).” *Cowan, et al., v. Ritchie County Bd. of Educ.*, Docket No. 2010-1537-CONS (Jan. 20, 2012).” *Carpenter v. Logan County Bd. of Educ. and Terry Turner*, Docket No. 2015-0051-LogED (Sept. 4, 2015).

5. The summer position posted for a bus aide in the Chapmanville area for the summer of 2016, was the same position held by Intervenor in the summers of 2012 and 2013, but was significantly different from the summer position held by Grievant in 2014. *See Carpenter v. Logan County Bd. of Educ. and Terry Turner*, Docket No. 2015-0051-LogED (Sept. 4, 2015). Therefore, Respondent followed the mandates of WEST VIRGINIA CODE § 18-5-39 when it selected Grievant for the 2016 summer position.

Accordingly, the 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: April 28, 2017.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE