JAMES CHAFFINS,

Grievant,

v.

DOCKET NO. 97-50-092

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, James Chaffins, filed this grievance on or about October 10, 1996, alleging:

> Violations of WV Code 18-5-39 and 18A-4-8b in regard to summer bus runs for elementary students for the extended school term. The grievant previously made the run. These runs have never been posted for bidding procedure to occur. The grievant has both summer seniority and regular seniority for the run. Relief sought is to have compensation for the loss of pay and that the run be posted for bidding to occur.

A level two hearing was conducted on November 15, 1996, and a decision was rendered on February 13, 1997, denying the grievance. Grievant appealed to level four on February 24, 1997, and the parties agreed to submit the case on the record developed below. Grievant filed proposed findings of fact and conclusions of law on March 18, 1997. Following a review of the level two transcript, exhibits, and Grievant's brief, I requested additional information from the parties pertinent to the decision. That information wasprovided by letter dated August 12, 1997, and has been incorporated into the record. The case became mature for decision on August 12, 1997.

SUMMARY OF EVIDENCE

Exhibits

Ex. A - Grievance form dated October 10, 1996.

Ex. B - Handwritten note on Lawson Products, Inc. notepaper, dated July 8, 1996.

Ex. C - Salary Records for Dunlow Elementary Summer Program for July 1994.

Ex. D -

July 29, 1994 handwritten letter from Wilts Salmons, Director of Support Services, regarding days Clifford Rice substituted at Dunlow Elementary in July 1994.

Ex. E -

July 29, 1994 memorandum from Chester Maynard, Principal of Dunlow Elementary, setting forth the days Clifford Rice drove the summer school run.

Ex. F -

Contract for Employment for Chapter I Extended Year Summer Program for Grievant, approved by the Board on August 8, 1994.

FINDINGS OF FACT

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

1. Grievant has been employed by the Wayne County Board of Education ("Board") as a bus operator for approximately 24 years.

2. Dunlow Elementary instituted a Chapter I Extended Year Summer Program in the summer of 1994. Tr., p. 18.

3. A bus operator position was newly created to accommodate students attending the Dunlow Elementary summer program.

4. The procedure in Wayne County is that bus operators sign up for summer work in the bus garage, and are called for jobs on the basis of seniority. If a driver has "summer" seniority for a particular summer position, that driver is entitled to the same position the next year. Tr., pp. 22-23. 5. The newly created bus operator position for the Dunlow Elementary summer program was not posted for competitive bidding in 1994.

6. Grievant, on the basis of seniority, was awarded the contract for the Chapter I Extended Year Summer Program, which began on July 11, 1994 through July 29, 1994, the end of the summer program. Ex. F.

7. Grievant drove the summer run for two weeks, from July 11-14 and from July 18-21, 1994. Ex. C.

8. Grievant injured his foot on or about July 21, 1994, and called into the office to inform them that “he wouldn't be driving, that he had a bad foot.” Tr., p. 12.

9. Grievant did not request nor was put on a leave of absence following his injury.

10. Clifford Rice substituted for Grievant the following days in the summer of 1994: July 15, July 22, July 25-29. Exs. D, E; Tr., p. 24.

11. There was no extended summer program at Dunlow Elementary in the summer of 1995.

12. The extended summer program at Dunlow Elementary was reinstituted the summer of 1996.

13. At the end of the 1995-96 school year, Wilts Salmons, Director of Support Services, was reviewing the seniority lists of bus operators to determine who should be offered the summer bus run at Dunlow Elementary for the 1996 summer.

14. At about the same time, Grievant was given a handwritten note by David Thompson, a bus garage mechanic, who told him that he was to report for the summer run at Dunlow Elementary on July 8, 1996, at 8:30 a.m. Ex. B. 15. David Thompson has no authority to assign bus runs. Only Mr. Salmons, Violet Tooley, the secretary, or King Queen, whose position was not identified, can assign bus runs. Tr., p. 29.

16. In the meantime, Clifford Rice telephoned Mr. Salmons, and told him he had had a contract for the 1994 summer program.

17. Mr. Salmons never saw Mr. Rice's contract, nor could he find one, but he nevertheless awarded the summer run to Mr. Rice on the basis of his alleged contract, which gave him “summer” seniority for the position.

