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JOHN KENNEDY

v.

Docket No. 91-24-427

MARION COUNTY BOARD OF EDUCATION

DECISION

John Kennedy has been employed by Respondent Marion County Board of Education (MCBE) as a bus operator since 1964. He alleges a violation of W.Va. Code §§18-5-39 and 18A-4-8b and claims he should have had priority over the less-senior successful applicant for a 1991 summer driving position. Grievant seeks reinstatement to the position and/or back wages and benefits.¹

¹On October 16, 1991, the grievance was submitted to level four for a record decision. Filing data indicates that adverse decisions were rendered at levels one through three on July 8, August 19 and September 26, 1991. Fact/law proposals were tendered by the parties on November 25, 1991.

The facts in this case are uncontroverted:

1. In Summer 1989 Janene Robinson, with a hire date of 1975, held a summer bus driving job in conjunction with operations at MCBE's Technical Center (Center).

2. In Summer 1990 the position did not exist due to a lack of need at the Center.

3. On May 23, 1991, MCBE again posted the bus driving position for the Center for Summer 1991. The job was to last from June 24 to August 1, 1991.

4. Both Ms. Robinson and Grievant applied; however, on June 17, 1991, Ms. Robinson was assigned to the position instead of Grievant. Ms. Robinson had never been granted a summer leave of absence.

While the parties are in agreement about the facts giving rise to the grievance, they disagree about the interpretation of the applicable law, that is, newly-amended W.Va. Code §18-5-39, effective June 7, 1991. The pertinent provisions of that statute are as follows:²

Inasmuch as the present county school facilities for the most part lie dormant and unused during the summer months, and inasmuch as there are many students who are in need of remedial instruction and others who desire accelerated instruction, it is the purpose of this section to provide for the establishment of a summer school program, which program is to be separate and apart from the full school term as established by each county.

The board of education of any county shall have authority to establish a summer school program utilizing the public school facilities. . . . The

²Certain portions of the statute have been highlighted in bold print for later reference.

county board of education shall have the authority to determine the term and curriculum of such summer schools based upon the particular needs of the individual county. . . .

. . . .

Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. . . .

Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term. . . . An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer. If such employee is unavailable or if the position is newly created, the position shall be filled pursuant to. . . [W.Va. Code §18A-4-8b]. When any summer employee who is employed in a summer position is granted a leave of absence for the summer months, the board shall give regular employment status to such employee for that summer position which shall be filled under the procedure set forth in. . . [W.Va. Code §18A-4-8b]. The summer employee on leave of absence shall have the option of returning to that summer position if such exists the succeeding summer or whenever such position is reestablished if it were abolished. The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed.

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 such position in previous summers, such reductions in force and priority in reemployment to such summer positions shall be based upon the length of service time in the particular summer program or classification. . . .

Grievant contends that the first set of highlighted words means that the employee who holds a summer position may only retain said position in the event it is offered the next or succeeding summer and urges that that employee does not retain

any rights to a position if it is abolished and later recreated. Referencing the next set of highlighted words, Grievant opines that an exception only occurs when an employee returns from a leave of absence and retains the right to reclaim an ongoing or reestablished previously-held summer position. In his view, since Ms. Robinson had not been on a leave of absence in Summer 1990, she therefore had no claim to the reestablished Center driving position in Summer 1991. He claims a right to the job because of his overall seniority as a bus operator, superior to that of Ms. Robinson's, and urges that he should have been hired pursuant to Code §18A-4-8b on the basis of seniority.

On the other hand, MCBE argues that Grievant has not established a right to the job based on his overall county seniority. It holds the view that, under Code §18-5-39, once a service employee is placed in a summer position, that employee accrues seniority rights to return to the position even if it is not offered in succeeding years.

MCBE's position has not been disproved. Clearly, Grievant has not considered the statute in its entirety. If any doubt remains with respect to Grievant's view, it is resolved by the third set of emphasized words in §18-5-39. This portion of the statute clearly creates seniority-based reduction-in-force actions and attendant recall rights for "employees. . .employed in a particular summer program or classification."

The record herein establishes that Ms. Robinson held the Center driving position in 1989. In 1990 she was, in effect, the subject of a reduction-in-force action with respect to the

Center driving assignment due to lack of need.³ However, in accordance with §18-5-39, Ms. Robinson had "priority in reemployment" for the Center driving assignment when it became available again in 1991 because she held one year of prior service time in that specific position, and the hiring requirements of §18A-4-8b were not applicable. Grievant made no claim to prior summer employment and apparently had no years of service in that particular summer program and driving position. Thus, Grievant has failed to establish a violation of Code §§18-5-39 and 18A-4-8b.

In addition to the factual and legal determinations contained in the foregoing discussion and analysis, the following formal conclusions of law are made.

Conclusions of Law

1. 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, in the year following a leave of absence if the position still exists or at a later time if it is recreated

³Inasmuch as W.Va. Code §18-5-39 does not speak of a mechanism for summer reductions in force or otherwise reference any other statutory scheme in existence to institute formal RIF procedures, and inasmuch as §18-5-39 clearly enables a board of education to offer a needs-based summer school, it can be inferred from the statute that a reduction of summer personnel simply occurs at any time when the need for a specific program or job in a classification or certification in any particular summer ceases to exist and no job posting results.

following its abolishment, or in the year the position is restored following a reduction-in-force. W.Va. Code §18-5-39.

2. Grievant failed to establish a violation of W.Va. Code §§18-5-39 and 18A-4-8b or that he was entitled to be instated to the summer driving position he sought on the basis of his overall county seniority as a bus operator.

The grievance is accordingly **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.



NEDRA KOVAL
Administrative Law Judge

Date: December 30, 1991