JAMES E. STOUT and .

EDWARD A. SOUTHERN, .

.

Grievants, .

.

v. . DOCKET NO. 93-17-081

.

HARRISON COUNTY BOARD .

OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by James E. Stout and Edward A. Southern (hereinafter Grievants), school service personnel employed as an electrician and plumber, respectively, by the Harrison County Board of Education (hereinafter HCBE or Respondent), alleging a violation of W. Va. Code §§18A-4-8b and 18A-4-8e, in regard to their not being selected by Respondent HCBE for a duly posted position as Director/Coordinator of Services (hereinafter DCS) in the HCBE Maintenance Department. Mr. Stout submitted his grievance to Level II on December 2, 1991. Mr. Southern submitted his grievance at Level II on December 3, 1991. (See footnote 1) The two grievances were consolidated and a Level II hearing in this matter was initiated on December 20, 1991 and continued until February 4, 1993. (See footnote 2)

Following denial of their grievance at Level II on February 22, 1993, Grievants appealed to Level IV on March 1, 1993, bypassing Level III as authorized under W. Va. Code §18-29-4(c). After this matter was set for hearing and continued, Grievants elected to waive a hearing and have the grievance decided on the basis of the record developed below. Upon receipt of written submissions from the parties, this case became mature for decision on July 13, 1993. (See footnote 3)

DISCUSSION

HCBE contends that this grievance is barred from consideration at Level IV because it was not initiated in a timely manner. Thus, in order to proceed to the merits in this grievance, it must first be determined if the instant grievance was properly submitted under the time limits established by W. Va. Code §18-29-4. That statute provides, in pertinent part:

> 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 ..., the grievant or the designated representative shall schedulea conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought. W. Va. Code §18-29-4(a)(1).

Both Grievants testified that they received no formal notification that they had not been selected for the DCS position for which they had applied. (See footnote 4) Although they had heard rumors that someone else had been selected, they were not aware of the selectee's identity until the individual selected, Mr. Ammons, reported to work. (See footnote 5) Level II Hearing Transcript at 19-21. [Hereinafter cited as "T at ." Exhibits from Level II will be cited as "R Ex " for Respondent's Exhibit and "E Ex " for Evaluator's Exhibit.] It was established through the testimony of Mr. Robert Skidmore, Administrative Liaison for HCBE, that Mr. Ammons first reported to work on November 7, 1993. T at 67. Because Mr. Ammons was placed in the chain of supervision over Grievants as of the time he reported to work, it is apparent that the existence of grounds for a grievance became known to the Grievants, within the meaning of §18-29-4, as of November 7,1991. (See footnote 6) Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992). See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990).

On November 13, 1991, Ms. Sharon Douglas, President of the Harrison County School Service Personnel Association, wrote a memorandum to HCBE's Superintendent, Mr. Robert E. Kittle, in behalf of Grievant Stout, addressing this matter in the following pertinent details:

> Mr. James Stout was a recent applicant for the position of Coordinator assigned to the Maintenance Department. Since Mr. Stout was the most seniored applicant he is, therefore, requesting in writing the reasons why he was not awarded the position (18A-4-8b, copy attached). Mr. Stout has requested this information from Mr. Stemple on two (2) previous occasions, once on October 25, 1991 and again on November 5, 1991. As of this date, there has been no reply. Therefore, Mr. Stout has requested my assistance in obtaining same. (E Ex 1.)

The formal grievance forms submitted by Grievants Stout and Southern on December 2, 1991, and December 3, 1991, respectively, indicate "never issued" in regard to a decision at Level I. E Ex 1. Grievants' immediate supervisor at the time this grievance arose was Mr. Loren Flanigan. T at 19, 35, 71. There was testimony from Ms. Douglas that Grievants were unable to submit their grievance to Mr. Flanigan because he was off sick at the time the grievance arose. This fact was corroborated by Mr. Skidmore, although he was uncertain as to the exact dates Mr. Flanigan wasoff due to illness. (See footnote 7) T at 71. Mr. Skidmore was also somewhat uncertain about the procedure to be followed when the first level supervisor was not available, although he indicated that he would find it acceptable to go to the second level supervisor at that point. T at 71-72.

