ARTHUR BYRD,

Grievant,

v. **DOCKET NO. 04-20-276**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On May 7, 2004, Grievant Arthur J. Byrd filed a grievance against his employer, the Kanawha County Board of Education (Respondent), claiming: “Employer hired less senior person for bus driving position.” As relief, Grievant seeks, “Position w/ front pay, back pay & to be made whole in every way.”

Having been denied at levels one and two, level three was bypassed and a level four hearing was held in the Grievance Board's Charleston office on September 3, 2004. Grievant was represented by Scott E. Elswick, Esq. Respondent was represented by James W. Withrow, Esq. The matter became mature for decision on September 17, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1 Grievant is employed by Respondent as a substitute bus operator.

2 Grievant's seniority dates from April 4, 2002. Another bus operator, Robert Flinner, also began work as a substitute bus operator that day. To break the seniority tie, a coin-flip was conducted, with Grievant winning the toss.

3 In August or September, 2003, Grievant, properly following Respondent's established

procedure, notified Respondent he would be unavailable until January due to a medical condition that he believed would make it unsafe for him to drive a school bus. For unknown reasons, Grievant's supervisor was not informed of his status.

4 Grievant's supervisor, Linda Vance, attempted to call Grievant for a run at least three times subsequent to his approved leave. However, being unaware he was unavailable for cause, she informed George Beckett, Administrative Assistant for Pupil Transportation, that Grievant was not available to drive when he should be, in violation of transportation policy.

5 On or about December 8, 2003, Grievant received a letter from Mr. Beckett informing him he had been terminated from the substitute list because he was unavailable to work.

6 Grievant called Mr. Becket, who told him to work out the misunderstanding with Ms. Vance. When he went to the terminal to talk to her on or about January 6, 2004, tempers flared and an angry confrontation ensued, with no resolution. Grievant later stated he wanted to file a grievance, but Ms. Vance told him she would not accept it, nor would Mr. Beckett.

7 Grievant filed his grievance at with Bill Courtney at the County Board office, and subsequently had an informal conference with Mr. Beckett on February 9, 2004. Mr.Becket issued a memorandum decision on February 18, 2004, that informed Grievant the misunderstanding had been cleared up by the conference and he was not terminated. However, due to Grievant's confrontation with Ms. Vance and another bus operator, Mr. DeGrange, Grievant was reprimanded and the following conditions were placed on his continued employment:

> You no longer work for Kanawha County Schools at the St. Albans Terminal and shall not be on the premises.
>
> When you are released by your doctor and able to drive that you notify me immediately.
>
> At your choice you will be assigned as a substitute bus operator at the South Charleston Terminal.
>
> That you will contact Alice Foster, Supervisor at South Charleston Terminal and become acquainted with those runs.

8 There is no evidence that Grievant pursued that grievance any further.

9 Mr. Flinner applied for and was awarded a regular, half-time bus operator position at the East Bank terminal, effective March 22, 2004. Grievant knew about the posting for that position and decided not to apply because at the time he was unsure that he wanted to work for Respondent any more.

10 On April 1, 2004, Respondent posted two openings for full-time bus operators at the St. Albans terminal. Grievant, as well as Mr. Flinner and Jim Cochran applied for the positions. These are the positions at issue in this grievance.

11 Grievant was informed by the personnel office that its records still reflected he had been terminated, therefore he was not eligible for either position. Because he had waited until the last day to apply, he was unable to get the problem cleared up before the posting closed. He was not considered for either job. 12 Mr. Flinner was awarded one of the positions because he was a regular employee and had priority over the substitute applicants, and Mr. Cochran was awarded the other position on the basis of overall seniority.

13 Mr. Cochran was more senior than Grievant, having begun working for Respondent April 1, 2002.

14 Grievant supplied Mr. Beckett with a letter, dated May 20, 2004, from his physician stating he was medically able to drive a bus.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. Code St. R. § 156-1-4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends he should have been awarded one of the positions posted on April 1 because he was more senior (by virtue of the coin toss) than Mr. Flinner, and that he would have gotten the regular position that had given Mr. Flinner the edge if he had not been improperly terminated.

Respondent points out that Grievant knew he was not terminated at the time Mr. Flinner's first regular position was posted, and Grievant had simply not applied for it of his own accord.

At the time Mr. Flinner applied for the East Bank position, Grievant knew he had not been terminated. He was free to apply for that job. Although he now states he still thought he was terminated, the memorandum speaks for itself and makes it clear he has “continued employment” based on certain conditions. None of the conditions would haveprevented him from applying for a job at the East Bank Terminal. (See footnote 1) Grievant did not pursue his first grievance after that decision, further evidence he understood the outcome to be favorable to him.

Had Grievant applied and been refused due to the personnel department still having a record of his termination, that would be a different matter; since he never applied, that issue is moot. Mr. Flinner was properly awarded that position, so when the later jobs were posted, he was validly holding a regular position.

There is no question Respondent made a mistake in terminating grievant from the substitute list, (See footnote 2) and in failing to purge its records after the previous grievance resolved the issue, thus denying him the opportunity to be considered for the jobs that are the subject of this grievance. However, the error was harmless to grievant, because even though he was not permitted to interview, the successful applicants had better claims to the job than he did. In neither case would having resolved the confusion over Grievant's status earlier changed the outcome in the hiring process for these positions: Mr. Flinner would still have had priority by virtue of his legitimate, regular position, and Mr. Cochran by virtue of his superior seniority. Grievant does not dispute that a regular employee was entitled to a position ahead of a substitute, nor that Mr. Cochran was more senior. A grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Div. of Corrections/Northern Regional Jail*, DocketNo. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994).

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1 This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156

W. Va. Code St. R. § 156-1-4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*.

2 A grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Div. of Corrections/Northern Regional Jail*, Docket No. 99-CORR-516 (May 5, 2000); *Dooley v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-255 (Nov. 30, 1994).

3 Grievant met his burden of proving Respondent erred in denying him the opportunity to apply for the positions in question, but the error was harmless in that Grievant would not have been a successful applicant.

For the foregoing reasons, this grievance is **DENIED**.

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 servea 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.

Date: September 24, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Although it should be noted Grievant had at the time not provided a release from his doctor to return to work. Grievant argues this requirement should not have been necessary because Grievant removed himself from work, but he never requested the requirement after receiving the prior grievance decision.

Footnote: 2

The single issue set out in the Statement of Grievance is clear. Grievant now wishes to relitigate the issues raised and resolved in his prior grievance. His attempt to introduce evidence on those matters at the level four hearing for this grievance was objected to, and no evidence was permitted, having been deemed irrelevant to the matter sub judice.