



Members
James Paul Geary
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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

CLARENCE BASHAM

v.

Docket No. 89-20-581

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Clarence Basham is on staff with Respondent Kanawha County Board of Education. He complains as follows:

Grievant, a regularly-employed bus operator, applied for a position of Transportation Supervisor at the Dickinson terminal. A regular employee with less seniority than Grievant received this position. Grievant alleges a violation of. . .[W.Va. Code] §18A-4-8b(b) and requests instatement to this position and wages, seniority and benefits retroactive to the date of the filling of the position.

After denials at Level I¹ and Level II² and inaction at Level III³, Grievant advanced his claim to Level IV, where

¹ The Level I answer, in pertinent part, is "I will respond to your grievance by stating that you have not been recommended for employment as a Transportation Supervisor."

² The Level II transcript, its attendant exhibits, and one additional exhibit constitute the record at Level IV.

³ Grievant advanced his claim to Level III, but no action was taken within the time limits prescribed by Code (Footnote Continued)

it was scheduled for hearing on October 12. This hearing was subsequently cancelled⁴ and the case submitted for resolution on the record created below supplemented by proposed findings of fact and conclusions of law.⁵

The uncontroverted testimony of George Beckett, Transportation Director for Kanawha County Schools,⁶ is that seniority, qualifications and evaluation of past service were all considered in selecting three bus terminal Supervi-

(Footnote Continued)

§18-29-4(c). In another case, remand might be ordered for compliance, but it appears that Respondent intended to waive consideration in this case and such will be assumed.

⁴ Shortly before October 12, the undersigned was advised by Respondent's counsel that the case had been resolved informally between the parties. However, on October 12, Grievant appeared at the offices of this Grievance Board for hearing. He admitted that he had agreed to settlement but had changed his mind, and that he had not advised either his attorney or Respondent's counsel of this decision or of his intent to appear for hearing. Separate telephone conferences with the parties' representatives resulted in an agreement that the case should be submitted on the record for adjudication on its merits.

⁵ Although proposals were due November 3, Grievant requested and was granted permission to file his proposals November 6. Respondent did not make a submission and it will be assumed that it has adopted the Level II decision findings and conclusions as its proposal at Level IV.

⁶ Mr. Beckett's official title within the Kanawha County Schools' structure is Director of Pupil Transportation.

sors of Transportation⁷ around the time of Grievant's application.⁸ T. 89. W.Va. Code §18A-4-8b(b) states the standard as follows:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment . . . on the basis of seniority, qualifications and evaluation of past service.

Seniority is defined peculiarly in the statute. First, it must be determined where each applicant stands on the following five-tier ordered list:

⁷ Supervisor of Transportation is a category of service employment per W.Va. Code §18A-4-8. In Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (Jan. 27, 1989), it is equated with the county transportation director's position, even though there is a separate "Director or Coordinator of Services" classification that might more closely relate to the latter. However, it is noted that §18A-4-8 also lists "School Bus Supervisor," which possibly is more descriptive of the vacancies in question herein. Although county boards of education in West Virginia may not alter the classification descriptions found at Code §18A-4-8, they have some leeway in categorizing personnel, and since "Supervisor of Transportation" has been identified by all parties to the instant grievance as the relevant title for terminal managers, the undersigned will not depart therefrom.

⁸ "[A]bout eighteen" people applied for one or more of the three available positions, i.e., Dickinson, Sissonville and East Bank. T. 68. Another unsuccessful applicant, Ira Buster Carter, filed a sister grievance at Level IV, but it was later dismissed at his request. Even though Grievant specifically sought the Dickinson job, he also expressed interest in the Sissonville post and it appears that to some extent all applicants were reviewed for each opening.

At Level II, Grievant amended his relief request to include, as an alternative to reinstatement at Dickinson, "the supervisor's pay and benefits." T. 37. There is no basis upon which Grievant could be awarded such a remedy herein and therefore the same will not be further discussed.

1. Regularly employed service personnel;
2. Service personnel whose employment has been discontinued in accordance with this section;
3. Professional personnel who held temporary service jobs or positions prior to . . . June [9, 1982], and who apply only for such temporary jobs or positions;
4. Substitute service personnel; and
5. New service personnel.

Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988). Regularly-employed service personnel always have priority, or "seniority," over service personnel "whose employment has been discontinued in accordance with this section," and so forth. See Meade v. Mingo Co. Bd. of Educ., 356 S.E.2d 479, 481-82 (W.Va. 1987). The record reflects that all candidates, or at least the successful ones and Grievant, were regular employees of Respondent and therefore, equal at this stage of seniority. Thus the next stage is reached, where seniority is identified as beginning "on the date. . . [the employee] enters into his assigned duties." Since the separateness of employment classifications is highlighted immediately prior to this identification in Code §18A-4-8b(b) and indeed throughout the statute, "assigned duties" must be understood to be coequal with "classification." This admittedly equates this aspect of seniority with "the length of time the employee has been employed by the county board of education within a particular job classification," the reduction-in-force (RIF) standard separately enunciated in §18A-4-8b(b). However, RIF'd employees are specifically covered by the five-tier

list, and have priority, in hiring situations, second only to then-current regular personnel. This bridges the somewhat separate sections of the statute respectively covering hiring and RIF's the applicants' work histories, and supports the conclusion, as applied to this case, that the applicants' work records need analysis, to compare time-in-service each has with Respondent as Supervisor of Transportation.⁹

"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." Grievant has past experience with Respondent as a Supervisor of Transportation,¹⁰ so it is clear that at least at one time, he "qualified" for the position under this standard and, if he is

⁹ Time spent as a bus operator or in another related classification thus does not appear to be relevant to the determination of "seniority" for purposes herein. It is supposed that in an extreme situation, where multiple applicants are indistinguishable on the basis of seniority, qualifications and evaluation of past service, time spent in a related job might be viewed as a reasonable tie-breaker. However, in certain deadlock situations in education personnel law, random selection is the favored solution. See, e.g., Code §§18A-4-8b(b), ¶12.

¹⁰ It is noted the last continuing contract of employment entered into between Grievant and Respondent, dated July 1, 1975, identifies him as a "Supervisor of Transportation -- Pupil Transportation." Gr. Ex. 7. Grievant, however, expressly disavowed any claim of entitlement based on this agreement, T. 48, and none will therefore be discussed herein.

still so qualified, see this Decision, supra, he is entitled to preference in this area of assessment.¹¹ "Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in. . .[W.Va. Code §18A-4-8]. . ."

It is appropriate for a county board of education to require its employees to successfully complete an examination or demonstrate relevant prowess in some other reasonable fashion in order to attain privileges to an employment classification title.¹² Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (Jan. 27, 1989); Jervis; Cook v. Wyoming Co. Bd. of Educ., Docket No. 55-87-014 (May 14, 1987); Jones v. Ohio Co. Bd. of Educ., Docket No. 35-86-051 (May 30, 1986); Adkins v. Logan Co. Bd. of Educ., Docket No. 23-86-024 (May 22, 1986). However, the law does not allow that same board of education to hire service personnel on the "most qualified" basis so clearly enunciated for professional educational staff in Code §18A-4-8b(a). Instead,

¹¹ It does not appear that an employee necessarily must then-currently be working under a specific class title to "hold" it. See Jervis. He may have previously worked in the category or successfully completed all qualifying requirements.

¹² Mr. Beckett candidly confessed he did not know whether or not Respondent had any policy requiring "a structured interview or a written test. . .or how the interview is to be given, or anything of that nature." T. 88. This lack of information is rather startling, particularly since Mr. Beckett has been at his current helm for an extended period, thirteen years. T. 65-66.

as long as a person meets the minimal standard, i.e., holds a classification title in his category of employment or meets the definition of the Code §18A-4-8 job title, he is qualified,¹³ and, as long as his evaluations of past service are acceptable, he must be selected for the position if it is filled at all if he is the most senior applicant, as defined above. Id.¹⁴

It is entirely possible that a person who once served under a certain class title of employment might need to submit to updated testing and/or interviewing to again be equipped to so serve, just as many workers in society are required to engage in continuing education to retain the privilege to practice their trades. This is in recognition of the fact that technology advances, new work techniques are developed, and employers' business needs change over time.¹⁵ Therefore, just because a grievant may once have

¹³ "When a person holds a pertinent job classification title, or meets a job title definition, it must be presumed that he or she possesses at least the minimum skills required by that job. See Jones v. Ohio Co. Bd. of Educ., Docket No. 35-86-051 (May 30, 1986)." Jervis, p. 8.

It is recognized once again that persons already holding the relevant classification title have priority over those qualifying by "meeting the definition." Code §18A-4-8b(b).

¹⁴ In this regard, Grievant's completion of training in transportation at Daytona Beach Community College, etc., is commendable but not necessarily pertinent to whether he is "qualified" per Code §18A-4-8b(b).