Mr. Robert Stemple, Grievants' second level supervisor, testified at the Level II hearing without addressing the facts and circumstances surrounding the question of whether Grievants submitted their grievance in a timely fashion. Thus, a preponderance of the evidence supports Grievants' contention that they attempted to discuss this issue with Mr. Stemple. More significantly, the record reflects that Superintendent Kittle never responded to Ms. Douglas' November 13, 1991 inquiry regarding why Grievant Stout was not selected for the position at issue. This failure to respond to an inquiry specifically authorized by W. Va. Code §18A-4-8b (See footnote 8) was provided as justification for Grievants' delay until December 2 and 3, 1991, to formally submit their grievances on the required forms.

The West Virginia Supreme Court of Appeals noted in Duruttya v. Board of Education (See footnote 9) that the education grievance procedure is "intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level." Id. at 42. The Duruttya court rejected a school board's defense of untimely filing based upon a finding of "substantial compliance" with the grievance procedure time limits set forth in W. Va. Code §18-29-1, et seq. Id. at 43. Similarly, our Supreme Court of Appeals stated in Spahr v. Preston County Board of Education: (See footnote 10) "We do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer; therefore the process should remain relatively simple." Id. at 743.

Consistent with Duruttya and Spahr, Grievants here substantially complied with W. Va. Code §18-

29-4(a)(1) through Ms. Douglas' correspondence to Superintendent Kittle, which was submitted within 15 days of the date on which the "event" (in this case, selection by HCBE of an individual not currently employed in a school service personnel position) became known to the Grievants. Given the failure of HCBE's Superintendent Kittle to respond to this correspondence, as well as the absence of a clear policy on how to process grievances in the absence of the immediate supervisor, HCBE is now precluded from attempting to rely upon thetechnical letter of the grievance procedure to prevent this matter from being addressed on its merits. See Independent Fire Co. v. Human Rights Comm'n, 376 S.E.2d 612 (W. Va. 1988); Moore v. Mason County Bd. of Educ., Docket No. 26-88-210 (Mar. 1, 1989). (See footnote 11) Moreover, consistent with Spahr, Ms. Douglas' correspondence to Superintendent Kittle effectively tolled the time limits for filing a grievance until the inquiry was answered. See Spahr, supra, at 740, n. 2. By waiting from November 13 to December 2 or 3 for a response that was never forthcoming does not constitute such unreasonable delay so as to allow the Respondent to invoke laches as a defense. (See footnote 12) Moreover, Respondent cannot invoke the equitable doctrine of laches where it fails to respond to Grievants' request for information as required by law.

HCBE also contends that the instant grievance is moot because the position to which Grievants are seeking instatement was abolished by Respondent in January 1993. R Ex 6. This argument is valid only to the extent that the undersigned lacks authority to grant relief to Grievants beyond the date the position was effectively abolished. (See footnote 13) However, if Grievants were to prevailon the merits of their grievance, the undersigned could award other appropriate and meaningful relief, such as classification seniority under W. Va. Code §18A-4-8g, in accordance with W. Va. Code §18-29-5(b). Thus, notwithstanding that HCBE abolished the position at issue since this grievance arose, there remains a meaningful controversy regarding Grievants' entitlement to the position from October 1991 to the date it was abolished in 1993. Because Grievants are seeking promotion to a different classification of employment as defined under W. Va. Code §18A-4-8, rather than a lateral assignment from one position to another in the same classification, this case is distinguished from Harrison v. Cabell County Board of Education. (See footnote 14)

Having addressed Respondent's procedural defenses, the merits of the instant grievance will now be addressed. HCBE contends that Grievants effectively disqualified themselves from competing for the posted position when they attached a condition to their bids. HCBE's posting of the DCS position

specifically stated the "employment term" for this position as 240 days. R Ex 1. HCBE alleges that both Grievants conditioned their applications for the DCS position on revising the employment term to a 261 day contract. Grievants respond by alleging that HCBE simply "assumed" that they were unwilling to accept a pay cut in order to accept a promotion. Accordingly, it is necessary to examine the available evidence on this issue in some detail.

When applying for this vacancy, Grievant Stout included the following note on the face of his Service Personnel Bid Sheet: "Would like to retain 261 day contract which I have always had." R Ex 2. Similarly, Grievant Southern noted on the face of his bid sheet: "Keep 261 days" with a further note as follows: "I would like to bid this job (SP-91-007) with the same understanding that Jr. Baker and Merv Baker received. The fact that they kept their original contract of 261 and their job classification." R Ex 2.

Both Grievants supplemented their bid sheets with nearly identical letters dated October 15, 1991, which stated the following:

> I would like to be considered for the Coordinator position currently posted in the Maintenance Department and retain my 261 day contract.
>
> Several employees in the Maintenance Department have been up-graded in recent years and retained their 261 day contract. Some examples of this are:
>
> Marvin Baker went from Carpenter/Foreman to Coordinator
>
> Junior Baker went from Carpenter/Foreman to Coordinator
>
> Bill Sayers from Truck Driver to Foreman
>
> Richard K. Stewart from Roofer/Welder to Foreman
>
> Larry Baker from Carpenter II to Carpenter Foreman
>
> John Gorski from Painter to Painter Foreman
>
> All of the Foreman's positions were posted as 240 day contracts. Due to the fact that the above listed maintenance employees retained their 261 day contracts I feel that my request is justified. (R Ex 2)

Mr. Robert Stemple, HCBE's Assistant Superintendent of Schools, testified that he, along with Mr. Loren Flanigan and Mr. Victor Gabriel, comprised a three-person committee appointed bySuperintendent Kittle to interview candidates for the DCS position. T at 74. From 50 applications submitted for the position, they interviewed 14 applicants, including the Grievants. T at 75. Grievants were the only internal applicants from HCBE's maintenance employees and were the only internal applicants interviewed.

Mr. Stemple testified that, at the conclusion of their joint interview, the committee asked Mr. Stout and Mr. Southern if they were interested in the job if it was a 240-day job, and that both individuals indicated they were not interested in the job if it was going to be for 240 days. T at 77-78. Mr. Stemple recalled that Grievants were clear that they would only accept the job if it was for 261 days. T at 78-79.

Following completion of the interviews, the committee submitted a written recommendation to Superintendent Kittle. T at 79-80. In that report, the members stated that "[t]he two maintenance employees are 261-day contracted employees, and both mentioned, following the interview, they are not interested in the job if it is to be a 240-day contract. (See footnote 15) Our response was that the job will be a 240-day contract." R Ex 3.

Additionally, each of the Grievants submitted virtually identical documents in January 1992, with the title "Amendment to Grievance" stating as follows:

> Based on the violations which were cited in the original grievance dated December 2, [3 in Grievant Southern's amendment] 1991, Mr. Stout [Southern] is requesting instatement to the position of Director/Coordinator in the Maintenance Department, along with seniority and back wages (retroactive to the filling of the position) based on 261 day employment term.

Mr. Stout was questioned by his representative (Mr. Roush) as to his intentions in regard to a 261-day contract versus a 240-day contract. That portion of the Level II transcript reads as follows:

> Q. On your application did you specify that you wanted to keep your two hundred and sixty-one (261) day contract?
>
> A. I wrote up in the top corner of it "would like to retain two hundred and sixty-one day."

Q. In other words, you didn't condition the bid that you wouldn't accept it in any other form, though, did you?

A. No, other than writing it on the paper and when - - -well, go ahead and I'll explain later on.

Mr. ROUSH: Okay. Well, go ahead with what you were saying.

THE WITNESS: Okay. When we came down for the interview with Mr. Stemple and Mr. Flanigan, Mr. Southern and myself came down, Mr. Stemple, at that time, told me I would be losing money by going down to a two hundred and forty (240) day contract. I said, well, I don't want to actually lose money. I mean there has been some cases of people possibly being transferred into different positions and still retaining the existing contract that they was in.

Mr. ROUSH: Did you indicate to him that you were not interested in the position at two hundred and forty days?

A. Not if I had to take a twenty-one (21) day cut. I said, if I'm going to lose money, I really don't want to take it and lose money.

Q. Were you ever offered the position at the two hundred and forty (240) day contract?

A. No, sir, I was never - - - they never came out and said, well you can have it at two hundred and forty (240) days.

Q. Okay. At the end of the interview, did you indicate your continued interest in the position?

A. Yes, sir, I did. T at 17-18.

Although Mr. Southern also testified, he was not questioned regarding this issue. T at 54-63.

Grievants have the burden of proving each pertinent element of the allegations supporting their grievance by a preponderance of the evidence. Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988). Looking solely at the bid sheets and accompanying correspondence submitted by Grievants, the language employed regarding a 261-day contract created at least an ambiguity as to whether Grievants were conditioning their bid for the DCS position on Respondent's changing the employment term from 240 days to 261 days. Thus, it was appropriate, if not necessary, for the committee which interviewed Grievants to explore this issue.

Mr. Stemple's testimony regarding the committee's inquiry on this issue was clear and unequivocal: Grievants were interested solely in a 261-day contract term. T at 77-79, 86. Moreover, his testimony was fully consistent with the written report submitted by the committee to Superintendent Kittle on October 18, 1991, well before this grievance arose. R Ex 3. On the other hand, GrievantStout's testimony tended to corroborate Mr. Stemple's testimony more than it advanced Grievants' contention that they were merely stating a preference, not establishing a condition on their bids. In particular, Grievant Stout's statement that he responded to the interviewing committee's questions on the issue, "I said, if I'm going to lose money, I really don't want to take it and lose money," provided a reasonable basis for Respondent to conclude that Grievants were applying for the job only if it was available on a 261-day contract basis. (See footnote 16) T at 18. That Grievants' were insistent upon obtaining the position on their terms is further corroborated by their "amendments" to the instant grievance in January 1992 wherein they specified that they were seeking instatement to the DCS position "based on a 261 day employment term." (See footnote 17) E Ex 1.

Accordingly, the evidence of record supports a finding that Grievants' written and oral statements reasonably led HCBE to conclude that Grievants were conditioning their application on HCBE's revising the term of employment to 261 days. Since HCBE ultimately filled the position on a 240-day basis, the undersigned finds that Grievants effectively rescinded their application for the positions by conditioning their bids on a 261-day employmentterm, and are now estopped from arguing that one of them was better qualified than the selectee. (See footnote 18) See Nutter v. Harrison County Bd. of Educ., Docket No. 91-17-081 (Dec. 26, 1991). Moreover, since the Grievants here rendered

themselves ineligible for the position by conditioning their application, they are no longer in a position to show damages from HCBE's actions in filling the position. Thus, they do not have standing to contest HCBE's award of the position to another individual. See Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant James E. Stout is an Electrician II who has been employed in HCBE's Maintenance Department for more than twenty-five years. T at 14.

2. Grievant Edward A. Southern has been employed by HCBE since 1980 and has progressed from his initial classification, General Maintenance, to Plumber I, later to Plumber II and, ultimately, to his current position as a Plumber Foreman. T at 54. 3. On October 15, 1991, Grievants submitted bids for a dulyposted position of Director/Coordinator of Services (DCS) in HCBE's Maintenance Department. R Ex 2.

4. The DCS position was posted and filled by HCBE as a 240-day term of employment. R Ex 1; T at 78.

5. Grievants' bids contained qualifying notes and correspondence indicating that they wanted to retain their current 261-day term of employment. R Ex 2.

