VICKIE FARROW,

Grievant,

v.

DOCKET NO. 97-40-029

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Vickie Farrow, filed the following grievance against the Putnam County Board of Education ("Board") on August 19, 1996:

> Grievant, a regularly employed bus operator, was employed during the summer of 1996 by the Respondent to paint buildings, structures, equipment, machinery and other items. Grievant was compensated at the "C" pay grade with 0 years of experience. Grievant alleges that she should have been compensated at an "E" pay grade with 15 years of experience. Grievant alleges a violation of West Virginia Code §18A-4-8 and §18-5-39 and requests wages and benefits at the alleged grade and years retroactive from July 8, 1996 to completion of the summer work program.

Following adverse decisions at the lower levels of the grievance process, Grievant appealed to level four on January 17, 1997. (See footnote 1) Hearing was held on March 7, 1997, and this case became mature for decision on March 21, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

ISSUE

The issue is whether Grievant was working out of classification as a general maintenance worker in the Board's temporary summer maintenance program from 1991 to 1996, for which she should be compensated.

SUMMARY OF THE EVIDENCE

Joint Exhibit

1.

Level one grievance form, dated August 12, 1996, and response dated August 19, 1996.

Grievant's Exhibits

1. May 16, 1996 Putnam County Schools Vacancy Bulletin.

2.

Putnam County Schools Contracts of Employment for Temporary Summer General Maintenance Assignment, dated June 3, 1991, May 18, 1992, June 3, 1993, June 6, 1994, June 8, 1995, and June 6, 1996, between Grievant and the Board.

Testimony

Grievant testified in her own behalf. The Board presented the testimony of Jack Coyner.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

1. Grievant has been employed by the Board as a full-time bus operator for fifteen years.

2. The Board has had a temporary summer employment maintenance program for at least 30 years. The purpose of this program is to ensure proper maintenance and upkeep of the school buildings, grounds, and equipment. 3. The temporary summer maintenance program is not connected with a summer school program.

4. The Board posts the temporary summer maintenance employment positions each year. See LII, G. Ex. 1. (See footnote 2)

5. Grievant was first employed in the temporary summer employment maintenance program in 1991. Her contract with the Board in 1991 stated her position as Temporary Summer General Maintenance, with school painter duties. The contract length was 30 days, with compensation in the C2 pay grade, or general maintenance with zero experience. LII G. Ex. 2.

6. Grievant was reemployed in the summer maintenance program every summer thereafter, including the 1996 school year. The contracts for those years stated Grievant's position as Temporary Summer General Maintenance, with general maintenance duties. The contracts are virtually identical in all other aspects to the 1991 contract. LII G. Ex. 2.

7. The summer maintenance program employees can be assigned to any necessary task by Supervisor of Maintenance Bob Erskine. Farrow, LII Tr., p. 17; Coyner, LII Tr., p. 27.

8. Grievant has been assigned to the paint crew all the years she has been employed in the summer maintenance program. She spends all of her time painting the interior and exteriors of schools, including fixtures such as shelving and heating and cooling ducts. 9. The paint crew receives its work orders from Mr. Erskine on the first day of work. After that, it performs the work without supervision. It does not assist more skilled workers in these tasks.

10. Other temporary summer maintenance employees work on the roofing crew, bleacher crew, and maintain the grounds, or, in inclement weather, assist the custodians in moving furniture and buffing floors.

Discussion

Grievant contends she has been employed as a general maintenance worker each summer from 1991 to 1996 in accordance with W. Va. Code § 18-5-39, but has performed the duties of a painter as defined in W. Va. Code § 18A-4-8. She seeks compensation as a painter, with back pay from 1991. The Board argues that Code § 18-5-39 does not apply, because Grievant's summer employment was not in connection with a summer school program, and thus, it is not obligated to employ temporary summer employees within the classifications defined in W. Va. Code § 18A-4-8.

W. Va. Code § 18-5-39 (1996) provides, in pertinent part:

> Notwithstanding any other provision of the code to the contrary, the county board is authorized to 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, article four, chapter eighteen-a of this code. . . The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to all rights, privileges and benefits provided in . . . [§§

> 18A-4-5b, 18A-4-8, 18A-4- 8a, 18A-4-10 and 18A-4-14], . . . of this code: Provided, That those personsare not entitled to a minimum employment term of two hundred days for their summer position.

The Board's argument is not persuasive. It is true the first paragraph of that Section provides, in part, that, "it is the purpose of this section to provide for the establishment of a summer school program, which program is to be separate and apart from the full school term as established by each county." Further, that Section provides that "[t]he county boards may employ as teachers for this summer school program any certified teacher." Thus, the hiring of teachers for summer employment is directly related to the establishment of a summer school program under this Section. However, that Code Section goes on to state that:

> 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, 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.

It is clear this provision is intended to expand the purpose of W. Va. Code § 18-5-39 with regard to service personnel beyond the scope of an established summer school program. It specifically contemplates hiring service personnel to fill the more general needs of a county board of education, which would include maintenance and upkeep of the school buildings, grounds, and equipment.

Finding that W. Va. Code § 18-5-39 applies to the hiring of temporary summer service personnel, it follows that those employees must be classified and paid in accordance with W. Va. Code § 18A-4-8. W. Va. Code § 18A-4-8 defines "general maintenance" as "personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system."

W. Va. Code § 18A-4-8 defines "painter" as "personnel employed to perform duties of painting, finishing and decorating of wood, metal and concrete surfaces of buildings, other structures, equipment, machinery and furnishings of a county school system."

