BILLY CHAPMAN,

Grievant,

v. DOCKET NO. 97-40-560

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Billy Chapman filed this grievance against Respondent Putnam County Board of Education shortly after October 20, 1997, grieving Respondent's failure to select him for the posted position of long-term temporary bus operator, alleging a violation of W. Va. Code §§ 18A-4-8b and 18A-4-8g. Grievant requested as relief instatement into the position, and regular seniority as a bus operator from the date the position was filled. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant has been a regular teacher's aide for the Putnam County Board of Education ("PBOE") for two years. He was previously employed by PBOE as a substitute bus operator for two years.

2. On October 9, 1997, PBOE posted a long-term temporary bus operator vacancy, due to the regular bus operator being on leave of absence. The posting stated on its face that the vacancy was open only to substitute employees. Grievant applied for the posted position, but was not selected. The successful applicant was a substitute bus operator, who was selected on or about October 21, 1997.

3. At the time he applied for the posted position, and at the time the selection was made, Grievant held a Commercial Driver's License, and was certified in CPR and first aid, but was not certified by the State of West Virginia as a school bus operator. In order to be certified to operate a school bus he had to submit to and pass a physical examination and a psycho-motor skills

examination, and he had to complete eighteen hours of in-service training. Grievant made no effort to complete these requirements between the time of the posting and the time the position was filled.

4. During the 1996-97 school year, PBOE changed its practice, and no longer allows regular employees to bid on long-term temporary vacancies.

Discussion

The burden of proof is upon 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). The parties focused their arguments on whether Grievant was qualified for the position, and whether PBOE could limit applicants to substitute employees.

W. Va. Code § 18A-4-8b provides:

> 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, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
>
> Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy.

W. Va. Code § 18A-4-8 defines "Bus operator" as, "personnel employed to operate school buses and other school transportation vehicles as provided by the state board of education."

As Grievant acknowledged, this Grievance Board has already determined that an employee who has not completed the requirements to obtain certification as a bus operator, and is not certified, is not qualified for a bus operator position. Grievant could not legally operate a school bus, and there was no assurance that he could complete the requirements to obtain certification.

> 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:
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> "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 [W. Va. Code §§ 18A-4-8b and 18A-4-8], as well as the regulations, together, the ALJ in Yeager [v. Kanawha County Board of Education, Docket No. 20-88-050 (October 3, 1988)] 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-4-8b. 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 busoperator positions until that time."

Yeager, supra. Therefore, following Yeager, because [the successful applicant] 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.

Harless v. Boone County Bd. of Educ., Docket No. 96-03-186 (Sept. 26, 1996).

Grievant urged the undersigned to reject the reasoning in Harless, supra, and Yeager, supra, pointing to the recent holding of the Supreme Court of Appeals of West Virginia in Keatley v. Mercer County Board of Education, 200 W. Va. 487, 490 S.E.2d 306 (1997). Keatley, in Syllabus Point 3, held that a board of education was permitted to hire an employee who had completed all the requirements to receive his principal's certificate, but had not yet received that certificate. This case is obviously different from Keatley in a significant aspect. Grievant was not simply waiting to receive official certification. Grievant had not completed the requirements necessary to obtain certification, and there was no assurance that he would be able to do so.

This Grievance Board follows the principle of stare decisis, meaning that it follows the rulings of its own cases in deciding subsequent grievances. The undersigned has been presented with no reason to vary from the precedent set in Harless, supra, and Yeager, supra. Based upon the holdings of those cases, as set forth above, Grievant was not qualified for the posted position. Grievant knew he needed to do certain things in order to maintain his bus operator certification, but made a personal

decision that it was not worth the expense to do so. He offered no valid excuse for his failure to complete the requirements to keep his certification current, although he argued they were not difficult to complete.

This Grievance Board recently decided that PBOE cannot limit applicants for long-term temporary positions to substitute employees. Tucker v. Putnam County Board of Education, DocketNo. 97-40-576 (April 28, 1998). That case relied upon W. Va. Code § 18A-4-15(2), to find that regularly employed school service personnel are permitted to apply for and receive posted long-term temporary positions, and cannot be excluded from consideration. That case is dispositive of this issue in this case.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon 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. W. Va. Code § 18A-4-8b requires a county board of education to base its selection of the successful candidate for a service personnel position upon qualifications, seniority, and past performance evaluations.

3. Grievant was not qualified for the posted position, as he had not completed the requirements to be certified as a school bus operator, did not hold state certification to drive a school bus, and could not operate a school bus until he completed these requirements. Harless v. Boone County Bd. of Educ., Docket No. 96-03-186 (Sept. 26, 1996); Yeager v. Kanawha County Bd. of Educ., Docket No. 20-88-050 (Oct. 3, 1988).

4. Grievant failed to prove he should have been selected for the posted position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the CircuitCourt of Putnam 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: June 10, 1998

Footnote: 1

The grievance was denied at Level I in October 1997. Grievant appealed to Level II on November 11, 1997, and after a hearing was held on December 3, 1997, the grievance was denied at Level II on December 17, 1997. Grievant waived Level III, appealing to Level IV on December 19, 1997. A Level IV hearing was held on February 23, 1998, with Grievant represented by Kimberly A. Levy, Esquire, and Respondent represented by James W. Withrow, Esquire. This matter became mature for decision upon receipt of the last of the parties' post-hearing written submissions on March 11, 1998.