MAURICE CLEMMONS,

Grievant,

v. **Docket No. 04-23-097**

LOGAN COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Maurice Clemmons ("Grievant"), brought this grievance to challenge the actions of the respondent, the Logan County Board of Education ("BOE"), in awarding a posted bus run to Tracy Belcher (hereafter "Belcher"). (See footnote 1) Grievant claims that Belcher was not properly certified to operate a school bus when she was awarded the run. As relief, Grievant states "I want the position and any benefits I may have lost."

BOE failed to provide the underlying record. Counsel for BOE reported that the tape recording of the underlying hearing was defective. Upon concurrence of the parties, the grievance proceeded to Level IV. Grievant provided a copy of a handwritten document signed by the Transportation Supervisor, dated January 29, 2004, which states "[c]an't be resolved at this level[.]" This appears to be the Level I decision. Grievant also provided a copy of the Level II decision, dated February 18, 2004, denying the underlying grievance. (See footnote 2) The Level IV appeal was brought on for hearing on July 15, 2004. BOE was represented by Leslie Tyree, its general counsel, who, with the consent of Grievant, appeared by telephone. Grievant was represented by Donald Jarvis of the Amalgamated Transit Union. The grievance matured for decision at the conclusion of the Level IV hearing.

Upon review of the scanty record, including the proceedings at Level IV, the undersigned finds that the following pertinent facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Belcher was awarded a bus run by BOE on or about January 14, 2004. Grievant's Exhibit 1 at Level IV.

2 2. Grievant's uncontroverted testimony established that he was certified and working as a bus operator for BOE and wanted the position in question.

3 3. Grievant formed the belief that Belcher was not certified as a bus operator at the time she was awarded the run in question because he and other bus operators had noted her absence from in-service training sessions.

4 4. In response to discovery requests in this grievance, counsel for BOE produced what she described as “a copy of the last 'certification' for Ms. Belcher.” Grievant's Exhibit 4 at Level IV. This was a ”School Bus Operator Certification” for “Tracy Belcher” that had been issued by the West Virginia Board of Education for school year 2002-2003. Grievant's Exhibit 3 at Level IV.

5 5. On its face, the certification card for Belcher expired at the conclusion of the 2002-2003 school year.

Discussion

Upon the sketchy record developed herein, Grievant must prevail. No one disputed his assertion that he was certified and working as a bus operator at the time the bus run was awarded to Belcher in January 2004. The only evidence in the record regarding Belcher's certification shows, on its face, that it expired at the end of the 2002-2003 school year.

At Level IV, BOE's counsel attempted to argue that Belcher's certification must still be valid because BOE had not been informed otherwise. However, counsel was not sworn as a witness and declined to offer any admissible evidence to support this retreat from BOE's stated position that the certification card introduced by Grievant was the “last 'certification' for Ms. Belcher.” Grievant's Exhibit 4 at Level IV.

According to the Level II decision, executed by counsel for BOE, Belcher had been on “sick leave since August, 2003.” At Level IV, counsel for BOE asserted that Belcher had been on workers' compensation. As noted, counsel for BOE was not sworn as a witness and declined to present any evidence to support either assertion as to Belcher's status.

BOE failed to rebut Grievant's evidence that Belcher was not certified to operate a school bus at

the time she was awarded the contested run. BOE also failed to rebut Grievant's testimony that he should have been awarded the position. Therefore, the grievance must be granted.

Based upon the foregoing findings of fact, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

6 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *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).

7 2. Grievant must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

8 3. Pursuant to West Virginia Code section 18A-4-8(i)(16), a "'[b]us operator' means personnel employed to operated school buses and other school transportation vehicles as provided by the state board[.]"

9 4. The state board of education is charged with testing the competency of school bus operators. W. Va. Code § 18A-4-8e.

10 5. The West Virginia School Bus Transportation Policy and Procedures Manual expressly requires that "[a]ll school bus operators shall be certified by the State Department [of Education]." W. VA. CODE ST. R. § 126-92-15.1 (2004). Earlier versions of the policy contained this same requirement. *Lowe v. Hancock County Bd. of Educ*., Docket No. 03-15-101 (September 24, 2003).

11 6. "[B]us 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)" *Harvey v. Mineral County Bd. of Educ*., Docket No. 00-28-117 (Aug. 7, 2000).

12 7. "'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 that position. In those circumstances the employee no longer fits the definition of bus

operator contained in W. Va. Code § 18A-4-8 and therefore does not have the qualifications upon which the decision to fill positions is based pursuant to W. Va. Code § 18A-4-8b.'" *Harper v. Putnam County Bd. of Educ*., Docket No. 99-40-021 (April 15, 1999) (quoting *Yeager v. Kanawha County Bd. of Educ*., Docket No. 20-88 050 (Oct. 3, 1988)).

13 8. Through unrebutted evidence, Grievant met the burden of proving by a preponderance that the certification of the successful applicant, Belcher, had expired by the time the bus run was awarded to her in January 2004.

14 9. In addition, the certification card, which was not signed by Belcher, expressly stated that it was "NOT VALID UNLESS SIGNED IN INK." Due to the fact that, on its face, the certification had expired, this seeming defect need not be addressed further.

15 10. In light of the expiration of Belcher's certification, Belcher was no longer qualified to receive the position.

16 11. Based on BOE's failure to controvert or rebut Grievant's testimony regarding his certification and entitlement to the position, Grievant has proven by a preponderance of the evidence that the bus run in question should have been awarded to him.

Accordingly, this grievance is **GRANTED.** The Logan County Board of Education is **ORDERED** to award the contested bus route to Grievant, as of the date it was awarded to Tracy Belcher, and to provide Grievant with back pay and all benefits he would otherwise have received.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any 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 West Virginia Code section 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 30, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Although Ms. Belcher's first name sometimes appears as "Traci," the spelling found in the Level II decision has been used herein.

Footnote: 2

The parties agreed that the reference to "Tracy Baisden" in the Level II decision was intended to be "Tracy Belcher."