RAYMOND HOLBERT,

Grievant,

v.

DOCKET NO. 01-54-427

WOOD COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

For his grievance, Raymond Holbert alleges:

> Grievant, a regularly employed custodian, contends that the respondent has erred in: (a) requiring Grievant to retake the competency test for the carpenter classification, which he has previously passed, and (b) failing to hire Grievant for a posted "Carpenter/General Maintenance" position. Grievant also contends that Respondent did not properly follow the proper testing procedure in administering the competency test and failed to fill the position within twenty working days of posting as required by statute. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b, 18A-4-8e and 18A-4-8g. (See footnote 1)

As relief, Grievant requests, "(a) instatement into the position in question; (b) compensation for any and all wages and all benefits of the position (pecuniary and otherwise) lost as a result of Respondent's actions; and (c) interest on any sums to which he is entitled." This grievance was denied at Level I because Grievant's immediate supervisor lacked authority to grant the relief requested. It was again denied at Level II following a hearing conducted by Wood County Assistant Superintendent Gale Hammett, Jr., and Respondent waived Level III. A Level IV hearing was held October 22, 2001, at which time Grievant appeared represented by John Roush of the West Virginia School Service Personnel Association and Respondent was represented by Dean A. Furner, Esq. of Spilman, Thomas & Battle, PLLC. Upon receipt of the parties' proposed findings of fact and

conclusions of law on November 28, 2001, the matter became mature for decision.

Based on a preponderance of the evidence contained in the lower-level record and adduced at the Level IV hearing, the undersigned makes the following findings of fact:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Custodian III at Parkersburg South High School. He has worked in various positions for Respondent since 1992 and has been a full-time custodian since 1995. He is in his third year in his current position.

2. Grievant has applied for various other jobs posted by Respondent over the years, including a Carpenter position. The first time he applied for a Carpenter position, he took the required competency test for the Carpenter I and Carpenter II classifications on May 19, 1998. (See footnote 2) When he subsequently applied for another Carpenter position, he re-took the competency test, before being informed that he had passed the test the first time. Grievant was not selected to fill either position because other applicants had more seniority. 3. In the summer of 2000, the State Department of Education, which develops the competency tests for all classifications that require them, revised the Carpenter test, changing the skill portion of the test so that it is now different from the competency tests Grievant previously took and passed.

4. From December 1, 2000 to December 8, 2000, Respondent posted a Carpenter/General Maintenance position in its Maintenance Department. (See footnote 3)

5. Grievant applied for the Carpenter position, and was called for an interview. At that time, he was informed that he would have to take a “hands-on” competency test for the Carpenter classification. Having previously worked as a Carpenter from 1980 until he was hired by Respondent in 1992, Grievant met the minimum experience qualifications for the posted position.

6. The competency test was administered to Grievant by Joe Smith, coordinator for the vocational department, Foster Yost, zone coordinator for the maintenance department and Ron Baumgardner, a carpenter employed by Respondent in its maintenance department. The test was given in the maintenance department's shop. (See footnote 4) The test administrators concluded that Grievant's performance on the test was inadequate. Another applicant who took the test at the same time as Grievant also failed the test. (See footnote 5) 7. A third applicant who was tested on another day by different test administrators was deemed to have passed, and was awarded the job. The successful applicant had not been employed by Respondent before, and had no seniority in any

classification.

DISCUSSION

Grievant bears the burden of proving by a preponderance of the evidence that he should have been selected for the Carpenter position he applied for. *See,* W. Va. Code § 18-29-6. The first matter that must be disposed of is whether Grievant should have been required to re-take the competency test for the Carpenter classification. West Virginia Code § 18A-4-8e(c) states: "Once an applicant passes the competency test of a classification, the applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in [W. Va. Code § 18A-4-8b] and shall not be required to take the competency test again." Respondent argues that the West Virginia Department of Education's *Guidelines for Administering School Service Personnel Tests* [Lvl. II Employer's Exh. No. 1], which states, "each applicant for a position must be given the approved service personnel test for their classification if they did not hold the classification title before July 1, 1991," invalidates Grievant's prior tests because the revision added a "hands on" component. Respondent contends that the prior test was not the "approved service personnel test" for the Carpenter classification at the time Grievant applied for the latest posting. Obviously, the State Board of Education's testing guidelines do not supercede the Code. The better interpretation is that an applicant must take the test that is approved at the time the applicant takes the test. Respondent's argument ignores the plain meaning of the controlling Code section, which provides that an applicant, having once passed the required test, may not be required to take it again. The Code section clearly links the test to the classification and not to the position posted, and does not distinguish between written and "hands on" portions of the test.

