

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**TERRY SPROUSE,  
Grievant,**

**v.**

**Docket No. 2010-1638-LewED**

**LEWIS COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

Grievant, Terry Sprouse, filed this grievance on June 29, 2010, alleging that he “was denied several summer school field trip runs. Grievant contends this denial violates his summer contract and WV Code §18-5-39. Grievant seeks the field trip runs in question, or should the runs have already occurred, compensation for the runs he should have been granted.” This grievance was denied by letter dated July 12, 2010, following a level one conference. Level two mediation was conducted on October 25, 2010. Appeal to level three was perfected on November 5, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on March 16, 2011, at the Grievance Board’s Westover office. Grievant appeared in person and by his representative, Owens Brown, West Virginia Education Association. Respondent appeared by its counsel, Jason S. Long, Dinsmore & Shohl LLP. This matter became mature for consideration upon receipt of the last of the parties’ proposed findings of fact and conclusions of law on April 25, 2011.

**Synopsis**

Grievant argues that he should have been given all extra-duty assignments for the summer of 2010 when he was under contract for a regular summer position. During the summer of 2009, Respondent mistakenly awarded Grievant an extra-duty assignment

which was not based on seniority-based rotation. In addition, Respondent credited Grievant with one day of summer seniority in 2009 for the day he performed the extra-duty assignment. When Respondent became aware of this mistake as to the law as it relates to the extra-duty assignment, it discontinued the practice. Respondent acted properly in correcting its error, and Grievant had no entitlement to all extra-duty assignments for the summer of 2010 as a result of his contract for a regular summer position. Grievant was entitled to one day of summer seniority in 2010 for the extra-duty assignment because it occurred within his summer contracted time.

The following findings of fact are based upon the record of this grievance.

### **Findings of Fact**

1. Grievant is employed as a bus operator by the Lewis County Board of Education.
2. In the summer of 2003 and 2006, Grievant held a 3.5 hour summer bus contract.
3. Before the summer assignments were distributed for the summer of 2007, Steve Casto, Personnel Director for the Respondent, became aware of the requirement to maintain a seniority list for regular seniority and a list for summer seniority.
4. On or about June 8, 2007, Mr. Casto requested that Grievant and other bus operators perform a random selection drawing based upon their agreement to determine summer seniority. At that time, it was believed that the bus operators were tied for summer seniority based upon summers worked, as opposed to the actual number of summer days worked.

5. By letter dated June 20, 2007, Mr. Casto advised Grievant that the random selection process to break the tie was not necessary. No tie existed. The letter concluded that summer seniority is based on the actual days worked; therefore, summer seniority would be calculated in days instead of summers.

6. Having the unpleasant task of going through the archives, Mr. Casto conducted a review of payroll records and compiled a list of summer seniority for all bus operators and service personnel based on the number of summer days worked.

7. Grievant did not file a grievance over the summer seniority calculations made in the summer of 2007.

8. Grievant did not have a summer bus assignment for the summer of 2007 and 2008 because he had less summer seniority than the other bus operators.

9. Grievant received a summer bus assignment for the summer of 2009, specifically a 3.5 hour assignment. The start time was 10:30 a.m., "3.5 hours per day, only when students are present and/or require transportation." Grievant's Exhibit No. 4.

10. On July 16, 2009, Grievant did transport summer school students to the Central Regional Jail, with a depart time of 10:30 a.m. and return time of 3:00 p.m. Mr. Casto acknowledged that it was a mistake to allow Grievant to perform the Central Regional Jail assignment, which was extra duty in nature and subject to seniority-based rotation. The mistake was made when seniority-based rotation was not used in this instance.

11. Grievant was given a day's seniority for summer seniority purposes for that Central Regional Jail transport of summer school students. Respondent was advised by counsel that this was also a mistake.

12. During the summer of 2010, there were two groups of summer school students at Lewis County High School. Grievant's summer bus contract assignment was to transport both groups from the High School to the Middle School for lunch. The term of this contract ran from June 22 to July 23, 2010, for 3.5 hours per day.<sup>1</sup>

13. One of the two groups was scheduled for that summer to take three field trips. They were scheduled for June 24, 2010, to the Regional Jail, 10:00 a.m. to 2:15 p.m.; July 1, 2010, to the West Virginia Glass Museum, 8:45 a.m. to 2:45 p.m.; and on July 9, 2010, to the West Virginia Junior College, 8:45 a.m. to 1:45 p.m.

14. The other summer group did not take field trips; however, they still required transportation from the High School to the Middle School for the lunch program on these three days.

15. Grievant received the July 9, 2010, extra duty assignment pursuant to seniority-based rotation. Respondent did not count July 9, 2010, as a day of summer seniority for Grievant.

### **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 Bd. 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;

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<sup>1</sup>The contract term also ran for a short period of time in August 2010.

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).

Grievant asserts that he should have been given the other two summer field trips for 2010 based on his summer employment contract. In addition, Grievant seeks summer seniority for the extra-duty assignment that he performed on July 9, 2010. Respondent counters that Grievant has failed to demonstrate any violation of a specific statute, policy, rule, regulation, or agreement. In addition, Respondent has established its summer seniority practices have been corrected and are in compliance with applicable law.

