BEVERLY SIZEMORE,

Grievant,

v. Docket No. 03-05-253

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Beverly Sizemore ("Grievant"), employed by the Brooke County Board of Education ("BCBE") as an Aide, filed a level one grievance on May 1, 2003, in which she alleged a violation of W. Va. Code § 18-5-39 occurred when another aide with less summer seniority was employed. For relief, Grievant requests back pay, with interest, benefits, and future placement if available. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, and advanced the grievance to level four on August 22, 2003. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on February 5, 2004, at which time Grievant was represented by John E. Roush of the West Virginia School Service Personnel Association, and BCBE was represented by David F. Cross, Esq. The grievance became mature for decision upon receipt of the parties proposed findings of fact and conclusions of law filed on or before March 9, 2004.

The following facts have been derived from a preponderance of the evidence submitted at level four.

Findings of Fact

1. Grievant was first employed by BCBE as a substitute Aide in October 1979, and has been employed as a regular, full-time Aide since December 10, 1984.

2. Grievant was additionally employed by BCBE as an Aide in the SpecialEducation Extended Year Program from 1980 through 1990, 1998 through 2000 and 2002. Although Grievant was a substitute employee until 1984, she worked summers because no regular employee was interested in the assignment.

3. In Summer 2003, BCBE determined that only six Aides would be needed for the

summer program. The six individuals with the greatest consecutive summer seniority were awarded the position. Grievant was not employed in Summer 2003.

4. Grievant worked the summers of 1980-1990, 1998, 1999, 2000, 2002. Brenda George was employed as a substitute Aide in October 1992, and has worked in the summer program continuously since that time.

5. Prior to the enactment of W. Va. Code § 18-5-39 in1986, service personnel had no seniority rights regarding summer positions, and BCBE did not begin posting summer assignments until approximately 1988. BCBE's records are incomplete regarding the employment of summer service personnel for the time period covered by this grievance.

Discussion

Because this matter does not involve a disciplinary action, Grievant has the burden of proving her 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). Grievant asserts that she had more summer seniority than Ms. George, and should have been employed during Summer 2003. BCBE argues that it employed the six individuals with the most consecutive summer seniority.

W. Va. Code § 18-5-39, states in pertinent 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. . . .

(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.

Assistant Charles Baker testified at level two that summer employment has traditionally been awarded on the basis of most consecutive summers the applicants have worked. However, there is no support for this procedure in the applicable statutory language. To the contrary, subparagraph (g) specifically provides that when a reduction in force is necessary in a summer program, priority in reemployment is to be based on the length of service time in the particular program or classification. There is no reference to consecutive years of service, and BCBE erred in using that criteria. Grievant has more summer seniority than Ms. George, and was entitled to an assignment in 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. Because this matter does not involve a disciplinary action, Grievant has the burden of proving her 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. W. Va. Code §18-5-39(f) provides than when a board of education reduces 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.

3. BCBE erred when it determined which employees would be retained in a down-sized summer program based upon most consecutive summers worked.

Accordingly, the grievance is GRANTED, and BCBE Ordered to compensate Grievant for Summer 2003, with interest and benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Brooke 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 andState 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: MARCH 23, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE