

BEVERLY GOLDIZEN,

Grievant,

v.

Docket No. 00-12-122

GRANT COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Beverly Goldizen ("Grievant") alleges she should have been selected to fill a regular bus operator position over the successful applicant. This grievance was initiated at level one on March 14, 2000, and was denied on March 30, 2000. Due to some apparent confusion, Grievant appealed directly to level four on April 7, 2000, bypassing levels two and three. However, the parties agreed that this grievance could be considered at level four. A level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on June 5, 2000. Grievant was represented by counsel, John E. Roush of WVSSPA, and Respondent Grant County Board of Education ("GCBOE") was represented by counsel, Dennis V. DiBenedetto. This matter became mature for consideration on July 14, 2000, upon receipt of the parties' fact/law proposals.

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

Findings of Fact

1. Grievant has been employed by GCBOE as a substitute bus operator since 1997, and was certified by the West Virginia Board of Education ("State Board") as a bus operator during the 1997-1998 and 1998-1999 school years.
2. Joe Whetzel has been regularly employed by GCBOE as a custodian since January 15, 1998.
3. On July 19, 1999, GCBOE posted a vacancy for a regular bus operator .
4. Grievant, Mr. Whetzel, and several other applicants applied for the bus operator vacancy during the posting period.

5. School bus operators in West Virginia are not permitted to operate a school bus without a valid certification card from the State Board, issued on an annual basis. Drivers are required to pass physical, written and driving tests to be certified.
6. Grievant's 1998-1999 bus operator certification expired on June 30, 1999.
7. Due to GCBOE officials' failure to provide the appropriate documents to the State Board during the summer of 1999, none of the substitute or regular bus operators employed by GCBOE received official certification from the state until September 17, 1999.
8. None of the applicants for the posted bus operator vacancy held a valid certification card during the posting period.
9. Grievant had completed all requirements for renewal of her bus operator certification when the position at issue was posted.
10. Mr. Whetzel had completed all requirements for certification as a bus operator during the posting period for the vacant position.
11. Mr. Whetzel was approved by GCBOE for placement in the bus operator position on August 5, 1999, and began his duties on August 23, 1999.
12. Grievant bid upon and was the successful applicant for another regular bus operator's position, effective September 1, 1999. Grievant's seniority date as a regular employee with GCBOE has been September 1, 1999, since she began working in that position.
13. Both Grievant and Mr. Whetzel began performing their bus operator duties for the 2000-2001 school year without valid certification.
14. In late August of 1999, Grievant heard "rumors" that Mr. Whetzel had not been certified as a bus operator when he was hired for the vacant position at issue. Grievant questioned then-superintendent Harold Garber if Mr. Whetzel was certified, and he told Grievant that Mr. Whetzel was certified.
15. There was no transportation supervisor employed by GCBOE at the beginning of the 1999-2000 school year, so Grievant had no other authority to question at that time regarding Mr. Whetzel's certification.
16. At some point in January of 2000, another substitute bus operator told Grievant that Mr. Whetzel had not been certified when hired for his position. Grievant questioned the new superintendent, Marsha Carr-Lambert, regarding Mr. Whetzel's certification, who advised Grievant to

investigate the matter, because she did not have the information. Specifically, Ms. Carr-Lambert advised Grievant to talk to the president of the local School Service Personnel Association.

17. After talking with Ms. Carr-Lambert, Grievant went to the new transportation director, Mike VanMeter, who advised her that he would have to contact the State Board office to obtain certification information.

18. Grievant "checked back" with Mr. VanMeter on a few occasions between late January and early March, and he advised her that he was having difficulty contacting the individual he needed to speak with, Wayne Clutter, Executive Director of School Transportation and Facilities for the State Board.

19. Grievant ultimately requested Mr. Clutter's phone number from Mr. VanMeter and phoned him herself on March 10, 2000. Mr. Clutter advised Grievant on that day that Mr. Whetzel had not been certified until September 17, 1999.

20. Grievant filed this grievance on March 14, 2000.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. GCBOE contends that this grievance was not initiated within the time limits specified in W. Va. Code § 18-29-4(a)(1), which states:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

A timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally

notified of the decision being challenged. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 28, 1997). See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).

Grievant contends that she made an earnest effort to investigate the "rumors" that Mr. Whetzel was not certified when selected for the position at issue, and she did not "discover" the grievable event until four days prior to filing this claim. Initially, she was informed by the former superintendent that Mr. Whetzel was, in fact, certified. Later, she made several efforts to obtain the information from the new superintendent and from the transportation director, with no certain answers. It has been previously held by this Grievance Board that, during the time period when a grievant is attempting to obtain information regarding whether or not the factual basis of the grievance exists, the time for filing the grievance is tolled. This is especially true when, as in the instant case, board of education officials have caused the delay by not responding to the grievant's inquiries. See Stout/Southern v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); see also Thomaselli v. Hancock County Bd. of Educ., Docket No. 94-15-563 (Apr. 28, 1995). Accordingly, the undersigned finds that the grievable event did not occur until March 10, 2000, when Grievant was unequivocally notified by the State Board that Mr. Whetzel was not certified when he was hired for the bus operator vacancy. Her filing at level one on March 14, 2000, was, therefore, timely under the provisions of W. Va. Code § 18-29-4(a)(1). See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

As to the merits of this grievance, Grievant contends that, because Mr. Whetzel was not certified at the time he was hired and placed in the position at issue, he should not have been selected. She argues that, as the next most senior substitute employee in line for the position, she was entitled to receive it. It is well-settled that certification from the State Board is a required component of the qualifications of any person hired to fill a bus operator position. 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, 1998). Most recently, in a case involving a factual situation very similar to the one presented here, it was held that, even if a bus operator has fulfilled all of the requirements for certification and is merely waiting for a certification card that is "in the mail," he is not legally qualified to be selected for a bus operator position. Harper v. Putnam County Bd of Educ., Docket No. 99-40-021 (Apr. 15, 1999).

Quite clearly, pursuant to the decisions discussed above, Mr. Whetzel was not qualified for the bus operator vacancy, because he was not actually certified until September 17, 1999, well after he was hired and placed in the position. However, Grievant was also not certified by the State Board until September 17, 1999, so Respondent contends that she also was not entitled to placement in the position. Grievant counters by quoting the following language from the Grievance Board's decision in Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993):

A first-time bus operator may not man a school bus until he or she has the CDL licensure and especially the [State Board] certification card in hand. Currently certified bus operators . . . are permitted to operate their buses in a new school year by temporarily using their certification cards from the prior school year until the receive their new cards for the current year[.]

Accordingly, Grievant argues, as a previously certified bus operator, she was entitled to be considered qualified for the position at the beginning of the new school year, while Grievant was not, because he had never before been certified.

Unfortunately, the administrative law judge who authored the Sage decision merely made the above statement as a finding of fact, with no statement as to its authority. It is possible that this statement may have been found in some early version of the State Board's regulations regarding certification, but the undersigned has no way of knowing for sure. Moreover, Mr. Clutter, who is directly in charge of certification matters for the State Board, testified unequivocally that a board of education is not allowed to place bus operators behind the wheel without valid certification cards, whether or not they have been certified the previous year. Accordingly, the undersigned finds that neither Grievant nor Mr. Whetzel held valid certifications when the position was posted and filled, so neither was qualified for placement in the position. [\(See footnote 1\)](#) Grievant is entitled to no relief in this case.

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

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving 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 timeliness defense is an affirmative defense which the employer must establish by a preponderance of the evidence. Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. A grievance must be filed within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant. W. Va. Code § 18-29-4(a)(1).

4. Grievant initiated this grievance within fifteen days of being unequivocally notified that Mr. Whetzel was not certified as a bus operator at the time he was selected and placed in the position at issue. See Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Stout/Southern v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Thomaselli v. Hancock County Bd. of Educ., Docket No. 94-15-563 (Apr. 28, 1995).

5. A bus operator who does not hold a valid, current certification card from the State Board of Education is not qualified and cannot be hired for a vacant bus operator position, even if he has completed certification requirements and the card is "in the mail." Harper v. Putnam County Bd of Educ., Docket No. 99-40-021 (Apr. 15, 1999).

6. Neither Grievant nor the successful applicant held valid State certifications as bus operators at the time the position at issue was filled, so neither was entitled to placement in the position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Grant 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: July 26, 2000

DENISE M. SPATAFORE

Administrative Law Judge

[Footnote: 1](#)

It should also be noted that Grievant has already benefitted from GCBOE's illegal placement of all of its drivers in positions at the beginning of the 2000-2001 school year. Although Grievant had sought to be granted an earlier regular seniority date by virtue of winning this grievance, i.e. August 23, 1999, when Mr. Whetzel began his duties, she has in fact received a September 1, 1999, regular seniority date to which she was not entitled because of her lack of certification.