In the instant case, Respondent acknowledges its past failure to follow the applicable statutory procedures for filling summer positions. This seems to have led to much of the confusion in this case. In addition, Grievant ignores the terms of his summer employment contract and seeks all extra-duty assignments for the summer of 2010. A short review of the applicable law would likely prove beneficial in framing the discussion.

W. VA. CODE § 18-5-39 provides the basis for assigning summer employment, stating with regard to the hiring of service personnel for summer employment as follows:

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.

This CODE Section “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). “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). “The seniority granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. VA. CODE §§ 18-5-39; 18A-4-8b; & 18A-4-8g. *Bowmen v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039B (Mar. 31, 1999).” *Beane v. Kanawha County Bd. of Educ.*, Docket No. 03-20-008 (April 30, 2003).

Concerning extra duty assignments, such as field trips and athletic events, WEST VIRGINIA CODE § 18A-4-8b(f) requires that such assignments be offered to employees in the applicable classification pursuant to a seniority-based rotation.<sup>2</sup> *White v. Monongalia County Bd. of Educ.*, Docket No. 2008-0586-CONS (Dec. 16, 2008). Grievant was employed under a regular summer contract position and being paid according to the salary schedule of persons regularly employed in the same class title, but he was not working in

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<sup>2</sup>W. VA. CODE § 18A-4-8b(f) states, in pertinent part, that a “service person with the greatest length of service time in a particular category of employment is given priority in accepting extra duty assignments, followed by other fellow employees on rotating basis according to the length of their service time until all employees have had an opportunity to perform similar assignments.”

an extra-duty assignment. In fact, service personnel employed under contracts for regular summer positions pursuant to W. VA. CODE § 18-5-39 are not working in extracurricular or extra-duty assignments. *Johnson, et al. v. Ritchie County Bd. of Educ.*, Docket No. 01-43-509 (Jan. 15, 2002).

The three extra-duty assignments at issue during the summer of 2010 occurred within Grievant's contracted work day. Respondent employed a substitute to cover the Grievant's summer bus assignment on July 9, 2010, when Grievant accepted the extra-duty assignment to the West Virginia Junior College. This assignment was done properly pursuant to seniority-based rotation. Nevertheless, nothing under this fact scenario would suggest that Grievant should not be given credit for a day of summer seniority for the assignment on July 9, 2010. The undersigned agrees with Grievant that he was entitled to one day of summer seniority in 2010 for the extra-duty assignment performed on July 9, 2010, because it occurred within his summer contracted time.

Turning to the confusion over the bus operators' seniority agreement under the perception that a tie breaker was necessary, Respondent acknowledges that it was in error in signing off on that agreement. The record reflects that Mr. Casto was under the belief that Grievant and others were tied for summer seniority based upon summers worked, not the number of summer days worked. Respondent was advised by counsel that, pursuant to *Carr v. Tucker County Bd. of Educ.*, Docket No. 01-47-469 (Dec. 27, 2001), summer seniority should be calculated in days instead of summers. Thereafter, Mr. Casto conducted a review of payroll records and compiled a list of summer seniority for all bus operators and service personnel according to the number of summer days worked. In addition, Respondent acknowledges that it was a mistake to allow Grievant to perform the

Central Regional Jail assignment on July 16, 2009, because they failed to award this assignment based on seniority-based rotation.<sup>3</sup> Correcting these mistakes was the proper course of action by Respondent. Accordingly, Grievant received the July 9, 2010, extra-duty assignment based upon seniority-based rotation. Grievant had no entitlement to all of the extra-duty assignments for the summer of 2010.

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 Bd. 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. “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). “The seniority granted to regularly employed workers and the “seniority” granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. VA. CODE §§ 18-5-39; 18A-4-8b; & 18A-4-

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<sup>3</sup>“The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).” *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).



8g. *Bowmen v. Kanawha County Bd. of Educ.*, Docket No. 99-20-039B (Mar. 31, 1999).”  
*Beane v. Kanawha County Bd. of Educ.*, Docket No. 03-20-008 (April 30, 2003).

3. Extra duty assignments, such as field trips and athletic events, WEST VIRGINIA CODE § 18A-4-8b(f) requires that such assignment be offered to employees in the applicable classification pursuant to a seniority-based rotation. *White v. Monongalia County Bd. of Educ.*, Docket No. 2008-0586-CONS (Dec. 16, 2008).

4. Respondent acknowledged that the Seniority Agreement entered into by the bus operators, at Respondent’s request, was in error. In addition, Respondent assigned Grievant the 2009 extra-duty assignment in error when it failed to award that position based upon seniority-based rotation.

5. “The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).” *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinED (Oct. 31, 2008).

6. Respondent acted properly in correcting its errors.

7. Grievant received the July 9, 2010, extra-duty assignment based upon seniority based rotation. Grievant had no entitlement to all of the extra-duty assignments for the summer of 2010. Grievant was entitled to one day of summer seniority for the work he performed on July 9, 2010, as it occurred within his summer contracted time.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to credit Grievant with a day of summer seniority for the work performed on July 9, 2010.

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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

**Date: May 27, 2011**

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**Ronald L. Reece**  
**Administrative Law Judge**