SCOTT LEISHMAN,

Grievant,

v. Docket No. 04-30-253

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Scott Leishman ("Grievant"), employed by the Monongalia County Board of Education ("MCBE" or "Respondent") as a custodian, filed a level one grievance on July 16, 2003, in which he alleged violations of W. Va. Code §§ 18A-4-8b, 18A-4-15, and 18A- 5-39, when substitute employees were allowed to perform maintenance work during the summer. For relief, Grievant requested compensation for lost wages, with interest, and benefits, including the right to retain the position in future summers. The grievance was denied at level one. An evidentiary hearing was conducted at level two, and the grievance was denied by decision dated June 16, 2004. Grievant elected to by-pass level three, and appeal was made to level four on June 25, 2004. A hearing to supplement the record was conducted on September 13, 2004. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, of Kay Casto & Chaney. The grievance became mature for decision on October 14, 2004, the due date for submission of proposed findings of fact and conclusions of law.

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 employee sinceApril 2001. He has been classified as a Custodian III at all times pertinent to this grievance.

2. In summer 2001, Grievant was employed by MCBE to work on a maintenance crew. Grievant primarily worked on a construction project at the Morgantown High School football field that summer. Grievant did not work in 2002, but prevailed in a grievance which held that he was entitled to the position he held in 2001. Leishman v. Monongalia County Bd. of Educ.,

Docket No. 03-30-070 (May 27, 2003).

3. MCBE did not employ a maintenance crew for summer 2003, but two substitute employees, who had been assigned to fill vacancies held by 261-day employees during the 2002-2003 school year, worked during the summer. These employees were assigned to complete projects at the football field and elsewhere.

4. Grievant was later hired for a summer grass cutting crew, but the assignment was shorter in duration than the construction crew positions of prior summers.

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.

Grievant argues that because the work was completed between the regular 200-day employment terms, it was a summer job. Grievant also perceives the summer work performed in 2003 as a continuation of the 2001 project, thereby entitling him to theassignment. MCBE asserts that no construction crew was hired for summer 2003, and that the two employees in question were simply substituting for absences in regular, 261-day positions.

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.

If a summer maintenance crew position had been posted, Grievant would have been entitled to it, subject to seniority considerations. No one was hired for a construction crew in

2003, however, and the fact that work was completed on a project for which Grievant was once employed does not transform assignments into summer positions. In this instance, work was completed during the summer by substitutes for regular employees. Because the employees were completing the 261-day employment terms of absent employees, the assignments were not summer positions.

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 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. An employee who was employed in a summer service personnel job shall have the option of retaining the job or position, if it exists during any succeeding summer. W. Va. Code § 18-5-39(f).

3. The fact that work was completed during the summer break between two 200-day contract terms, or that the work performed was related to that completed by a summer work crew in previous years, does not require the positions be filled as summer positions in 2003, in this instance.

4. Grievant failed to prove that MCBE erred when substitute employees were allowed to complete the 261-day contractual assignments of absent employees rather than posting and filling two positions as summer assignments.

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 theGrievance 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: OCTOBER 28, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE