CARL LITTLE,

Grievant,

v. Docket No. 96-20-352

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Carl Little, states he was "passed over on Substitute Mechanics call out list, which is the preference of my Mechanic/Driver classification." (See footnote 1) He requests as relief that he be paid for the eight days of employment he would have had if he had been in a mechanic's position at the end of the school year and payment for three vacation days. This grievance was denied at Levels I and II and waived at Level III. An appeal to Level IV followed.

At the first Level IV hearing on October 22, 1996, it was discovered that the tape of the Level II hearing could not be located. Grievant's attorney, Mr. Alfred Sines, requested theLevel IV hearing be continued, and the Kanawha County Board of Education ("KCBOE") be directed to search for the tape and transcribe it. This Motion was granted.

A second Level IV hearing was held on December 3, 1996, at which time KCBOE's attorney, Mr. Greg Bailey, indicated a search for the tape had been conducted to no avail. Mr. Bailey again apologized for this problem. Grievant's attorney then made several Motions. Mr. Sines requested the undersigned to issue a show cause order to produce the tape. This Motion was denied as Mr. Bailey had already conducted two searches for the tape, and it had not been found. Mr. Sines then requested, several times, that his client be granted Summary Judgement because of the prejudice created by KCBOE's failure to produce the tape. Mr. Sines also alleged that KCBOE had acted unlawfully and with blatant disregard of Grievant's rights. Mr. Sines quoted from W. Va. Code § 18-29-6, which states, "the institution shall be responsible for promptly transcribing the testimony and evidence and for providing a copy of the certified transcription to the party requesting same . . .". Grievant's attorney supported his request by stating that circuit court judges may grant Summary Judgement in similar situations.

The undersigned repeatedly informed Mr. Sines that Grievance Board Administrative Law Judges do not grant Summary Judgements,and this Motion would not be granted in this hearing. The undersigned also informed Mr. Sines that testimony was frequently taken at Level IV hearings, and the undersigned was willing to hold this Level IV hearing as a de novo hearing. After further discussion, Grievant was also offered the option of returning to Level II for another hearing, if that was what he wanted. (See footnote 2) Mr. Sines requested attorney fees for this Level II hearing, and this request was denied as a hearing was available at Level IV, and this Level IV hearing would expedite the grievance process, as directed by the grievance procedure. After noting his objections to the denials of all his motions, a Level IV hearing was held on the above-stated date. The parties decided that post-hearing submissions would not be necessary, thus this case became mature for decision on the hearing date, December 3, 1996.

The material facts in this case are not in dispute and will be set out below.

Findings of Fact

1. Grievant is a multiclassified employee. He began employment as a substitute bus operator on September 2, 1993, andas a substitute mechanic on June 7, 1995. (See footnote 3) He indicated on his application that he preferred work as a mechanic.

2. In late November 1995, Grievant was "called out" to fill the position of a regularly employed bus operator.

3. Grievant kept this position until the end of the 1995- 1996 school year. (See footnote 4)

4. In December 1995, while Grievant was employed in this bus operator position, but before he achieved the rights of a "regular" employee, he was told there was a need for him to work as a substitute mechanic. Grievant was unclear of the length of thispotential employment as a mechanic. He told his supervisor, Ms. Ruth Hatfield, that he had a long-term substitute bus operator position. Grievant knew at the time of this discussion that his bus driver position would last for an extended period of time, and that he could remain in the position the entire time and receive all "regular" benefits.

5. Grievant was not asked to serve as a substitute mechanic again until June 10, 1996, after his bus operator employment ended for the year.

6. KCBOE employs very few substitute mechanics, and those who are employed are usually working as long-term substitutes for an absent employee. Because there are only two or three substitute mechanics available at any one time, Ms. Ruth Hatfield, Supervisor of Bus Maintenance, does not keep a separate call-down list. These substitute's names are listed at the bottom of the regular employee roster.

7. The long-term substitute position Grievant thinks he should have been offered in April 1996, became open in the following manner:

a. Dwight Garnes, who was working as a long-term substitute for Robert Mullins, applied for and received a regular, full-time bus operator position.

b. Pursuant to Policy 1.6, in KCBOE's Pupil Transportation Handbook, which states: "A substitute will remain on an assigned run until the regular employee returns or the run is filled or eliminated", and Grievant's prior discussion with Ms. Hatfield in December 1995, Grievant was not called about filling the long-term substitute position.

c. Because Grievant had turned down the prior request to work in a substitute mechanic position in December 1995, his name was not next in the call-down order in April 1996 to be called for the position. (See footnote 5)

d. Mr. Mark Byrd, a substitute mechanic in another, less favorable, long-term substitute position, was awareof the vacancy, and requested to be placed in the position of Mr. Mullins vacated by Mr. Garnes' transfer. As Mr. Byrd was next on the call-down list, he was placed in the position.

