

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**BRADLEY KEVIN HOWARD,  
Grievant,**

**v.**

**Docket No. 2016-1654-MarED**

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

**DECISION**

Grievant, employed by the Marshall County Board of Education as a bus operator, filed a Level One grievance dated May 16, 2016. Grievant complains of the order in which Respondent hired summer full-time bus operators as it relates to seniority. Grievant seeks seniority and any back pay.<sup>1</sup> Grievant's Level Two and Level Three grievance forms allege that Respondent hired a less senior bus operator to fill a summer bus operator position for the summer of 2016 in violation of WEST VIRGINIA CODE §§ 18-5-39 and 18A-4-8b. Grievant seeks seniority credit as a bus operator for the days worked in the summer of 2016 by the applicant placed in the summer job.

A Level Three hearing was conducted before the undersigned on July 11, 2017, at the Grievance Board's Westover office. Grievant appeared in person and by his counsel, Joe E. Spradling, West Virginia School Service Personnel. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice LLP, and by Assistant Superintendent Corey

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<sup>1</sup>Grievant indicated during the Level Three hearing that he was not seeking a back pay award.

Murphy. This case became mature for consideration upon receipt of the parties' fact/law proposals on August 15, 2017.

### **Synopsis**

Grievant is employed by Respondent as a regular bus operator. Grievant seeks summer seniority credit as a bus operator for the summer of 2016. The record established that Grievant was not entitled to a bus operator position for the 2016 summer school. It is undisputed that Grievant did not serve in a summer school bus operator position in the summer of 2016. Accordingly, this grievance is denied.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievant is employed as a bus operator by the Marshall County Board of Education.
2. On July 27, 2016, the undersigned issued a decision in the related grievance of *Howard and Brooks v. Marshall County Bd. of Educ.*, Docket No. 2015-1630-CONS (July 27, 2016). That grievance concerned how a 2015 summer bus operator position was awarded.
3. During the summer of 2015, James Taskers was properly hired as a summer school bus operator.
4. During the spring of 2016, Respondent posted seven summer school bus operator positions.

5. Mr. Taskers decided that he no longer wanted to be a summer bus operator for the summer of 2016 and relinquished his summer school bus operator position. Mr. Tasker remains employed by Respondent as a regular bus operator.

6. Because Mr. Taskers was not available for the 2016 summer school, the position in which he previously served was filled in accordance with WEST VIRGINIA CODE § 18A-4-8b.<sup>2</sup>

7. The following bus operators were hired for the 2016 summer school; Tonda Anderson, Paul Blake, Mary Brooks, Susan Dunham, Brad Varlas, Robert Ruckman, and Jerry Gump. Respondent's Exhibit No. 2.

8. Ms. Beverly Brooks filed a grievance regarding the 2016 summer school bus operator positions on May 16, 2016, claiming that she should have been hired for one of these positions - specifically the position that was filled by Jerry Gump.

9. Mr. Howard also filed a grievance regarding the 2016 summer school bus operator positions on May 16, 2016.

10. Beverly Brooks has greater regular seniority than the Grievant.

11. After the 2016 summer school had ended, Corey Murphy, Assistant Superintendent for Marshall County Schools, determined that Beverly Brooks should have been hired for the position that Jerry Gump was awarded. Ms. Brooks had more regular seniority than Ms. Gump and she was entitled to the summer school bus operator position that had previously been held by Mr. Taskers, the unavailable employee.

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<sup>2</sup>See *Eisentrout v. Preston County Bd. of Educ., et al.*, Case No. 12-1464 (June 28, 2013)(explaining the application of WEST VIRGINIA CODE § 18A-4-8b and the meaning of the term "unavailable employee" when hiring service personnel for summer school positions).

12. Jerry Gump worked during the entire 2016 summer school program as a bus operator. As a result, Respondent provided her with a seniority credit for the work she performed.

13. Respondent settled the grievance filed by Ms. Brooks regarding the 2016 summer school bus operator position because it determined that she was legally entitled to that position. As a result, Ms. Brooks was given a seniority credit for the 2016 summer school and back pay.

14. Grievant acknowledged that he was not entitled to any of the 2016 summer school bus operator positions. However, he is seeking a seniority credit as a bus operator for the 2016 summer school because Jerry Gump was mistakenly awarded the position at issue and received a seniority credit for her work. Grievant does not want Ms. Gump to have any summer seniority credit advantage over him as a result of Respondent's error.

15. Grievant worked as a handyman at the bus garage during the 2016 summer school program.

### **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).

The instant grievance has no merit. Grievant admitted that he was not entitled to any of the 2016 summer school bus operator positions. Grievant also acknowledged that he is not entitled to any back pay. Grievant is asking the undersigned that he be awarded summer seniority credit as a bus operator for the 2016 summer school program. The record of this case does not support such a request.

Jerry Gump worked during the entire 2016 summer school program as a summer bus operator. In response to a grievance by Beverly Brooks regarding that same position, Respondent determined that the position should have been filled pursuant to WEST VIRGINIA CODE § 18A-4-8b. Beverly Brooks, as the applicant with the most regular seniority, should have been awarded the position at issue.<sup>3</sup> Respondent settled Ms. Brooks'

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<sup>3</sup>W. VA. 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.

grievance by providing her with back pay and a seniority credit for the 2016 summer school. Ms. Gump was allowed to retain the seniority credit she earned during the 2016 summer school because she actually performed the work and applicable law required that she not be stripped of that credit.<sup>4</sup>

Jerry Gump did nothing unlawful or deceitful to obtain the 2016 summer school bus operator position. An error was made and then later corrected by Respondent. Ms. Gump, as a matter of law, is entitled to keep the seniority she earned during the 2016 summer school program driving a bus for Respondent. Grievant was never entitled to any bus operator position for the 2016 summer school program. Grievant failed to provide the undersigned with any authority to support Grievant's claim to bus operator seniority credit for the 2016 summer school program. Respondent has no obligation to provide Grievant with the relief he seeks.

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).

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<sup>4</sup>The West Virginia Supreme Court of Appeals has ruled that school service personnel must be given seniority credit of the time they work under a contract later determined to have been incorrectly awarded to that employee, except where the employee knowingly took some unlawful or deceitful action to obtain that seniority. *Hall v. The Board of Education of the County of Mingo*, 541 S.E.2d 624 (2000).

2. W. VA. 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 determined that no statute, policy, rule or regulation requires a county board to provide an employee with the same benefits accorded another similarly-situated employee where those benefits were conferred as the result of mistake or error. *Blackburn, et al., v. Mingo County Bd. of Educ.*, Docket No. 2015-1148-CONS (June 1, 2016).

4. Grievant presented no evidence to show that he was entitled to a bus operator position for the 2016 summer school program. Grievant did not serve in a 2016 summer school bus operator position. Grievant is not entitled to any summer seniority credit as a bus operator for the summer of 2016.

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: August 31, 2017**

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