ARTHUR CLARK,

Grievant,

v. Docket No. 97-40-313

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Arthur Clark, originally grieved the failure of the Putnam County Board of Education ("PCBOE") to post for competitive bid two bus operator positions after the regular employees who held those positions bid on other vacant bus runs. The initial relief Grievant sought was the posting of these positions. At Level II, Grievant sought to be instated into one of the positions and "all benefits due" including back pay, seniority, additional experience credit, and insurance and medical benefits. This grievance was denied at Level I, and at Level II, was granted, in part, and denied, in part. This decision will be discussed below. Grievant elected to by-pass Level III. Grievant appealed to Level IV, and a Level IV hearing was held on September 2, 1997. This case became mature for decision on September 24, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

The Level II Decision discussed PCBOE's practice of allowing regular bus operators to bid on positions or runs which were vacant due to another regular bus operator'sabsence. This practice then created another vacancy in that bus operator's regular run which could be posted. This practice had the possibility of creating numerous vacancies and numerous employees in new runs. This practice also prevented substitutes from being placed in many of these posted positions as the regular employees were, of course, given preference.

The Level II decision ruled this practice did not follow the guidelines mandated by W. Va. Code § 18A-4-15, and held that all "long term temporary positions caused by leaves of absence extending beyond thirty days, will be filled in accordance with Code 18A-4-15, and only substitute employees will be eligible to bid on and accept such long term substitute

positions." Level II Decision at 2. This decision required the original two positions at issue to be posted if the employees remained off the job when the school year began in August 1998. However, as this decision also found Grievant had not proven he would have received one of the substitute positions if they had been posted, his request for relief was denied.

This grievance arrived at Level IV in an unusual posture. Neither party disagreed with that portion of the Level II Decision dealing with the change in past practice, and the only issue before the undersigned Administrative Law Judge is the factual one of whether Grievant met his burden of proof and demonstrated he would have received one of the positions had they been posted. Thus, the issue of whether PCBOE correctly interpreted the statute and changed its past practice in accordance with the statute, was not and could not be addressed at Level IV.

The following Findings of Fact are derived from the record in its entirety.

Findings of Fact

1. Grievant has been employed by PCBOE as a substitute bus operator for four years.
2. During the 1996-1997 school year, regular bus operators, Rick Cobb and Robert Anthony were on extended leaves of absence.
3. After these bus operators had been on extended leaves for more than thirty days their positions were posted.
4. Roger Casto, the regular bus operator assigned to Bus 890, bid on and was awarded the long-term temporary assignment on Mr. Cobb's bus. He began this run on February 18, 1997. David Phelps, a substitute bus operator, was called from the rotating substitute list and placed into Mr. Casto's vacant position.
5. Donetta Tucker, the regular bus operator assigned to Bus 850, bid on and was awarded the long-term temporary assignment on Mr. Anthony's bus. She began this run on March 4, 1997. Stacy Winters, a substitute bus operator, was called from the rotating substitute list and placed into Ms. Tucker's vacant position. The 850 run is a half- day run.
6. Mr. Phelps and Mr. Winters completed the 1996-1997 school year in these positions. They were never posted.
7. From February 18, 1997, until May 5, 1997, Grievant was the third most senior

substitute bus operator behind Van Patton and Beverly Douglas. On May 5, 1997, Ms. Douglas received a regular bus operator position. 8. Mr. Patton signed a notarized affidavit stating he would not have applied for either Ms. Tucker's or Mr. Casto's position if they had been posted. (See footnote 1)

Discussion

As this grievance does not involve a disciplinary matter, 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 § 4.19 (1996); 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.

Although it is possible, maybe even likely that Grievant would have, at least, received the half-day run, Grievant has not met his burden of proof and demonstrated he would have received one of the positions. Given PCBOE's practice at the time, if the positions had been posted for bidding, it was possible for another regular bus operator to bid on the positions. If a regular bus operator had applied, they would have received preference for the position. Additionally, if these positions had been posted, it is likely that Ms. Douglas would have bid on the positions, and she would have received one ahead of Grievant because of her greater seniority.

Thus, a regular half-time employee could have bid on the full-time position occupied by one of the substitutes, and Ms. Douglas could have bid on the half-time position heldby the other substitute. (See footnote 2) **Grievant has failed to prove entitlement to any back pay, and the other relief he seeks in this instance. Grievant's request for relief in the form of benefits and seniority is unfortunately too speculative and cannot be granted.** (See footnote 3) **"When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Farley v. W. Va. Parkways Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). Parsons v. Mercer County Bd. of Educ., Docket No. 97-27-115 (Aug. 26, 1997).**

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, 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 § 4.19 (1996); 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. Grievant has not proven by a preponderance of the evidence that he would have received one of the positions if they had been posted.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1998

Footnote: 1

Mr. Patton was issued a subpoena for the Level IV hearing. He did not respond to this summons. The parties then agreed to receive his statement as an affidavit.

Footnote: 2

Mr. Patton stated he would not have bid on either Ms. Tucker's or Mr. Casto's position if posted. This statement is accepted as true, and what effect he could have on these two positions, if posted, is not considered.

Footnote: 3

Documents submitted by Respondent demonstrated Grievant would not have received the prerequisite number of days for either the seniority or experience credit, even if he had received Mr. Casto's position in February. Further, it is likely Grievant would not have received the position in February because PCBOE would probably

wait the first thirty days to see if the position needed to be posted, then the position would have to be posted for a certain number of days, and then there would have to be a selection and board action to approve the selection.