PENNY MOUNT,

Grievant,

v. DOCKET NO. 01-06-028

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Penny Mount, filed this grievance against her employer, the Cabell County Board of Education ("CCBOE") on or about October 5, 2000. Her Statement of Grievance reads:

> **Violations of WV Code 18A-4-8e with regard to grievant['s] nonselection for position based on competency testing without appropriate inservice training and poor workability of computers.**
>
> **Relief Sought: Relief sought is to be granted the position with all benefits due if most qualified and senior applicant.** (See footnote 1)

This grievance was denied at Levels I and II. Grievant appealed to Level IV on January 26, 2001, and the parties asked to have the case submitted on the record developed below. This case became mature for decision on February 15, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) **The grievance was assigned to the undersigned Administrative Law Judge for decision on February 16, 2001.**

Issues and Arguments

Grievant stated she did not receive the required eight hours of inservice training prior to taking the competency examination, and her computer malfunctioned during the performance testing. Grievant also argued the position vacancy and notice of competency examination were not properly posted; thus, she did not receive the required proper notice for the competency examination, and the selection should be voided.

Respondent argued there was no malfunction of the computers used in the testing. Respondent agrees there was no inservice testing, but states that as the test given was not a State Department of Education ("DOE") competency examination, but a county developed test, inservice was not required. (See footnote 3) Respondent notes Grievant appeared for and took the competency examination; thus, she obviously received notice of the test.

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 is regularly employed as a Cafeteria Manager with CCBOE.

2. From August 2 through August 8, 2000, CCBOE posted a Notice of Vacancy for the newly created position of Inventory Supervisor. This Notice went to all the usual places for posting.

3. A second Notice was sent to all the same places informing employees that a competency examination for the position would be conducted on August 8, 2000.

4. Grievant, as well as multiple other regular and substitute employees, applied for this position.

5. As the State had not yet developed a competency examination for the Inventory Supervisor classification, CCBOE developed its own test. This competency examination was composed of two parts: a written portion and a performance portion. To be qualified for the position, an applicant was required to complete successfully both portions of the test.

6. The purpose of the performance portion was to determine whether applicants could operate a computer, load a disk into the A drive, and save and delete information. These duties would be required by CCBOE's Inventory Supervisor position, which would deal with the textbook and film inventory.

7. No inservice was given before the competency examination

8. Grievant passed the written portion of the competency examination, but did not pass the performance portion of the competency examination.

9. At least one other regularly employed service personnel passed the competency examination. He was offered the position, but turned it down.

10. After the position was offered to the regularly employed service personnel who passed the competency examination and they refused the position, the vacancy was offered to the most senior substitute service personnel, Helen Coleman, who was currently employed as a substitute cook.

11. Ms. Coleman accepted the position.

12. The computers on which the applicants took the test functioned properly.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

"A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). The first issue to address is Grievant's claim that her computer malfunctioned during the competency examination. Grievant presented no evidence to support this allegation other than her inability to get the computer to perform the assigned tasks. The Test Administrator

noted the individuals who had difficulty with the performance portion of the competency examination were either unfamiliar with Drive A or lacked sufficient computer skills to perform the required task. It appears Grievant did not lodge a complaint at the time of the testing, other than to say she could not get the computer to do what she wanted. This evidence is insufficient to prove her computer malfunctioned.

The Code Section addressed in this grievance is W. Va. Code § 18A-4-8e, **(See footnote 4)** **and it states in pertinent part:**

> **(a) 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. . . .**
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> **(b) 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 [§ 18A-4-8] of this article. Competency tests shall not be used to evaluate employees who hold the classification title in the category of their employment.**
>
> **(c) The competency test shall consist of an objective written and/or performance test: . . . . The performance test 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 passingscore shall be established by the state department of education for each test and shall 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 [§ 18A-4-8] 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, the 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.**
>
> **. . .**
>
> **(e) Competency tests shall be administered to applicants in a uniform manner**

> **under uniform testing conditions. County boards of education are responsible for scheduling competency tests, notifying applicants of the date and time of the one day of training prior to taking the test and the date and time of the test. County boards of education shall not utilize a competency test other than the test authorized by this section.**
>
> **. . .**
>
> **(g) A minimum of one day of appropriate inservice training shall be provided employees to assist them in preparing to take the competency tests.**
>
> **(h) 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.)

Grievant argued she did not receive the required notice of the competency examination as she did not see a posting for the testing. She also presented the testimony of another applicant who testified she did not receive notice of the testing, as she "was not in the school at the time." Test. Paulette Ross at 20, Level II Hearing. (See footnote 5) **As for theGrievant, it is clear no one called and told her when the exam was scheduled; however, Grievant was informed orally of the date, time, and place of the exam when she asked for a copy of the Job Description at the Central Office. Grievant did appear and take the competency examination.**

This Code Section concerning notice was added in 2000, and states "[c]ounty boards of education are responsible for scheduling competency tests, [and] notifying applicants of the date and time of the one day of training prior to taking the test and the date and time of the test." Since how this notice is to be given is not specified, it would appear that notifying applicants of the testing in the same way they are notified of the position, by posting as required by W. Va. Code § 18A-4-8b, would be sufficient. Additionally, as boards of education are required to fill vacant or newly created positions twenty working days after the posting, either trying to contact all applicants by phone or by mail might create time difficulties in filling the position. W. Va. Code § 18A-4-8b. It would also appear that placing the time, date, and location of the competency examination on the Vacancy Hotline, if the county has one,

would be helpful, as many applicants find out about openings in this way. Since Grievant did receive notice of the competency examination, there is no further need to discuss this allegation.

The next issue is whether CCBOE was required to give applicants an eight hour inservice even though the competency examination was not one designed by the State Board of Education. W. Va. Code § 18A-4-8e (g) clearly states "[a] minimum of one day of appropriate inservice training shall be provided employees to assist them in preparingto take the competency tests." This requirement does not differentiate between DOE developed competency examinations and board of education developed competency examinations. Further, this Grievance Board held in Quintrell v. Lincoln County Board of Education, Docket No. 95-22-051 (Aug. 31, 1995), aff'd Kanawha County Cir. Ct. 95-AA- 241 (Apr. 30, 1996), that this Code Section was mandatory, and county boards of education are required to provide eight hours of inservice training prior to each competency examination, unless the applicant has signed a written waiver stating he or she does not wish to receive a full eight hours of inservice.

Respondent cites Jackson v. Putnam County Board of Education, Docket No. 92-40- 086 (June 29, 1992), as support for its proposition. Jackson, an older case, dealt with the board of education giving its own competency examination as the State Board of Education had not yet developed one for the classification. This Grievance Board found no error in this testing to assess applicants' ability to perform the duties of the position. See Meeks v. Kanawha County Bd. of Educ., Docket No. 90-20-424 (Oct. 31,1991). There was no discussion of inservice training in Jackson. Accordingly, Jackson does not support CCBOE's decision not to offer inservice training. Further, the statute is clear, inservice must be offered prior to the taking of a competency examination, and CCBOE violated W. Va. Code § 18A-4-8e by its failure to provide this mandated inservice prior to the competency examination.

The next question is what type of relief should be given. Grievant had asked to retake the exam after inservice training. Grievant must be allowed to retake the Inventory Supervisor competency examination, but since DOE has now developed a competencyexamination, this is the test the statute requires to be given. The record also indicates there were other applicants who took and did not pass the competency examination. W. Va. Code § 18-29-5(b)

states an administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . . ." Accordingly, in the interest of fairness to all, Respondent is directed to give notice to all original applicants, who failed the Inventory Supervisor competency examination, of the to-be-scheduled inservice and testing for the Inventory Supervisor position. After this testing, CCBOE is to select the successful applicant pursuant to the requirements in W. Va. Code § 18A-4-8b, and to assess the applicants in terms of seniority, etc., using data at the time the original decision was made. See Marshall v. Monongalia County Bd. of Educ., Docket No. 00-30-276 (Jan. 12, 2001); Dorsey v. Nicholas County Bd. of Educ., Docket No. 34-87-041-4 (May 28, 1987), aff'd, Circuit Court of Nicholas County, Civil Action No. 87-C-275 (Aug. 29, 1989).

Additionally, because there is no evidence of wrongdoing on the part of Ms. Coleman, the original successful applicant, she is entitled to retain the regular seniority she attained while she held the Inventory Supervisor position, but this regular seniority cannot be utilized in assessing whether she should receive the position the second time. Hall v. Bd. of Educ. of Mingo County, West Virginia Supreme Court of Appeals, Nos. 27870 and 28396 (Dec. 1, 2000).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

___1. 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18a-4-8e requires a board of education to provide eight hours of inservice training prior to a competency examination. This inservice is required whether the test is one devised by a board of education or by DOE.

3. Boards of education are required to post notice of inservice and competency examinations following the same requirements for posting a vacancy as mandated in W. Va. Code § 18A-4-8b.

4. Because CCBOE failed to give the required inservice prior to the competency

examination, Respondent is required to give DOE's Inventory Supervisor exam to all the original applicants who failed the competency examination, after it conducts the mandatory inservice.

Accordingly, this grievance is GRANTED, and the appropriate relief is described on page 9 and 10.

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 Educationand 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 7, 2001

Footnote: 1

At the Level II hearing, Grievant altered her relief saying what she sought was the opportunity to retake the competency examination after inservice training. Grievant's Test. at 32, Level II Hearing.

Footnote: 2

Grievant was represented by Representative Susan Hubbard form the West Virginia Education Association, and Respondent was represented by Attorney Howard Seufer.

Footnote: 3

No DOE competency examination had been developed at the time the position was posted and the testing occurred. There is now a DOE competency examination for the position of Inventory Supervisor.

Footnote: 4

This Code Section was amended in 2000, effective July 1, 2000, and added the section requiring boards of education to "notify[] applicants of the date and time of the one day of training prior to taking the test and the

date and time of the test."

Footnote: 5

During the testimony for this grievance, the issue of proper notice for other individuals, such as Ms. Ross, was raised. This was not an issue before the undersigned Administrative Law Judge in this grievance. Additionally, there was only limited testimonypresented on this matter.