TAMMY LEMLEY,

Grievant,

v. **Docket No. 99-54-198**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Tammy Lemley, alleges the Wood County Board of Education ("WCBOE") violated W. Va. Code § 18-5-39 and states:

> Grievant appleid (sic) for a summer maintenance position which was advertised from June 11 through June 18, 1998. This position was awarded to William Perkins. Grievant alleges a violation of West Virginia Code § 18-5-39 and seeks instatement into the summer maintenance position if said position exists in future summers, retroactive wages and benefits for the summer of 1998, interest on all monetary sums, and priority to accept summer positions in the future as permitted by law.

This grievance was denied at Levels I and II, and Level III was waived by WCBOE. Grievant requested, and WCBOE agreed, this case be submitted on the record developed below. This case became mature for decision on July 16, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1) No submission was received from Grievant.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant was employed by WCBOE in the Summers of 1985 and 1986 as a substitute maintenance worker in a temporary position.

2. Grievant was hired as a regular employee, an Aide, on September 24, 1987, and holds the classification of an Aide III.

3. Grievant worked the Summers of 1987 - 1991 as an Aide.

4. Grievant requested and received a leave of absence from her Aide position for the Summer of 1992 only.

5. Grievant worked the Summers of 1993 and 1994 as an Aide.

6. Maintenance positions were posted for the Summers of 1995 and 1996. (See footnote 2)

7. Grievant did not apply for any summer work for the years of 1995, 1996, and 1997. She applied for a 1998 summer position as a maintenance worker.

8. The 1998 position was awarded to William Perkins, a regular bus operator, who has more regular seniority than Grievant.

9. Mr. Perkins had no prior summer experience; his regular seniority date is August 25, 1975.

10. Of the employees who applied for the summer maintenance position, Grievant was ranked fourth on the list. No testimony was given as to the summer employment of the two employees on the list ahead of Grievant in regular seniority.

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. 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. (See footnote 3)

The Code Section at issue, W. Va. Code § 18-5-39 states 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. 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 section eight-b, article four, chapter eighteen-a 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. 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 sections five-b [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14], eight, eight-a, ten and fourteen, article four, chapter eighteen-a of this code: Provided, Thatthose persons are not entitled to a minimum employment term of two hundred days for their summer position.
>
> 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 that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.
>
> 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.

(Emphasis Added).

The Grievance Board has previously discussed and decided the issue presented here in the case of Tuttle v. Marion County Board of Education, Docket No. 96-24-412 (February 28, 1997). In Tuttle, the grievant had filled an unposted position in the Summer of 1994, but refused the position for the Summer of 1995. The position was posted for the Summer of 1996, and the grievant applied for, but did not receive the position. The most senior applicant was selected. The grievant argued she was entitled

to the position because of her year of summer seniority. The board of education argued that once the grievant refused the position she relinquished her entitlement, and it was then required to pick the candidate with the most regular seniority.

The administrative law judge discussed the above-cited Code Section and stated:

> 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 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.

Subsequent to the decision in Tuttle, the case of Chaffins v. Wayne County Board of Education, Docket No. 97-50-092 (September 3, 1997), was decided. It discussed the 1996 change in the statute, and stated:

> 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 in the original). 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 position if they held the position in the immediately preceding summer. (See footnote 4) 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.

(Emphasis added). Thus, the cases of Tuttle and Chaffins have previously resolved the issue in this grievance. If Grievant had continued in her maintenance position, or been RIF'd from it, she would be entitled to it over Mr. Perkins when it was re-established. However, once she engaged in a voluntary act, by choosing another position, such as Aide over Maintenance, or choosing not to apply for the position, such as Grievant did in 1995 and 1996, she abandoned any entitlement to the position that she might have had. Once that happened, WCBOE was correct to look at the applicants and select the individual with the most overall regular seniority, in this case Mr. Perkins.

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

Conclusions of Law

___1. 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. 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. 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). Seegenerally 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).

3. There is no statutory provision which grants service personnel employees hired for summer employment summer 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, supra.

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 (sic) entitlement to that position." Chaffins, supra.

5. Because Grievant did not accept the maintenance position each year it was posted, she abandoned her entitlement to the position.

6. Grievant has failed to prove she was entitled to the summer maintenance position.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Wood County. Any 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 9, 1999

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association at Level III, but he withdrew as Grievant's representative on June 15, 1999. Respondent was represented by Attorney Dean Furner from the law offices of Spilman Thomas & Battle.

Footnote: 2

There was no evidence on whether maintenance positions were posted for the Summers of 1987 - 1994 and for 1997.

Footnote: 3

Respondent argued this grievance should be dismissed as untimely filed because Grievant did not apply, or file a grievance over, the 1995 and 1996 positions. This argument was not explained further, and does not appear applicable to this grievance. Because of the decision in this grievance, this contention will not be discussed further.

Footnote: 4

The decisions referred to in this quote would be pre-Tuttle decisions.