

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**JERRY LYNN GUMP,  
Grievant,**

**v.**

**Docket No. 2017-2138-MarED**

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

**DECISION**

Grievant, Jerry Gump, filed a Level One grievance on May 1, 2017, alleging that Respondent, Marshall County Board of Education, “cut retired position & terminated that route, while 2 hired for ‘new routes’ continued to have their jobs with less ‘summer school seniority’ than myself.” Grievant seeks to “have worked for & earned summer seniority job, that [she] worked 51 days for.”

A Level One hearing was held on July 12, 2017, and the grievance was denied by decision dated August 30, 2017. A Level Two mediation was conducted on December 1, 2017. Grievant perfected her appeal to Level Three on December 15, 2017. A Level Three hearing was conducted before the undersigned on March 1, 2018, at the Grievance Board’s Westover office. Grievant appeared in person and was represented by her counsel, Rich McGervey, West Virginia School Service Personnel Association. Respondent appeared by Assistant Superintendent Corey Murphy, and by its counsel, Richard S. Boothby, Bowles Rice LLP.

## **Synopsis**

Grievant is employed by Respondent as a regular bus operator. Grievant seeks summer school program bus operator assignments awarded to other bus operators. This case involves previous grievances filed by other parties, a settlement agreement, and facts that can be somewhat disjointed at times. Nevertheless, while Grievant is entitled to retain any summer school days she has worked, that summer school credit did not entitle her to any summer school positions at issue in this case.

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

## **Findings of Fact**

1. Grievant is employed by Respondent as a regular bus operator. From at least the summer of 2014 up to and including the summer of 2017, Respondent has conducted a summer school program requiring bus operators to transport students.

2. From the summer of 2014 up to and including the summer of 2017, Respondent approved the hire of at least six bus operators each summer.

3. During the summer of 2014, although bus operator David Seals held a summer bus operator position, he was unable to drive the route due to a work-related injury. Likewise, Brad Varlas held a summer bus operator position in 2014, but was unable to work during the 2014 summer school due to illness. Neither Mr. Seals nor Mr. Varlas requested a leave of absence from Respondent and neither was granted a leave of absence.

4. During the summer of 2014, Ms. Durham served as Mr. Seal's substitute. She drove Mr. Seal's summer bus route for the entire summer school period.

5. During the summer of 2014, Grievant served as Brad Varlas's substitute and drove Mr. Varlas's summer bus route for the entire summer school period.

6. In the early spring of 2015, Mr. Seals resigned from all employment with Respondent. The bus route Mr. Seals was entitled to for the summer of 2014 still existed in the summer of 2015.

7. On April 27, 2015, Respondent posted job #S-78 which advertised up to six summer bus operators position for summer 2015. On April 28, 2015, Ms. Brooks bid on #S-78. On April 28, 2015, David Meagers bid on #S-78. On April 29, 2015, Ms. Dunham bid on #S-78. On May 1, 2015, Mr. Howard bid on #S-78.

8. At Respondent's board meeting on May 12, 2015, summer bus operators positions were awarded to Tonda Anderson, Paul Blake, Mary Brooks, James Tasker, Brad Varlas, and David Meagers.

9. Only one of the six bus operators from summer 2014 was not hired to return in one of the six bus operator positions for the summer of 2015, David Seals. The position previously held by Mr. Seals was vacant because of his retirement.

10. Brad Varlas was able to work in his summer bus operator position during the summer of 2015.

11. Sometime before the start of the 2015 summer school, and after reviewing the decision of the West Virginia Supreme Court of Appeals styled *Eisentrout v. Preston County Bd. of Educ.*, Case No. 12-1464, Respondent's Assistant Superintendent/Personnel Director Corey Murphy decided that Respondent had erred in

hiring Mr. Magers to the position previously held by Mr. Seals. Mr. Murphy determined that WEST VIRGINIA CODE § 18-5-39 did not actually address how to fill this particular position given the relevant facts.

12. Mr. Murphy determined that Ms. Danham should be awarded the summer bus operator position previously held by Mr. Seals. On May 26, 2015, Respondent rescinded the hire of Mr. Magers and hired Ms. Dunham for one of the six summer bus operator positions.

13. During the summer of 2015, it became apparent that one additional bus route was needed to accommodate all of the students being served by the summer program. Without informing the administration and having no authority to do so, David Smith, Transportation Director, added a seventh summer bus operator position for the 2015 summer school. David Magers was hired to fill this newly-created seventh position.

14. During the 2015 summer school program, Grievant again worked as a substitute summer bus operator; this time for Paul Blake who was out on sick leave.