18. The 1994 and 1996 summer bus runs in questions were not posted by the Board.

19. Grievant did not decline or abandon the Dunlow Elementary bus run in mid- summer 1994.

ISSUE

The issue is whether Grievant has proven by a preponderance of the evidence that he was entitled to the 1996 Chapter I Extended Year Summer Program bus run.

DISCUSSION

Grievant argues that he was entitled to the 1996 summer bus run over Clifford Rice because (1)

he had driven the summer run in 1994; (2) he had more regular seniority; and (3) he had more summer seniority.

W. Va. Code § 18-5-39 (eff. 7/1/96) provides, in pertinent part:

> Notwithstanding any other provision of the code to contrary, the county board is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in . . . § 18A-4-8. . . 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 jobor 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 . . . § 18A-4-8b. . . of this code. When any summer employee who is employed in a summer position is granted a leave of absence for the summer months, the board shall give regular employment status to the employee for that summer position which shall be filled under the procedure set forth in . . . § 18A-4-8b. . . of this code. The summer employee on leave of absence shall have the option of returning to that summer position if the position exists the succeeding summer or whenever the position is reestablished if it were abolished. . . .
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> . . .
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> If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in such position in previous summers, such reductions in force and priority in reemployment to such summer positions shall be based upon the length of service time in the particular summer program of classification.

This Board has previously noted that Code § 18-5-39 is a narrowly drafted exception to the more general provision in Code § 18A-4-8b requiring competitive posting for school service personnel positions. McCoy v. Wayne County Bd. of Educ., Docket No. 93-50-475 (Mar. 1, 1994); Francis v. Logan County Bd. of Educ., Docket No. 93-23-346 (Dec. 29, 1993). Stated simply, if a school service employee has, for example, driven a summer bus run in the previous summer, he or she is entitled to drive that run the next summer without having to bid for it. However, "[t]here is no statutory provision which grants service personnel employees hired for summer employment seniority, which they retain after they decline the position for one or more years, and may rely upon to obtain the position at a later time." Tuttle v. Marion County Bd. of Educ., Docket No. 96-24-412 (Feb. 28, 1997). Thus, if an employee wishes to retain a summer position, he or she must continue to accept that position year after year, or risk abandoning any subsequently entitlement to that position. In addition, Code § 18-5-39 "clearly creates seniority-based reduction-in-force actions and attendant recall rights for

'employees . . . employed in a particular summer program of classification'". Kennedy v. Marion County Bd. of Educ., Docket No. 91-24-427 (Dec. 30, 1991). The Administrative Law Judge in Kennedy, supra, noted that:

> Inasmuch as W. Va. Code §18-5-39 does not speak of a mechanism for summer reductions in force or otherwise reference any other statutory scheme in existence to institute formal RIF procedures, and inasmuch as
>
> > § 18-5-39 clearly enables a board of education to offer a needs-based summer school, it can be inferred from the statute that a reduction of summer personnel simply occurs at any time when the need for a specific program or job in a classification or certification in any particular summer ceases to exist and no job posting results.

Consequently, with respect to the Dunlow Elementary summer school program, it can be inferred that a reduction in force occurred in the summer of 1995, when that program was not offered.

Turning to the instant grievance, Grievant first argues that he is entitled the 1996 summer bus run because he drove that run in 1994, and the run did not exist during 1995. Grievant argues that 1994 was the "previous" summer to 1996, as referenced in the statute. Grievant interprets the statute to mean the previous summer in which the summer position was available.

This provision of Code § 18-5-39 was amended in 1996, in a material aspect. That Section previously read, "[a]n employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer." (Emphasis added). The 1996 amendment deleted the word "immediate", probably in response to Grievance Board decisions which held that employees could only assert entitlement to a summer positionif they held the position in the immediately preceding summer. Any gaps in the summer program would serve to eliminate that entitlement.

While I find that the amendment, on its face, does not necessarily provide the desired result, it seems clear that what was intended by deleting the word "immediate" was to provide service employees entitlement to summer positions in any succeeding summer, especially when the programs ceased to exist from time to time, such as in the instant case. Of course, in keeping with Tuttle, supra, if an employee declines a summer position in any given summer, he or she abandons any entitlement to that position in succeeding summers. Therefore, I find Grievant would be entitled to the 1996 summer bus run if he did not subsequently relinquish his right to the run by abandoning the position.

