WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JERRY PORTER,

Grievant,

v. **Docket No. 2011-1337-CONS**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent,

v.

JERRY CASTEEL,

Intervenor.

DECISION

Grievant, Jerry Porter, filed two grievances against his employer, Respondent Wayne County Board of Education, on January 3, 2011. In the first, the statement of grievance reads as follows:

> I applied for painter/truck driver position posted in May '08 and passed the test given for that position. The test was presented to me as the "painters test." I did not get that job due to another employee having more seniority them myself. This year in September 2010, I applied to the job posting of painter/handyman/rubber roofing/carpenter. I passed the rubber roofing test. However, the painters test was given to me also which I did not pass. According to the WV Code 18A-4-8e I should have been excluded from the painters test since I had previously taken and passed it. Failing of this test kept me from getting this position. I feel like my previous passing score should have carried over and I should not have been given it again. The WV Code also states that once an employee passes the competency tests that the employee may not be required to take the competency test again (as provided in section eight-b of this article.

As relief sought, Grievant states, "I feel like my previous passed score on the painters test be carried over on my qualifications for the job posting in 2010 and I be awarded the posted position. I am also seeking back pay from this position which I feel I was unjustly not awarded, along with seniority that would have been acquired at the hiring date of the painter/handyman/rubber roofing/carpenter position."

In the second grievance, the statement of grievance states as follows:

> I applied for the posting of painter/handyman/rubber roofing/carpenter position in Sept. 2010. Fortunately, I passed the rubber roofing test given. However, I failed the painters test. I am filing a grievance based on the WV Code 18A-4-8e which states that an employee be given a minimum of one day of appropriate in-service training to assist in preparation of the competency tests given. I was neither given or offered any form of inservices to prepare me for these tests given in order to qualify myself for this position. I had also applied for the locksmith posting and subsequently failed the test given for locksmith after receiving no preparation for this competency test as well.

As relief, Grievant sought, "I request that all employees, not just myself, be given the appropriate inservices needed prior to taking a competency test. And that I am readministered the painters test for the Sept. 2010 posting of painter/handyman/rubber roofer/carpenter. I am also requesting that I am readministered the locksmith test after proper inservices given."[1]

At Level One, these two grievances were heard together on January 21, 2011. The

[1] The position of truck driver/locksmith/handyman/carpenter posted in 2010 was not filled, and later rescinded on August 2, 2011. Accordingly, Grievant's claims regarding this position and the locksmith test are now moot, and will not be addressed further herein.

grievances were denied at Level One in separate decisions on February 10, 2011.[2] Grievant appealed to Level Two in each of these grievances on February 23, 2011.

Grievant filed a third grievance against Respondent on February 18, 2011, stating as follows: "[i]t came to my knowledge that a person applied for the same job that I did. That person failed the competency test but was awarded the position anyway." As relief, Grievant sought, "[b]e given the painters competency test that I was not provided inservice for and be awarded the position that I applied for with seniority and back pay." The Level One hearing was held on March 11, 2011. It is noted that Jerry Casteel was granted Intervenor status at Level One in this third grievance. This grievance was denied on the merits at Level One by decision dated March 15, 2011. Grievant timely appealed to Level Two on March 28, 2011.

The three grievances were consolidated at Level Two by Order entered March 29, 2011.[3] A Level Two mediation was conducted on April 6, 2011. The Level Three appeal was perfected on April 15, 2011. A Level Three grievance hearing was conducted by the undersigned administrative law judge at the West Virginia Public Employees Grievance Board's Charleston, West Virginia, office on September 13, 2011. Grievant appeared in person, and with his representative, Jeremy Radabaugh, West Virginia Education

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[2] Respondent raised timeliness as a defense to the first two grievances at Level One. Further, at Level One, the Chief Administrator's Designee denied the first grievance finding that Grievant failed to meet his burden and finding the grievance untimely filed. The Chief Administrator's Designee denied the second grievance for timeliness.

[3] Due to a clerical error, Intervenor Casteel's name was not added to the style of this grievance following consolidation at Level Two. The undersigned discovered the error the day of the Level Three hearing. As such, the undersigned has included Intervenor's name in the style in this Decision.

Association. Respondent appeared by counsel, David A. Lycan, Esquire. Intervenor Jerry Casteel appeared in person, *pro se*. This matter became mature for decision on October 13, 2011, upon the receipt of the last of the parties' proposals.[4]

Synopsis

Grievant filed three grievances concerning his application for a multi-classified position with Respondent. Grievant took the painter's competency test required for one position, but did not pass it. Grievant argued that a competency test he had previously taken in 2008 during the application process for another position should have been used to qualify him for this position, and that he should not have been required to take the painter's competency test. The test Grievant took and passed in 2008 was a general maintenance competency test, not a painter's competency test. The general maintenance test cannot be substituted for the painter's test. Because Grievant did not pass the painter's competency test, he was not qualified for the position he sought. Accordingly, Grievant failed to meet his burden of proving his claim by a preponderance of the evidence. However, even if he had met his burden, Respondent met its burden of proving that the grievance was untimely filed. Grievant failed to present a proper basis for excusing his untimely filing.

Further, Respondent failed to afford Grievant with the required in-service training prior to taking the required competency test(s). However, Respondent met its burden of proving that this grievance was untimely filed. Grievant failed to present a proper basis for excusing his untimely filing. Lastly, Grievant alleged that Intervenor failed the required

[4] It is noted that Intervenor Casteel did not submit proposed Findings of Fact and Conclusions of Law for consideration.

competency test, but was still selected for the position. Grievant presented no evidence to support this claim. From the evidence presented, Intervenor passed the required competency tests. Grievant failed to present sufficient evidence to prove his claim by a preponderance of the evidence. For these reasons, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Jerry Porter is employed as a regular bus operator for the Wayne County Board of Education.

2. In September 2010, Grievant applied for two multi-classified positions. The first position was rubber roofer/painter/carpenter/handyman; the second, truck driver/locksmith/carpenter/handyman.

3. None of the applicants for these two positions held classification titles in these areas of employment. As such, Loren Perry, Respondent's Service Personnel Director, administered the applicants' competency tests to determine who would qualify for the positions.

4. Prior to administering the competency tests to the applicants, Respondent failed to provide the applicants with in-service training to prepare them for the tests.

5. Grievant and Intervenor took the rubber roofing competency test and passed the same, despite having no in-service training.

6. On November 1, 2010, Director Perry administered the painter's competency test to Grievant and Intervenor.

7. While he was taking the test, Grievant told Director Perry that he had taken the painter's competency test, and passed the same, in 2008 when he applied for a prior posting; therefore, he should not have to take the painter's competency test again.

8. In response, Director Perry checked the file for painter's competency tests to locate Grievant's 2008 test. However, Director Perry could find no such test. Director Perry informed Grievant that he could not find any record of Grievant taking the painter's competency test in 2008. After being informed of this, Grievant resumed and completed taking the painter's test.

9. Grievant failed the painter's competency test. Director Perry informed Grievant that he had failed the test that same day, November 1, 2010. Intervenor passed the painter's competency test.

10. Because Grievant failed the painter's competency test, he was not administered the carpenter's competency test. Accordingly, Grievant was not considered for the rubber roofer/painter/carpenter/handyman position. Intervenor, however, passed the painter's test and went on to take the carpenter's competency test. Thereafter, he was selected for the position. Intervenor was awarded the position on November 16, 2010. Intervenor was the only applicant who passed all the required competency tests.

11. On or about November 7, 2010, Director Perry's secretary discovered the test that Grievant had taken and passed in 2008 and brought it to his attention. The test taken in 2008 was the general maintenance competency test, not the painter's competency test. Director Perry then discovered that in 2008 his predecessor, Tab Mathis, had administered the general maintenance competency test to all the applicants for a truck driver/painter position, not the required painter's test. Grievant had passed this test in 2008, but had not

been selected for the position because another applicant had more seniority. Therefore, the applicant who was selected for the 2008 position was considered "qualified" for a painters position without having taken and passed a painter's competency test.[5]

12. On or about November 7, 2010, Director Perry informed Grievant that his 2008 test had been found and that it was general maintenance competency test, not a painter's competency test. Director Perry further informed Grievant that because the 2008 test was not the painter's competency test, he could not credit Grievant with having passed the painter's competency test.

13. Grievant took only one competency test in 2008. Grievant further verified his signature on his 2008 answer sheet, which was attached to the general maintenance competency test. Grievant also acknowledged that the test he took in 2008 appeared different than the test he took in 2010.

14. On December 9, 2010, Grievant called the West Virginia Department of Education to request a study guide to help him prepare for the locksmith competency test. Grievant spoke with Abbey Reynolds Heid, then Coordinator of Technology and Information Support for the WVDE. During their conversation, Grievant informed Ms. Heid that he was not provided in-service training to prepare for his competency test. Ms. Heid then informed Grievant of WEST VIRGINIA CODE § 18A-4-8e.

15. December 22, 2010, was the last day of school in Wayne County before the holiday break that year.

16. Grievant filed his first two grievances on January 3, 2011.

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[5] No grievances were filed in 2008 regarding the filling of the truck driver/painter position.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In his three claims, Grievant alleges that Respondent violated numerous statutes surrounding its filling of the rubber roofer/painter/carpenter/handyman position in November 2010. Grievant further alleges that a competency test he took and passed in 2008 should have carried over to qualify him for this position, and that he should not have been required to take the competency test administered on November 1, 2010. Respondent, however, argues that Grievant was administered the general maintenance competency test in 2008 in error, not the requisite painter's competency test. As such, the 2008 test cannot qualify Grievant for the position at issue. Respondent also asserts this grievance was untimely filed.[6] Further, with respect to Grievant's claim regarding in-service

[6] It is noted that Respondent did not file a Motion to Dismiss at Level Three, nor did Respondent orally move for dismissal at the Level Three hearing. In his opening statement, counsel for Respondent stated that it was Respondent's position that the second grievance, not the first, was untimely filed. Further, in its proposed Findings of Fact and Conclusions of Law, Respondent does not specifically argue that the first grievance was untimely filed. However, it is noted that Respondent raised timeliness at Level One.

training, Respondent argues that the grievance was untimely filed, and that, although it failed to provide the required in-service training for Grievant prior to his taking the required competency test, his claims must be denied. Respondent also contends that it properly selected Intervenor to fill the position as he had completed all the requirements for the classification titles for this position and was the most qualified applicant.

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. Bd. of Educ. of County of Wyoming,* 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." *Id.* The same statute then defines "qualifications" as meaning that "the applicant holds a classification title in his or her category of employment . . . and is given first opportunity for . . . filling vacancies." W. VA. CODE § 18A-4-8b(b).

The requirements for competency testing by county boards of education are set forth in WEST VIRGINIA CODE § 18A-4-8e. "The purpose of these tests is to provide county boards a uniform means of determining whether school service personnel who do not hold a classification title in a particular category of employment meet the definition of the classification title in another category of employment as defined in section eight of this article. . . ." W. VA. CODE § 18A-4-8e(b). "The subject matter of each competency test is

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As timeliness was one of the reasons the first grievance as denied at Level One, the undersigned will address the issue of timeliness with respect to the first grievance.

commensurate with the requirements of the definitions of the classification titles as provided in section eight [18A-4-8] of this article." W. VA. CODE § 18A-4-8e(c)(3). "Competency tests are administered to applicants in a uniform manner under uniform testing conditions. County boards 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 may not use a competency test other than the test authorized by this section." W. VA. CODE §18A-4-8e(e). Further, once an employee has passed a competency test for a classification title, he or she may not be required to take the test again. *See*, W. VA. CODE § 18A-4-8e(c)(4). Further, WEST VIRGINIA CODE § 18A-4-8e(g) states that "[a] minimum of one day of appropriate in-service training is provided to employees to assist them in preparing to take the competency tests." *Id.*

The competency test Grievant took and passed in 2008 was the general maintenance competency test, not the painter's competency test. The evidence presented establishes that in 2008, the former service personnel director gave the incorrect test to the applicants for a prior truck driver/painter posting. The general maintenance competency test does not qualify Grievant for the painter classification. A mistake made by another employee constitutes an ultra vires act[7], and does not entitle Grievant to relief. Similarly, the Grievance Board recognizes that "two wrongs do not make a right." *See, Arbogast v.*

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[7] Ultra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-297 (Jan. 31, 1996). *See, Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.,* Docket No. 99-HHR-228 (Nov. 30, 1998).

Division of Corrections/Huttonsville Correctional Center, Docket No. 2008-1758-CONS; *Guthrie v. W. Va. Dep't of Health and Human Res.,* Docket No. 95-HHR-277 (Jan. 31, 1996); *Froats v. Hancock County Bd. of Educ.,* Docket No. 89-15-414 (Dec. 18, 1989). *See also, Roberts v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-017 (May 2, 1996), *aff'd, Circuit Court of Kanawha County,* Civil Action No. 96-AA-72 (May 25, 1997); *Gilliam v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-511 (April 24, 1997). A former employee made a mistake in 2008 by administering the incorrect competency test for a painter position posting. Grievant cannot now benefit from this mistake as he requests.

Pursuant to West Virginia Code § 18A-4-8e(e), the 2008 general maintenance competency test that Grievant passed cannot be substituted to qualify him for the 2010 rubber roofer/painter/carpenter/handyman position. As Grievant failed the actual painter's competency test in 2010, he does not hold the qualifications for the position he seeks. Therefore, the Grievant has failed to meet his burden in proving his claim that the competency test he took and passed in 2008 would qualify him for the rubber roofer/painter/carpenter/handyman position. Because Grievant did not qualify for this position, there is no need to address the issue of which applicant was next in line for the position.

Even if Grievant could meet his burden of proof in this claim, the Grievance was not timely filed. Timeliness is an affirmative defense. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the

burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991). The grievance process must be started within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the most recent occurrence of a continuing practice. *See,* W. VA. CODE § 6C-2-4(a)(1).[8] The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *See, Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Grievant took and failed the painter's competency test on November 1, 2010. Grievant filed his grievance on January 3, 2011, more than fifteen days after the occurrence. Even if you began to calculate the fifteen days from the day the 2008 test was discovered, a week or so later, the filing date is still beyond the fifteen-day time period. Accordingly, Respondent has met its burden in proving that this grievance was untimely filed. Grievant has not presented sufficient evidence to excuse his untimely filing.

In his second claim, Grievant asserts that Respondent failed to provide him with the

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[8] West Virginia Code § 6C-2-2(c) defines "days" as meaning "working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." *Id.*

one-day in-service training to prepare him to take the painter's competency test as required by statute. Respondent fully admits that it failed to provide Grievant with the in-service training required by West Virginia Code § 18A-4-8e(g). Grievant was entitled to the training and Respondent denied him this opportunity. However, Respondent asserts that this grievance was untimely filed.

Grievant argues that the triggering event for his second claim did not occur until December 9, 2010, the date he was advised by an employee of the West Virginia Department of Education that he was supposed to have received in-service training prior to taking competency tests. Respondent argues that the triggering event occurred on November 1, 2010, the day he took the painter's test while knowing he did not receive an in-service training. Even though Respondent's actions in failing to provide Grievant with the required in-service training violate the law, generally, "[i]gnorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule." *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *Pisino v. Div. of Corr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008). *See also, Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001). "The date a grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice." *Harris v. Lincoln County Bd. of Educ.,* Docket No. 89-22-49 (March 23, 1989);

Mills v. Wayne County Bd. of Educ., Docket No. 05-50-451 (May 12, 2006). Accordingly, the undersigned must find that the second grievance was untimely filed. As such, even though Respondent admits violating the statute by failing to provide Grievant in-service training, no relief can be granted. Respondent has met its burden in proving that this grievance was untimely filed. Grievant has not presented sufficient evidence to excuse his untimely filing. However, if in the future, Grievant is again denied in-service training before taking any competency test, Grievant may, of course, file another grievance.