6. HCBE's Superintendent of Schools, Mr. Robert E. Kittle, appointed a three-member committee to interview applicants for the DCS position. T at 73. That committee interviewed 14 applicants, including Grievants, who were jointly interviewed as the only internal applicants. T at 75.

7. During the course of their interview, Grievants responded to questions from the committee regarding their preferred term of employment which indicated that they were not interested in the position, unless the employment term was modified to 261 days so that Grievants would not lose money. R Ex 3; E Ex 1; T at 17-18, 77-79, 86.

8. Consistent with the committee's recommendation, HCBE selected Mr. Joseph Ammons to fill the DCS position on October 22, 1991. Mr. Ammons first reported to work on November 7, 1991. T at 67.

9. Although Grievants had heard rumors that HCBE had selected someone to fill the DCS position as early as October 22, 1991, they were not aware of the selectee's identity or qualifications untilNovember 7 when Mr. Ammons reported to work as the new DCS. T at 19-21.

10. At the time Mr. Ammons reported to work, Grievants' immediate supervisor was absent from work due to illness. T at 71.

11. On November 13, 1991, Ms. Sharon Douglas wrote to HCBE Superintendent Kittle in behalf of Grievant Stout, citing W. Va. Code §18A-4-8b and requesting an explanation why the most senior school service employee that applied for the DCS position was not selected. E Ex 1.

12. Having received no response to Ms. Douglas' correspondence, Grievant Stout submitted a grievance at Level II on December 2, 1991. Grievant Southern submitted a substantially identical grievance on December 3, 1991.

CONCLUSIONS OF LAW

1. Under the "discovery provision" of W. Va. Code §18-29-4(a)(1), "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance." Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739, 742 (W. Va. 1990); Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481/482 (Aug. 19, 1992).

2. Where Grievants applied for a DCS position in Maintenance Department and were not formally notified of their nonselection for the position, Grievants did not become aware of the facts giving rise to their grievance until the individual selected for the position reported to work in their work area.

3. Correspondence from Grievants' representative to HCBE's School Superintendent requesting HCBE's reasons, in accordance with W. Va. Code §18A-4-8b, for not awarding the DCS position to the most senior school service employee applicant effectively tolled the time limits for filing a grievance under W. Va. Code §18-29-4(a)(1). See Spahr, supra, at 740. Accordingly, where no response to said inquiry was forthcoming, Grievants' delay until December 2 and 3, 1991, to submit their grievances was not so unreasonable as to allow HCBE to prevail on the issue of timeliness. See Independent Fire Co. v. Human Rights Comm'n, 376 S.E.2d 612 (W. Va. 1988); Moore v. Mason County Bd. of Educ., Docket No. 26-88-210 (Mar. 1, 1989).

4. The fact that HCBE subsequently abolished the DCS position in its Maintenance Department in January 1993, or thereabouts, does not render the instant grievance moot where substantial question

as to Grievants' entitlement to position and any benefits that might arise therefrom remains a substantial question. See Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1986).

5. Grievants have the burden of proving each essential element of a grievance of this nature by a preponderance of the evidence. Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988).

6. Where Grievants indicated to committee interviewing them for vacant position that they would not accept the position unless the contract term was revised from 240 days to 261 days, Grievants' conduct reasonably led the employer to believe that Grievants' bidswere conditioned on a 261-day employment term. Since HCBE ultimately filled the position on a 240-day basis, Grievants were not proper "applicants" for the position at issue in accordance with W. Va. Code §18A-4-8b. See Nutter v. Harrison County Bd. of Educ., Docket No. 91-17-081 (Dec. 26, 1991).

7. Where Grievants' actions are determined to have rendered them ineligible for employment, they do not have standing to contest a violation of W. Va. Code §18A-4-8b in regard to the selection of another individual to fill a school service personnel position. See Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

Accordingly, this Grievance is hereby **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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.

