CARLOTTA D. TUTTLE

v. Docket No. 96-24-412

MARION COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Carlotta D. Tuttle, employed by the Marion County Board of Education (Board) as a custodian, filed a level one grievance on August 9, 1996, in which she complained that she was denied a summer position to which she was entitled. Grievant requested the same compensation paid to the employee who was appointed to the position. The grievance was denied at levels one and two; and the matter was advanced to level four on October 1, 1996, after the Board waived consideration at level three. The parties agreed that the matter could be submitted for decision based upon the lower level record. The grievance became mature for decision on November 7, 1996, the deadline for submission of the record and proposed findings of fact and conclusions of law. (See footnote 1)

The record establishes the following essential facts are undisputed by the parties.

1. Grievant had been regularly employed by the Marion County Board of Education as a custodian for approximately four years at the time the grievance arose.

2. In the summer of 1994, Grievant was asked, and agreed, to work a summer position as custodian at the White Adult Basic Education (ABE) Center.

3. The Board had not posted the summer custodial assignment.

4. In the summer of 1995, Grievant was asked, and refused, to work the summer custodial position.

5. Again, the position had not been posted. 6. On July 16, 1996, the Board posted a vacancy for the position of custodian at the White ABE Center. The assignment was for two days per week through August 9, 1996. The posting did not indicate a starting date, but did advise that applications must be filed by July 22, 1996.

7. Grievant applied for, but did not receive, the position.

Grievant argues that she was entitled to the position by virtue of her summer employment in 1994

which provided her one year of seniority, more than that held by the successful applicant. The Board argues that because Grievant chose not to accept the position in 1995, she relinquished her right to it in 1996, and that the most senior applicant was selected.

A review of the relevant statutory provisions supports the Board's position. W.Va. Code §18-5-39 provides in pertinent part:

Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in section eight, article four, chapter eighteen-a of this code. An 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. If such 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.

Neither this section, nor any other provision, grants the type of seniority for summer employment Grievant claims in this matter. The only statutory entitlement to continued summer employment is from year to year. Summer seniority is not addressed, and the provision cannot be interpreted to create an entitlement other than that involving employment the preceding year. The record does not reflect the individual who held the position in the summer of 1995, however; that factor is not controlling in that no additional claim has been made on the summer 1996 assignment. The Board's decision to award the position to the most senior, regularly employed applicant is consistent with the criteria set forth in Code §18A-4-8b, and there is no evidence that it was an improper standard to apply in this matter.

In addition to the foregoing facts and discussion it is proper to make the following conclusions of law.

Conclusions of Law

___1. In matters of a non-disciplinary nature the grievant has the burden of proving the allegations of her 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. 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 (March 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.

4. Grievant has failed to prove that she was entitled to the summer custodial position at the White ABE Center.

Accordingly, the grievance is **DENIED**.

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

Date: February 28, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Neither party elected to file proposed findings and conclusions at level four.