

ELAINE PRICKETT and DONNA SIZEMORE,

Grievants,

v. Docket No. 03-30-227

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Elaine Prickett and Donna Sizemore ("Grievants"), employed by the Monongalia County Board of Education ("MCBE") as bus operators, filed a level one grievance in June 2003, in which they alleged a violation of W. Va. Code § 18-5-39. For relief, Grievants requested instatement to summer assignments or compensation. The grievance was denied at levels one and two, and Grievants 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 30, 2003, and an evidentiary hearing was scheduled for December 10, 2003. By letter dated December 8, 2003, MCBE counsel Kelly J. Kimble of Kay Casto & Chaney advised the undersigned that she and Grievants' representative, Terry Reed of AFSCME, agreed to submit the matter for decision based upon the lower-level record. Both parties waived the opportunity to file proposed findings of fact and conclusions of law.

The facts essential to the disposition of this case are undisputed, and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant Elaine Prickett has been employed by MCBE as a bus operator for thirteen years. Grievant Donna Sizemore has been employed by MCBE as a bus operator for twenty-five years. 2. Grievants were employed as Kaleidoscope bus operators at Westwood Middle School during Summer 2002.

3. Effective Summer 2003, MCBE revised its summer transportation schedule by combining all the programs, i.e., Kaleidoscope, Extended School Year, etc., rather than providing separate transportation for each program.

4. Eight positions of bus operator were posted on May 22, 2003, to transport students

participating in the various summer programs.

5. Applicants were awarded the positions based upon their summer seniority rather than their overall seniority. In situations where two or more applicants held the same amount of seniority, a drawing was conducted. Grievants were involved in drawings for positions.

6. Grievants were not awarded bus operator assignments for Summer 2003.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. "The 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Grievants argue that because the positions were new, MCBE was required to fill them based upon total county seniority, and not summer seniority. MCBE asserts that the eight runs were simply reorganized from the previous summer bus routes, and the assignments were properly made based upon summer seniority.

W. Va. Code §18-5-39(f) provides, in part:

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.

The Grievance Board has previously held that MCBOE supports a single transportation program with bus routes which change from summer to summer, and when fewer employees in a job classification are needed than in a prior year, re-employment should be determined by the individuals' length of service time in the summer program. Costello v. Monongalia County Bd. of Educ., Docket No. 01-30-016 (June 21, 2001). See also Williams v. Kanawha County Bd. of Educ., Docket No. 00-20-058 (May 10, 2001), in which it was determined that the

board managed a single summer program, and the grievant was entitled to bump into another assignment after the school she had worked in the prior summer was closed.

Although Grievants characterize the positions in question as “new,” that was not the case. The transportation department simply consolidated transportation for all summer programs, resulting in a need for fewer employees. MCBE acted in compliance with W. Va. Code § 18-5-39(f) by placing individuals in the summer positions based upon their summer seniority. 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, Grievants have the burden of proving their 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. Service personnel employees shall have the option of retain the job or position if it exists during any succeeding summer. If the employee is unavailable or the position is newly created, it shall be filled in compliance with W. Va. Code § 18A-4-8b. W.Va. Code §18-5-39(f).

3. When fewer employees in a job classification are needed than in a prior year, re-employment should be determined by the individuals' length of service time in the summer program. Costello v. Monongalia County Bd. of Educ., Docket No. 01-30-016 (June 21, 2001).

4. MCBE did not violate W. Va. Code § 18-5-39(f) by placing individuals in the summer positions based upon their summer seniority.

5. Grievants failed to establish that the bus operator positions for Summer 2003 were new, or that they should have been awarded on the basis of regular seniority. 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, 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: DECEMBER 22, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE