THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JAMES W. EISENTROUT,
Grievant,

v. **Docket No. 2010-0022-PreED**

PRESTON COUNTY BOARD OF EDUCATION,
and DEPARTMENT OF EDUCATION,
Respondents.

DECISION

Grievant James W. Eisentrout filed this grievance against his employer, Preston County Board of Education, on July 8, 2009. His Statement of Grievance provides that "Grievant, a regularly employed school bus operator, applied for the summer bus operator's vacancy for a 'PHS Summer Athletic/Band Program/Shuttle Run' in the Bruceton area. Grievant was the most senior candidate for this vacancy, but the vacancy was awarded to Kevin Durr, a less senior school bus operator who has worked in other summer assignments in prior years. Grievant alleges a violation of West Virginia Code § 18-5-39 and § 18A-4-8b." For relief "Grievant seeks instatement into this summer position if it exists in subsequent summers, retroactive wages, benefits, & summer priority. Grievant also seeks an award of interest on monetary sums."

This grievance was denied at level one by decision of the superintendent's designee on August 7, 2009. The Department of Education was joined as a party to this grievance by action of the Grievance Board on September 4, 2009. Level two mediation was conducted on October 13, 2009. Appeal to level three was perfected on October 26, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on January 4, 2010, at the Grievance Board's Westover office. Grievant appeared in person

and by his counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent Preston County Board of Education appeared by its attorney, Gregory W. Bailey, Bowles Rice McDavid Graff & Love LLP. The Department of Education did not make an appearance. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on February 5, 2010.

Synopsis

Grievant sought a summer assignment that was posted on May 11, 2009 and was for an area close to his residence. This summer assignment was performed during the previous summer by a bus operator who had retired. The successful applicant for the May 2009 posting performed a similar summer assignment for the summer of 2008 in a different location in the county. Grievant did not perform any bus operator summer assignments during the summer of 2008 or in any previous summers. The successful applicant was awarded the position based upon his prior summer service in the bus operator classification. Grievant argues this was in error because the assignment in question was performed by an operator that retired in 2008 and, therefore, was unavailable to perform the assignment in the summer of 2009. Accordingly, the position should have been posted and filled based upon the basis of regular county seniority. This argument is not persuasive and, therefore, Grievant has failed to meet his burden of proof. This grievance is denied.

The following findings of fact are based upon stipulations submitted by the parties and the limited record of this grievance developed at level one and level three.

Findings of Fact

1. The summer assignment in question was posted on May 11, 2009, and was identified as "1 Bus Operator for the PHS Summer/Athletic Band Program(s) Shuttle Run on an as/if needed basis, at daily rate of pay: Bruceton area." The summer assignment was performed during the summer of 2008 by William L. Eye. Mr. Eye retired, resulting in the posting of the summer assignment in question.

2. Bus operator Kevin L. Durr performed a summer bus assignment designated as "Bus Operator for the PHS Summer/Athletic Band Program(s) Shuttle Run on an as/if needed basis, at daily rate of pay: Newburg/Masontown area" for the summer of 2008.

3. Grievant did not perform any bus operator summer assignment during the summer of 2008 or in any previous summers.

4. Both Grievant and the successful applicant, Kevin L. Durr, made application for the position in question relating to the Bruceton area.

5. Grievant has greater regular county seniority than Mr. Durr.

6. The position in question was awarded to Mr. Durr based upon his prior summer service in the bus operator classification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is

evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

While the facts are not in dispute in this grievance, statutory interpretation is contested. Grievant asserts that Mr. Durr worked a particular summer assignment during the summer of 2008.[1] The assignment in question was performed by William Eye in the summer of 2008.[2] Due to his retirement Mr. Eye was unavailable to perform the assignment in the summer of 2009; therefore, the position should have been posted and filled pursuant to W. VA. CODE § 18A-4-8b. Respondent counters that W. VA. CODE § 18-5-39 requires that newly created positions be filled in accordance with the requirements of § 18A-4-8b. Respondent further argues that Grievant had no summer seniority and should not enjoy preference in summer assignments over an employee who had summer seniority.

Grievant begins his argument at § 18-5-39(f) which provides, in relevant part, as follows:

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[1]That being the summer athletic band program shuttle run for the Newburg/Masontown area.