The "general maintenance" classification is in the C pay grade, and the "painter" classification is in the "E" pay grade. The state minimum pay scale set forth in W. Va. Code § 18A-4-8a provides service personnel an incremental salary increase for each year of employment in any position with a county board.

Grievant clearly performed the duties of a painter during the summers from 1991 to 1996. Further, she performed these tasks without supervision, and was not assigned to assist a more skilled worker, as contemplated by the general maintenance classification. W. Va. Code § 18A-4-8 places a duty upon boards of education to classify employees according to their duties, and requires an annual review of the job classifications. When an employee meets the requirements of a particular classification, that classification must be given to the employee. Wiseman, et al. v. Kanawha County Bd. of Educ., Docket No. 20-86-275-1 (Mar. 11, 1987). The grievants in Wiseman were regular school employees hired for temporary summer employment with the board of education. The grievants there, as here, were classified as general maintenance workers, but spent all of their time painting the interiors and exteriors of school buildings and fixtures. They were not assigned to assist more skilled employees, but obtained their work orders from their supervisor, then performed the work without supervision. The grievants had performed thiswork for at least five years prior to the filing of the grievance. Administrative Law Judge Catsonis held that the Wiseman grievants were misclassified as general maintenance workers and ordered them reclassified as painters, although he limited the back pay award to the summer immediately preceding the filing of the grievance. Wiseman, supra. See generally, Stewart v. Brooke County Bd. of Educ., Docket No. 96-05-394 (Apr. 10, 1997).

It should be noted that the Wiseman grievants, unlike Grievant, did not enter into written contracts with the board of education for their summer services. Grievant, on the other hand, had contracts for each of her years' summer employment, which specifically stated her position as general maintenance worker. While I find this fact determinative in awarding back pay to the Grievant, it does not excuse the Board from its responsibility to classify its employees properly according to the definitions in W. Va. Code § 18A-4-8. That Code Section places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and pay grade to which it is assigned. Taylor-Hurley v. Mingo County Bd. of Educ., Docket No. 96-29-265 (Apr. 28, 1997); Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994). Simply stated, the statute requires the board to call the position what it is. Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995). In this case, Grievant was performing the duties of a painter. (See footnote 3)

In classification grievances, when the employer has not raised a timeliness defense, the

Grievance Board generally does not limit back pay to a successful grievant. However,in this case, Grievant knowingly entered into contracts with the Board from 1991-1996 as a general maintenance worker. Grievant acknowledged she could have been assigned to any type of maintenance duties, but knew she would be placed on the paint crew. Thus, Grievant had the knowledge and the opportunity from 1991 on to file a grievance over her misclassification, but failed to do so. Grievant cannot rest on her rights for years and then file her grievance, hoping to receive a windfall back pay award against her employer. See Maynard v. Board of Educ. of Wayne County, 357 S.E.2d 246 (W. Va. 1987). She is, therefore, barred from receiving back pay for the summers prior to 1996. See W. Va. Code § 18-29-3(v). (See footnote 4)

Conclusions of Law

1. W. Va. Code § 18-5-39 provides for the hiring of service personnel to fill the general needs of a county board of education, including maintenance and upkeep of the school buildings, grounds, and equipment, which is separate and apart from an established summer school program.

2. W. Va. Code § 18A-4-8 places a duty upon boards of education to classify employees according to their duties, and requires an annual review of the job classifications. When an employee meets the requirements of a particular classification, that classification must be given to the employee. Wiseman, et al. v. Kanawha County Bd. of Educ., Docket No. 20-86-275-1 (Mar. 11, 1987). ___ 3. W. Va. Code § 18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and pay grade to which it is assigned. Taylor-Hurley v. Mingo County Bd. of Educ., Docket No. 96- 29-265 (Apr. 28, 1997); Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994). Simply stated, the statute requires the board to call the position what it is. Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995). 4. W. Va. Code § 18A-4-8 defines “general maintenance” as “personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system.”

5. W. Va. Code § 18A-4-8 defines “painter” as “personnel employed to perform duties of painting, finishing and decorating of wood, metal and concrete surfaces of buildings, other structures, equipment, machinery and furnishings of a county school system.”

6. The salary of a summer employee shall be in accordance with the salary schedule of

persons regularly employed in the same position in the county where employed and persons employed in those positions are entitled to all rights, privileges and benefits provided in . . . [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14], . . . of this code. W. Va. Code § 18-5-39.

7. W. Va. Code § 18-5-39 extends the right of the proper classification title and pay grade to summer employees.

8. Grievant has proven by a preponderance of the evidence that she performed the duties of the painter classification in her summer employment with the Board from 1991 to 1996.

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART**. The Board is hereby **ORDERED** to compensate Grievant in an amount constituting the difference between the pay she received as a general maintenance worker with zero years experience, and the pay she should have received as a painter with fifteen years experience for the summer of 1996 only.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: June 4, 1997

Footnote: 1

The record below includes the October 3, 1996 level two hearing transcript and exhibits, as well as the level two decision issued by the Superintendent's designee, Harold Hatfield, on January 7, 1997.

Footnote: 2

The level two transcript and exhibits will be referenced as "LII Tr., p. ___", and "LII ___ Ex. ___".

Footnote: 3

This holding in no way entitles Grievant to hold the painter classification in the future, especially in light of the fact

she has not taken the painter competency test pursuant to W. Va. Code § 18A-4-8e. It merely recognizes Grievant was working out of classification in the past, for which she should be compensated.

Footnote: 4

"The doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice."