

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MATT SPICER,
Grievant,**

v.

DOCKET NO. 2013-1942-MonED

**MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Matt Spicer, filed a grievance against his employer, the Monongalia County Board of Education, on or about May 21, 2013. The statement of grievance reads:

Respondent hired an unqualified applicant to fill a Mechanic/Bus Operator position. Grievant was the most senior qualified applicant. Grievant alleges a violation of WVBOE Policy No. 4336 and W. Va. Code 18A-4-8b & 18A-4-8g.

As relief Grievant seeks “compensation for lost wages and benefits (personal leave, vacation, holiday pay, etc.) with interest.”

A hearing was held at level one on July 3, 2013, and a level one decision denying the grievance was issued on July 16, 2013. Grievant appealed to level two on July 18, 2013. A mediation session was held on October 28, 2013. Grievant appealed to level three on November 19, 2013. A level three hearing was held before the undersigned Administrative Law Judge, on April 28, 2014, at the Grievance Board’s Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on June 2,

2014, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued he should have been selected for a posted Mechanic/School Bus Operator vacancy because he was a Bus Operator at the time of the posting, and was fully-certified as a Bus Operator. No applicant held the multi-classification title in the posting, and none of the applicants had any seniority in the Mechanic classification. All applicants had passed the Mechanic state competency test. The successful applicant had the most seniority as a Bus Operator for Respondent, and the most overall seniority, but he was not a Bus Operator at the time of the posting, and was not certified to operate a school bus. He did not become fully certified as a Bus Operator until more than a month after he was placed in the position. Without proper certification as a Bus Operator, the successful applicant could not be placed in the posted position.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a Bus Operator since November 10, 2004, and was certified as a Bus Operator at the time the grievance was initiated.

2. On April 12, 2014, MBOE posted a vacancy for a 261-day Mechanic/School Bus Operator. The primary focus of the posting was to fill a Mechanic vacancy. The posting included the Bus Operator classification because Mechanics drive buses when

there are not enough substitute Bus Operators available to cover all bus routes, or in emergency situations. The posting stated that a CDL was required, and “must have or be able [to] complete WV school bus operator certification.”

3. Grievant applied for the position, as did Gerald Marshall and Dale Lewis.

4. None of the applicants had ever held the multi-classification title of Mechanic/Bus Operator.

5. None of the applicants had ever held the classification title of Mechanic, and none of the applicants had any seniority in that classification.

6. All three applicants had passed the state competency test for the Mechanic classification.

7. At the time of the posting, Mr. Lewis was employed by MBOE as a Welder/General Maintenance employee and a fill-in substitute Bus Operator. Mr. Lewis worked as a substitute Bus Operator when there was a shortage of substitute Bus Operators, and was properly certified as a Bus Operator. Mr. Lewis had previously been employed by MBOE as a Bus Operator for approximately three years.

8. At the time of the posting, Mr. Marshall was employed by MBOE as a Carpenter. Mr. Marshall had been employed by MBOE as a Bus Operator from February 1, 1988, until August 13, 2007. Mr. Marshall did not maintain his Bus Operator certification when he began working as a Carpenter, and was not certified as a Bus Operator at the time the position was posted. He did hold a CDL.

9. Mr. Marshall was placed in the posted position based on his overall seniority with MBOE, effective May 13, 2013. Mr. Marshall did not become certified to operate a

school bus until July 25, 2013, and Respondent did not require him to drive a school bus until after he was properly certified.

10. Grievant bid on a 261-day HVAC position and was placed in that position in June 2013, shortly after the end of the 2012-2013 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

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.

In this case, the vacancy at issue was a multiclassified position. “Multiclassification’ means a person employed to perform tasks that involve the combination of two or more class titles in this section [W. VA. CODE § 18A-4-8(i)].” W. VA. CODE § 18A-4-8(i)(62). A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title. W. VA. CODE § 18A-4-8g(l). None of the applicants held the multiclassification title in the posting, and none had ever held the Mechanic classification. Grievant, however, held the title of Bus Operator at the time of the posting.

“Although seniority rights for school personnel are well defined in W. VA. CODE § 18A-4-8b, which requires an employer to make decisions affecting the filling of service personnel positions ‘on the basis of seniority, qualifications and evaluation of past service,’ there is a lack of definition with regard to seniority rights of multiclassified personnel. The West Virginia Supreme Court of Appeals has attempted to clarify these rights by holding, ‘[m]ulticlassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction of force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles.’ *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005), citing *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003) and *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001).” *Miller v. Preston County*

Bd. of Educ., Docket No. 2011-0107-PreED (Aug. 9, 2011). “[M]ulticlassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question. . . . Multiclassification is not a separate title within W. VA. CODE § 18A-4-8, and each category within the multiclassification should be viewed separately. *Taylor-Hurley, supra; Cornell, supra.*” *Id.* Mr. Marshall had the most seniority as a Bus Operator of all the applicants, however, he did not hold the Bus Operator classification title at the time of the posting. The statute does not address whether, when no applicant holds the multi-classification title, must an applicant hold one of the classifications at the time of the posting in order for that applicant’s seniority in the classification title to be considered. This issue need not be decided, however, as it is clear that Mr. Marshall was not certified to drive a school bus at the time he was placed in the position.

WEST VIRGINIA 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." This Grievance Board determined many years ago 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. Mr. Marshall could not legally operate a school bus at the time he began working in the position, and there was no assurance that he could complete the requirements to obtain certification. *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).

"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 bus operator 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, supra.

This Grievance Board follows the principle of *stare decisis*, meaning that it follows the rulings of its own cases in deciding subsequent grievances. Respondent cites to the recent case of *Bowyer v. Fayette County Board of Education*, Docket Number 2012-1352-FayED (August 22, 2013), in support of the argument that Mr. Marshall could be placed in the position, even though he was not properly certified as a bus operator, "so long as certification is obtained prior to the employee beginning his or her job duties." *Bowyer*, however, did not involve a Bus Operator certification, and the person placed in the position was fully certified at the time he or she began working in the position. Generally, the cases addressing lack of certification have involved situations where all the requirements for certification have been met, but the certificate itself has not been issued yet, which was not the case here. While Respondent did not allow Mr. Marshall to drive a bus until he was properly certified to do so, the fact remains that he was not certified to operate a bus in May 2013 when he began working in the position, and could not fulfil all the requirements

of the position. Mr. Marshall was not qualified for the posted position at the time he began working in the position, and should not have been selected over Grievant for the position.

In June 2013, Grievant bid on and was placed in a 261-day HVAC position. Grievant wishes to stay in this position, and is seeking only back-pay, vacation and personal days, and seniority in the Mechanic classification. Accordingly, since Mr. Lewis did not grieve the placement of Mr. Marshall in the posted position, and Mr. Marshall is now fully-certified for the position, Mr. Marshall will not be removed from the Mechanic/Bus Operator position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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).

2. “Although seniority rights for school personnel are well defined in W. VA. CODE § 18A-4-8b, which requires an employer to make decisions affecting the filling of service personnel positions ‘on the basis of seniority, qualifications and evaluation of past service,’ there is a lack of definition with regard to seniority rights of multiclassified personnel. The West Virginia Supreme Court of Appeals has attempted to clarify these rights by holding, ‘[m]ulticlassified school service personnel: (1) do not belong to a separate

classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction of force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles.’ *Taylor v. Pocahontas County Bd. of Educ.*, Docket No. 05-38-213 (Oct. 14, 2005), citing *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003) and *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001).” *Miller v. Preston County Bd. of Educ.*, Docket No. 2011-0107-PreED (Aug. 9, 2011).

3. “[M]ulticlassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question. . . . Multiclassification is not a separate title within W. VA. CODE § 18A-4-8, and each category within the multiclassification should be viewed separately. *Taylor-Hurley, supra; Cornell, supra.*” *Miller v. Preston County Bd. of Educ.*, Docket No. 2011-0107-PreED (Aug. 9, 2011).

4. Mr. Marshall had the most seniority as a Bus Operator of all the applicants.

5. This Grievance Board determined many years ago 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. *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).

6. The successful applicant “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,” and there was no assurance that he could complete the requirements to obtain certification. *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).. *Harless v. Boone County Bd. of Educ.*, Docket No. 96-03-186 (Sept. 26, 1996).

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to pay Grievant back-pay from May 13, 2013, until the date he was placed in the HVAC position in June 2013, in the amount of the difference in pay as a Bus Operator and a 261-day Mechanic/Bus Operator, plus any extra days he would have worked as a 261-day employee, and to credit him with any additional vacation and personal days, and other benefits, to which he would have been entitled had he worked in the posted position for that period of time, and seniority for this period of time in the Mechanic classification.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 2, 2014

BRENDA L. GOULD
Administrative Law Judge