F. DENNIS WEAVER, .

.

Grievant, .

.

v. . Docket No. 94-26-128

.

MASON COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by F. Dennis Weaver (Grievant) alleging violations of W. Va. Code §§ 18A-4-8b and 18A-4-8e in regard to his not being selected by Respondent Mason County Board of Education (MCBE) for a General Maintenance/Electronic Technician position. Grievant initially submitted his grievance at Level I on November 15, 1993. After his grievance was denied, Grievant appealed to Level II where, after several continuances, a hearing was conducted on March 16, 1994. Following an adverse decision at Level II on March 22, 1994, Grievant appealed to Level III where his grievance was waived by MCBE on April 5, 1994. Following a timely appeal to Level IV and a hearing being set for June 7, 1994, the parties mutually agreed to submission of this matter on the record developed below. Upon timely receipt of proposed findings of fact and conclusions of law from the parties, this matter became mature for decision on August 3, 1994.

DISCUSSION

In grievances that are not disciplinary in nature, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). Consistent with this burden of proof, the following pertinent facts

necessary to resolution of this grievance have been determined according to the testimony and exhibits admitted into the record at Level II:

FINDINGS OF FACT

1. Grievant is currently employed by MCBE as a Custodian III, assigned to Leon Elementary School.

2. Grievant was previously employed by MCBE in a multi-classified position as described in W. Va. Code § 18A-4-8 and held the classification titles of Carpenter II, Electrician I, Plumber I and Mason.

3. Grievant was laid off from his multi-classified maintenance position with MCBE in June of 1986 as the result of a reduction in force, shortly thereafter obtaining employment with MCBE as a Custodian.

4. On July 29, 1993, MCBE posted a vacancy in its Maintenance Department for a multi-classified position of "General Maintenance/ Carpenter II/Electrician II/Security Technician." G Ex 1.

5. The position described in Finding of Fact Number 4 was again posted by MCBE on August 10, 1993, soliciting applicants fora multi-classified Maintenance Department vacancy for a "General Maintenance/Carpenter II/Electrician II/Electronic Technician." G Ex 2.

6. The position posting described in Finding of Fact Number 4 was re-posted as described in Finding of Fact Number 5 after it was determined that W. Va. Code § 18A-4-8 contains no provision for a "Security Technician" class title.

7. On October 6, 1993, the position described in Findings of Fact Numbered 4 and 5 was again posted by MCBE, this time seeking applicants for a multi-classified position requiring "General Maintenance/Electronic Technician" classification categories of employment. G Ex 3.

8. The position posting described in Finding of Fact Number 5 was re-posted as described in Finding of Fact Number 7 when no applicants passed the required competency tests.

9. On September 18, 1993, following the second posting described in Finding of Fact Number 5 and on October 23, 1993, following the third posting described in Finding of Fact Number 7, Grievant was administered the state competency test for Electronic Technician and on each occasion failed to obtain the minimum passing score required by the State Department of Education.

10. The successful applicant for the position described in Finding of Fact Number 7 was Randall

Wright. Mr. Wright was not previously employed by MCBE and was not required to take or pass the state competency test for Electronic Technician.

11. MCBE did not require Mr. Wright to take the competency test for Electronic Technician because of its interpretation of "Guidelines for Administering School Service Personnel Tests" from the West Virginia Department of Education and Mr. Wright's degrees of Bachelor of Science and Associate of Science in Electrical Engineering Technology from the West Virginia Institute of Technology.

12. The successful applicant, Mr. Wright, took the competency tests for General Maintenance and Carpenter on September 18, 1993, passing the former and failing the latter.

In addition to the foregoing Findings of Fact, the following portions of W. Va. Code § 18A-4-8b are pertinent to this grievance:

> 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 [§ 18A-4-8], 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. 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. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

* * *

Also applicable here is W. Va. Code § 18A-4-8e, entitled "competency testing for service personnel," which provides:

> The state board of education shall develop and cause to be made available competency tests for all of the classification titles defined in section eight [§ 18A-4-8] and listed in section eight-a [§ 18A-4-8a] of this article for service personnel. Each classification title defined and listed shall be considered a separate classification category of employment for service personnel and shall have a separate competency test, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment and shall have a single competency test. The cafeteria manager class title shall be included in the same classification category as cooks and shall have the same competency test. The executive secretary class title shall be included in the same classification category as secretaries and shall have the same competency test. The classification titles of chief mechanic, mechanic and assistant mechanic shall be included in one classification title and shall have the same competency test.
>
> The purpose of these tests shall be to provide county boards of education with a uniform means of determining whether school service personnel employees who do not hold a classification title in a particular category of employment can meet the definition of the classification title in another category of employment as defined in section eight of this article. Competency tests shall not be used to evaluate employees who hold the classification title in the category of their employment.
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> The competency test shall consist of an objective written and/or performance test: Provided, That applicants shall have the opportunity of taking the written test orally if requested. Oral tests shall be recorded mechanically and kept on file. Persons administering the oral test shall not know the applicant personally. The performance tests for all classifications and categories other than Bus Operator shall be administered by a vocational school which serves the county board of education. A standard passing score shall be established by the state department of education for each test andshall be used by county boards of education. The subject matter of each competency test shall be commensurate with the requirements of the definitions of the classification titles as provided in section eight of this article. The subject matter of each competency test shall be designed in such a manner that achieving a passing grade will not require knowledge and skill in excess of the requirements of the definitions of the classification titles. Achieving a passing score shall conclusively

demonstrate the qualification of an applicant for a classification title. Once an employee passes the competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [§ 18A-4-8b] of this article and shall not be required to take the competency test again.

An applicant who fails to achieve a passing score shall be given other opportunities to pass the competency test when making application for another vacancy within the classification category.

Competency tests shall be administered to applicants in a uniform manner under uniform testing conditions. County boards of education shall be responsible for scheduling competency tests and shall not utilize a competency test other than the test authorized by this section.

When scheduling of the competency test conflicts with the work schedule of a school employee who has applied for a vacancy, said employee must be excused from work to take said competency test without loss of pay.

A minimum of one day of appropriate inservice training shall be provided employees to assist them in preparing to take the competency tests.

Competency tests shall be utilized to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee.

Notwithstanding any provisions in this code to the contrary, once an employee holds or has held a classification title in a category of employment, that employee shall be deemed as qualified for said classification title even though that employee no longer holds that classification.

The requirements of this section shall not be construed to alter the definitions of class titles asprovided in section eight of this article nor the procedure and requirements of section eight-b of this article.

The testing procedures of this section shall be implemented effective the first day

of July, one thousand nine hundred ninety-one.

In regards to those matters which are personal to Grievant, no violation of law has been shown. MCBE's decision to rescind the initial posting of July 29, 1993 was proper given that there is no "Security Technician" category of employment in W. Va. Code § 18A-4-8. Similarly, when no applicants met the requirements of the second posting of August 10, 1993, MCBE appropriately issued another posting on October 6, 1993. A preponderance of the evidence indicates that, from the beginning, the focus of the position at issue was upon maintenance and repair of electronic equipment installed for various security purposes. Accordingly, MCBE did not abuse its discretion by deleting the Carpenter and Electrician categories of employment from the multi-classed position it sought to fill. See Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

Likewise, Grievant was properly afforded two opportunities to test for the Electronic Technician portion of the multi-classed position in compliance with W. Va. Code § 18A-4-8e. Since Grievant failed to pass the test on both occasions, he does not hold one of the required classifications for the position in question. Thus, Grievant was not qualified for the position and MCBE was not obligated to extend hiring preference to Grievant under W. Va. Code § 18A-4-8b(1).

In order to pursue a grievance under W. Va. Code § 18-29-1, et seq., the grievance procedure for education employees, an employee must be "adversely affected" by the employment decision being challenged. Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). See W. Va. Code § 18-29-2(a); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb 28, 1990). Since Grievant is not qualified for the position in question, he does not have standing to challenge MCBE's selection of Mr. Wright. Thus, it is not necessary to examine whether MCBE followed W. Va. Code § 18A-4-8e in exempting Mr. Wright from the competency test for Electronic Technician based upon his college degrees or other credentials. Moreover, since Grievant does not purport to possess any credentials similar to those which prompted MCBE to exempt Mr. Wright from the competency test for Electronic Technician, Grievant has not made out a prima facie case of discrimination under W. Va. Code § 18-29-2(m). See Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

In addition to the foregoing discussion, the following conclusions of law are appropriate to disposition of this matter:

CONCLUSIONS OF LAW

1. In a grievance alleging improper selection, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Where Grievant, who already held the service personnel employee classifications of Carpenter II, Electrician I, Plumber I and Mason, was given two opportunities to pass the uniform state competency test for Electronic Technician, but failed to pass the test on both occasions, there was no persuasive evidence that MCBE violated W. Va. Code §§ 18A-4-8b or 18A-4-8e by failing or refusing to select him for a vacancy for a "General Maintenance/Electronic Technician" in its Maintenance Department.

3. Given that Grievant was not minimally qualified for a vacant position as a General Maintenance/Electronic Technician, he lacks standing to complain about alleged improprieties in the selection of another individual for the vacancy as he has not shown that he was "adversely affected" by the employment decision being challenged. Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). See W. Va. Code § 18-29-2(a); Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991); 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 Mason 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: October 25, 1994