

PATRICIA HARVEY,

Grievant,

v. Docket No. 00-28-117

MINERAL COUNTY BOARD OF EDUCATION,

Respondent,

and

SANDRA KEPHART, Intervenor.

DECISION

Patricia Harvey ("Grievant") initiated this grievance on December 20, 1999, alleging she should have been selected for a paraprofessional position over the successful applicant, Sandra Kephart ("Intervenor"). The grievance was denied at level one on December 21, 1999. Upon appeal to level two, a hearing was held on March 15, 2000, followed by a written decision denying the grievance dated March 24, 2000. Level three consideration was bypassed, and Grievant appealed to level four on March 30, 2000. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on June 12, 2000. Grievant was represented by John E. Roush, counsel for the School Service Personnel Association; Respondent was represented by counsel, Kimberly S. Croyle; and Intervenor represented herself. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 17, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant began employment with Respondent Mineral County Board of Education ("MCBOE") as a substitute teacher's aide in November of 1996.
2. Grievant has been certified as a paraprofessional by the West Virginia Department of Education since August 7, 1998.

3. On September 22, 1999, MCBOE posted a notice of vacancy for a paraprofessional position at its Alternative Learning Center. The deadline for applications was October 1, 1999.
4. Both Grievant and Intervenor applied for the paraprofessional position within the posting period.
5. Intervenor had completed all educational requirements to become a paraprofessional by late August 1999.
6. Intervenor did not apply for paraprofessional certification from the West Virginia Board of Education ("State Board") until after the position at issue was posted. Intervenor testified that she submitted her application materials sometime in late September or early October 1999.
7. Once Intervenor submitted her application for certification, the State Board had questions regarding one of the courses she had taken, and initially refused to give her credit for the course, denying her certification.
8. After several communications with the State Board, her application was finally approved, and Intervenor's paraprofessional certification was issued on January 4, 2000.
9. Pursuant to the State Board's regulations regarding the licensure of paraprofessionals, Intervenor's certification became effective on October 3, 1999.
10. MCBOE did not fill the paraprofessional position until January 4, 2000, so that Intervenor could obtain her certification and be placed in the position.
11. Intervenor began her duties as a paraprofessional on January 10, 2000.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

W. Va. Code § 18A-4-8b provides that "[a] county board of education shall make decisions affecting promotion and filling of any service personnel positions . . . on the basis of seniority, qualifications, and evaluations of past service." The statute further defines "qualifications" as holding the classification title in the particular category of employment. In the instant case, neither Grievant

nor Intervenor had actually worked in the classification of paraprofessional. However, as with other service personnel classifications for which competency testing is required pursuant to W. Va. Code § 18A-4-8e, employees can become qualified as paraprofessionals by obtaining the required certification through the State Board, as provided by W. Va. Code § 18A-3-2a(3), which states:

A paraprofessional certificate may be issued to a person who has completed thirty-six semester hours of post-secondary education or its equivalent in subjects directly related to performance of the job, all approved by the state board, and can demonstrate the proficiencies to perform duties as required of a paraprofessional as defined by [§ 18A-4-8].

In addition, W. Va. Code § 18A-4-8b requires that regularly employed service personnel receive hiring preference over substitutes. Grievant contends that, although Intervenor was a regular employee entitled to preference over her, Intervenor was not minimally qualified for the position, because she did not hold a valid certification as a paraprofessional during the application period. Moreover, Grievant argues that MCBOE has violated the portion of W. Va. Code § 18A-4-8b which requires that “all vacancies shall be filled within twenty working days from the posting date notice,” because it clearly did not fill the position within twenty days, so that Intervenor could obtain her certification. Grievant was a qualified substitute with the required certification in hand during the posting period and twenty days thereafter, so she contends that she should have been selected over Intervenor.

MCBOE does not dispute that it failed to fill the position within twenty days as required by the statute. However, Respondent contends that, even if the position had been filled within the statutorily-required period, Intervenor would have been the proper selection. In support of its position, MCBOE cites the West Virginia Supreme Court of Appeals' opinion in Keatley v. Mercer County Bd. of Educ., 200 W. Va. 487, 490 S.E.2d 306 (1997). In Keatley, the Court held that it was appropriate for a board of education to fill an administrative position with an applicant who “has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results.” 200 W. Va. at 493. However, the Court also noted that:

Under our holding today an applicant can be in the process of starting or completing the requirements to obtain a Certificate during the interview stage. However, at the point of actually being hired the applicant must have completed all requirements for a Certificate.

Id., n. 11. Similarly, the Grievance Board has held that an individual who had completed the college courses required for a position was a proper selection for an aide position, even though the credits had not yet been recorded during the application period. Davis v. Doddridge County Bd. of Educ., Docket No. 99-09-125 (Aug. 9, 1999).

In the instant case, although Intervenor's certification was not actually issued until January 4, 2000, she had completed all of the necessary requirements for certification before September of 1999. Even though there was a question regarding one of the credits, Intervenor was ultimately awarded the certification based upon the courses she had completed before the position at issue was posted. This fact is further evidenced by the State Board's "backdating" of her certification to October 3, 1999, which was accomplished pursuant to the following portion of the regulations regarding paraprofessional licensure:

The effective date of the license . . . shall be the date of the applicant's eligibility provided the application is received by the licensing agency within three months after the date of eligibility. When the application is received by the licensing agency more than three months after the date of the applicant's eligibility, the effective date shall be three months prior to the date the application is received by the licensing agency[.]

126 C.S.R. 136 § 8.1 (Emphasis added). Accordingly, the State Board determined that Intervenor had completed all requirements for certification by October 3, 1999, which was well within the twenty-day period required by W. Va. Code § 18A-4-8b.

Pursuant to the holding set forth in Keatley, supra, the undersigned finds that Intervenor had completed all requirements for certification when she applied for the paraprofessional position and was merely awaiting the results. Therefore, she was the most senior, qualified regular employee, and she was appropriately selected to fill the position.

Grievant has argued that two prior Grievance Board decisions are controlling in this case. She has cited Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994), where it was determined that a board of education erred when it held a position open beyond the twenty-day statutory period in order to allow the successful applicant to take the required test to obtain an electrician's license. The Grievance Board held that the board was required to award the position to Grievant, who held the required license at the time he applied. However, as noted by Respondent, Cyphers is distinguishable from the instant case, because Intervenor had completed all requirements

for certification at the time she applied for the paraprofessional position, and the position was not “held open” to allow another applicant to complete testing or other requirements for the position.

Likewise, the instant case differs from the situation presented in Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993), where it was determined that a board of education was required to fill a bus operator's position within the twenty-day statutory period with the most senior applicant who actually held a certification card from the State Board. The grievant in that case was held not to have been entitled to placement in the position, even though she had fulfilled all requirements necessary for certification and was merely waiting for her certification card to be issued. Grievant contends that the instant situation is identical to that presented in Sage, entitling her to placement in the paraprofessional position. However, this Grievance Board has repeatedly recognized that bus operator positions are unique, in that bus operators are prohibited by law from operating a school bus without a valid certification card in hand. See Goldizen v. Grant County Bd. of Educ., Docket No. 00-12-122 (July 26, 2000); Chapman v. Putnam County Bd. of Educ., Docket No. 97-40-560 (June 10, 1998); 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). Accordingly, even if the certification requirements have been met and the card is “in the mail,” a bus operator cannot, by law, perform the duties required of the position and cannot be selected to fill vacancies. See Goldizen, *supra*; Harper v. Putnam County Bd. of Educ., Docket No. 99-40-021 (Apr. 15, 1999). This differs from the situation presented here, in which the reasoning set forth in Keatley, *supra*, is applicable.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. "A county board of education shall make decisions affecting promotion and filling of any service personnel positions . . . on the basis of seniority, qualifications, and evaluations of past

service." W. Va. Code § 18A-4-8b.

3. All vacancies must be filled within twenty working days from the date of posting. W. Va. Code § 18A-4-8b.

4. A board of education is permitted to fill a vacant position with an applicant who has completed the requirements for certification at the time of the interview or date of hiring and is waiting for the certification results. Keatley v. Mercer County Bd. of Educ., 200 W. Va. 487, 490 S.E.2d 306 (1997).

5. Grievant proved by a preponderance of the evidence that MCBOE failed to fill the paraprofessional position at issue within twenty days of the posting, as required by W. Va. Code § 18A-4-8b.

6. If the position at issue had been filled within the statutorily required period, Intervenor would have been the proper selection, because she had completed all of the requirements for certification within the twenty-day statutory period.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Mineral 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 7, 2000

DENISE M. SPATAFORE

Administrative Law Judge