GENE HAER,

Grievant,

v.

DOCKET NO. 99-26-292

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Gene Haer, filed this grievance against his employer, the Mason County Board of Education ("Board"), on June 23, 1999, alleging as follows:

> Policies, rules, regulations and favoritism. Position for Chief Mechanic/Mechanic Supervisor was posted three separate times changing the qualifications each time. The minimum qualifications were listed as follows: High school diploma and classified as a chief mechanic/mechanic or successful completion of the WV test for mechanic. Minimum 5 years experience as a bus operator. Then it was later changed to minimum 5 years experience as a mechanic only. To rescind the decision made to give Joe Smith the job and place myself in the position based on my seniority and qualifications as a prior supervisor of the garage. I have worked in the transportation department as a bus operator/supervisor transportation/mechanic.

The grievance was denied at level one, and levels two and three were by-passed without objection. Grievant appealed to level four on July 21, 1999, and a level four hearing was conducted in the Grievance Board's Charleston, West Virginia, office on September 28, 1999. This grievance became mature for decision on October 23, 1999, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Herbert H. Henderson, Henderson, Henderson & Staples, and the Board was represented by Howard E. Seufer, Jr., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

April 27, 1999 posting of position vacancies.

Ex. 2 -

May 25, 1999 posting of position vacancies.

Ex. 3 -

May 28, 1999 posting of position vacancies.

Ex. 4 -

June 7, 1999 minutes of Mason County Board of Education.

Testimony

Grievant testified in his own behalf and presented the testimony of Marlene Reynolds and Jerry Lanier. The Board presented the testimony of George Miller.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. When a service employee classified as “Supervisor of Transportation/Mechanic” retired during the 1998-99 school year, school officials saw an opportunity to reduce the number of service personnel without terminating any of them. This was an attractive option, since the Board was “over formula” by 20 service personnel positions.

2. Instead of posting the position of “Supervisor of Transportation/Mechanic”, the Board posted the new position of “Supervisor of Mechanics.” The plan was to eliminate the job of “Supervisor of Transportation” by having the Board's existing Director of Transportation assume the transportation duties formerly performed by the “Supervisor” position. It was anticipated that one of the Board's four incumbent mechanics would getthe new job of “Supervisor of Mechanics”, allowing the Board to

eliminate the mechanic's position vacated by the successful applicant.

3. To start the process, on April 27, 1999, the Board posted notice of a vacancy in the new position of “Supervisor of Mechanics” for the 1999-2000 school year. One of the minimum qualifications stated for the position was that applicants must have a minimum of five years experience as a bus operator. This requirement was a carry-over from the last time the job was posted under its former title of “Supervisor of Transportation/Mechanic.” Jt. Ex. 1.

4. After the posting was made, the Board's Assistant Superintendent for Personnel called the West Virginia School Service Personnel Association (“WVSSPA”) to ask whether the State Department of Education had a competency test for the position of “Supervisor of Mechanics.” WVSSPA attorneys reacted by advising the Assistant Superintendent that the “Supervisor of Mechanics” class title was illegal because the West Virginia Code does not authorize such a classification. (See footnote 1) Previously unaware that this was the case, school officials decided to give the new job a lawful class title and to re-post the position.

5. Accordingly, on May 25, 1999, the Board posted notice of a vacancy in the position of “Chief Mechanic/Mechanic”, which is a multi-classification authorized by the Code. This multi-classification seemed suitable, since it would still allow the person in the position to supervise mechanics. Except for the title of the position, the job descriptionattached to the posting was the same as that annexed to the first posting. It contained the same list of performance responsibilities and much of the same other information, including the requirement that applicants have a minimum of “five years experience as a bus operator.” Jt. Ex. 2.

6. No sooner was the posting prepared than the WVSSPA notified the Assistant Superintendent for Personnel that the Board could not lawfully require a “Chief Mechanic/Mechanic” to have prior experience as a bus operator. Their reasoning was that the multi-classification did not include the class title of “Bus Operator.” Conceding the point, and recognizing that the requirement appeared in the second posting only because it had been carried over from the first posting, school officials retracted the second posting and issued a third.

7. The third posting was made on May 28, 1999. Like the second, it identified the position as “Chief Mechanic/Mechanic”. The third posting was identical to the second except that the requirement of a minimum of “five years experience as a bus operator” was replaced by the requirement of a minimum of “five years experience as a mechanic.” Jt. Ex. 3.

8. To be fair to all applicants, school officials considered, under the third posting, anyone who applied in response to the first and second postings. 9. All four of the Board's mechanics applied. Grievant applied for the job under the first and third postings. (See footnote 2) Joseph Smith applied under all three postings. A number of bus operators also applied.

10. On June 7, 1999, the Superintendent recommended, and the Board approved, the appointment of Joseph Smith to the position of Chief Mechanic/Mechanic, effective for the 1999-2000 school year. Jt. Ex. 4.

11. The State Department of Education offers a competency test for the position of mechanic. Neither Grievant nor Joseph Smith has ever taken that test. However, both men held the class title of Mechanic when the Board approved the Superintendent's recommendation on June 7, 1999.

12. There is no separate competency test for the position of Chief Mechanic. W. Va. Code § 18A-4-8e directs that the "[t]he classification titles of chief mechanic, mechanic, and assistant mechanic shall be included in one classification title and shall have the same competency test."

13. When the Board approved the Superintendent's recommendation, neither Grievant nor Joseph Smith had ever held the class title of Chief Mechanic.

14. When the Board approved the Superintendent's recommendation, Joseph Smith had more seniority in the Mechanic category than Grievant, with a seniority date of 1984 (compared to Grievant's Mechanic seniority date of 1987). Conversely, Grievant hadmore "county" seniority as a service employee, with a seniority date of 1981 (compared to Joseph Smith's county seniority date of 1984).

15. Both Grievant and Joseph Smith had good evaluations of their past performance.

16. In recommending Joseph Smith instead of Grievant, the Superintendent relied upon the facts that both men were qualified and both had satisfactory evaluations, but Joseph Smith had more seniority as a Mechanic than Grievant. In other words, in- classification seniority was the deciding factor.

DISCUSSION

Grievant's contention is that he should have received the appointment of Chief Mechanic/Mechanic because he had more county seniority than Joseph Smith. He also alleges that the position was "created" for Joseph Smith, as evidenced by the fact that it was posted three times

with differing requirements. The Board maintains it followed all applicable rules, regulations, statutes, and procedures in filling the Chief Mechanic/Mechanic position.

Because 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 W. Va. Education and State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996).

W. Va. Code § 18A-4-8b provides, regarding the filling of school service personnel positions, that:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel asprovided in . . . § 18A-4-8 . . ., 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 of this article, that relates to the promotion or vacancy.

With respect to the use of seniority in hiring service personnel, W. Va. Code § 18A- 4-8g mandates that:

> For all purposes including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in . . . § 18A-4-8e . . .
>
> . . .
>
> Seniority acquired within different classification categories shall be calculated separately: Provided, That when a school service employee makes application for a position outside of the classification category currently held, if the vacancy is not filled by an applicant within the classification category of the vacancy, the applicant shall combine all regular employment seniority acquired for the purposes of bidding on the position.

W. Va. Code § 18A-4-8e, in turn, mandates that:

> The classification titles of chief mechanic, mechanic, and assistant mechanic shall be included in one classification title and shall have the same competency test.
>
> . . .

> 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.

It is undisputed that the Chief Mechanic/Mechanic position was a newly created promotional position in Mason County. As such, no employee could have previously heldthe announced classification. Thus, Grievant argues, there could be no in-classification seniority, and the Board should have looked to total county or overall seniority, evaluations and past service. See W. Va. Code § 18A-4-8g, ¶ 11. Had it done that, Grievant would have prevailed over Joseph Smith as the applicant with the most county or overall seniority.

The Board argues that, taken together, §§ 18A-4-8g and 18A-4-8e clearly mandate that, in filling service vacancies in the positions of Chief Mechanic, Mechanic, or Assistant Mechanic, a county board must look to the applicants' seniority in any of those categories, rather than to any other seniority, such as “county” seniority as a service employee.

Neither party, however, has correctly focused on the material issue in this grievance. The position of Chief Mechanic/Mechanic is a multi-classification title, and the filling of that position must be governed by the law and statutes dealing with multi-classification.

In a similar previous Grievance Board decision, Edmonds v. Kanawha County Bd of Educ., Docket No. 99-20-023 (Mar. 31, 1999), the Board posted a Bus Operator/Clerk position. The grievant, Ms. Edmonds, had approximately 3 years experience in that classification title. The successful applicant had only one day's experience in the Bus Operator/Clerk title, but had approximately 7 years experience as a bus operator. The board of education awarded the position to the successful applicant on the basis that he had greater seniority than Ms. Edmonds in one portion of the class title, that of bus operator. W. Va. Code § 18A-4-8 lists "multi-classification" as a separate class title. W. Va. Code § 18A-4-8g [1993] discusses multi-classification titles, and clarifies how they are to be treated in a reduction in force situation. It states:

> [s]chool service personnel who hold multi-classification titles shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his multi-classification title. Multi-classified employees shall be subject to reduction in force in any category of employment contained within their multi-classification title based on the seniority accumulated within said category of employment: Provided, That if a multi-classified employee is reduced in force in one classification category, said

> employee shall retain employment in any of the other classification categories that he holds within his multi-classification title.

Further, W. Va. Code § 18A-4-8g states " [s]ervice personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill such vacancy." W. Va. Code § 18A-4-8b contains a similar sentence and says "[q]ualifications shall mean that the applicant holds a classification title in his category of employment . . . and must be given first opportunity for promotion and filling vacancies." Employees who otherwise meet the job qualifications are considered next. Id.

W. Va. Code § 18A-4-8b also states service personnel positions shall be filled on the basis "of seniority, qualifications, and evaluations of past service." A preference for hiring the employee with the most seniority is indicated by the statement that if the most senior employee is not hired a board "must show valid cause." Id. This emphasis on seniority was discussed in Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993). The West Virginia Supreme Court stated "the legislative intention toemphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." Id. at 274.

The issue of filling multi-classified positions was raised in Wilson v. Marion County Board of Education, Docket No. 93-44-084 (July 27, 1993). Although this case was decided on other grounds, Administrative Law Judge Keller stated "[i]t is likely that an individual would be required to hold all of the class titles included in a multi-classified position to be qualified." Id. at n. 2. Judge Keller also noted that since "multi-classification is listed as a separate class title in W. Va. Code § 18A-4-8, it should not be viewed fractionally."

The Administrative Law Judge in Edmonds held that the board of education improperly filled the Bus Operator/Clerk position. Specifically, the ALJ noted that:

> This reasoning flows from the fact that multi-classification is listed as a separate title, and the Code Sections which grant the current employee priority refer to being “in the same classification category of employment” or holding “a classification title in his category of employment.” Thus, if multi- classification is a separate class title, possessing only a portion of the class title would not grant a preference. Vanooyen v. Harrison County Bd. of Educ., Docket No. 96-17-209 (July 25, 1997), aff'd Kanawha County Cir. Court Civil Action No. 97-AA-115 (May 22, 1998); Gandee v. Mason County Bd. of Educ., Docket No. 93-26-476 (Sept. 30, 1994).

Following Edmonds, the Board here erred in awarding the position to Mr. Smith. While he had

greater in-classification seniority as a Mechanic, it is undisputed that neither Grievant nor Mr. Smith ever held the classification title of Chief Mechanic. To fractionally apportion seniority to only one part of the multi-classification title of Chief Mechanic/Mechanic goes directly against the holding in Edmonds and is not justified in this case. Since Chief Mechanic/Mechanic is its own classification, and neither applicant hadever held that classification before, the Board should have looked to "overall" or "county" seniority in filling this newly created position. Therefore, Grievant prevails. (See footnote 3)

CONCLUSIONS OF LAW

1. In filling a service personnel position, a county board of education must consider seniority, qualifications, and evaluation of past service. W. Va. Code § 18A-4-8b.

2. "Qualifications shall mean that the applicant holds a classification title in his category of employment . . . and must be given first opportunity for promotion and filling of vacancies." Id.

3. "'Multi-classification' means personnel employed to perform tasks that involve the combination of two or more class titles in this section. . . ." W. Va. Code § 18A-4-8.

4. Since "multi-classification" is listed as a separate classification in W. Va. Code § 18A-4-8, an employer may not consider an applicant's possession of one of the required classifications as granting that applicant priority over another applicant who is qualified in the posted multi-classified position. Edmonds v. Kanawha County Bd. of Educ., Docket No. 99-20-023 (Mar. 31, 1999); Vanooyen v. Harrison County Bd. of Educ., Docket No. 96-17-209 (July 25, 1997), aff'd Kanawha County Cir. Court Civil Action No. 97-AA-115 (May 22, 1998); Gandee v. Mason County Bd. of Educ., Docket No. 93-26-476 (Sept. 30, 1994).

5. Neither Grievant nor the successful applicant ever held the classification title Chief Mechanic/Mechanic before, and it was improper to award the position to Mr. Smithbased upon greater seniority in a fractional portion of that multi-classification title. Edmonds, supra.

5. Grievant was entitled to the position in question because he had greater overall county seniority than the successful applicant.

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to place Grievant in the Chief Mechanic/Mechanic position, with all back pay and benefits to which he is entitled from June 7, 1999, the date of the awarding of the position by the Board.

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

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: November 30, 1999

Footnote: 1

The only "Supervisor" classifications included in W. Va. Code § 18A-4-8 are the class titles of "Supervisor of Maintenance" and "Supervisor of Transportation."

Footnote: 2

He did not apply under the second posting because it was taken down and replaced so soon by the third posting.

Footnote: 3

Because of the outcome of this grievance, it is unnecessary to discuss Grievant's favoritism claim, although the facts in this case do not support that claim.