VALERIE TIBBS,

Grievant,

v. **Docket No. 01-15-590**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Valerie Tibbs ("Grievant") initiated this proceeding on April 23, 2001, alleging entitlement to a Mason/Carpenter II/ Handyman position. She seeks placement in the position with back pay. Grievant's immediate supervisor was without authority to grant relief, and, upon appeal to level two, a hearing was conducted on August 14, 2001. The grievance was denied in a written level two decision dated November 9, 2001. Level three consideration was waived, and Grievant appealed to level four on November 27, 2001. After a continuance granted for good cause shown, a level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on March 4, 2002. Grievant was represented by Owens Brown of WVEA, and Respondent was represented by William Fahey, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 4, 2002.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator for twenty-two years. 2. On January 5, 2001, Respondent posted a vacancy for the position of Mason/Carpenter II/Handyman.

3. Grievant and several others applied for the position within the posting period. (See footnote 1)

4. None of the applicants for the position currently held the necessary classification titles.

5. Grievant took the written portion of the qualifying test for Mason/Carpenter/Handyman on February 23, 2001, and passed it. (See footnote 2)

6. On March 20, 2001, Grievant and 13 other individuals took the performance portion of the

masonry test.

7. The performance masonry test consisted of two parts. The first portion was a tool identification exercise, which required the applicant to name 16 tools by looking at photocopied drawings of them, worth a possible 16 points. The second portion of the test required the actual building of a small corner section of a brick wall, worth 55 points. The State Board of Education requires a score of at least 70% on both portions combined in order to pass the test.

8. The bricklaying portion of the masonry test was graded using a rating sheetprovided by the State Board of Education. Applicants were told how many layers of brick should be used and what the dimensions should be when the wall was finished.

9. Steve Shannon, a vocational teacher for Hancock County who teaches building construction, administered the performance portion of the masonry test.

10. Grievant improperly identified five of the tools on the tool identification test, scoring11 of a possible 16 points.

11. Grievant's scores on the bricklaying portion of the test were as follows:

Item	Scale	Grievant's score
Mortar mixed properly	2-10	2
Bed properly placed	1-5	2
Mortar placed properly on bricks	1-5	2
Joints properly struck and joined	1-5	3
Relatively clean job	1-5	4
Time used efficiently	1-5	3
Dimensions correct	1-10	2
Corner plumb on both sides and level	1-10	8

12. Grievant scored 26 on the bricklaying portion of the test, for a total score of 37 on the

performance test. Consequently, she failed to achieve the required 70% passing score.

13. Only three of the fourteen people who took the masonry performance test on March 20, 2001, passed it. Those who passed the masonry performance test were thenallowed to take the carpentry performance test.

14. The successful applicant for the position was David Ewing, who had not been previously employed by Respondent. Prior to being awarded this position, Mr. Ewing had worked for 22 years as a certified union mason. Mr. Ewing achieved a score of 14 on the tool identification test and a perfect score of 55 on the bricklaying exercise.

15. Grievant has previous experience doing masonry work for a family construction business. For the past three years, she has worked for a construction company during the summer months. She is not a certified mason.

16. Mr. Shannon stood in the front of the classroom, approximately twelve feet from the applicants, while they performed the bricklaying exercise. He evaluated the quality of their mortar while they were mixing it and actually laying the bricks. The remainder of the scoring of the bricklaying exercise was done immediately after the applicants completed their walls and left the room.

17. Grievant was the only female who took the masonry performance test.

18. Of 24 applicants, only Mr. Ewing and one other applicant successfully passed the required testing to qualify for the Mason/Carpenter II/Handyman position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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); 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. W. Va. Code §18A-4-8b provides that service personnel positions must be filled onthe basis of seniority, qualifications and evaluations. “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 vacancies.” The statute further provides that “[o]ther employees then must be considered and shall qualify by meeting the definition

of the job title."

W. Va. Code § 18A-4-8e provides for competency testing of school service personnel, in pertinent part, as follows:

> 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.
>
> 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.
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> The competency test shall consist of an objective written and/or performance test[.] . . . The performance test for all classifications and categories . . . shall be administered by a vocational school which serves the county board of education. A standard passing score shall be established by the state department of education for each test and shall be used by county boards of education.
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> * * * * *
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> 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.

This Grievance Board has consistently recognized that the competency testing requirements set forth in the above statute do not allow a board of education to place anemployee in any position for which he or she has not passed the applicable test. Edmonds v. Lincoln County Bd. of Educ., Docket No. 97-22-120 (May 27, 1998). See Seabolt v. Kanawha County Bd. of Educ., Docket No. 00-20-307 (Dec. 22, 2000).

