JEANNE STRADER,

Grievant,

v. **Docket No. 99-30-263R**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jeanne Strader, employed by the Monongalia County Board of Education (MCBOE) as a bus operator, filed a level four grievance appeal on June 22, 1999, in which she alleged violations of W. Va. Code §§18A-4-16 and 18A-4-8b, when she was not selected for a number of extra-duty assignments. The grievance had previously been denied at level one. A level two hearing was conducted on May 17, 1999; however, a decision was not issued, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). A level four hearing was conducted in the Grievance Board's Morgantown office on August 12, 1999, at which time Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBOE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney. The grievance was denied at level four based upon a finding that it was untimely filed. Grievant appealed to the Circuit Court of Kanawha County where it was determined the level four ruling was wrong, and the matter was remanded for a decision on the merits. The parties declined the opportunity to request an additional hearing and/or to submit further argument, and the matter became mature for decision on August 20, 2001.

Upon review of the level two transcript, testimony and exhibits offered at level four, the following findings of fact are made.

Findings of Fact

1. Grievant has been employed by MCBOE as a bus operator since 1984, and held that classification at all times pertinent to this grievance.

2. On or around September 21,1998, MCBOE posted seven mid-day, extra-duty runs of one hour in duration. The deadline to apply for the positions was October 2, 1998.

3. The extra-duty postings included five runs in the Morgantown area, and two runs in the

Blacksville area of the county.

4. Grievant applied for each of the assignments posted for the Morgantown area.

5. At the time the aforementioned positions were posted, bus operators were allowed to apply either at the bus garage or at the central office.

6. Position posting #659 was awarded to Sheila Hixenbaugh, an applicant with less seniority than Grievant. Grievant was listed as an applicant for this position.

7. Position posting #660 was awarded to Elizabeth Panrell who is less senior than Grievant. Grievant was not listed as an applicant for this position. (See footnote 1)

8. Position posting #665 was awarded to Jack Dumire, who has more seniority than Grievant. Grievant was included as an applicant for this position, but Mr. Dumire's name was not on MCBOE's list.

9. Position posting #666 was never filled on a permanent basis, and the run was completed by a substitute bus operator throughout the 1998-99 school year. Grievant wasnot listed as an applicant for this position, but was more senior than any applicant with the exception of Charlotte Travis, who accepted another position.

10. Position posting #667 was awarded to Ms. Travis, who has more seniority than Grievant. Grievant was listed as an applicant for this position.

11. Ms. Hixenbaugh, Ms. Panrell, and Mr. Moore, were appointed to positions which they held the immediate preceding year. It is the practice of MCBOE to post all extra-duty positions, and to award them to the individual who held the assignment the prior year, regardless of seniority.

Discussion

As this grievance does not involve a disciplinary matter, 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. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both

sides, a party has not met its burden of proof. Id.

Grievant argues that notwithstanding MCBOE's failure to locate her applications, she did in fact complete one for each of the five Morgantown positions, and that she was at least entitled to posting #666 when Ms. Travis accepted another run. MCBOE assertsthat Grievant has failed to prove that she actually submitted a bid for posting #666, and has failed to prove that she was entitled to any of the other positions in question.

MCBOE is correct that Grievant has failed to produce evidence that she actually submitted a bid for posting #666, i.e., she did not keep a copy of the bid sheet. While a copied bid sheet would have resolved the question of whether Grievant applied for the position, the lack of one is not surprising as it does not appear to have been customary for applicants to retain copies. Grievant's failure to recall the numerical assignments given the postings does not affect her credibility. Further, given the fact that applications were accepted at two locations, and the disarray of MCBOE's records in this matter, the document may well have been misplaced.

As noted by MCBOE, Grievant has maintained that run #666 was never posted. Grievant is certainly confused regarding this matter as the evidence shows run #666 was one of the seven posted by MCBOE on September 21, 1998. It is undisputed that this run was never filled. Transportation Director Richard Gemas testified at level four that he was unaware of the reason the position was not filled, but opined that it has apparently fallen through the cracks. MCBOE also does not dispute that after Ms. Travis, Grievant was the most senior bus operator of the remaining applicants. Therefore, Grievant was entitled to position #666. (See footnote 2)

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. As this grievance does not involve a disciplinary matter, 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. A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more

probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

2. Grievant has proven by a preponderance of the evidence that she applied for posting #666, and was the most senior applicant after Ms. Travis accepted another position.

Accordingly, the grievance is **GRANTED**, and MCBOE Ordered to instate Grievant to posting #666, effective October 1998, with all back pay and benefits to which she would have been entitled, less appropriate set-off.

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

Date: August 27, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant believes that two bus operators were assigned to posting #660, with the second being Russell McElroy. Mr. McElroy has more seniority than Grievant, but was also not listed as an applicant.

Footnote: 2

Because Grievant has not challenged MCBOE's practice of allowing bus operators to retain extra-duty assignments from year to year, it is unnecessary to address posting numbers 664, 665, 667, 659, and 660.