ELAINE PRICKETT, et al.

Grievants,

v. Docket No. 04-30-311

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

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 13, 2004, in which she alleged a violation of W. Va. Code § 18A-4-8b, stating "all jobs must be posted." No relief was requested. After Supervisor Paul Christopher responded that he could not resolve the grievance at level one, nineteen additional employees joined Grievant at level two. The grievance statement was amended to include the explanation that "summer positions were not posted and filled properly." Relief requested at level two was for "all jobs posted and filled accordingly to 18A-4-8b." Following an evidentiary hearing, the grievance was denied at level two. Grievant elected to bypass consideration at level three, and advanced her complaint to level four on August 24, 2004. At this time, the statement of grievance was again amended to include an alleged violation of W. Va. Code § 18-5-39, when two summer positions were not posted. The relief requested at level four was instatement, lost wages with interest, recall rights for future summers, and all other benefits had she been placed in the position. 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 grievance became mature for decision upon receipt ofproposed findings of fact and conclusions of law submitted by the parties on or before November 22, 2004.

MCBE initially raised two procedural issues at level four. First, was a "Motion To Dismiss" those individuals who purported to join the grievance at level two. MCBE argues that those individuals had not timely pursued a complaint, and none had offered any evidence, or even appeared at any level. The multiple individuals who attempted to join the grievance at level

two failed to timely initiate their claim regarding the positions in question, since they did not indicate any interest in the matter until sometime after Grievant filed her level two appeal on July 29, 2004. Further, while these individuals have a general interest in the posting of positions, they do not allege that any are interested in or entitled to the assignments now in question. The "Motion To Dismiss" is granted regarding those individuals.

MCBE additionally asserts that the level one grievance alleged no facts, and the amended statement at level two remained so vague that it does not give adequate notice of the claims. After some discussion of the matter, it was determined that Grievant was addressing two positions which were filled without posting, as well as the position she held as a substitute. Having clarified the issue as such, counsel for MCBE did not indicate that she was impeded in the presentation of her case regarding Grievant's claim at level four.

Addressing the merits of the case, the following facts have been derived from a preponderance of the evidence admitted 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. Grievant was placed fifth in seniority, and along with the others, was put on the preferred recall list.

3. In Summer 2003, 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. Grievant was assigned the extra-duty position again in Summer 2004.

5. Cathy White, a bus operator also employed by MCBE, held a summer bus run awarded to her some time prior to 2003. Due to an at-work injury, Ms. White was on Workers' Compensation during Summer 2003, and the position was filled by a substitute driver, Joe Boyles.

6. Ms. White was again unable to work in Summer 2004. She was no longer receiving

Workers' Compensation benefits, and had not requested a leave of absence, but was absent on a day-to-day basis. 7. Grievant was offered the opportunity to "step up" as a substitute employee for Ms. White in Summer 2004. Because she was classified as a substitute employee, Grievant did not earn seniority or other benefits for the assignment. (See footnote 1)

8. MCBE failed to post at least two bus operator positions for Summer 2004, apparently due to a communication breakdown between the personnel office and the transportation department.

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 because MCBE failed to post Ms. White's position and the other two positions, she was denied the opportunity to earn seniority and benefits, as well as the right to retain a regular position in subsequent summers. MCBE asserts that Ms. White's position was still retained by Ms. White, and was not available for posting. MCBE concedes that two other positions were not posted as required, but argues that they cannot now be posted since the assignments have been concluded, and any relief would be speculative. Assistant Human Resources Manager Rick Williams testified at level four that Ms. White's position was not posted because she had not requested a leave of absence, and was simply absent on a day-to-day basis. W. Va. Code § 18A-5-39(f) provides that

[w]hen 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.

MCBE could not post Ms. White's position while she was on day-to-day sick leave, and

properly filled her assignment with a substitute.

As to the other positions which were not properly posted for Summer 2004, Grievant has simply failed to establish any entitlement to relief. Even though those employees on the preferred recall list with greater seniority than Grievant had accepted other positions, it is unknown whether the unposted positions were more lucrative. Further, other regular summer employees were eligible to bid on these positions. Under these circumstances, it is impossible to determine whether Grievant would have received either of the positions. The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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. MCBE acted in compliance with W. Va. Code § 18A-5-39(f) when it placed Grievant as a substitute employee for Ms. White's regular summer.

3. MCBE erred in not posting summer job vacancies; however, it is impossible to determine whether Grievant would have actually received either assignment, and any relief would be speculative.

Accordingly, this 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

. There is no evidence when MCBE may have changed its practice adopted during the 1997-98 school year, to no longer allow bus operators to "step up," and to hire substitute employees as needed. Miller v. Monongalia County Bd. of Educ., Docket No. 99-30-223 (Feb. 29, 1999). See also Costello v. Monongalia County Bd. of Educ., Docket No. 98-33-388 (Jan. 22, 1999).