The Board argues that Grievant did abandon the Dunlow Elementary position mid- summer 1994, when he informed the Transportation office that he had injured his foot and would not be driving the run for the remainder of that summer. The run was then given to Clifford Rice, who was the last employee to hold that run prior to the summer of 1996.

It is undisputed that Grievant did not request nor was granted a leave of absence for the remainder of the summer of 1994, thus he cannot rely on that particular provision of Code §18-5-39 to claim entitlement to the position. Grievant did not present any evidence of his injury other than that he injured his foot, which prevented him from driving the remainder of the summer. I do not find that, in this instance, being precluded from driving a bus run due to a foot injury constitutes declining or abandoning that position. Clearly, Grievant did not desire to injure his foot, nor is there any evidence that, but for that injury, he would have continued to drive the summer run until its finish. Since I find thatGrievant did not abandon the summer bus run in 1994, he is entitled, by statute, to that same run in 1996.

However, this raises the last, but important, issue. Grievant was awarded the 1994 summer bus run in violation of W. Va. Code § 18A-4-8b. W. Va. Code §18-5-39 clearly states that newly created summer service positions are to be posted and filled in accordance with Code § 18A-4-8b, which requires a board to post all newly created school service personnel positions for at least five working days, and to fill such positions within twenty working days from the posting date notice. This statutory provision applies to summer positions, and precludes a board of education from filling a short-term summer position with a substitute. Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995); Caldwell v. Mercer County Bd. of Educ., Docket No. 91-27-483 (Jan. 6, 1992). Clearly, this provision applied to the newly created Chapter I Extended Summer Program at Dunlow Elementary School in 1994.

It is undisputed the Board did not post the subject position when it was newly created in 1994, nor when it was offered again in 1996. Thus, Grievant obtained the position in 1994 in violation of the applicable Code provisions, and normally would not be allowed to rely on that mistake to assert entitlement to the bus run in 1996. See e.g., Clark/Melton v. Putnam County Bd. of Educ., Docket No. 96-40-504 (Mar. 12, 1997); Bays v. Putnam County Bd. of Educ., Docket No. 95-40-096 (July 21, 1995).

However, under the particular facts of this case, Grievant has proven that he would have received

the summer bus run in 1994 had it been posted. It is undisputed that Grievant was initially chosen for the run because he had the greatest seniority. Thus, it can be inferred that Grievant would have received the run on that same basis even if it hadbeen posted and competitively bid. (See footnote 1) Therefore, in this particular instance, Grievant has proven he was entitled to the summer bus run in the summer of 1996.

CONCLUSIONS OF LAW

1. In matters of a non-disciplinary nature the grievant has the burden of proving the allegations of his complaint by a preponderance of the evidence. Ray v. Cabell County Bd. of Educ., Docket No. 96-06-324 (Feb. 21, 1997); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994).

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 generally Mooney v. Mercer County Bd. of Educ., Docket No. 94-247-582 (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).

3. "There is no statutory provision which grants service personnel employees hired for summer employment seniority, which they retain after they decline the position for one or more years, and may rely upon to obtain the position at a later time." Tuttle v. Marion County Bd. of Educ., Docket No. 96-24-412 (Feb. 28, 1997).

4. If an employee wishes to retain a summer position, he or she must continue to accept that position year after year, or risk abandoning any subsequently entitlement to that position. 5. W. Va. Code § 18-5-39 states that newly created summer service positions are to be posted and filled in accordance with Code § 18A-4-8b, which requires a board to post all newly created school service personnel positions for at least five working days, and to fill such positions within twenty working days from the posting date notice.

6. While Grievant did not receive the 1994 summer bus run as a result of competitive bidding, he has proven by a preponderance of the evidence that he would have received that position had it been posted on the basis of his greater seniority.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to compensate Grievant in the amount he would have received had he been awarded the Dunlow Elementary summer bus run during the summer of 1996. The Board is further **ORDERED** to post any newly created summer positions in the future in accordance with the provisions of W. Va. Code §§ 18-5-39 and 18A-4-8b.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 3, 1997

Footnote: 1

No issue was raised as to Grievant's qualifications or evaluations.