

**JOE WOLFE, JR., et al.,**

**Grievants,**

**v.**

**Docket No. 03-30-133**

**MONONGALIA COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Joe Wolfe, Jr., James Dalton, William Hendershot, Gerald Marshall, Jr., Rodney Moore, Ida Oseky, Rhonda Owens, Mary Rogers, Irene Shelton, Donna Sizemore, and Jeanne Strader (“Grievants”) employed by the Monongalia County Board of Education (“MCBE” or “Respondent”) as Bus Operators, filed a level one grievance on April 18, 2003, in which they alleged violations of W. Va. Code §§18A-4-8 and 18-5-39, when they were not employed as Painters during Summer 2003. For relief, Grievants requested back pay and benefits. Grievants' immediate supervisor lacked authority to resolve the matter at level one. The grievance was denied following an evidentiary hearing conducted at level 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 May 28, 2003. Grievants' representative, Terry Reed of AFSCME, and MCBE counsel Kelly J. Kimble, Esq., of Kay, Casto & Chaney, agreed that a decision could be issued based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law, submitted on or before August 29, 2003.

The following facts have been derived from a preponderance of the credible evidence admitted at level two.

#### **Findings of Fact**

1. Grievants are employed by MCBE as Bus Operators during the school year. Grievants have additionally been employed on the summer paint crews for a number of years. Grievant Wolfe has worked as a Painter during the summer for eighteen years.

2. Grievants were employed as Painters under a separate “Contract of Summer Employment,” which specifically provided the time period for the assignment. For example, Grievant Wolfe's Summer 2002 contract was effective 6/17/02 to 8/16/02. The contract also provided that the assignment “shall terminate at the end of the designated summer term of employment. . . .”

3. By letter dated March 25, 2003, MCBE Superintendent Michael J. Vetere, Jr. notified Grievants that he had decided not to advertise and fill the Summer Painting Crews for Summer 2003.

#### Discussion

In a non-disciplinary grievance, the 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.

Grievants argue that they are entitled to retain the positions they held the previous summer since they were not terminated through the reduction in force process. MCBE asserts that the summer assignments expired by the terms of the contract, making it unnecessary to eliminate the positions through the reduction in force process.

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

(f) 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. . . .

(g) If a county board reduces in force the number of employees to be employed in a particular summer 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 summer program or classification.

(Emphasis Added.)

The statutory language is clear and unambiguous, Grievants would have been entitled to retain their summer positions if they continued to exist. Of course, the positions did not exist in Summer 2003. The reduction in force provisions addressed in W. Va. Code §§ 18-5-39(g) and 18A-4-8, are not controlling because there was no reduction in force. Grievants' summer employment was

specifically defined by contract for a limited period of time. Because the contract was fulfilled at the end of the employment period, there was no need to terminate Grievants' employment a second time through the reduction in force process. The positions simply were not posted for Summer 2003, therefore, Grievants were not entitled to the assignments. Even if it should be determined that a reduction in force was required, it would only elevate form over substance in this case. Grievants did not work as Painters, and no one else was given the assignment. Grievants are not entitled to any compensation for Summer 2003. 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. In a non-disciplinary grievance, the 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. 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. W. Va. Code § 18-5-39.

3. If a county board reduces in force the number of employees to be employed in a particular summer 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 summer program or classification. W. Va. Code § 18-5-39(g).

4. Because Grievants' employment contracts terminated their employment at the end of the Summer 2002 period, it was not necessary for MCBE to eliminate their 2003 summer employment through the reduction in force process.

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: SEPTEMBER 16, 2003** \_\_\_\_\_

**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**