15. Another bus operator, Beverly Brooks, worked as a substitute bus operator for Mary Brooks who likewise was out on sick leave.

16. For the summer of 2016, all of the bus operators who worked during the 2015 summer school program returned, except for Jim Tasker and David Magers.

17. Jim Tasker, though still employed by Respondent as a regular bus operator, was unavailable for the 2016 summer school program due to health-related issues.

18. For the summer of 2016, Mr. Tasker's position was initially awarded to Grievant, Jerry Gump, who worked in the assignment during the 2016 summer school program.

19. A grievance was then filed by bus operator Beverly Brooks, who claimed that because Mr. Tasker was unavailable within the meaning of the law, Mr. Tasker's 2016 summer bus operator position should have been filled on the basis of regular seniority. As the applicant with the most regular seniority, Ms. Brooks claimed that she should have been awarded that position for the summer of 2016.

20. After reviewing the circumstances, Respondent conceded that Ms. Brooks should have been hired for the 2016 summer bus operator position rather than Grievant.

21. After the 2016 summer school program had ended, Respondent and Ms. Brooks entered into a settlement agreement by which Ms. Brooks was given credit for the 2016 summer bus operator position and back pay. As a result, Ms. Brooks, rather than Grievant, returned to the bus operator position in question for the next summer school program.

22. A new bus operator position was lawfully added for the 2016 summer school program bringing the total number of summer drivers to seven. This new position was awarded to Robert Ruckman, the most senior regular bus operator in Marshall County.

23. All of the 2016 summer bus operators, except for Brad Varlas and Grievant, who worked or were otherwise awarded bus operator assignments for the 2016 summer school program were hired to return for the 2017 summer school program. Grievant, due to the settlement agreement referenced above, was not given a bus operator position for the summer of 2017.

24. Grievant asserts that she is entitled to the 2017 summer bus operator assignment driven by Beverly Brooks or Robert Ruckman. Grievant's claim appears to be based on her reliance on the language in WEST VIRGINIA CODE § 18-5-39(f), emphasizing

that she drove a summer bus operator assignment in the summer of 2016 and has more summer service time than Beverly Brooks and Robert Ruckman.

25. Robert Ruckman's regular seniority date is October 23, 1985. Beverly Brooks regular seniority date is December 20, 2004. Grievant's regular seniority date is February 2, 2015.

### **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 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.

WEST VIRGINIA CODE § 18A-4-8b(a) provides that:

A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

Although Grievant was employed in the 2016 summer school program as a bus operator, that administrative decision was determined to be legally in error. Under the *Eisentrout* decision, *supra*, with respect to the 2016 summer school program, Mr. Tasker was an unavailable employee within the meaning of WEST VIRGINIA CODE § 18-5-39(f). When an employee is unavailable, WEST VIRGINIA CODE § 18-5-39(f) requires that employee's position be filled as it would under WEST VIRGINIA CODE § 18-4-8b. The latter statute requires that service positions be awarded on the basis of regular seniority, among other factors. Beverly Brooks had the most regular seniority of all the applicants for Mr. Tasker's 2016 summer school position, not Grievant. Through a settlement agreement, this error was corrected and Ms. Brooks was provided with summer service credit as if she had worked in the 2016 summer school assignment.<sup>1</sup> Ms. Brooks then had priority to return to the same position for the 2017 summer school program, not Grievant.

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<sup>1</sup>The position which was previously held by Jim Tasker, who was out ill.

Finally, although Grievant had more summer service time than Beverly Brooks and Robert Ruckman, she was not entitled to the 2017 summer school bus operator position that was held by Mr. Ruckman in the summer of 2016. In the summer of 2016, Respondent posted an additional summer bus assignment. Because it was a newly-created position, it was filled pursuant to WEST VIRGINIA CODE § 18-4-8b, using county seniority, not summer service time. Mr. Ruckman had more county seniority than Grievant and was awarded the new 2016 summer bus operator assignment. Because Mr. Ruckman held the bus operator assignment in the summer of 2016, he returned to that assignment in the summer of 2017, pursuant to WEST VIRGINIA CODE § 18-5-39(f).

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. “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).” *Parrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 27, 1997).

4. The West Virginia Supreme Court of Appeals in *Eisentrout v. Preston County Bd. of Educ.*, Case No. 12-1464, ruled that a retiree of a board of education cannot be considered an unavailable employee for the purpose of WEST VIRGINIA CODE § 18-5-39.

5. Grievant is entitled to retain any summer school days she has worked. However, due to the particular facts of this case, that summer school credit did not entitle her to any summer school positions at issue in this grievance.

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: May 22, 2018**

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