SCOTT W. LEISHMAN,

Grievant,

v. **Docket No. 03-30-070**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Scott W. Leishman (Grievant), employed by the Monongalia County Board of Education (MCBE) as a Custodian, filed a level one grievance on June 26, 2002, in which he alleged a violation of W. Va. Code § 18A-5-39 when he was not awarded a summer position. For relief, Grievant requested instatement to the position with back pay. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced his appeal to level four on March 10, 2003. Grievant, representing himself, and MCBE counsel Kelly J. Kimble of Kay Casto & Chaney, agreed to submit the matter for decision based upon the lower-level record. Grievant submitted an additional written statement on April 14, 2003, and the matter became mature for decision on April 30, 2003, the due date for any response to be filed by MCBE.

The following facts derived from the record are undisputed.

Findings of Fact

1. Grievant has been employed by MCBE as a Custodian assigned to South Middle School at all times pertinent to this grievance.

2. Grievant was employed by MCBE during Summer 2001, as a member of themaintenance crew.

3. MCBE posted four summer maintenance positions for 2002.

4. Grievant did not see the posting until the day after it expired. Grievant contacted Rick Williams, Assistant Manager of Human Resources, to express his interest in one of the positions, but was advised that they had already been filled.

5. Grievant's seniority was greater than at least one of the employees awarded a summer

maintenance position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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.

Summer school employment is specifically addressed in W. Va. Code § 18-5-39(f). That statute provides, 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.

W. Va. Code § 18A-4-8b provides, in pertinent part: Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

MCBE contends that the position was properly posted in accordance with W. Va. Code § 18A-4-8b. Therefore, Grievant's failure to timely apply forfeits his entitlement to continued summer employment under W. Va. Code § 18-5-39(f). Grievant asserts that he is entitled to more definitive notice that the position he previously held was available.

W. Va. Code § 18-5-39 gives service employees who have held summer school positions during the previous summer the option of retaining that same position during the following summer.

Essentially, this statute gives an employee who works in a summer school position, a "right of first refusal" to that same job (if it exists) in any succeeding summer, until he or she declines to accept the position. Cecil v. Kanawha County Bd. of Educ., Docket No. 97-20-366 (Oct. 31, 1997). See Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sept. 15, 1997). However, the statute does not specify how the employees are to be notified that a summer position they previously held is available. MCBE submits that posting notices in compliance with W. Va. Code § 18A-4-8b is a reasonable and efficient method for disseminating such notice.

"School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Moreover, the statute must be applied as written. See Keatley v. Mercer County Bd. ofEduc., 200 W. Va. 487, 490 S.E.2d 306 (1997). The statute explicitly provides that positions be filled in accordance with W. Va. Code § 18A-4-8b when "the employee is unavailable or . . . the position is newly created." The statute similarly makes it clear that an employee such as Grievant "shall have the option of retaining the job" if the job exists "during any succeeding summer."

At level two, Grievant testified that he found the maintenance posting, along with others, on a table in the school conference room. Generally, posting is reasonable notice to employees of summer job openings. However, when an employee who held a position the prior year does not apply, the statutory language implicitly places a responsibility on boards of education to contact the employee to ensure he is afforded a meaningful opportunity to exercise his option to accept or decline continued summer employment in the position he previously held. Because posting will effectively provide notice to most employees, this should not be an unduly burdensome task for a board, and it will cover those situations in which, for whatever reason, an employee does not see a posting. Although MCBE had awarded the position to another service employee before Grievant's application was received, there is no indication that the individual had assumed the summer duties, and the situation should have been corrected. In these circumstances, Grievant was clearly not "unavailable" for the position within the plain meaning of W. Va. Code § 18-5-39(f). Therefore, MCBE had no authority to hire another service employee from the posting, as the condition precedent for this competitive process had not yet occurred. Thus, Grievant established that he was deprived of employment as a maintenance employee in Summer 2002, contrary to W. Va. Code § 18-5-39(f).

Consistent with the foregoing discussion, the following Conclusions of Law aremade in this

matter.

Conclusions of Law

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his 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 gives service employees who have held summer school positions during the previous summer the option of retaining their position during any succeeding summer that the position exists. Established summer positions are to be filled through competitive posting in accordance with W. Va. Code § 18A-4-8b only if the employee who held the position during the preceding summer is "unavailable." See Lilly v. Fayette County Bd. of Educ., Docket No. 96-10-481 (Sept. 15, 1997).

3. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

4. Where Grievant's application for the summer position he held during the previous summer was submitted after the date the posting closed, but before the summer assignments began, Grievant was not "unavailable" for the position within the meaning of W. Va. Code § 18-5-39(f). Therefore, MCBE's decision to hire another service employee who timely applied for the position under the posting violated Grievant's entitlement to retain his previously held summer position as established by W. Va. Code § 18-5-39(f).

Accordingly, this Grievance is **GRANTED**. Respondent Monongalia County Board of Education is ORDERED to instate Grievant to the position of maintenance worker forthe summer of 2002, and to pay him back pay, less any appropriate set off, and all other benefits to which he would have been entitled.

Any party may appeal this Decision to the Circuit Court of Kanawha County or 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: MAY 27, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE