SANDRA ROEGNER,

Grievant,

v. **Docket No. 99-40-087**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sandra Roegner, filed the following grievance against her employer the Putnam County Board of Education ("PCBOE"), in December 1999, stating:

> **Grievant applied for two teachers' aide vacancies (a full-time vacancy at Poca Elementary School and a half-time vacancy at George Washington Middle School). At the time of the posting of these vacancies, Grievant was employed in a cook's position posted pursuant to Code § 18A-4- 15(2). Grievant was the most senior candidate for both of these vacancies and has received satisfactory evaluations of her work performance. The Respondent selected substitute teacher's aides to fill these vacancies. The Grievant alleges a violation of West Virginia Code § 18A-4-8b, § 18A-4-8g, and § 18A-4-8e. Grievant seeks the opportunity to take the relevant competency examination[,] and if she passes this examination, instatement into one of the grieved positions, wages, benefits, and regular employment seniority retroactive to the date of the filling of these vacancies by the Respondent, and interest on all monetary sums.**

There was no information about a Level I filing or response. A Level II hearing was held on January 26, 1999, and the grievance was denied on February 15, 1999. Level III was bypassed, and a Level IV appeal was received on February 24, 1999. A Level IV hearing was scheduled on May 18, 1999, but the parties agreed they did not need ahearing and only reviewed additional documents at that time. (See footnote 1) **This case became mature for decision on June 11, 1999, by agreement of the parties.** (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by PCBOE as a substitute Cook since March 11, 1997.

2. On November 11, 1998, pursuant to posting, she received a temporary, full-time position as a Cook.

3. From November 17 to 23, 1998, two aide positions were posted. One was a full-time position at Poca Elementary School, and the other was a half-time vacancy at George Washington Middle School.

4. Grievant applied for both positions, and was not selected for either.

5. Both the successful applicants were substitute aides, who had qualified for the positions by passing the aide competency examination, prior to the posting.

6. Grievant had never taken the competency examination for aides, nor had she ever requested to take the competency examination for the aide classification. Grievant had also never asked to be placed on the list of people to be called when thenext testing for aides was scheduled. Additionally, Grievant did not request to take the competency examination after she applied for the two positions at issue.

7. PCBOE schedules competency examinations in the aide classification two or three times a year, or more often as needed. If the list of substitutes is depleted, or if an insufficient number of names is on the list to meet expected needs, an eight hour in service training and the subsequent competency examination are scheduled. The individuals on the list are contacted so they may be present for the in service and competency examination.

8. Grievant was working as a regular employee at the time she applied for the positions. Shortly after she filed this grievance, she voluntarily quit her Cook position because she was upset about the grievance and did not like the people she was working with at West Teays. Grievant is currently on the substitute Cooks' list, and after she filed this grievance she placed her name on the list to take the aide competency examination.

9. Several years ago, Jay Clay, a custodian, along with other male applicants, was allowed to take the competency examination after he applied for an aide position, because the position required a male aide, and there were no male aides on the substitute list. He received the position after he passed the competency examination, based on his seniority.

10. When Grievant questioned why she was not selected for one of the positions, she was informed of the need to request to take the competency examination.

Issues and Arguments

Grievant argues she is entitled to the aide position because, as a regular employee, she had preference over substitute employees pursuant to W. Va. Code § 18A-4-8b. She maintains PCBOE is required to call and schedule employees for the in service training and a competency examination after they apply for a position for which they are not qualified by prior competency testing. (See footnote 3)

Respondent argues Grievant was not qualified for the position as she had not taken or passed the competency examination. Further, Respondent contends it is not required to insure that all applicants have completed the competency examination prior to the awarding of the position. Respondent also maintains it is not required to give the in service training and to administer the competency examination each time a new position is posted throughout the school year and the summer. Such a requirement would be a heavy burden, especially since each competency examination must bepreceded by a mandatory eight hours of in service training. Respondent maintains such on demand testing is not required by the statute. (See footnote 4)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

Grievant alleges violation of multiple Code Sections, and argues her standing as a regular employee, due to her filling a temporary, posted position, entitles her to take the competency examination, and if she passes, to fill the position.

W. Va. Code §18A-4-8g states in pertinent part:

A substitute school service employee shall acquire regular employment status and seniority if said employee receives a position pursuant to subsections (2) and (5), section fifteen [§ 18A-

4-15(2) and (5)], of this article; Provided, That a substitute employee who accumulates regular employee seniority while holding a position acquired pursuant to said subsections shall simultaneously accumulate substitute seniority. County boards shall not be prohibited from providing any benefits of regular employment for substitute employees, but the benefits shall not include regular employee status and seniority.

Thus, Grievant acquired regular employment status and seniority as the requirements of W. Va. Code §§ 18A-4-15(2) or (5) were followed when she was hired to fill the Cook position. (See footnote 5) The issue of what "regular employee status" actually means, and what actions that status requires of school boards has been discussed in several Grievance Board cases. See Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992); Stutler v. Wood County Bd. of Educ., Docket No. 54-86-333-3 (Aug. 20, 1987); Miller v. Wood County Bd. of Educ., Docket No. 54-86-298-3 (May 13, 1987).

The issue of whether the provisions of W. Va. Code § 18A-4-15(2), conferring "regular employee status" on certain substitute service personnel, constructively elevates such employees to the status of "regularly employed service personnel" within the meaning of W. Va. Code § 18A-4-8b, thereby entitling such employee to a higher priority in competing for posted school service personnel positions, has been previouslyaddressed in Messer v. Mingo County Board of Education, Docket No. 93-29-497 (Aug. 1, 1994). Although the rights conferred by W. Va. Code § 18A-4-15(2) are of limited duration ("only until the regular employee is returned to such position"), the scope of the term "regular employee status" is not restricted by the statute. Messer, supra. Clearly, "regular employee status" requires the school board to extend the same pay, benefits, and seniority to the substitute employees in such positions. Id.; Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug. 4, 1993), aff'd, No. 93-AA-217 (Kanawha County Cir. Ct., Feb. 15, 1994). The Legislature reinforced those conclusions in 1994 when the provision in W. Va. Code §18A-4-8g stating: "A substi tute school service employee may acquire regular employment status and seniority . . . " was changed to "shall acquire regular employment status and seniority . . . ." (Emphasis added). Thus, "[w]hen an individual is competitively selected under [W. Va. Code] § 18A-4-8b procedures to fill the position of a school service employee on leave of absence, W. Va. Code § 18A-4-15(2) requires the school board 'to give regular employee status' to such individual."

Messer, supra. See Ferrell, supra. Thus, Grievant would be considered a regular employee at the time she applied for the position.

W. Va. Code §18A-4-8b states regular positions are to be filled on the basis of seniority, qualifications and evaluations of past service. Applicants for positions shall be considered in the following order:

(1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section;(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.

Id.

Because of her regular employee status due to a temporary, posted position, W. Va. Code § 18A-4-8b would give Grievant preference for one of the positions at issue, if she were qualified. See Hlebiczki v. Ohio Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997). See also Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993).

"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 contained in 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." Nutter v. Harrison County Bd. of Educ., Docket No. 98-17-516 (June 25, 1999).

It is clear Grievant was not qualified for the position at the time she applied for it. This Grievance Board has repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the legality of the selection process. Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). See also Harper v. Putnam County Bd. of Educ., Docket No. 99-40-021 (Apr.15, 1999); Farley v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Suan v. Lewis County Bd. of Educ., Docket

No. 96-21-273 (Dec. 31, 1996); Muncy v. Mingo County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994). Thus, it would appear Grievant does not have standing to grieve in this case.

Whether Grievant had standing or not, is not really the issue in this case. Grievant's argument seeks to mandate a board of education to call and schedule a non- qualified employee for the inservice training and competency examination without any action on the part of the applicant. This issue has been addressed in Rose v. Braxton County Board of Education, Docket No. 95-04-521 (Sept. 30, 1996), aff'd (Kanawha County Cir. Ct., Feb. 19, 1998), appeal ref'd (W. Va. Supreme Ct. of Appeals, Sept. 17, 1998). Grievant requests the undersigned Administrative Law Judge to reconsidered the holding in Rose, and either overrule it, or carve out an exception in keeping with her argument.

In Rose, the grievant argued the respondent board of education had a duty to tell him about the required competency examination, and then was required to call him and set up this testing without any action on his part. In Rose, the grievant did not know a competency examination was required when an employee wished to change classifications. The posting referred applicants to the Job Description for the required qualifications, and the Job Description stated a competency examination was required to be qualified. In this case, Grievant argued it was unfair to penalize her for not knowing she had to take the competency examination. However, it is clear, through Grievant's own testimony, that she was aware she would have to take and pass the competency examination before she could be selected for the position. It is also clear that she knew the aide test was conducted at regularly scheduled intervals, because she had called the Personnel Office and inquired as to when the next testing was scheduled. When she received this information, she did not request that her name be placed on the testing list. Unfortunately, she just assumed, based on misinformation from co-workers, that PCBOE would allow her to take the competency examination test whenever she applied for an aide position. This assumption was not based on information provided by PCBOE, and this assumption could have been corrected by a phone call to someone in the Personnel Office, as PCBOE has been operating in this same manner ever since the competency examinations were developed.

In Rose, it was held a board of education did not have a duty to arrange testing without input or a request from the employee. Given the case history of Rose, the undersigned Administrative Law Judge declines to limit or overrule it, and it is clear Rose applies. Grievant did not request to take the exam, even after she applied for the position, and she assumed it would be given to her without any action on her part. The next issue is whether PCBOE is required to schedule in service training and competency examination each time it posts a position when no one has requested it. (See footnote 6) The Code Section at issue is W. Va. Code § 18A-4-8e which states:

> 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 . . . .
>
> The purpose of these tests shall be to provide county boards of education 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.
>
> The competency test shall consist of an objective written and/or performance test: . . . . 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.

(Emphasis added.).

As noted in the above Code Section, boards of education are required to administer the competency examinations to all applicants "in a uniform manner under uniform testing conditions." Additionally, boards of education "shall be responsible for scheduling competency tests." No other direction is provided to county boards about the scheduling of these exams, other than directing a county board to excuse an employee from work, if the scheduled test conflicts with his work schedule, and allowing an employee to retake a competency examination he had previously failed. Although the process could be handled in another way, PCBOE's past practice of requiring an applicant to request or sign up for the testing, and scheduling the testing at regularly scheduled intervals, and as needed, cannot be said to be wrong in this instance when Grievant did not request the testing. Rose, supra. PCBOE stated, and it would appear true, that requiring a board of education to give an eight-hour in service and a competency examination after each posting would appear to be a costly and time- consuming method of meeting the requirements of W. Va. Code § 18A-4-8e. In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a grievance of this nature, alleging improper selection, Grievant has the burden of proving the allegations in her 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. A substitute school service employee selected to fill a position under W. Va. Code §18A-4-15(2) "is a regular employee for the time he or she serves in the position." Bushko v. Marion County Bd. of Educ., Docket No. 92-24-089 (Aug. 6, 1992).

3. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with "regularly employed service personnel" receiving preference over substitute service personnel. See Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987).

4. Under the circumstances presented here, Grievant should be considered to be a regular employee at the time of the selection. Messer v. Mingo County Bd. of Educ., Docket No. 93-29-497 (Aug. 1, 1994). See Ferrell v. Mingo County Bd. of Educ., Docket No. 92-45-440 (Aug 4, 1993), aff'd, No. 93-AA-217 (Kanawha County Cir. Ct. Feb. 15, 1994); Bushko, supra; W. Va. Code §§ 18A-4-15(2) and 18A-4-8g. See also Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331, 189 W. Va. 273 (1993); Hlebiczki v. Ohio Bd. of Educ., Docket No. 97-35-037 (Sept. 30, 1997). 5. Grievant was not qualified for the aide positions at the time of the posting or at the time of selection, as she had not taken and passed the required competency examination.

6. Employees, who are not qualified for a position, do not have standing to grieve their non-selection or the selection process. Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). See also Harper v. Putnam County Bd. of Educ., Docket No. 99-40-021 (Apr. 15, 1999); Farley v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Suan v. Lewis County Bd. of Educ., Docket No. 96-21-273 (Dec. 31, 1996); Muncy v. Mingo County Bd. of Educ., Docket No. 94-20- 364 (Dec. 29, 1994); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

7. Boards of education are not required by W. Va. Code § 18A-4-8e to call an unqualified applicant and schedule them for an in service and competency examination they have not requested.

Accordingly, this grievance is DENIED.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 12, 1999

Footnote: 1

This grievance was reassigned to the undersigned Administrative Law Judge for administrative reasons.

Footnote: 2

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney John Grafton.

Footnote: 3

In the lower level record, Grievant's attorney indicated if he did not receive the answer he wanted from the board of education, that "this [would be] the kind of injustice that leads us to go to the Legislature and to talk to those folks and explain the circumstances and, I think, convince them to change the law." It is noted that any time a law is clarified, this occurrence is helpful to all parties.

Footnote: 4

Respondent noted there may be times when a scheduled competency examination coincides with a posting, and thus it could appear that special testing was scheduled. This has not occurred.

Footnote: 5

W. Va. Code §18A-4-15 states in pertinent part:

The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

. . .

(2) To fill the position of a regular service employee on leave of absence: Provided, that if such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article. The substitute shall hold such position and regular employee status only until the regular employee shall be returned to such position and the substitute shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

. . .

(5) To fill the vacancy created by a regular employees' suspension . . . .

Footnote: 6

Grievant's argument that PCBOE would only be required to give the test when the most senior, regular employee is not qualified for the position is deemed to be without merit. No such limited testing in special circumstances is identified in W. Va. Code § 18A- 4-8e, and could easily be seen as favoritism to regular employees.