Grievant chose not to present evidence on his third claim, that being that Respondent selected Intervenor for the rubber roofer/painter/carpenter/handyman position even though he failed his competency test, at the Level Three hearing. Intervenor and Respondent presented limited evidence on this issue to support the position that Intervenor passed his competency test. Grievant did not refute the same. Accordingly, the Grievant has failed to present sufficient evidence to prove this claim by a preponderance of the evidence.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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 WEST VIRGINIA CODE § 18A-4-8b, "qualifications" means that "the applicant holds a classification title in his or her category of employment . . . and is given first opportunity for . . . filling vacancies." W. VA. CODE § 18A-4-8b(b).

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

5. "The subject matter of each competency test is commensurate with the requirements of the definitions of the classification titles as provided in section eight [18A-4-8] of this article." W. VA. CODE § 18A-4-8e(c)(3).

6. "Competency tests are administered to applicants in a uniform manner under uniform testing conditions. County boards 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 may not use a competency test other than the test authorized by this section." W. VA. CODE §18A-4-8e(e).

7. Once an employee has passed a competency test for a classification title, he or she may not be required to take the test again. *See*, W. VA. CODE § 18A-4-8e(c)(4).

8. A mistake made by another employee constitutes an ultra vires act, and does not entitle Grievant to relief. Similarly, the Grievance Board recognizes that "two wrongs do not make a right." *See, Arbogast v. Division of Corrections/Huttonsville Correctional Center*, Docket No. 2008-1758-CONS; *Guthrie v. W. Va. Dep't of Health and Human Res.,*

Docket No. 95-HHR-277 (Jan. 31, 1996); *Froats v. Hancock County Bd. of Educ.,* Docket No. 89-15-414 (Dec. 18, 1989). *See also, Roberts v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-017 (May 2, 1996), *aff'd, Circuit Court of Kanawha County,* Civil Action No. 96-AA-72 (May 25, 1997); *Gilliam v. W. Va. Dep't pf Transp.,* Docket No. 96-DOH-511 (April 24, 1997).

9. "Ignorance of the law or of the right to invoke the grievance procedure will not toll the running of the time period for filing a grievance or satisfy the requirements of the discovery rule." *Reeves v. Wood County Bd. of Educ.*, Docket No. 91-54-337 (Dec. 30, 1991); *Pisino v. Div. of Corr.*, Docket No. 2009-0539-MAPS (Dec. 15, 2008). *See also, Mills v. Wayne County Bd. of Educ.*, Docket No. 05-50-451 (May 12, 2006); *Strader v. Monongalia County Bd. of Educ.*, Docket No. 05-30-114 (Aug. 19, 2005); *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001).

10. "The date a grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice." *Harris v. Lincoln County Bd. of Educ.,* Docket No. 89-22-49 (March 23, 1989); *Mills v. Wayne County Bd. of Educ.,* Docket No. 05-50-451 (May 12, 2006).

11. Grievant failed to establish by a preponderance of the evidence that the general maintenance competency test he took and passed in 2008 qualified him for positions in the painter classification.

12. Grievant was not qualified to be selected for the 2010 rubber roofer/painter/carpenter/handyman position because he failed the painter's competency

test.

13. Respondent proved by a preponderance of the evidence that Grievant failed to file his first two grievances within the mandatory statutory time lines. Grievant did not demonstrate a proper basis to excuse his untimely filings.

14. Grievant failed to prove by a preponderance of the evidence that Intervenor, the successful applicant for the rubber roofer/painter/carpenter/handyman position, failed the painter's competency test. To the contrary, the evidence presented establishes Intervenor passed the painter's competency test, and was the only applicant who passed all of the required competency tests for this position.

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 (eff. July 7, 2008).

DATE: March 30, 2012.

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Carrie H. LeFevre
Administrative Law Judge