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LEWIS G. BREWER

Administrative Law Judge

Dated: April 12, 1994

Footnote: 1 The timeliness of these grievances is a combined factual and legal issue which will be addressed infra.

Footnote: 2Although the December 20th hearing was recessed to allow Grievants to amend their grievance, it is not clear from the record what transpired to delay the hearing at Level II more than one year. However, it is clear that both Grievants agreed to proceed with representation by a single counsel in pursuit of their grievances, notwithstanding that both Grievants were seeking the same position.

Footnote: 3As a result of employee turnover, this grievance was administratively transferred to the undersigned for decision on December 21, 1993.

Footnote: 4That HCBE provided no formal notification to Grievants of their nonselection for the Director/Coordinator of Services position for which they duly applied is uncontroverted. It is not clear from the record if HCBE has a standard procedure for notifying unsuccessful applicants for vacant positions. However, such a procedure would be useful in avoiding ambiguity as to when an employee was on notice that a grievable event had occurred.

Footnote: 5Based upon these rumors, Grievant Stout had conferred with Ms. Sharon Douglas, President of the School Service Personnel Association in Harrison County, as early as October 22, 1991, in regard to the possibility of filing a grievance.

Footnote: 6Mr. Ammons was officially selected for the position on October 22, 1991. However, the available evidence indicates that Grievants were not aware of the identity of the selectee, and thereby the existence of the grounds for their grievance, until Mr. Ammons' arrival in November.

Footnote: 7Although Ms. Douglas testified that she "believed" Mr. Flanigan was off work due to illness from October 22 through November 13, 1991, there was no foundation for this testimony which would permit the undersigned to make a factual finding as to the exact dates of his absence.

Footnote: 8"If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies." W. Va. Code §18A-4-8b ¶2.

Footnote: 9382 S.E.2d 40 (W. Va. 1989).

Footnote: 10391 S.E.2d 739 (W. Va. 1990).

Footnote: 11Inasmuch as Grievants provided an explanation for their delay in filing their formal grievance showing reasonable diligence in their efforts to perfect their grievance, Poole v. Nicholas County Bd. of Educ., Docket No. 32-88-162 (Dec. 6, 1988), and other cases cited by Respondent dealing with the doctrine of laches, are factually distinguished.

Footnote: 12See n. 11, supra.

Footnote: 13Grievants contention that, had one of them been selected for the DCS position rather than Mr. Ammons, neither of them would have left the position as Mr. Ammons did and, therefore, it wouldnot have been abolished by HCBE, is totally speculative. The record supports a finding that HCBE abolished the DCS position in its Maintenance Department

in the due course of business.

Footnote: 14351 S.E.2d 604 (W. Va. 1986).

Footnote: 15The "minimum qualifications" for the position as posted listed a requirement of "[s]upervision skills with five years experience in supervision or superintendency of all construction trades or equivalent." R Ex 1. Mr. Stemple testified that the Grievants did not appear to meet this requirement but the selection committee elected to interview them anyway as they felt Grievants were "good candidates." T at 98, 101. Apparently the committee elected not to address the question of whether Grievants met the minimum qualifications for the position, based upon Grievants' responses to the committee's questions regarding willingness to accept a 240-day contract.

Footnote: 16Given that Grievant Stout's testimony did not further Grievants' cause, it is telling that Grievant Southern was not questioned on this aspect of Grievants' case.

Footnote: 17Although these documents were not generated until after HCBE had made its determination that Grievants were disqualified, they are nonetheless corroborative of Mr. Stemple's testimony as to the Grievants' responses during their interview.

Footnote: 18Inasmuch as Grievants were no longer "applicants" for the position within the meaning of W. Va. Code §18A-4-8b, it is not necessary to address other issues raised by this grievance, including whether Grievants were qualified for the vacancy, whether HCBE was required under W. Va. Code §18A-48e to administer a competency test to Grievants, and whether Grievants were entitled under W. Va. Code §18A-4-8e to a day of inservice training to prepare for such test.