KENZIE CONLEY,

Grievant,

v. **DOCKET NO. 97-23-521**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Kenzie Conley, represented by Cecil Spry, filed this grievance against Respondent Logan County Board of Education, represented by Brian Abraham, Esq., on or about October 30, 1997. This grievance arose when a regular bus operator's regular route and vocational route were posted together as a temporary vacancy. Grievant alleges the vocational route should have been posted as a vacancy, and the regular route should have been posted as a separate vacancy. Grievant sought as relief that the vocational run be posted properly, and that he receive the pay he would have received had he been placed in the position, legal fees and expenses. (See footnote 1) However, Grievant filed this grievance after the regular bus operator had returned to work, and the position cannot now be posted. (See footnote 2) The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed as a regular bus operator by the Logan County Board of Education ("LBOE"), and has been an employee seven years.

2. Beverly Gilman is a regular bus operator who drives both a regular bus route and a vocational route.

3. On October 13, 1997, LBOE posted Ms. Gilman's position as a temporary vacancy, posting the regular route and vocational route together, as one position vacancy.

4. Shannon Bailey bid on the temporary vacancy as posted, and was awarded the position. She worked in the temporary vacancy five days, until Ms. Gilman returned to the position. (See

footnote 3)

5. Grievant did not bid on the temporary vacancy as posted.

6. Grievant has more seniority than Ms. Bailey, but many bus operators are more senior than he.

7. Grievant drives a regular route which departs Chapmanville Middle School at 2:30 p.m. Ms. Gilman's vocational run departs the vocational school around 2:15 p.m., and arrives at Logan High School shortly thereafter. Bus traffic is congested at Logan High School, so that a bus operator cannot quickly depart Logan High School once he arrives. It is at least 12 miles from Logan High School to Chapmanville Middle School.

8. Grievant could not safely drive both Ms. Gilman's vocational run and his regular routewithin the scheduled times. Grievant could not have assumed Ms. Gilman's vocational duties and maintained his regular route, unless LBOE adjusted the bus schedules, or allowed Grievant to make his regular run late.

Discussion

The burden of proof is upon the grievant to prove the elements 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's argument relied upon the fact that a bus operator has separate contracts for his regular run and for his vocational run. Grievant also argued that because LBOE had on one occasion in the past posted a temporary vacancy's vocational run separate from the regular route, which had affected him, it should have done so in this case.

It is not possible to re-post the vacancy, as Ms. Gilman has returned to work. The relief Grievant requests is that he be awarded backpay. In order to be awarded backpay, however, Grievant must prove by a preponderance of the evidence that he would have been awarded the vocational run, had it been posted as a separate vacancy. Grievant candidly admitted he could not say he would have been awarded the vocational run, as he is well down the seniority list. Grievant has not demonstrated he was adversely affected, and the undersigned cannot award the relief requested. Zirkle/Teller v. Hancock County Bd. of Educ., Docket No. 96-15-289 (Feb. 13, 1997); See Shobe v. Latimer, 253 S.E.2d 54 (W. Va. 1979); Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Panrell/Marsh v. Monongalia County Bd. of Educ., Docket No. 94-30-586 (Mar. 24, 1995);

Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

Further, it is clear that Grievant could not have performed the requirements of the vocationalrun, and maintained his regular run, as he simply would not have had time to do so. Grievant did not give any indication that he would be willing to give up his regular run for the vocational run; rather, he suggested that LBOE could have adjusted its bus schedules to accommodate him, or it could have simply let him be late in making his regular run. A board of education is not required to make such accommodations. Blume v. Fayette County Bd. of Educ., Docket No. 95-10-560 (Apr. 29, 1996). "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996), Conclusion of Law Number 3. Walls v. Wyoming County Bd. of Educ., Docket No. 95-55-157 (Aug. 29, 1995). Accordingly, whether the posting was in error need not be addressed, as Grievant has not proven it affected him personally.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon the grievant to prove the elements 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. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

3. "Implicit in the provisions of W. Va. Code § 18A-4-8b governing the appointmentof school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. See Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (Apr. 21, 1995)." Teter v. Randolph County Bd. of Educ., Docket No. 95-42-535 (May 9, 1996), Conclusion of Law Number 3.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 29, 1998

Footnote: 1

As Grievant was not represented by an attorney, the issue of whether legal fees could be awarded is moot. Grievant presented no evidence that he had incurred any expenses.

Footnote: 2

The grievance was denied at Level I on October 31, 1997. Grievant appealed to Level II, and after a hearing, held on November 6, 1997, the grievance was denied on November 7, 1997. Respondent waived consideration at Level III on November 13, 1997, and Grievant appealed to Level IV on November 21, 1997. A Level IV hearing was held on January 12, 1998, and this matter became mature for decision upon receipt of the last of the parties' post-hearing written submissions on February 9, 1998.

Footnote: 3

Apparently, Ms. Gilman was on a medical leave of absence, and her position was initially filled by a substitute without posting. Once it became clear her leave would extend beyond thirty days, the position was posted as a temporary vacancy. See W. Va. Code § 18A-4-15(2).