# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

# GRIEVANCE BOARD

**DOUGLAS TENNANT,**

**Grievant,**

**v.** **Docket No. 06-24-135**

**Denise M. Spatafore**

**Administrative Law Judge**

**MARION COUNTY BOARD OF EDUCATION,**

**Respondent.**

## DECISION

Douglas Tennant ("Grievant") initiated this proceeding on March 2, 2006, alleging he should have been selected for a Truck Driver/Groundsman/General Maintenance position. After the level two hearing held on March 17, 2006, Grievant alleged a default occurred, on April 17, 2006. Grievant appealed to level three on April 13, 2006, and to level four on April 25, 2006. A hearing regarding Grievant's allegation of default was conducted by the undersigned in the Grievance Board's office in Westover, West Virginia, on June 30, 2006. Grievant's request for relief by default was denied in an Order dated August 15, 2006. *See Tennant v. Marion County Bd. of Educ.*, Docket No. 06-24-135D (Aug. 15, 2006). In accordance with that Order, a hearing regarding the merits of this grievance was convened on October 4, 2006. Grievant was represented by counsel, Kimberly Levy of the School Service Personnel Association, and Respondent was represented by counsel, Stephen R. Brooks. This matter became mature for consideration upon receipt of the parties' fact/law proposals on

October 30, 2006. The following material facts have been proven by a preponderance of the evidence.

## Findings of Fact

1. Grievant is regularly employed by Respondent as a bus operator.
2. Grievant had previously worked in the summer as Groundsman/General Maintenance.
3. On December 20, 2006, Respondent posted a vacancy for a Truck Driver/Groundsman/General Maintenance. The posting also stated under “duties” that the individual would perform “herbicide/pesticide applications as required (license required).”
4. The three most senior applicants were Grievant, Dan Gorman, and David Hayhurst.
5. Mr. Gorman has more seniority than Grievant.
6. At the time he applied for the position at issue, Mr. Gorman was working as a custodian.
7. After the position was posted, both Grievant and Mr. Gorman already possessed or had successfully passed the competency testing requirements for the three classifications included in the position.
8. Mr. Gorman was selected to fill the position, because he was the most senior applicant.
9. Mr. Gorman did not have an applicator's license at the time he applied for the position. Respondent allowed him to take the time to obtain the license, which he received on April 28, 2006.
10. Grievant has had an applicator's license since September of 2005. He was the only applicant who had the license at the time he applied for the position, and Respondent knew about his license.

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); *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 argues that, because the applicator's license was required as part of the posting, he should have been placed in the position as the most senior applicant possessing the required

qualifications. Respondent counters that the license is not a requirement for the classification, so possession of it does not make one applicant more qualified than another. Therefore, Grievant and Mr. Gorman were equally qualified, and the most senior, qualified applicant was selected. In addition, Respondent contends that it had a well-known “practice” of allowing successful applicants to take the opportunity to acquire necessary licenses and certifications after being selected to fill positions, and Grievant was well aware of this practice.

W. Va. Code §18A-4-8b provides, regarding the filling of school service personnel positions, that:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel asprovided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy.

This same *Code* section requires that all positions be filled within twenty days of posting. This latter requirement was a pivotal issue in the long-established precedent set forth in *Cyphers v. Marion County Board of Education*, Docket No. 94-24-134 (Oct. 31, 1994). In that case, the board of education placed a requirement in the posting that, in addition to passing the relevant competency test, the successful applicant would need to possess or obtain a journeyman's electrician license. Under circumstances similar to the instant case, the board allowed the more senior applicant a period of time (approximately three months after the posting) to obtain the necessary license.

As noted in *Cyphers*, *supra*, no specific statutes address the filling of service personnel positions requiring specific licensure. However, in concluding that the board had erred in hiring the applicant who did not have the required license, this Grievance Board stated:

> Although the Board's decision to allow a service employee the opportunity to obtain a required licensure prior to his assuming the duties of a position is not precluded by statute, utilizing this alternative does not negate the Code §18A-4-8b requirement that the position be filled within twenty working days. In the present matter the most senior applicant was not qualified to hold the position at the time it was to be filled.

This principle has been reaffirmed in recent years. As stated in *Holbert v. Wood County Board of Education,* Docket No. 01-54-427 (Nov. 30, 2001):

> 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).

*Citing Whitt v. Mingo County Bd. of Educ.*, Docket No. 97-29-419 (Jan. 30, 1998).

A board of education's authority to establish a job-related qualification for school service personnel position exceeding the minimum requirements for that classification title has been upheld both by this Grievance Board and the State Supreme Court. *See Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995), *rev'g Hopkins v. Ohio County Bd. of Educ.*, Docket No. 92-35-359 (Aug. 12, 1993). Accordingly, since Respondent chose to state in the posting that the applicator's license was required, it was bound by the provisions of the posting. Because Grievant was the only fully qualified applicant within the 20 days following the posting, Respondent was obligated to place him in the position. Despite Respondent's “practice” of allowing applicants to take time obtain licenses and certifications after being selected, it is bound by the provisions of W. Va. Code § 18A-4-8b(g).

The following conclusions of law support this Decision.

## Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his 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 (2004); *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. Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. Va. Code §18A-4-8b.

3. “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).

4. A board of education has the authority to establish a job-related qualification for a school service personnel position exceeding the minimum requirements for that classification title. *See Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995), *rev'g Hopkins v. Ohio County Bd. of Educ.*, Docket No. 92-35-359 (Aug. 12, 1993).

5. "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).

6. Grievant was the most senior applicant who possessed all licenses and certifications necessary for the posted position within the twenty days after the posting, so he was entitled to placement in the position.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to place Grievant in the Truck Driver/Groundsman/General Maintenance position, with benefits, seniority and wages, retroactive to twenty working days after the position was posted, plus interest at the statutory rate.

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

**Date: December 8, 2006**

_____

**DENISE M. SPATAFORE**

**Administrative Law Judge**