PAMELA REYNOLDS and REGINA GRAHAM,

Grievants,

v. Docket No. 01-54-111

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Pamela Reynolds and Regina Graham, filed this grievance against their employer, the Wood County Board of Education ("WCBOE"). This grievance deals with summer positions and seniority. Ms. Graham filed her grievance on August 23, 2000, and Ms. Reynolds filed her grievance on September 15, 2000. The Statement of Grievance reads:

> **Grievants, regular bus operators, contend that the board of education filled summer positions at the bus garage with employees who have not previously worked those jobs in violation of West Virginia Code §§ 18-5-39.**
>
> **RELIEF SOUGHT: Grievants seek compensation for lost wages and benefits for the summer of 2000 with interest and priority filling these positions if they exist in future summers.**

This grievance was denied at all lower levels. Grievants appealed to Level IV on March 27, 2001. A Level IV hearing was held on May 17, 2001. This case became mature for decision on July 17, 2001, upon receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievants argue WCBOE violated W. Va. Code § 18-5-39 by not placing them in summer mechanic's helper positions they previously held, when these positions again became available in the Summer of 2000. Grievants maintain two employees with less summer seniority, Chuck Reynolds (See footnote 2) **and Floyd Simms, were hired to fill the positions of**

mechanic's helpers during the Summer of 2000.

Respondent argues it was following the mandates of W. Va. Code § 18-5-39, and was required to place summer bus operators with greater overall seniority into these positions.

It is clear from the evidence presented in this case that the parties view the facts very differently. Mr. George Summers, Director of Personnel, believed that employment offers were made to Mr. Reynolds and Mr. Simms the previous years. Since Mr. Summers was not the individual who would have or did make these job offers, his beliefs were not seen as accurate, especially as this information conflicted with Grievants' testimony.

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. Grievants are regular bus operators who signed up in 1993 for summer work. On June 8, 1993, WCBOE approved their hiring for "curricular and extracurricular trips and extra labor, as needed. . . ." Mr. Reynolds and Mr. Simms, also bus operators, were nothired for any Summer positions that year. Being approved to work during the summer did not insure the individual would be called to work. Resp. Ex. No. 1, at Level II.

2. Because these sign-up work lists were posted only in the bus garage, only bus operators signed up to fill the positions. This type of posting had been in effect for many years.

3. The employees who worked as extra labor were hired and paid as mechanic's helpers. (See footnote 3) **The major duty was cleaning buses.**

4. Once employees signed up on these lists, their names were not removed unless the employee requested or the employee retired. Once an employee had been called for this summer work the duties were not rotated among all employees who had signed up. The called employee kept the position for the entire summer. (See footnote 4)

5. In the Summer of 1993, Grievants worked as bus operators and were not called to work at the garage.

6. On May 24, 1994, WCBOE again approved Grievants' hiring for "curricular and

extracurricular trips. . . ." The minutes do not reflect if anyone was hired as "extra labor" to work as mechanic's helpers. Mr. Reynolds was hired for the Extended YearProgram as a bus operator, and WCBOE's records do not reflect that Mr. Simms was hired for any summer positions that year. Resp. Ex. No. 1, at Level II.

7. Grievants were working as summer bus operators, in the Summer of 1994, when they were called by the Supervisor of Transportation to ask if they wished to work as mechanic's helpers in the garage. Both Grievants accepted this work and worked in the garage for several weeks, performing various duties until the end of the summer.

8. On May 23, 1995, WCBOE approved Grievants' hiring for "curricular and extracurricular trips and extra labor, as needed. . . ." Mr. Reynolds was also approved for these positions. WCBOE's records do not reflect Mr. Simms was hired in any capacity that summer.

9. Grievants worked the Summer of 1995 as mechanic's helpers. Neither Mr. Reynolds nor Mr. Simms worked as mechanic's helpers that summer. **(See footnote 5)**

10. On June 4, 1996, WCBOE approved Grievants' hiring for "curricular and extracurricular trips and extra laborers, as needed. . . ." Mr. Reynolds and Mr. Simms were also approved for these positions that year. Resp. Ex. No. 1, at Level II.

11. Grievants worked the Summer of 1996 as mechanic's helpers. Mr. Reynolds and Mr. Simms did not work that summer as mechanic's helpers.

12. On June 10, 1997, WCBOE approved Grievants' hiring for "curricular and extracurricular trips and extra laborers, as needed." Mr. Reynolds and Mr. Simms were also approved for these positions that year. Resp. Ex. No. 1, at Level II. 13. Fewer workers were needed the Summers of 1997, 1998, and 1999. Neither Grievant was called to work as a mechanic's helper. All the employees who were called to work as mechanic's helpers had greater summer seniority as a mechanic's helper than Grievants. Mr. Reynolds and Mr. Simms were not called to work as mechanic's helpers these summers.

14. A new Supervisor of Transportation was hired prior to the Summer of 2000. A list of employees who had worked previous summers was given to him by Mr. Summers. This list did not identify in what classifications these employees had worked the previous summers and which summers they had worked. This list appears to list the employees by regular

seniority, but this fact was unclear from the evidence presented.

15. During the Summer of 2000, WCBOE needed a greater number of summer workers in the bus garage. The employees who had greater summer seniority than Grievants as mechanic's helpers were called to work in the garage. Mr. Reynolds and Mr. Simms, who had greater regular seniority, but who had never worked as mechanic's helpers, were also called to work in the garage as mechanic's helpers.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. KanawhaCounty Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. 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." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Both parties argue W. Va. Code § 18-5-39 supports their arguments. This Code Section reads in pertinent part;

> **(f) Notwithstanding any other provision of the code to the contrary, the county board may 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 [§ 18A-4-8b], article four, chapter eighteen-a of this code. When any summer employee is absent, qualified regular employees within the same classification category who are not working because their employment term for the school year has ended or has not yet begun the succeeding school employment term, shall be given first opportunity to substitute for the absent summer employee on a rotating and seniority basis. 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 has 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, eight,eight-a, ten and fourteen [§§ 18A-4-5b, 18A-4-8, 18A-4-8a, 18A-4-10 and 18A-4-14], article four, chapter eighteen-a of this code: Provided, That those persons are not entitled to a minimum employment term of two hundred days for their summer position.

(g) 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.

(h) 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 [§ 18A-4-8], 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.)

W. Va. Code § 18-5-39 is clear, "[a]n 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." Grievants were employed in the position of mechanic's helpers during previous summers. They never refused to work in these summer positions; thus, opening these positions to other employees.

Additionally, W. Va. Code § 18-5-39 states: "[i]f 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." Grievants had worked in the classification of mechanic's helpers for three prior summers. They did not work 1997-1999because of lack of need. It was appropriate that they were not recalled during those years when other employees were, because they were the least senior of the summer mechanic's helpers. However, when

the need increased, they should have been called back as the next most senior of the summer mechanic's helpers. See Williams v. Kanawha County Bd. of Educ., Docket No. 01-20-058 (May 10, 2001).

There was no evidence presented to demonstrate Mr. Reynolds or Mr. Simms had worked as mechanic's helpers in the summer prior to 2000. The minutes reflect Grievants were hired as mechanic's helpers prior to Mr. Reynolds and Mr. Simms, and that they worked in the positions as early as 1994. Mr. Reynolds worked as a bus operator and was first added onto the list as "curricular and extracurricular trips and extra labor, as needed" in 1995. Mr. Simms was not added to this list until 1996. Clearly, Grievants have more summer seniority in the positions at issue and should have been called back for 2000.

The fact that Mr. Reynolds and Mr. Simms had more regular seniority is not applicable. Grievants should have been recalled because they had the next most amounts of summer seniority within the classification of mechanic's helper.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd.of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. 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." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. W. Va. Code § 18-5-39 states: "[a]n 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."

3. W. Va. Code § 18-5-39 states: "[i]f 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."

4. Grievants have met their burden of proof and demonstrated they should have been recalled to the positions of mechanic's helpers as they had the next most amounts of seniority in the classification. See Williams v. Kanawha County Bd. of Educ., Docket No. 01-20-058 (May 10, 2001).

Accordingly, this grievance is GRANTED. WCBOE is ordered to compensate Grievants for the Summer of 2000, plus interest, give them summer seniority for the Summer of 2000, and place them in the correct position on the summer seniority list formechanic's helpers, so that they may be recalled to those positions when their names are reached on the list.

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 30, 2001

Footnote: 1

Grievants were represented by counsel, John E. Roush, of the West Virginia School Service Personnel Association. Respondent was represented by counsel, Dean Furner, of Spilman, Thomas, and Battle.

Footnote: 2

Grievant Reynolds is the wife of Mr. Reynolds.

Footnote: 3

It appears these employees had not taken and passed the competency examination for mechanic's assistant classification; however, it is also unknown whether there was a competency examination for the classification at the time of their initial hiring. It was also unclear whether these employees were performing the duties of a mechanic's assistant during the summers. These issues should be resolved by Respondent, and future positions should be properly classified, and employees should be given the proper classification, if qualified.

Footnote: 4

Mr. Summers believed the employees on the list were called on a rotating basis, and this list was rotated throughout the summer. This was not the case.

Footnote: 5

Grievant Reynolds testified he husband worked many summers in private industry, and he did not work for WCBOE.