**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**MITCH NELSON,**
**Grievant,**

**v.** **Docket No. 2008-1190-BooED**

**BOONE COUNTY BOARD OF EDUCATION,**
**Respondent,**

**and**

**RICKY STARKEY AND RICHARD SHORT,**
**Intervenors.**

# DECISION

This grievance was initiated by Mitch Nelson ("Grievant") on February 13, 2008, alleging favoritism/discrimination. His Statement of Grievance reads as follows:

> Grievant is a long time regular employee in the custodian classification category. On February 7, 2008, the Respondent filled two posted multiclassification maintenance positions, i.e. [sic] Truck Driver/Carpenter II/Roofer/General Maintenance & Plumber II/Sanitation Plant Operator. Respondent filled the two positions with two substitute custodians, i.e. [sic] Ricky Starkey & Richard Short. Respondent provided these two employees with the opportunity to take the training and testing necessary to qualify for these positions prior to or at the time of the posting. Grievant was advised that he would not be able to take the necessary training and testing for approximately four to five months. Grievant contends that the events described above constitute favoritism/discrimination [West Virginia Code § 6C-2-2(g)] and violate West Virginia Code § 18A-4-8b, 18A-4-8g & 18A-4-8e. (Subsequent to filing the grievance at level I, grievant passed the plumber competency test and obtained, at his own cost and n [sic] his own time, the necessary water treatment license.)

His relief sought is "opportunity to take the training and/or testing necessary to qualify for the above-described positions and, if he is successful instatement with compensation for lost wages with interest and all other benefits lost, both pecuniary and nonpecuniary. (Grievant's first preference is the Plumber II/Sanitation Plant Operator position.)"

Dr. Richard Adkins, the designee of the chief administrator, conducted a level one hearing on July 11, 2008. By decision dated July 28, 2008, Dr. Adkins denied the grievance. Grievant appealed to level two on August 2, 2008. The mediation session conducted on September 23, 2008, was unsuccessful. Grievant appealed to level three on September 30, 2008. The undersigned Administrative Law Judge conducted a level three hearing on December 4, 2008. Grievant appeared in person and by counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by Timothy R. Conaway, Esquire. Ricky Starkey and Richard Short appeared *pro se*. At the level three hearing, Ricky Starkey withdrew as an intervenor in the grievance based upon the representation of Grievant that he was not seeking the position that Mr. Starkey was awarded, i.e., the General Maintenance/Roofer/Carpenter II/Truck Driver position. This matter became mature for consideration on December 26, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

**Synopsis**

Grievant was regularly employed as a Custodian III, at the time he applied for a General Maintenance/Plumber II/Sanitation Plant Operator position for which he was not qualified. Grievant neither possessed the experience nor had he taken the necessary competency tests. The Respondent chose to fill the position with a substitute service employee who possessed all of the posted minimum requirements for the position. If Grievant had met the minimum requirements posted for the General Maintenance/Plumber II/Sanitation Plant Operator at the time he applied for the position, he would have received priority or preference as the result of his regular seniority. Grievant was not qualified for

the position he was seeking, and Respondent was not required to call Grievant and schedule testing for him that he had not requested.

Grievant also contended that Respondent engaged in discrimination and favoritism by awarding Intervenor Short the position at issue, alleging he was allowed an opportunity to take the required competency tests that others were not given. These allegations were simply untrue, in that Intervenor had qualified for the class title position by virtue of taking the required tests before he applied for the position in January 2008. Grievant had not taken the required tests at that time, so he was not qualified for the General Maintenance/Plumber II/Sanitation Plant Operator position when it was posted in January 2008. No discrimination or favoritism was proven, and the grievance is denied.

After a detailed review of the entire record, the undersigned makes the following Findings of Fact:

**Findings of Fact**

1. Grievant has been employed by Respondent as a Custodian since October 5, 1983.

2. The Respondent posted two positions for the 2007-2008 school year. Such postings began on January 11, 2008. The first posted position was a maintenance position for General Maintenance/Roofer/Carpenter II/Truck Driver. The second posted position was for General Maintenance/Plumber II/Sanitation Plant Operator. Qualifications were attached to the job postings. The job posting had an attachment that required applicants to meet the definitions of the various classifications.

3. The minimum requirements for the position Grievant seeks are: High school diploma or GED; two years experience as a plumber; hold a valid 1 S Waste Water

Operator Certificate; and general knowledge of drawings, blueprints, and work assignments.

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

5. The Respondent filled the positions on February 7, 2008. Richard Short was selected to fill the General Maintenance/Plumber II/Sanitation Plant Operator position. Ricky Starky was selected to fill the General Maintenance/Roofer/Carpenter II/Truck Driver position. Grievant modified his relief requested at level three, indicating he was not seeking the position awarded to Ricky Starkey. Mr. Starkey moved to withdraw his status as Intervenor at the level three hearing.

6. Prior to his selection to fill the posted position, Intervenor Richard Short was employed as a substitute custodian and substitute maintenance employee.

7. The Respondent has enacted a policy governing competency testing for service positions. The Respondent schedules competency examinations between June 1 and August 1 of any given school year.

8. At the time the General Maintenance/Plumber II/Sanitation Plant Operator position was filled, Mr. Short possessed all of the posted minimum requirements for the position.

9. At the time Grievant made application for the position in issue, he had never taken the plumber test, the sanitation plant operator test, or the general maintenance test necessary to qualify him for the General Maintenance/Plumber II/Sanitation Plant Operator classification. Neither did Grievant possess the minimum two years of experience as a plumber, nor did he have a general knowledge of drawings and blueprints.

10. During the interval between the filing of the grievance and the level one hearing, Grievant passed the general maintenance and plumber competency tests. He was also able to obtain the appropriate certification/licensure for water treatment.

11. Intervenor Short was compensated for the time he spent taking the training and passing the tests that qualified him for the position. Grievant has never requested that he be compensated for time spent taking such training, nor has he requested that the Respondent pay for such training.

**Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant alleges violation of multiple *Code* Sections, and argues his standing as a regular employee, and almost twenty-five years of regular seniority, entitles him to take the

required tests, and if he passes, to fill the position. Further, Grievant asserts the law requires the Respondent to arrange for applicants to take necessary competency tests and the inservice in preparation for the competency tests. Grievant contends it constitutes discrimination and favoritism by selecting Mr. Short, a substitute, for the posted position in question. Respondent counters that a county board of education is not required to call applicants for a position and notify them that they must take a competency exam to be qualified for the position. In addition, Respondent argues it was under no obligation to wait to fill a position while a regularly employed service employee attempts to obtain the qualifications for the position.

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E. 2d 58 (1986). West Virginia Code § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." In turn, the same statute defines "qualifications" as meaning that "the applicant *holds* the classification title in his or her category of employment . . . and shall be given first opportunity for . . . filling vacancies." (Emphasis added.) Respondent contends that, because Intervenor had completed all requirements for the classification titles for this position, it filled the position with the most qualified applicant.

Grievant argues that the longtime practice of the Respondent had been to hire employees and afterward send them to take the competency test for any applicable class title they do not already hold. The requirements for competency testing by county boards of education are set forth in West Virginia Code § 18A-4-8e, which defines the purpose of the tests as "to provide county boards of education a uniform means of determining whether . . . employees who do not hold a classification title . . . meet the definition of the classification title."

Grievant is, unfortunately, incorrect in his assertion that Respondent had any practice or obligation to offer a competency test to him under the circumstances presented. As further stated in West Virginia Code § 18A-4-8b(b), only if no applicant holds the classification title are "[o]ther employees . . . then considered and shall qualify by meeting definition of the job title." Therefore, only if no qualified individuals apply, i.e., no applicants hold the class titles in question or have successfully completed the competency test, is the board obligated to offer competency testing in order for other employees to be deemed qualified through successful completion of the examination. There is no dispute that Intervenor Short was qualified in both the plumber and sanitation plant operator classifications and held the necessary waste water operator certificate. Accordingly, Respondent correctly provided him the first opportunity to fill this position, as required by the statute.

It is clear Grievant was not qualified for the position at the time he 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 Weaver v. Mason County Bd. of Educ.*, Docket No. 94-26-028 (Oct. 25, 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 require 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 previously been addressed by the Grievance Board in *Rose v. Braxton County Board of Education*, Docket No. 95-04-521 (Sept. 30, 1996), *affirmed* (Kanawha County Cir. Ct., Feb. 19, 1998), *appeal refused* (W. Va. Supreme Ct. of Appeals, Sept. 17, 1998). 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 qualify.

In the instant case, Grievant argued it was unfair given that the competency policy is hidden in a thick manual, and the policy was not well known among the employees. However, it is clear, through Grievant's own testimony, that while he claims to have been interested in a maintenance position for a number of years, at the time the position in issue was posted he had taken no steps to prepare himself to assume a maintenance position. At the time he made application for the position in issue, he had not taken the plumber test, nor the sanitation plant operator test, nor even the general maintenance test. 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. The record of this matter establishes that Grievant did not request to take any competency examinations prior to application for the position.

Grievant is also incorrect in his assertion that he was in a similar position to that of Intervenor Short as an aspirant for a position in maintenance. As explained by Respondent's Director of Maintenance Andrew Dolan in his testimony, Intervenor Short had taken and passed the necessary sanitation and plumbing examinations when the position was posted in January 2008. Grievant was not qualified for the classification titles at the time he applied, and, as discussed above, when applicants for a class title have successfully completed the requisite competency test, the board of education has no obligation to provide opportunities for competency testing.

"Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52 (2007);[1] *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant has failed to establish discrimination and/or favoritism under the facts presented. Intervenor Short took the general maintenance, plumber II, and sewage plant operator's test well in advance of the posting of the position in issue. Intervenor Short, of his own volition, obtained the necessary waste water operator certificate.[2] There is no evidence to suggest that Grievant would have been denied the opportunity to take the necessary competency exams had he so requested. Respondent was under no obligation to recruit Grievant to take the competency exams. Intervenor Short had passed the competency exams; asked to take the exams and Grievant did not. Grievant and Intervenor Short were not treated differently.[3]

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[1]Although these cases addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions were virtually identical to those contained in the current statute.

[2]The operator's certificate is issued by the State of West Virginia if an individual passes an exam after a course of training.

[3]This discussion does not minimize the fact that during the interval between the initiation of the grievance and the level one hearing, Grievant passed the general maintenance and plumber competency tests. Grievant was also able to obtain the appropriate certification for operation of a water treatment facility. While the timing of these accomplishments does not advance his grievance, they may well prove helpful in making application for future maintenance positions. In fact, the record of this matter indicates that sometime after the initiation of this grievance, Grievant was placed on the substitute maintenance list in addition to continuing to hold his regular custodial position.

In summary, Grievant's allegations of discrimination, favoritism, and improprieties in the selection decision at issue are unsupported by the evidence presented. Intervenor Short met all qualifications for the position and was entitled to the position over Grievant.

The following conclusions of law support the decision reached.

**Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

2. A board of education must fill service personnel positions on the basis of "seniority, qualifications and evaluation of past service." W. VA. CODE § 18A-4-8b(a).

3. Pursuant to the provisions of West Virginia Code § 18A-4-8b(a), "qualifications" means the applicant holds the classification title in the applicable employment category, and such individuals are entitled to the first opportunity in filling vacancies.

4. If no applicants hold the applicable classification title, competency testing must be provided to employees in order to meet the definition of that classification title. *See* W. VA. CODE §§ 18A-4-8e and 18A-4-8b(b).

5. Because Intervenor Short was qualified for the position at issue, Respondent had no obligation to offer competency testing to other applicants.

6. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm*., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

7. Grievant has failed to establish discrimination or favoritism in this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**Date: February 24, 2009**

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**Ronald L. Reece**
**Administrative Law Judge**