LARRIE HARPER,

Grievant,

v.

DOCKET NO. 99-40-021

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Larrie Harper, filed the following grievance against his employer, the Putnam County Board of Education ("Board") on October 23, 1998:

> Violation of WV Code 18A-4-8b and 18-29-2, section a, in regard to the grievant's nonselection for a posted position of bus operator. The grievant is a regularly employed custodian and his certification as a bus operator was mishandled (see attachments).
>
> Relief sought: Relief sought is to be awarded the posted position and any benefits due.

The grievance was denied at level one by Grievant's immediate supervisor, Cecil C. Dolin, on November 16, 1998. A level two hearing was conducted on December 8, 1998, and the grievance was denied by Harold Hatfield on January 12, 1999. The grievance was by-passed at level three, and Grievant appealed to level four on January 20, 1999. Hearing was held on March 25, 1999, at which time this case became mature for decision. Grievant was represented by Susan Hubbard, West Virginia Education Association, and the Board was represented by John Grafton, Esq., Grafton Law Offices.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

Grievance documents.

Ex. 2 -

Handwritten summary of events leading up to grievance.

Ex. 3 -

Putnam County Schools Vacancy Bulletin, School Bus Operator, dated September 24, 1998, with application deadline of September 30, 1998.

Testimony

Grievant testified in his own behalf, and presented the testimony of Wendy Kester. The Board presented the testimony of Cecil Dolan.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed as a custodian at Buffalo High School.

2. During the Summer and Fall 1998, Grievant began working toward the completion of all the requirements to obtain his certification as a school bus operator.

3. Grievant was one of six (6) individuals undergoing the training for school bus operator certification.

4. Grievant successfully completed his training and certification requirements up to the point that he took the learner's examination for commercial drivers. Three (3) of the individuals passed on the first test, and Grievant and two (2) others did not pass.

5. Grievant retook the learner's examination and passed on August 18, 1998. The psycho-motor skills test for Grievant was scheduled to occur on September 5, 1998. Due to unexpected non-cooperation on the part of the examiner, the testing was not completed as scheduled. Testing was rescheduled and successfully completed by Grievant on October 5, 1998. 6. Grievant bid on

the position of school bus operator, which was posted on September 24, 1998, with a deadline of September 30, 1998. Grievant had not yet completed all of the requirements for certification at the time he applied for the position.

7. Grievant completed his tasks necessary to become certified as a school bus operator on October 8, 1998, and the appropriate paperwork was submitted to the Office of the State Board of Education.

8. The posted school bus operator position was awarded to Steve Browning, a substitute bus operator, on October 12, 1998, and became effective October 13, 1998.

9. Grievant did not receive his certification card as a certified bus operator until Thursday, October 15, 1998. Monday, October 12, 1998, was Columbus Day, and the mail would not have been operating on that day.

10. An individual cannot drive a bus unattended unless he or she has completed all certification requirements and is in possession of a certification card.

DISCUSSION

Grievant alleges he should have been awarded the school bus operator position because he was a regular employee of the Board, and as such, would have had priority over a substitute for hiring, and because his certification card was “in the mail” at the time of the selection for the position.

The West Virginia School Transportation Regulations promulgated by the State Board of Education in accordance with W. Va. Code § 17C-14-12, provide in Section IX, Qualifications for Employment of School Bus Operators, that:

> No person shall be employed by the county board of education to operate any motor vehicle transporting school pupils, who has not beencertified by the Division of Public Safety and the State Department of Education.

126 C.S.R. 92 (Policy 4336)(Rev. Dec. 30, 1994).

Further, this Grievance Board has held, in Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88_050 (Oct. 3, 1988), and followed in Harless v. Boone County Bd. of Educ., Docket No. 96-03-186 (Sept. 26, 1996), that:

> It is clear that any person hired to operate a school bus must achieve certification

> before assuming the duties of the position and once that certification is lost, the person is ineligible to continue in that position. In those circumstances the employee no longer fits the definition of bus operator contained in W. Va. Code § 18A-4-8 and therefore does not have the qualifications upon which the decision to fill positions is based pursuant to W. Va. Code § 18A-4-8b. A county board of education may, of course, retain the employee until certification is regained but it may refuse to consider his or her application for bus operator positions until that time.

Yeager, supra.

Grievant could not legally operate a school bus at the time the selection of the bus operator position was made by the Board. Further, there is no assurance that he would have obtained his certification from the State Board of Education, even though he had passed all the requisite testing. Cecil Dolan, Director of Transportation, testified that sometimes the State Board of Education will catch something in the paperwork or testing that is not complete, and will not issue a certification card until those areas are adequately completed. Thus, just because Grievant's paperwork had been submitted to the State Board of Education, there was no guarantee that his certification card would be forthcoming.

Grievant urged the undersigned to reject the reasoning in Harless, supra, and Yeager, supra, pointing to the recent holding of the Supreme Court of Appeals of WestVirginia in Keatley v. Mercer County Board of Education, 200 W. Va. 487, 490 S.E.2d 306 (1997). Keatley, in Syllabus Point 3, held that a board of education was permitted to hire an employee who had completed all the requirements to receive his principal's certificate, but had not yet received that certificate. This argument was also put forth in Chapman v. Putnam County Bd. of Educ., Docket No. 97-40-560 (June 10, 1998), which involved an applicant for a bus operator's position who had not yet completed all the requirements for his bus operator's certification. The ALJ in Chapman distinguished Keatley, finding that the grievant in Chapman had not completed the requirements necessary to obtain certification, and there was no assurance that he would be able to do so. In this instance, Keatley can further be distinguished. Mr. Dolin and Ms. Kester both testified that the State Department of Education requires a bus operator to have his or her certification card in hand before he or she can operate a bus alone. There are obvious safety and liability reasons behind such a stringent requirement. Quite simply, Grievant did not have possession of his certification card at the time the bus operator position was awarded, even if it was “in the mail.”

Grievant suggests that Mr. Dolan should have done something to expedite his receipt of the certification card. Mr. Dolan quite correctly responds that he does not see that as his role as Director of Transportation, and indeed, to have tried to expedite Grievant's certification card, would have resulted in discrimination and/or favoritism towards another applicant.

CONCLUSIONS OF LAW

1. The West Virginia School Transportation Regulations promulgated by the State Board of Education in accordance with W. Va. Code § 17C-14-12, provides in Section IX, Qualifications for Employment of School Bus Operators, that:

> No person shall be employed by the county board of education to operate any motor vehicle transporting school pupils, who has not been certified by the Division of Public Safety and the State Department of Education.

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2. This Grievance Board has held, in Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88_050 (Oct. 3, 1988), and followed in Harless v. Boone County Bd. of Educ., Docket No. 96-03-186 (Sept. 26, 1996), that:

> It is clear that any person hired to operate a school bus must achieve certification before assuming the duties of the position and once that certification is lost, the person is ineligible to continue in that position. In those circumstances the employee no longer fits the definition of bus operator contained in W. Va. Code § 18A-4-8 and therefore does not have the qualifications upon which the decision to fill positions is based pursuant to W. Va. Code § 18A-4-8b. A county board of education may, of course, retain the employee until certification is regained but it may refuse to consider his or her application for bus operator positions until that time.

Yeager, supra.

3. Grievant did not possess his bus operator certification card at the time the Board selected the successful applicant for the posted bus operator position on October 12, 1998. Grievant was prohibited by law from operating a school bus until he had his certification card.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 15, 1999