LOUANN LOWE,

Grievant,

v. **Docket No. 03-15-101**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Louann Lowe ("Grievant"), employed by the Hancock County Board of Education ("HCBE" or "Respondent") as a custodian, filed a level one grievance on December 20, 2002, in which she alleged violations of W. Va. Code §§ 18A-4-8b and 18A-4-8g, when she was denied a position of bus operator. For relief, Grievant request instatement, back pay with interest, benefits, and seniority. (See footnote 1) The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced her claim to level four on April 7, 2003. A level four hearing was conducted in the Grievance Board's Wheeling office on August 4, 2003, at which time Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and HCBE was represented by William T. Fahey, Esq., Assistant Prosecuting Attorney. The matter became mature for decision upon submission of proposed findings of fact and conclusions of law received on or before September 5, 2003. (See footnote 2)

The essential facts of this matter are undisputed, and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant was employed by HCBE as a custodian during the 2001-2002 school year. Her employment was terminated at the end of the school year due to a reduction in force, and she was placed on the preferred recall list.

2. Grievant was rehired as a regular custodian assigned to the Oak Glenn School, effective November 14, 2002.

3. HCBE posted a vacancy for bus operator on November 13, 2002, with a closing date of November 19, 2002. The posting listed the qualifications for the position to include "possession of a valid driver's license as issued by the State of West Virginia, with special provision for the driving of

school buses."

4. Grievant submitted a bid for the position of bus operator on November 15, 2002. She was the most senior applicant for the position.

5. Grievant had previously been certified as a bus operator for the Northern Panhandle Headstart program, and simply needed to update her certification.

6. Grievant filed the necessary paperwork with the State Department of Education on November 25, 2002, and HCBE received a copy of her certification card from the State Department of Education by facsimile transmission on December 2, 2002. HCBE received the hard copy of the card on December 4, 2002.

7. Because Grievant did not have a hard copy of the certification "in hand" on December 2, 2002, HCBE awarded the position to a substitute bus operator, effective December 4, 2002. (See footnote 3) 8. But for her lack of a hard copy of her certification card from the State Department of Education, Grievant would have received the position.

Discussion

In a non-disciplinary grievance, the 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.

Grievant asserts that she had a facsimile copy of her certification card in hand on December 2, 2002, and as the most senior applicant, was entitled to the position. HCBE argues that Grievant did not have in her possession the required licensure, but only a faxed copy of the purposed license. Absent any rule, regulation, or written policy of the State Department of Education or the Legislature adopting facsimile transmission as an approved method of document delivery for State agencies or departments, HCBE denies that it acted improperly in relying upon past practice, and requiring the actual certification card be in Grievant's possession.

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, "[n]o 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." 126 C.S.R. 92 (Policy 4336)(Rev. Dec. 30, 1994). It is clear that any person hired to operate a school bus must achieve certification before assuming the duties of the position. Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88-050 (Oct. 3, 1988); Harless v. Boone County Bd. of Educ., Docket No. 96-03-186 (Sept. 26, 1996). In defining when an individual actually achieves certification, an applicant is typically required to have the certification card in his or her personal possession, or "in hand," prior to assuming their duties. This requirement is stringently applied due to the possible consequences involved in public transportation.

The Grievance Board has previously held that an individual who has passed all the requisite testing, and submitted all paperwork to the Director of Transportation cannot be employed as a bus operator because there is still no assurance that he or she will obtain certification from the State Board of Education. For example, some form may not be completed correctly, or entirely, and will have to be corrected. See Harper v. Putnam County Bd. of Educ., Docket No. 99-40-021 (July 15, 1999). However, in the present matter, the certification was issued and HCBE was in possession of a facsimile copy of the original document.

There are no laws, rules, regulations, or policies currently in place which address the issue of whether a facsimile may be accepted in this instance. The West Virginia Trial Court Rules, Section 12, has approved facsimile transmissions under specific guidelines and for specific agencies and departments. These Rules do not address the Department of Education, nor are they applicable to administrative hearings. Wayne Clutter, Executive Director of the Division of Transportation in the State Department of Education, testified at level four that his office routinely provides boards of education with facsimiletransmissions of certifications because there is a shortage of bus operators. Mr. Clutter opined the facsimile copy would be acceptable documentation for a bus operator.

HCBE decision to proceed with all due caution is understandable; however, in this case, certification was not pending, it had been issued. There was no question whether the document was valid, or that it had been issued by the State. Certainly, Grievant should have secured the document earlier, but HCBE knew on December 2, 2002, that she had been certified as a bus operator, and should have placed her in the position.

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, "[n]o 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." 126 C.S.R. 92 (Policy 4336)(Rev. Dec. 30, 1994).

2. Any person hired to operate a school bus must achieve certification before assuming the duties of the position. Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88-050 (Oct. 3, 1988).

3. A facsimile of Grievant's bus operator certification card, provided by the State Department of Education, was sufficient to prove that she had been awarded certification.

Accordingly, this grievance is **GRANTED**, and HCBE Ordered to adjust Grievant's seniority and benefits, and provide her back pay, if any, with interest, effective December 4, 2002. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Hancock 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: SEPTEMBER 24, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

At level four Grievant advised that she had since secured a position of bus operator, and would amend her requested relief to back pay, less any set off, interest, benefits and seniority.

Footnote: 2

Grievant withdrew a default claim at the level four hearing.

Footnote: 3

It is not clear from the record when HCBE met, but it appears to have been either December 2 or 4, 2002.