JOANNA COSTELLO,

Grievant,

v. **Docket No. 01-30-016**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Joanna Costello, employed by the Monongalia County Board of Education (MCBOE) as an aide, filed a level one grievance on or about July 20, 2000, in which she alleged a violation of W. Va. Code §18-5-39 when she was not employed for the summer of 2000. For relief, Grievant requests retroactive wages, benefits, and interest on all monetary sums, as well as priority for a summer position in 2001. The record does not indicate that a decision was issued at level one. The grievance was denied following an evidentiary hearing at level two, and the matter was appealed to level four on January 17, 2001, after Grievant elected to bypass consideration at level three. A level four hearing was conducted on May 4, 2001, at which time Grievant was represented by John E. Roush, Esq., of WVSSPA, and MCBOE was represented by Kelly Kimble, Esq., of Kay Casto & Chaney. The grievance became mature on June 7, 2001, following submission of proposed findings of fact and conclusions of law by both parties.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been regularly employed by MCBOE since September 4, 1979, assigned as an Aide to the Transportation Department. 2. In addition to the regular school year, Grievant has been employed by MCBOE for the extended school year special education program from its inception through the Summer of 1999. Grievant was the first Aide employed in this program, and for the first few summers, the only Aide employed in the program.

3. Prior to Summer 2000, MCBOE employed six Aides for the extended school year program, of which Grievant held the most summer seniority.

4. Grievant was assigned to the bus route driven by Jan Thorn. Ms. Thorn's run was eliminated

due to lack of need in Summer 2000, eliminating Grievant's position as well.

5. The five Aides who were employed by MCBOE for the extended school year program in Summer 2000 all had less seniority than Grievant.

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 §4.21 (2000); 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.

Grievant asserts that W. Va. Code §18-5-39 not only gives employees who have worked in a summer program the right to return to work in that program, but also requires that when fewer jobs are available than the previous summer, re-employment must be determined by summer seniority. MCBOE argues that the statute provides that the employee shall have the option of retaining the job or position if the job or position existsduring any succeeding summer. Because the bus route last held by Grievant was eliminated, MCBOE concludes that her job or position no longer existed.

W. Va. Code §18-5-39 states in pertinent parts:

(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. . . .

* * *

(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 re- employment to that summer position shall be based upon the length of service time in the particular summer program or classification.

The facts of this case are remarkably similar to those in Williams v. Kanawha County Board of Education, Docket No. 00-20-058 (May 10, 2001), in which Ms. Williams was not employed as a Cook in Summer 2000 when the lunch program was not offered at the school where she was

assigned in Summer 1999. KCBOE similarly characterized each school site as a separate “program” just as MCBOE defines each bus run as a “job”. However, it was determined that separate lunch “programs” did not exist at the numerous locations throughout the county, but rather, there was only one lunch program with sites which may change from summer to summer. Based upon the finding that only one program existed, and Grievant's seniority, it was determined that the language of W. Va. Code § 18-5-39 required herreassignment to another school for Summer 2000. See also Lilly v. Fayette County Bd. of Educ., Docket No. 99-10-433 (Mar. 17, 2000).

Applying the same reasoning in the present matter, MCBOE supports a single transportation program with bus routes which change from summer to summer based upon need. Therefore, when MCBOE determined that one less Aide would be required in Summer 2000 than was employed in Summer 1999, re-employment should have been determined by the individuals' length of service time in the summer program. Had the decision been based on seniority, Grievant would have been employed in Summer 2000.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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 §4.21 (2000); 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 provides that “[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” and, “[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 re-employment to that summer position shall be based upon the length of service time in the particular summer program or classification.” 3. MCBOE operated only one transportation program during the Summers of 1999 and 2000, with bus routes which were reconfigured to meet student needs.

4. Grievant was entitled to assignment as an Aide during Summer 2000 as she had more summer seniority than other employees in that classification who were employed by MCBOE during Summer 2000.

Accordingly, the grievance is **GRANTED**, and MCBOE Ordered to compensate Grievant for the Summer 2000 earnings she would have received, with interest.

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

Date: June 21, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE