MICHAEL MCDOUGAL and

ROBERT MCDOUGAL,

Grievants,

v. Docket No. 98-24-483

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Michael and Robert McDougal, employed by the Marion County Board of Education (MCBE) as custodians, filed level one grievances on August 21 and 25, 1998, respectively, after they learned that six substitute employees had worked at East Fairmont High School during the summer. They assert that they had applied for summer work, and were entitled to the assignments before substitute employees. For relief, Grievants request payment for the work.

Grievants' immediate supervisor lacked authority to grant the requested relief at level one, and the grievances were denied at level two. MCBE waived consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and the matters were advanced to level four on December 1, 1998. The grievances were consolidated for hearing, held on February 5, 1999, at which time Grievants were represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Harry M. Rubenstein, Esq. The grievance became mature for decision with the submission of proposed findings of fact and conclusions of law by the parties on or before March 10, 1999.

The essential facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. Grievants are regularly employed by MCBE and hold the classification titleof custodian. Grievant Robert McDougal is assigned to the Marion County Technical Center, and Grievant Michael McDougal is assigned to Fairmont Senior High School.

2. MCBE posted twenty-nine (29) summer positions for which Grievants would have been qualified in 1998. Grievants applied for summer crew maintenance work, but were not assigned summer employment based upon their summer maintenance program seniority. Only four regular

custodians, including Grievants, who applied for summer work did not receive a position, and only one of those individuals had accrued more seniority than Grievants.

3. On June 11, 1998, six substitute custodians were assigned to East Fairmont High School (EFHS) to provide general cleaning. The substitute employees continued to work through August 6, 1998, for a total of forty (40) work days.

4. The positions held by the substitute custodians were never posted, and were not offered to any regular employee.

5. Grievants learned about the six substitutes who worked during the summer at an inservice meeting conducted at the beginning of the regular employment term. They initiated grievance proceedings within a few days of learning of the facts.

6. Grievant Michael McDougal worked at a garage during summer 1998.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). SeeW. Va. Code §18-29-6. The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the Grievants have not met their burden of proof.

Grievants argue that W. Va. Code §18-5-39 requires that summer school service personnel positions be posted and filled pursuant to W. Va. Code §18A-4-8b, and that substitute personnel may fill newly created vacancies only until the positions are properly filled. Although Grievants ranked fifty-sixth (Robert) and eighty-fifth (Michael) on the custodian seniority list, they argue that only four regular custodial employees who applied were denied summer work, and had the six positions at EFHS been properly posted and filled, they both would have been hired. Finally, Grievants assert that employees with more seniority have waived any rights to the positions by their failure to timely initiate grievances.

MCBE responds that the positions were not posted because at the time it was not anticipated that

the project would be so prolonged, and concedes that, in retrospect, the positions should have been posted. MCBE argues that the relief sought by Grievants is over-speculative, given their seniority status, and that the grievance process was not designed to create a “treasure trove” which would entitle a complaining party to relief he would not otherwise be entitled, based upon a technical violation of the personnel laws. Because MCBE concedes the positions should have been posted, the only issue to be addressed is whether Grievants would have been awarded the assignments, and are therefore, entitled to the requested relief. After reviewing the evidence submitted, it isconcluded that Grievants have proven by a preponderance of the evidence that they would have received the positions had they been posted.

As noted by Respondent, Grievants are very low on the regular employee seniority list. However, the undersigned agrees with Grievants that the relevant factor in this situation is their seniority ranking among only those employees who had submitted applications for summer employment. Only twenty-five regular custodians applied for summer employment, and it may reasonably be concluded that the remaining custodians did not want to work for MCBE during the summer break. Because all but four of the custodial applicants for summer employment were employed by MCBE for the summer, had the six positions in question been posted, Grievants would have surely been awarded the assignments.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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). See W. Va. Code §18-29-6.

2. Grievants have proved by a preponderance of the evidence that they wouldhave been entitled to a summer assignment, had the positions been properly posted.

Accordingly, the grievance is **GRANTED**, and MCBE Ordered to compensate Grievants for the lost wages and benefits, less any appropriate set off.

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: March 19, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE