RANDALL NUTTER,

Grievant,

v. **Docket No. 98-17-516**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Randall Nutter (Grievant) challenges his non-selection for the multi-classified position of Roofer/Sheet Metal Mechanic/Welder/General Maintenance by the Harrison County Board of Education (HCBOE). He seeks placement in the position. The grievance was denied at level one on October 27, 1998, and appealed to level two on October 29, 1998. A level two hearing was held on November 9, 1998, followed by a decision, denying the grievance, dated December 18, 1998. Level three consideration was waived, and Grievant appealed to level four on December 28, 1998. After several continuances granted for good cause shown, a level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on April 23, 1999. Grievant represented himself, and HCBOE was represented by Basil Legg, Esquire. This matter became mature for consideration on May 17, 1999, upon receipt of Respondent's written proposals. Grievant declined to file proposals.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a substitute bus operatorsince August 29, 1997.

2. On July 13, 1998, HCBOE posted a vacancy for a Roofer/Sheet Metal Mechanic/Welder/General Maintenance. The qualifications for the position were listed in job descriptions attached to the posting.

3. For the Welder portion of the position, the minimum qualifications included “Must have certification in Electrical Arc Welding and M.I.G. Welding.”

4. As of the posting deadline, none of the applicants held all of the classification titles of the multi-classified position.

5. Competency testing for HCBOE is provided by United Technical Center, and is not available during the summer months. Accordingly, competency testing in all of the classifications was scheduled for September 14, 1998.

6. On September 14, 1998, Grievant, David Allen, and Monty Davis successfully completed the written tests for the classifications of welding, roofer/sheet metal mechanic, general maintenance, and the performance test for general maintenance.

7. The performance test for welding certification was scheduled for October of 1998, preceded by in-service training.

8. Grievant informed the test administrator at United Technical Center that he had a current welding certification, so he did not take the performance test for welding. (See footnote 1) 9. The certification test for ARC welding was administered on October 22, 1998, and the test for M.I.G. welding was administered on October 29, 1998.

10. Monty Davis and David Allen successfully obtained welding certification in both of the required categories.

11. Monty Davis, the most senior regular employee who had successfully completed competency testing in all of the categories of the multi-classification, was awarded the position. Mr. Davis' regular seniority date is August 31, 1984. L II, Bd. Exhibit 1.

12. Grievant has never received certification in M.I.G. welding.

Discussion

Grievant has posed several arguments in this case. He contends that he should have been deemed qualified for the welder portion of the position, because he was the only applicant, at the time of the posting, who possessed a state welder certification. He also argues that HCBOE erred in not filling the position within twenty days of posting, notwithstanding the unavailability of competency testing during the summer months. Grievant believes that the successful applicant was less qualified than he, entitling Grievant to the position.

Grievant does not dispute that he, along with the other applicants, did not hold any of the classification titles of the multi-classified position at the time it was posted. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications, and evaluations of past service. Qualifications are defined as holding the classification title of the vacancy or being able to meet that definition containedin W. Va. Code § 18A-4-8. In order to assess whether employees can meet the classification definitions, boards of education are to administer competency tests developed by the state board of education, pursuant to W. Va. Code §18A-4-8e. Accordingly, HCBOE properly required all of the applicants to take the competency tests for each of the classifications in the position. It would have been highly improper, contrary to what Grievant has argued, for Respondent to have placed Grievant in the position, simply because he held a state welder's certification.

Although the undersigned has an extremely limited understanding of welding in general, it is clear that the job description for welder, attached to the posting in this case, required two types of electrical welding certification. According to Grievant's testimony at level two, M.I.G. appears to involve a variation of electrical welding, and he clearly stated that the certification he currently holds does not cover M.I.G. welding. L II Tr. at 13. Therefore, Grievant was required to take the performance test in both types of welding in order to meet the qualifications of the job posting. Although Grievant contended that he was informed by the test administrator that he did not need to take the performance test, due to his prior state certification, the evidence indicates otherwise. When the results of the written tests were certified by United Technical Center, the administrator stated in the document that Mr. Allen, Mr. Davis and Grievant needed to take the welding performance test in order to receive certification. L II, Bd. Exhibit 1.

Aside from the issue of whether or not Grievant was qualified for the position at issue, he has not proven that he would have been placed in the position, even if he had received the necessary certifications in all categories. W. Va. Code § 18A-4-8b providesthat preference in filling vacancies is given in descending order to regular employees, employees on the preferred recall list, substitute employees, and lastly to new employees. Accordingly, even if all applicants had taken the required tests and successfully completed them, Mr. Davis would still have been the proper successful candidate, as the most senior qualified regular employee. Because Grievant is a substitute, and below Mr. Davis in the hiring hierarchy of W. Va. Code § 18A-4-8b, Grievant's qualifications are

irrelevant. When a regular employee qualifies for a position, comparison with applicants in the other categories of employees listed in the statute would be improper. See Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997). Therefore, even if Grievant had successfully completed the competency testing at the same time as Mr. Davis, Grievant would not have been entitled to the position. Mr. Davis was the appropriate selection for the position, and Grievant is not entitled to any relief in this matter.

Grievant also argues that the position was not filled within twenty days of the posting, as required by W. Va. Code § 18A-4-8b. However, HCBOE's actions in this regard were understandable and unavoidable. W. Va. Code § 18A-4-8e requires that performance tests be administered "by a vocational school which serves the county board of education." In this case, HCBOE was at the mercy of United Technical Center, which did not provide testing during the summer months. As discussed above, none of the applicants were qualified to fill the position during the posting and application period, and would not be so qualified until competency tests were completed. There is no dispute that the position was filled within twenty days of the completion of the required competency testing. Accordingly, invoking the equitable discretion allowed by W. Va. Code § 18-29-5(b), the undersigned finds that Respondent's failure to fill this position within twenty days of posting was not arbitrary or capricious, nor was it an abuse of discretion. Grose v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997).

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. Grievant bears the burden of proving the allegations of his complaint by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. County boards of education must fill school service personnel positions on the basis of seniority, qualifications, and evaluations of past service. Further, preference in filling vacancies is given in descending order to regular employees, employees on the preferred recall list, substitute employees, and lastly to applicants with no employment status with the board of education. W. Va. Code § 18A-4-8b.

3. When none of the applicants for a position hold the classification title(s) of the posted

position, competency testing must be administered in order to determine the qualifications of the applicants. W. Va. Code § 18A-4-8e.

4. The successful applicant for the position at issue was a more senior regular employee who had passed the required competency testing, and was entitled to placement in the position over Grievant, a substitute employee. See Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997) 5. Posted vacancies must be filled within twenty days of the posting date. W. Va. Code § 18A-4-8b.

6. Where none of the applicants held the classification title(s) of the posted position, and competency testing was not available within twenty days of the posting, it was not arbitrary and capricious or an abuse of discretion for Respondent to fill the position within twenty days after competency testing was completed. Grose v. Cabell County Bd. of Educ., Docket No. 96-06-274 (Feb. 26, 1997).

Accordingly, this grievance is **DENIED**.

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

Date: June 25, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record is somewhat unclear as to whether Grievant did not take the performance test by his own decision or was told he did not need to by the test administrator. However, as will be discussed later in this Decision, it appears that the test administrator was aware that Grievant needed to take the performance test in welding to receive all necessary certifications.