JOHN SMITH,

Grievant,

v. **Docket No. 02-20-135**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, John Smith, filed this grievance against his employer, the Kanawha County Board of Education ("KBOE"), on April 11, 2002. The statement of grievance reads:

> Grievant, a regularly employed truck driver, has been transferred from his position as a driver with the mail delivery system based at the central office to the "materials" delivery system based at the Crede Facility. Grievant contends that Respondent failed to comply with the notice and hearing provisions of West Virginia Code §18A-2-7.

As relief Grievant seeks "reinstatement to his position with the mail delivery system based at the central office."

The following Findings of Fact are made based upon the evidence presented at Levels II and IV. (See footnote 1)

FINDINGS OF FACT

1. Grievant has been employed by KBOE as a truck driver for seven years. Prior to that, he was employed by KBOE as a handyman and custodian, and has been an employee of KBOE for a total of 18 years.

2. In the Spring of 2002, Grievant was a "Pony driver," meaning he delivered mail to schools in Kanawha County. KBOE employs two other Pony drivers.

3. Around the first of 2002, Grievant's supervisor, Melanie Vickers, told the three Pony drivers that KBOE was considering changing the mail delivery system, so that there would be only two Pony drivers. If this occurred, Grievant would lose his position, as he had the least seniority of the three

Pony drivers in the truck driver classification.

4. Grievant is not the least senior truck driver employed by KBOE. Grievant did not believe he could displace a less senior truck driver employed elsewhere by KBOE.

5. On March 7, 2002, KBOE posted a temporary vacancy for a truck driver at its Crede facility. The position was to last until the absent employee returned to work. The last day to apply was March 15, 2002.

6. Karen Williams, KBOE's Personnel Director, saw Grievant one day and asked him to apply for the temporary vacancy. Grievant told her he wanted to wait and see what was going to happen with his job. She told him if he did not apply, he might be out of a job on July 1, and she was not letting him out of her office until he applied. Grievant told her he would think about it. Ms. Vickers also mailed Grievant the posting at his home, with the job circled, and a note which read, “John, please apply for this job.”

7. To protect himself in case his job was cut, Grievant applied for the posted temporary vacancy on March 15, 2002.

8. Grievant was never advised in writing at any time that his position was going to be cut. 9. When Grievant did not receive written notice by April 1, 2002, that his position would be cut, he began asking about what was going to happen with his position, and he asked for a hearing. He spoke with Ms. Vickers, Superintendent Ron Duerring, and William Courtney, KBOE's Director, Employee Relations. Grievant put his request for a hearing in writing, and gave it to Ms. Vickers. Ms. Vickers then left with the written request, and returned 10 minutes later, at which time she told Grievant he could not have a hearing because he was being transferred to Crede. Superintendent Duerring congratulated Grievant on getting the job at Crede. Grievant told him he was not aware that he had gotten that job. Grievant and Superintendent Duerring went to Mr. Courtney's office, and Mr. Courtney's explanation for Grievant not receiving a letter that his job was being cut, and for why he could not have a hearing, was that Grievant was being laterally transferred to Crede.

10. Grievant did not withdraw his application for the temporary vacancy, because he was afraid he was going to lose his Pony driver job. Even as of the date of the Level IV hearing, Grievant still believed his Pony driver job had been cut.

11. Grievant was never offered the temporary position, nor did he ever accept the position. He attended the KBOE meeting on April 18, 2002, where KBOE approved his placement into the

temporary position by transfer, but did not see the agenda or his name on it. Another employee told him his name was on the agenda.

12. KBOE did not vote to eliminate Grievant's Pony driver position.

13. As of the Level IV hearing on June 26, 2002, Grievant was still working as a Pony driver, and he did not know where he was to report to work on July 1, 2002, as no one had told him this information.

DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant argued his position could not be cut, because KBOE had not given him proper notice. Respondent argued it did not have to give Grievant notice and a hearing, because he had applied for another position, and had been awarded that position. Respondent argued Grievant has a position, and his grievance is premature.

Grievant presented no evidence that his Pony driver position had, in fact, been cut by KBOE. KBOE presented no witnesses to explain what had occurred here. Counsel for KBOE represented that KBOE had not voted to cut a Pony driver position, and it is accepted that this is true. That being the case, the undersigned need not address whether Grievant was given proper notice and hearing, as Grievant's Pony driver job still exists, and Grievant can be returned to it.

The undersigned is not going to speculate as to the motives of those involved in what transpired here. It is clear that the only reason Grievant applied for the posted temporary position was that Ms. Williams and Ms. Vickers told him he needed to do so, and provided him with erroneous information that his job would be cut; and Grievant made it quite clear that this was the only reason he was submitting an application. Neither Ms. Williams nor Ms. Vickers, nor anyone else, ever provided Grievant with the correct information that KBOE was not being presented with a proposal to cut his job, and it was not until the Level IV hearing that it became clear that Grievant's Pony driver job had not been cut. If the idea was to eliminate Grievant's job, the proper way to do that was to present that proposal to those who are responsible for such decisions, the members of the Kanawha County Board of Education; not to force Grievant into applying for a job he did not want, and then forcing him into that job without providing him with accurate information, and not filling his old job. Grievant does

not want to serve in the temporary position at the Crede facility, and had anyone told him that his job had not been cut, and asked him if he wanted the temporary position, he would not have taken it. The undersigned has the authority to grant relief that is fair and equitable. W. Va. Code § 18-29-5(b). The undersigned finds that Grievant should have been told the truth, and given the opportunity to accept or decline the temporary position. He should be returned to his Pony driver position.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. As Grievant's job was not cut by KBOE, he was not provided with correct information, and he did not consent to being transferred into the temporary position under these circumstances, he should be returned to his Pony driver position.

Accordingly, this grievance is **GRANTED**. The Kanawha County Board of Education is **ORDERED** to return Grievant to his Pony driver position immediately upon receipt of this **DECISION**.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 6, 2002

Footnote: 1

The grievance was denied at Level I on April 18, 2002. Grievant appealed to Level II, where a hearing was held on April 25, 2002. A Level II decision denying the grievance was issued on May 9, 2002. Grievant bypassed Level III, appealing to Level IV on May 20, 2002. A Level IV hearing was held on June 26, 2002. Grievant was represented by John Everett Roush, Esquire, and Respondent was represented by James W. Withrow, Esquire. This grievance became mature for decision on July 16, 2002, upon receipt of the last of the parties' written arguments.