ELAINE PRICKETT,

Grievant,

v. Docket No. 04-30-290

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

JOSEPH SHULTZ,

Intervenor.

D E C I S I O N

Elaine Prickett ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a bus operator, filed a level one grievance on June 24, 2004, in which she stated that she was more senior than Joseph Shultz ("Intervenor") who had been awarded a summer assignment. For relief, Grievant requested the run awarded to Intervenor. Transportation Supervisor Paul Christopher lacked authority to grant the requested relief at level one. The grievance was denied at level two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c). Appeal was made to level four on July 28, 2004, at which time Grievant alleged that her nonselection was a violation of W. Va. Code § 18-5-39. Grievant additionally expanded her requested relief to include lost wages with interest, future recall rights, and all other lost benefits. A level four hearing was conducted on October 12, 2004, at which time Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney. The case became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by counsel on or before November 22, 2004. The following facts have been derived from the record developed at levels two and four.

Findings of Fact

1. Grievant has been employed by MCBE as a regular, full-time bus operator since 1989,

and held regular summer assignments from 1999 until 2003.

2. In 2003, MCBE reconfigured its transportation plan for the summer, resulting in the reduction in force of seven bus drivers who had been employed in 2002. The seven individuals all held the same amount of summer seniority, and a drawing was conducted to determine their placement on the seniority list. Mary Jane Conley was ranked first, Louis Mogyoros, second, Karen Dalton, third, and David Gerrard, fourth. Grievant was placed fifth in seniority, and along with the others, was put on the preferred recall list.

3. In Summer 2003, Ms. Conley and Mr. Mogyoros did not work, and Ms. Dalton was on Workers' Compensation. Mr. Gerrard declined an extra-duty assignment, and did not work for MCBE. Grievant held an extra-duty summer assignment which required that she work approximately one hour daily. MCBE does not consider these positions to be regular summer jobs, and the employees who hold them are not granted seniority or benefits.

4. In Summer 2004, Ms. Conley retired, Mr. Mogyoros did not work, and Ms. Dalton assumed Ms. Conley's assignment. Mr. Gerrard was working as a substitute, and Grievant retained her one hour extra-duty run. Just prior to the summer session, Grievant was allowed to step up as a substitute for an absent employee's regular summer assignment. 5. On June 3, 2004, MCBE posted a vacancy for an Extended School Year (ESY) bus operator. This assignment was to be effective June 18, 2004 through July 30, 2004.

6. Intervenor Joseph Shultz was awarded the ESY assignment; however, as the result of a grievance, MCBE determined that the assignment had been made in error since Intervenor had relinquished his position, and his summer seniority, in 2003. **(See footnote 1)** **There is no evidence that Grievant intervened in this grievance.**

7. MCBE determined that David Gerrard should have been awarded the ESY assignment, and awarded him lost wages and seniority for 2004.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim 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 argues that she was entitled to the ESY position because the four employees "ahead" of her as a result of the tie break drawing conducted in 2003 were unavailable. With reference to Mr. Gerrard, Grievant asserts that he had severed his summer employment when he declined an extra-duty summer assignment in 2003. MCBE denies that Mr. Gerrard abandoned his summer seniority in 2003 consistent with the past practice of treating the extra-duty runs as separate and distinct from regular summer employment. W. Va. Code§ 18A-5-39(f) states in pertinent part:

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, 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(m) states:

All employees whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list and shall be recalled to employment by the county board on the basis of seniority.

MCBE clearly filled the position with the most senior employee on the summer preferred recall list, applying the practice that extra-duty assignments are not considered to be regular summer employment. Grievant does not allege the practice to be contrary to any statute, rule, regulation, or policy. Therefore, Grievant has failed to prove that she was entitled to the ESY position which was ultimately awarded to Mr. Gerrard.

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 claim 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. LoganCounty 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 § 18A-4-8b(m) requires that employees placed on a preferred recall list as the result of a reduction in work force be recalled to employment by the county board on the basis of seniority.

3. MCBE acted in compliance with W. Va. Code § 18A-4-8b(m) when it ultimately awarded the ESY position to Mr. Gerrard, the most senior employee on the preferred recall list, in Summer 2004.

Accordingly, the grievance is DENIED.

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

DATE: DECEMBER 7, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Because this decision removed Intervenor from the position in question, he lacks standing to intervene in the present matter. In any case, he did not appear at the level four hearing.