

MITZI HARLESS,

Grievant,

v.

DOCKET NO. 96-03-186

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Mitzi Harless, filed this grievance on or about April 17, 1996:

Grievant, a substitute bus operator, applied for a temporary bus operator's assignment in the Scott area. This position was awarded to Pamela Skeens who holds more seniority as a substitute bus operator than the Grievant. However, Ms. Skeens does not currently hold valid certification to operate a school bus in the State of West Virginia. Grievant alleges a violation of West Virginia Code §18A-4-8b and seeks instatement, wages, benefits, and seniority retroactive to March 5, 1996.

Following adverse decisions at the lower levels, Grievant appealed to level four on May 13, 1996. Hearing was held on July 16, 1996, and this case became mature for decision on July 30, 1996, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

The material facts in this grievance are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant has been employed by the Boone County Board of Education ("Board") as a substitute bus operator since February 20, 1992.
2. The Board posted a half-time bus operator's position on February 21, 1996 (LII, G. Ex. 3). This position had been assigned to Joseph Kinder, a regularly employed bus operator who had suffered a stroke during the Christmas break. Jessie Perdue, a substitute bus operator, had been

performing the half-time bus route before the posting.

3. Three substitute bus operators applied for the posted vacancy: Grievant, Pamela Skeens, and Jessie Perdue. The Board awarded the position to Pamela Skeens on March 5, 1996.

4. Ms. Skeens has been employed by the Board as a substitute bus operator since October 8, 1991, and has more seniority than Grievant. She most recently held a valid bus operator's certification in the 1994-95 school year.

5. State of West Virginia bus operator's certifications are required to be renewed each year.

6. Ms. Skeens suffered an on-the-job injury during school year 1995-96. Since suffering the injury, she has been off work and has received temporary total workers' compensation disability benefits. At the time of her hire, in March 1996, Ms. Skeens was still unable to work.

7. Because Ms. Skeens has been off work on workers' compensation, she has not completed a number of requirements necessary to renew her bus driver's certification. She has not had the required 18 hours in-service training, nor has she had a physical examination certifying she is physically fit to drive a school bus.

8. The Board believes that when Ms. Skeens returns to work she can be duly certified to drive a bus within three or four days.

9. Jessie Perdue, the substitute bus operator, continued to perform the half-time bus route after the position had been awarded to Ms. Skeens until the conclusion of the 1995-96 school year.

10. Both Grievant and Ms. Skeens hold the classification title of bus operator, and both had satisfactory evaluations.

Discussion

Grievant maintains that, because Ms. Skeens did not hold a valid certificate as a school bus operator in 1995-96, she was not qualified for the half-time bus operator position, and thus, the Board violated W. Va. Code § 18A-4-8b in selecting her for the position. The Board argues that Ms. Skeens was "qualified" for the position, because Code § 18A-4-8b defines a qualified applicant as one who "holds a classification title in his category of employment". There is no dispute that Ms. Skeens holds the classification title of bus operator. Further, the Board alleges that the state certification requirements for bus operators do not prohibit a board of education from hiring an individual who does not hold the requisite certification, but only prohibits that individual from driving a bus until he or

she obtains the certification. Finally, the Board argues that, because Ms. Skeens was off on workers' compensation, it was concerned that not hiring her for the position would have been a violation of W. Va. Code §§ 23-5A-1, et seq., which prohibit an employer from discriminating against an employee who is receiving workers' compensation benefits.

The first issue to be determined is whether Ms. Skeens was "qualified" for the bus operator position pursuant to W. Va. Code § 18A-4-8b. Because the regular bus operator was off on medical leave of absence, the position in question is a W. Va. Code § 18A-4-15(2) position, which is to be filled in the following manner:

The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

. . .

(2) To fill the position of a regular service employee on leave of absence: Provided, That if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position; . . .

W. Va. Code § 18A-4-8b states in pertinent part:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds the classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. . . .

The Board's argument that Ms. Skeens was qualified for the bus operator position because she held the classification title has been addressed before by this Board in Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88-050 (Oct. 3, 1988). In Yeager, grievant, who had been off on workers' compensation, let her certification lapse, and applied for a bus operator position. The board

of education did not select her for the position, and she claimed it violated W. Va. Code § 18A-4-8b because she held the classification title of bus operator, and therefore, was "qualified" for the position.

The Administrative Law Judge in Yeager held that Code § 18A-4-8b must be read in pari materia with Code § 18A-4-8, which defines a "bus operator" as "personnel employed to operate school buses and other school transportation vehicles as provided by the state board of education." 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 any 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).

Reading those statutory provisions, as well as the regulations, together, the ALJ in Yeager held:

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 the 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. Therefore, following Yeager, because Ms. Skeens did not have her bus operator's certification at the time she applied, she was not qualified, pursuant to W. Va. Code § 18A-4-8b, to fill the posted bus operator position at issue and should not have been hired for the position.

The second issue the Board raised was whether it would be violating W. Va. Code §§ 23-5A-1, et seq., if it did not hire Ms. Skeens, who was off work due to a compensable on-the-job injury. This issue has also been addressed by this Board in Stewart v. Wyoming County Bd. of Educ., Docket No. 95-55-381 (May 30, 1996), wherein the administrative law judge held that he was:

unaware of any statute, policy, regulation, or rule of law whereby a school service employee, on leave of absence due to an on-the-job injury, must be appointed to a position when the injury renders him or her incapable of performing the duties thereof.

Stewart, supra. In Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993), the grievant, although completing all the requirements necessary for certification as a bus operator, had not yet received her certificate, and was not selected for a bus operator position on that basis. Grievant claimed the board of education erred in not hiring her, in that it could have held the job open for her until she received her certification. The Administrative Law Judge held that had the board hired the grievant, it would have been legally obligated to not only pay her wages, but to also hire and pay a certified substitute operator to drive the bus until grievant received her certification. The ALJ found there was nothing in Code § 18A-4-8b which requires a county board of education to assume such a financial burden, and that such an action could constitute fiscal malfeasance on the board's part. Sage, supra.

Finally, the Board was concerned that it would be violating W. Va. Code § 23-5A-1, if it did not hire Ms. Skeens, which states:

No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

This provision has been interpreted to require some nexus between the employer's employment decision and the employee's claim of compensation. Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W. Va. 1991). In the first instance, Ms. Skeens' "employment" has not been disturbed by the Board as a result of her on-the-job injury. Ms. Skeens is still considered to be "employed" by the Board as a substitute bus operator. Second, it is doubtful the Board could be found to have violated W. Va. Code § 23-5A-1 in not selecting Ms. Skeens for a position which she is currently physically unable to perform. [\(See footnote 1\)](#) In conclusion, the undersigned finds that Ms. Skeens was not qualified to hold the position of bus operator pursuant to W. Va. Code § 18A-4-8b. Further, there is nothing in the Code or regulations which requires a county board of education to hire an individual, otherwise qualified, for a position which, due to a disability, renders him or her incapable of performing the duties of the position.

Conclusions of Law

1. In a non-disciplinary matter, it is incumbent upon the grievant to prove her case by a preponderance of the evidence.

2. Grievant has proven by a preponderance of the evidence that the successful applicant, Ms. Skeens, was not qualified for the subject bus operator position pursuant to W. Va. Code § 18A-4-8b and Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88-050 (Oct. 3, 1988).

3. There is no statute, policy, regulation, or rule of law whereby a school service employee, on leave of absence due to an on-the-job injury, must be appointed to a position when the injury renders him or her incapable of performing the duties thereof. Stewart v. Wyoming County Bd. of Educ., Docket No. 95-55-381 (May 30, 1996). Therefore, the Board was not required to hire Ms. Skeens for the subject bus operator position because of her absence due to an on-the-job injury.

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to instate Grievant into the subject position, if still available, with all attendant wages, benefits, and regular employment seniority retroactive to March 5, 1996.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone County and 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. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ

Administrative Law Judge

Date: September 26, 1996

[Footnote: 1](#)

This position was not one which Ms. Skeens held before, therefore, the reinstatement rights provided under W. Va. Code § 23-5A-3 do not apply in this instance.