8. As of June 1996, Grievant has been continuously employed as a substitute mechanic in a long-term, substitute position.

Discussion

Grievant was somewhat inexact in his requested relief. At first he stated he did not like "how things were done" because state laws were violated. He wanted things changed. Later, Grievant requested eight days of pay and three vacation days. He stated there was no difference in his pay no matter what position he was in, as he received the pay from the higher pay grade, mechanic.

His request for additional compensation is based on the following reasoning. His school

year position as a bus operator ended on Friday, June 7, 1996. On Monday evening, June 10, 1996, Ms. Hatfield asked Grievant to work as a substitute mechanic the next week. Grievant had plans to complete a roofing project and was not free to respond to Ms. Hatfield's request until June 14, 1996. He did not begin work in the substitute mechanic positionuntil June 24, 1996. He reasoned that if he had been hired in April 1996, he would not have made the other plans to do roofing, would not have missed a week's pay (See footnote 6) , and would have been paid by KCBOE during that time. Due to his inability to come to work at the time requested by Ms. Hatfield, he did not receive another call from her until later, and he did not start employment in his current position until June 24, 1996.

Grievant alleges a violation of W. Va. Code § 18A-4-15(6). He states he should have been given priority in accepting Mr. Mullins' position vacated by Mr. Garnes. W. Va. Code § 18A-4-15(6) states:

> A substitute with the greatest length of service time, . . . shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis. . . . All substitutes shall be employed on a rotating basis according to the length of service time until each substitute has had an opportunity to perform similar assignments. . . .

According to the sworn testimony of Mr. Beckett, Director of Pupil Transportation, Grievant had been the last substitute mechanic asked to fill a vacant position, in December 1995. Granted it was not made clear to Grievant how long he might be needed when he was told of the need for a mechanic in December1995. (See footnote 7) It is also clear Grievant did not clarify the length of time the position might last, but did inform Ms. Hatfield he was not interested because he was working in a full-time position. However, the key issue to resolve in deciding whether Grievant should have been offered the April 1996, substitute mechanic position, is whether he was next on the call-down list. Testimony is clear he was not; therefore, Grievant was not entitled to be offered the position at issue.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Grievant, in a non-disciplinary action, has the burden of proving his case by a preponderance of the evidence. Napier v. Logan County Bd. of Educ., Docket No. 94-23-541

(Apr. 25, 1995).

2. Grievant failed to prove KCBOE violated W. Va. Code § 18A-4-15(6). Indeed, the evidence demonstrated KCBOE followed the call-down procedure delineated in that Code Section.

Accordingly, this grievance is DENIED. Any party may appeal this decision to the Circuit Court of Kanawha 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1997

Footnote: 1

Grievant is multiclassified as a mechanic/bus operator, not driver.

Footnote: 2

Grievant was represented by Mr. Sines at the Level II hearing.

Footnote: 3

Grievant indicated he began employment as a mechanic in September 1993, but was not classified as a mechanic until June 1995.

Footnote: 4

At the time Grievant received this long-term substitute position, KCBOE allowed substitute employees, pursuant to its then policies, to keep a position until the absent employee returned. This position was never posted. Because of a recent Grievance Board decision, KCBOE met with employees and various employee organizations and worked out an agreement to change the policy and procedure. See Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 May 29, 1996; See also Ditty v. Brooke County Bd. of Educ., Docket No. 91-05-25 (Oct. 31, 1991); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 28, 1987). This December 1996

agreement provided that employees, who were currently in long-term substitute positions, would retain those positions (without posting) until the employee returned or resigned, and all new positions, where the employee had been off for more than thirty days, would be posted for bid. Grievant indicated that he had the option of continuing his long-term bus operator position at the beginning of the 1996-1997 school year pursuant to this agreement. It is noted that Grievant did not grieve KCBOE's failure to post the position.

Footnote: 5

There is some discrepancy in the evidence below on this issue. An unsigned lower level response indicates that there had been a need for a substitute mechanic in the past, and Grievant had not been called. This decision was unclear whether other people were called in on a rotating basis, or whether no one was called because no one was available. At Level IV, Mr. George Beckett, Director of Pupil Transportation, testified that there were times a substitute mechanic was needed, but because there was no one available, the position was not filled. As this information was not clarified, and Mr. Beckett's sworn testimony is that Grievant's name was not next on the call-down list, the above-stated finding of fact states the undersigned's conclusion on this testimony.

Footnote: 6

Of course, Grievant did not indicate how much pay he received from the roofing job which he could have chosen to forego.

Footnote: 7

Although not decisive to the issue at hand, is it obvious the communication of a potential position, and its refusal could have been clearer on the part of both individuals to the conversation. The undersigned hopes that in future Ms. Hatfield will offer a potential substitute position with as much information as she has at her disposal. It is also hoped Grievant will be more clear in his refusal and his openness to future offers.