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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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MICHAEL HOLSTINE, MICHAEL BRUBAKER
and VINCENT YARBER

v.

DOCKET NO. 10-86-263-4

FAYETTE COUNTY BOARD OF EDUCATION

DECISION

This matter comes before the West Virginia Education Employees Grievance Board on appeal from a review by the Fayette County Board of Education denying the grievance. Thereafter, the parties, by counsel, waived in writing their right to an evidentiary hearing at level four and submitted the matter for decision on the record.

Grievants, Michael Holstine and Vincent Yarber, are regularly employed bus operators while grievant Michael Brubaker is a regularly employed custodian. They complain that the respondent, the Fayette County Board of Education, violated WV Code §18A-4-8b in posting and filling five vacant positions in the classification of painters/general maintenance.

The respondent denies violating WV Code §18A-4-8b and asserts that it hired the five employees who scored the highest on the respondent's improvised qualifications test.

The record reveals that on January 14, 1986, the respondent posted a notice of vacancy indicating that five painter positions would be filled, and thereafter, received twenty-three applications. On February 22, 1986, the applicants were given a written test. On March 19, 1986, George Oyler and Michael G. Holstine (also a grievant in this matter) filed a grievance complaining that the five painter positions had not been filled within twenty working days as required by WV Code §18A-4-8b. On March 26, 1986, the grievance evaluator at level one, Wayne Wriston, by way of explanation/response to that grievance, stated that the notice/job posting required that a skills test be given and the tests would be given on April 1 and 2, 1986.¹

No appeal was filed to the March 19, 1986 grievance; however, the explanation/response revealed that the lapse of time between the posting and testing was more than the twenty days permitted by WV Code §18A-4-8b(b).

WV Code §18A-4-8b(b), in pertinent part, provides:

. . . 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. . . (Emphasis added)

The second set of tests were administered to the twenty-three applicants on April 1 and 2, 1986. The results of the tests

¹ It is noted that based upon this response, Mr. Wriston denied the grievance, even though the provisions of WV Code §18A-4-8b(b) had clearly been violated. It is also significant to note that the painter's test which was to be given to the applicants was compiled on March 27, 1986, one day after Mr. Wriston's level one response that an additional (skills) test would be given on April 1 and 2, 1986. The record is silent as to whether the applicants believed the written test given on February 22, 1986, was the "skills" test referred to in the job posting.

were withheld until the five positions were filled on May 16, 1986.

It is admitted by the respondent that the weight given the first and second test was not assigned by Mr. Wriston until after he graded the written test given on February 22, 1986 and had received the written report of his designated observer (Mr. Woodridge) of the practical skills test given on April 1 and 2, 1986.

All twenty-three applicants were required to have three years of painting experience (as per job posting) and in addition, all of the grievants had previous experience with the respondent as summer painters. None of the grievants were among the top five scorers on the tests and none of the grievants were selected even though they had more seniority than three of the successful applicants.

The grievants contend that pursuant to the respondent's policy, they had previously taken a painter's test for summer painter positions and this qualified them to be a painter and to perform the duties as specified by the definition/classification contained in WV Code §18A-4-8.

At this point, the respondent contends that while the grievants were "temporarily" assigned as painters for summer work, they were not classified as painters within the meaning of WV Code §18A-4-8, and therefore, not given hiring priority pursuant to WV Code §18A-4-8b.

In resolving this grievance, it is uncontroverted that the respondent violated WV Code §18A-4-8b(b) in not filling the posted vacancies within twenty days. The first tests were not given until

February 22, 1986 and the positions were not filled until the respondent board met and approved Mr. Wriston's recommendations on May 16, 1986.

The respondent contends that the grievable event occurred on or about February 11, 1986 (twenty working days after the January 14, 1986 posting) and that the grievance was not filed until May 22, 1986; therefore, the grievance was not timely. This contention clearly sidesteps the fact that the positions were not filled on the 21st, 22nd, or 23rd, etc., day after posting. In fact, the positions were not filled until May 16, 1986, over eighty working days from the date of posting. The grievants, on the other hand, assert that they base their complaint on the filling of the positions which occurred on May 16, 1986.

Thus, both parties rely upon WV Code §18-29-4(a)(1) to support their respective positions.

In pertinent part, WV Code §18-29-4(a)(1) provides:

(a) Level one.

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

(Emphasis added)

Admittedly, the "event" of filling the positions should have occurred on or about February 11, 1986 as the respondent contends but the "event" of filling the positions did not occur until May 16, 1986. Thus, the grievable event was in fact May 16, 1986 and

the grievance was filed on May 22, 1986, well within the fifteen day period provided for in WV Code §18-29-4(a)(1), supra. Since the grievance was timely, the question surrounding the manner in which the positions were filled needs to be addressed.

While the grievants complained about several matters regarding the filling of the positions, namely, seniority, summer qualifications v. regular/full time qualifications and testing of applicants, not all of these needs to be examined in order to resolve the grievance.

The West Virginia Education Employees Grievance Board has determined that under certain circumstances, qualification tests are permissible if uniformly applied.² In the present grievance, the respondent abused the testing process by not establishing passing scores and determining the weight to be given the written test before the test scores were available.³ This allowed the testing procedure to become so subjective that it lost its meaning. Here, the respondent manipulated the skills test scores so that there was

² See, e.g., Adkins v. Logan County Board of Education, Docket No. 23-86-024, and Beckett v. Raleigh County Board of Education, Docket No. 41-86-107.

³ The appearance of impropriety regarding the grading and weighing of the test results was a glaring problem throughout the record. The purpose of a test is to provide some objectivity to the decision making process and when that purpose is thwarted by manipulation of raw scores after the test results are known, then the objectivity ceases to be of significant value to the process.

no objective basis upon which to determine if the tests were scored properly. Such manipulation fosters bad faith and lowers morale which is one of the cornerstones of a good employment relationship and effective job performance. It was with this in mind that the Legislature created WV Code §18-29-1, et seq., and more particularly, WV Code §18-29-1 which, in pertinent part, provides:

The purpose of this article is to provide a procedure for employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served.⁴

In the respondent's misuse of otherwise permissible testing procedures, morale was damaged and this was exemplified by the filing of this and at least two other grievances. This undoubtedly was directly attributable to the delay in filling of the positions as required by WV Code §18A-4-8b(b).

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

FINDINGS OF FACT

1. Grievants, Michael Holstine and Vincent Yarber, are regularly employed bus operators while grievant, Michael Brubaker,

⁴WV Code §18-29-1, gives birth to the definition of a grievance which is contained in WV Code §18-29-2, and, in pertinent part, provides: "Grievance" means any claim. . .; or any action, policy or practice constituting a substantial detriment to . . job performance. . ."

is a regularly employed custodian. They are employed by the Fayette County Board of Education.

2. The respondent, the Fayette County Board of Education, posted a notice for the purpose of filling five painter/general maintenance positions on January 14, 1986.

3. The five painter/general maintenance positions were not filled until May 16, 1986, which was more than twenty days after the notice was posted.

4. The event upon which the grievance was based occurred when the vacancies were filled on May 16, 1986.

5. The respondent manipulated the test scores without first having established the qualification criteria or passing scores.

6. Grievants filed their grievance on May 22, 1986 and complained, among other things, that the respondent failed to fill the positions as required by WV Code §18A-4-8b(b).

7. The delay by respondent in filling the vacant positions added to the appearance of impropriety and substantially damaged the morale of its employees and their job performance.

CONCLUSIONS OF LAW

1. Pursuant to WV Code §18A-4-8b(b), vacancies shall be filled within twenty days from the posting date notice.

2. Where respondent violates WV Code §18A-4-8b(b) by failing to timely fill vacant positions and which thereby causes substantial harm to the morale of the employees, then a hearing

examiner may provide appropriate relief in accordance with WV Code §18-29-5(b).

It is noted that the grievants herein seek to be placed in the posted positions and be paid back wages. That relief is denied. However, the grievants and other qualified applicants are entitled to a fair opportunity to fill the positions as provided by law and to that end, the grievance is granted.

The Fayette County Board of Education is **ORDERED** to post and fill the five painter positions in compliance with WV Code §18A-4-8b(b) and this decision.

Either party may appeal this decision to the Circuit Court of Fayette County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (WV Code §18-29-7) Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.


JOHN M. RICHARDSON
Hearing Examiner

DATED: Feb. 11, 1987