Grievant argues that Mr. Shannon did not rate her bricklaying exercise fairly and believes there was bias against her because she is a woman. She contends that she should have been given a passing score on the masonry performance test, and that, as the most senior county employee, she

would then be entitled to placement in the position at issue. Grievant does not believe Mr. Shannon provided an adequate explanation for the low scores she received on the bricklaying exercise. She stated that she is very confident in her masonry skills and that she measured her wall before she left, concluding that it complied with the requirements stated on the exam.

It is true that Mr. Shannon was not terribly helpful with regard to explaining Grievant's scores on the masonry test when he testified for this grievance. He had not kept any written notes when he scored the tests and could not specifically remember the particulars of what was wrong with Grievant's wall. However, he testified that, other than the rating sheet with the items to be evaluated and the points range for each category, the state did not provide any guidance as to how the exercise is to be graded. Mr. Shannon admitted that the ratings are somewhat subjective, based upon the judgment of the evaluator. Melinda Isaacs, Coordinator of Standards and Assessment for the State Board of Education, testified that the masonry performance test is objective, because the administrator must use the items listed and the assigned point values when assessing each exercise.

Grievant also took issue with Mr. Shannon's qualifications to administer a masonrytest. Although he is not a certified mason, Mr. Shannon has numerous years of experience in and teaches all aspects of building construction, including masonry. As Ms. Isaacs noted, the statute only requires that performance exams be administered by someone at the county vocational center, and it is within the county's discretion to decide who is qualified. Since he is a masonry instructor, there is simply no basis upon which to conclude that Mr. Shannon was not qualified to administer this exam.

Unfortunately, it is very difficult to review a performance examination such as this one in order to determine whether the ratings given were accurate. The undersigned certainly has no masonry expertise which would allow me to second guess Mr. Shannon's judgment, even if the actual wall built by Grievant could be produced for review. Grievant's representative brought a brick and trowel to the level four hearing and asked Grievant, Mr. Shannon, and Mr. Ewing to demonstrate how they would apply mortar to a brick. Although Grievant's representative was advised by the undersigned that such a demonstration could not accurately be reflected in the record and could not be considered probative evidence, he expressed a desire to proceed anyway. All that the undersigned could gather from this demonstration, if anything, was that there is more than one way to “butter” a brick.

W. Va. Code § 18A-4-8e requires that competency tests be administered “in a uniform manner

under uniform testing conditions." The evidence submitted in this case simply does not establish a violation of the statute. Although Grievant obviously had a difference in opinion regarding the quality of the wall she built, she has not proven that the testing conditions to which she was subjected were not the same as for the other applicants. The evidence in this case will not support a conclusion that the testing conditions were not uniform for all candidates, and all applicants were evaluated using thesame set of standards established by the State Board of Education. Because, as Mr. Shannon explained, there are no specific guidelines for applying the rating criteria for the bricklaying exercise, some subjective judgment on the part of the administrator is unavoidable. However, the undersigned cannot find that the criteria were misapplied or that Grievant's test was graded unfairly.

___Grievant contends that the results of this examination evidence a general bias against her, which she believes is based upon her gender. Whether gender-based or otherwise, W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." To prove discrimination, gender based or generally, a grievant must establish a prima facie case which consists of demonstrating:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

The evidence in this case falls short of establishing a prima facie case ofdiscrimination. Of fourteen people who took the masonry competency test, only three people successfully completed it.

Therefore, Grievant and ten men failed the test, so she has not been “singled out” for failure. It is not difficult to believe that Mr. Ewing, with twenty years of experience as a certified mason, would build a wall superior to Grievant's and most of the other applicants'. There is simply no evidence that Grievant failed the exam because she is a woman, so her discrimination claim must fail.

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

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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); 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.

2. “Competency tests shall be administered to applicants in a uniform manner under uniform testing conditions.” W. Va. Code § 18A-4-8e.

3. In order to establish a prima facie case of discrimination, as defined by W. Va. Code §18-29-2(m), a grievant must prove :

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Grievant has not proven that the masonry competency test was administered in violation of the requirements of W. Va. Code § 18A-4-8e.

5. Grievant has failed to establish a prima facie case of discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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: April 16, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although Grievant seemed to feel she needed to prove that she applied for the position within the posting period, she was mistaken in her belief that it was posted twice. According to the assistant superintendent's testimony, the original posting was merely extended, and there appears to be no question that Grievant applied within the posting period.

Footnote: 2

Grievant offered evidence regarding her late arrival for this test, due to her bus driving schedule, and appeared to be arguing that she was prejudiced by this in some respect. She also believed the grading of this written test may not have been impartial, since applicants were to be identified only by social security number, and her late arrival allegedly insured that her test could be linked to her. However, since Grievant passed the test, she was clearly not harmed.