[2]That being the summer athletic band program shuttle run for the Bruceton area.

> 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. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [18A-4-8b], article four, chapter eighteen-a of this code.

Respondent also quotes this statute and points out it has been construed to establish an entitlement in the nature of summer seniority for service employees who served in a job or position in the previous summer. Respondent relies on W. VA. CODE § 18-5-39(g) as persuasive authority to consider summer seniority first, then regular seniority. That section provides:

> If a county board reduces in force the number of employees to be employed in a particular program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular program or classification.

Although subsection (a) of W. VA. CODE § 18-5-39 states: "it is the purpose of this section to provide for the establishment of a summer school program," subsection (f) broadens the scope of allowable employment for service personnel through its "any related duties" language, and subsection (h) expressly includes jobs "which are to be predominately performed during the summer months to meet the needs of a county board."

"W. VA. CODE § 18-5-39, which addresses the employment of service personnel for summer school programs, provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. [citations omitted]" *Lemley v. Wood County Bd. of Educ.*, Docket No. 99-54-198 (Sept. 9, 1999). The Grievance

Board has also determined that some flexibility exists in the definition of "same assignment." It is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different. By way of example, bus operators' positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ.*, Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v. Fayette County Bd. of Educ.*, Docket No. 99-10-435 (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ.*, Docket No. 00-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ.*, Docket No. 01-30-016 (June 21, 2001).

In the instant case, Grievant argues that, due to the retirement of Mr. Eye, the employee was unavailable to perform the assignment in question in the summer of 2009. This leads to application of the statutory language in § 18-5-39(f) which provides "[i]f the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [18A-4-8b], article four, chapter eighteen-a of this code." The undersigned is not convinced that this statutory interpretation is correct given the facts of this grievance. First of all, this is not a newly created position. Second, the employee who was employed in the service personnel job or position during the previous summer for the position in question was available. That was Mr. Durr.

It is enough for Mr. Durr to be entitled to return to the assignment in future summers if there is consistency in the type of work being performed, even if the location is different. That is what occurred in this grievance, and was stipulated to by the parties. Mr. Durr

worked the summer/athletic band program shuttle run for the Newburg/Masontown area during the summer of 2008. The fact that Mr. Eye retired created the vacancy for the summer/athletic band program shuttle run for the Bruceton area. Since Mr. Durr had been employed in the same program in the previous summer, and Grievant had not been employed in any such program in any preceding summers, Mr. Durr was properly awarded the position based upon his prior summer service in the bus operator classification. "'Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years[. . .]' *Kennedy v. Marion County Bd. of Educ.*, Docket No. 91-24-427 (Dec. 30, 1991)." *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 27, 1997).

This is the only outcome that is consistent with the legislative intent and statutory preference for honoring prior summer service over regular county seniority and is in keeping with the decisions cited above.

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 his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. "W. VA. CODE § 18-5-39, which addresses the employment of service personnel for summer school programs, provides that any employee who accepts a

summer assignment is entitled to the same assignment the following year if it exists. *Tuttle v. Marion County Bd. of Educ.*, Docket No. 96-24-412 (Feb. 28, 1997). *See Chaffins v. Wayne County Bd. of Educ.*, Docket No. 97-50-092 (Sept. 3, 1997). *See generally Mooney v. Mercer County Bd. of Educ.*, Docket No. 94-27-582 (July 31, 1995); *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 94-30-586 (Mar. 24, 1995); *Cooke v. Logan County Bd. of Educ.*, Docket No. 92-23-031 (Oct. 9, 1992)." *Lemley v. Wood County Bd. of Educ.*, Docket No. 99-54-198 (Sept. 9, 1999); *See also Carr v. Tucker County Bd. of Educ.*, Docket No. 01-47-469 (Dec. 27, 2001).

3. "'Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years[. . .]' *Kennedy v. Marion County Bd. of Educ.*, Docket No. 91-24-427 (Dec. 30, 1991)." *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 96-30-408 (April 27, 1997).

4. Grievant has no summer seniority for the position in question, and he did not enjoy any preference for that assignment over an employee who worked the summer assignment in the previous year.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: April 16, 2010

Ronald L. Reece
Administrative Law Judge