The position was ultimately awarded to an applicant who had never been employed by the Respondent. Had Grievant been given credit for his prior test, he would have had preference over this "outside" candidate. According to W. Va. Code § 18A-4-8b, "[f]irst preference in filling vacancies must be given to regular school service personnel, followed in descending preference by applicants from the preferred recall list, substitute employees and lastly to applicants with no previous employment status with the board of education." Because internal and external candidates are separate categories of preference, Grievant's other qualifications need not be compared to the successful candidate's. Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sep. 30, 1997).

Grievant's contention that the posting should have been filled within 20 days of its posting is also correct. “After the five-day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.” W. Va. Code § 18A-4-8b(g). “The language of Code § 18A-4-8b is mandatory. The posted position had to be filled within 20 working days of the date of the posting if a qualified applicant was available. The applicant had to be qualified at the time the statute required the position be filled; that is, within 20working days of the posting.” Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994); Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993).” Whitt v. Mingo County Bd. of Educ., Docket No. 97-29-419 (Jan. 30, 1998). Since Grievant was qualified at the time the posting closed, the position should have been filled within that time.

Consistent with the foregoing, the following conclusions of law are appropriate:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which the Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 C.S.R. 1 § 4.21. "The 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 party bearing the burden has not met its burden. Id.

2. Even if the official competency test is revised after an applicant passes it, “[o]nce an applicant passes the competency test of a classification, the applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in [W. Va. Code § 18A-4-8b] and shall not be required to take the competency test again.” W. Va. Code § 18A-4-8e(c).

3. A regularly employed school service employee who meets the qualifications for a position must be given hiring preference over an outside applicant for a service personnel job position. “First preference in filling vacancies must be given to regular school service personnel, followed in descending preference by applicants from the preferredrecall list, substitute employees and lastly to applicants with no previous employment status with the board of education.” W. Va. Code § 18A-4-8b; Hlebiczki v. Ohio County Bd. of Educ., Docket No. 97-35-037 (Sep. 30, 1997); Nutter v. Harrison Co. Bd. of Educ., Docket No. 98-17-516 (June 25, 1999).

4. In each category of preference set forth in W. Va. Code § 18A-4-8b, the criteria of seniority,

qualifications, and evaluation of past service are to applied to employees in that category to determine the appropriate candidate for a position. *See* Cramer/Castle v. Preston County Bd. of Educ., Docket No. 95-39-400 (Mar. 27, 1996). Hlebiczki, *supra*.

5. Grievant met his burden of proving that he had passed the competency test for the Carpenter classification and was the only qualified internal candidate for the posting in question.

6. "After the five-day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions." W. Va. Code § 18A-4-8b(g). "The language of Code § 18A-4-8b is mandatory. The posted position had to be filled within 20 working days of the date of the posting if a qualified applicant was available. The applicant had to be qualified at the time the statute required the position be filled; that is, within 20 working days of the posting." Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994); Sage v. Hancock County Bd. of Educ., Docket No. 92-15-385 (Feb. 1, 1993)." Whitt v. Mingo County Bd. of Educ., Docket No. 97-29-419 (Jan. 30, 1998).

For the foregoing reasons, this grievance is hereby **GRANTED.** Respondent is ordered to instate Grievant in the Carpenter/General Maintenance position, and to pay himbackpay at a rate equal to the difference, if any, between his current rate and the rate for the Carpenter/General Maintenance position from twenty working days after December 8, 2000, and to grant him seniority in the Carpenter/General Maintenance classifications from the same date, and to pay Grievant interest on any sums payable at the legal rate.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Wood 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: November 30, 2001

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

As originally filed on January 9, 2001, this grievance only concerned the requirement that Grievant re-take the competency test and that the position was not filled within twenty days of its posting. As that grievance was pending, Grievant continued to pursue the job and re-took the test as he was directed. On March 24, 2001, prior to the Level II hearing, the grievance was amended to include the allegation that the test was administered improperly. There was no objection to the amendment.

Footnote: 2

Although not at issue in this case, Lvl. II Grievant's Exh. No. 2 shows Grievant also passed the General Maintenance test on December 12, 1992.

Footnote: 3

On January 9, 2001, Grievant filed his original grievance alleging a violation of W. Va. Code § 18A-4-8b, since the position had not be filled within 20 days of posting. Although the evidence shows the job had not been filled at that time, it is unclear when it was filled and argument at Level IV concentrated on the re-taking of the test portion of the grievance.

Footnote: 4

In order to preserve the integrity of future competency tests, the exact task that was evaluated will not be identified here.

Footnote: 5

Although it is clear from the evidence that the test was not administered in compliance with the requirements of W. Va. Code § 18A-4-8e, the other internal applicant declined to file a grievance over the testing method and did not join in this grievance when it was amended,therefore it will be unnecessary to compare his qualifications with Grievant's.