¹⁵ "A county board of education in West Virginia is not required to fill any position with a person who does not
(Footnote Continued)

been "qualified" under the Code §18A-4-8b(b) standard does not mean that he maintains that state ad infinitum. See Jones ("A board of education may require. . .employees to be retested when. . .apply[ing] for another position [even] within the same classification."). It would seem, though, that Grievant's former status as a transportation supervisor would at the very least aid him in again qualifying for the categorization.¹⁶ Or, if standards have not been appreciably amended since his supervisory service, he may well still be so qualified.

Respondent argues that Grievant's performance as a transportation supervisor left something to be desired, see, e.g., T. 78-81; however, this is not revealed in his written evaluations. Mr. Beckett testified that all applicants had "satisfactory or better" evaluations, T. 86, and the impression clearly left from the record is that no distinction among the applicants was based upon these past performance

(Footnote Continued)

possess requisite skills, Burley v. Wayne Co. Bd. of Ed., Docket No. 50-86-1881-1 (Aug. 15, 1986). . . ." Jervis, p. 9. Nevertheless, Code §18A-4-8b(b) does not permit hiring based on comparative suitability once basic Code §18A-4-8b(b) "qualifications" have been established. Id.

¹⁶ As odd as it seems, since seniority and qualifications are such distinct concepts in Code §18A-4-8b(b), it is conceivable that Grievant herein could have seniority as a Supervisor of Transportation but not even be presently qualified for vacancies in that classification.

ratings.¹⁷ Since this is true, it is clearly unfair after the fact to even mention such information, whether recorded in formal evaluation documentation or not, in relation to Grievant's non-selection, particularly since Grievant was not made aware this material would be made available to the search committee; nor was he allowed an opportunity to refute it.¹⁸

Mr. Beckett also admitted that interviews and tests were scored and the applicants' rankings were significant to making the job selection. T. 88-89. To the extent this was a comparison of candidates, as opposed to an initial determination of qualification, i.e., meeting the classification title of employment, this is contrary to Code §18A-4-8b(b); again, even though it would seem to make eminent good sense to fill many service personnel vacancies, such as those for transportation supervisors, with the most well-suited applicant, that is simply not what the law provides. Code

¹⁷ If Grievant is still qualified, and if he was the only applicant with pertinent seniority, he appears to be entitled to the job he seeks since his past performance evaluations were at least satisfactory.

¹⁸ Mr. Beckett did testify that perceived deficits in Grievant's past performance were not given any weight in this selection process because "I don't think we ever got down to where that needed to be considered." T. 90. However, the information was made available to the selection committee members, T. 89, tainting at least the appearance of the process in this particular. W.Va. Board of Education Policy 5300(6)(b) mandates that employees are entitled to due process, i.e., adequate notice and a fair opportunity to respond, in all matters affecting their potential promotion to higher positions.

§18A-4-8b(b).¹⁹ To summarize, if a county board of education requires a test and/or an interview to initially determine whether out-of-classification employees "qualify," or meet the classification title of employment, a "passing" score on either or both may and should be set. However, once an individual has "passed," he may not be given priority simply because his rating is higher than another person who also scored in the "pass" range.

This case is distinguished from Moran, supra, which involved the selection of a county Director of Transportation. In that case, the board of education used an apparently reasonable testing and interview process to, in the first instance, determine "qualification." There is no indication that applicants, once they were determined minimally qualified, were compared except as to seniority and evaluation of past service; in fact, the grievant in that case was determined "not qualified."

Grievant, through counsel, has charged he was unaware he would be required to complete a written test. Gr. Proposed Finding of Fact 8. There is no direct evidence of this. At Level II, Grievant described the interview and testing format, T. 33-35, 46-47, and although he hinted at the informality at least of the examination portion of the

¹⁹ This seems particularly unfortunate when the service employee is directly involved with children and/or youth and their safety, as a transportation supervisor is.

procedure, he did not allege any surprise or lack of notice. T. 33-34. In fact, he viewed the process as "a fair opportunity. . .to present. . .[my] qualifications." T. 46-47. Mr. Beckett advised and it is accepted that Grievant was well aware some days in advance at least that the test was being administered and that he would be subject to it. T. 84. Grievant also contends Respondent did not set or inform him what was the lowest acceptable score on the test, and Mr. Beckett admitted, at T. 85, "I don't know that we set a specific score as far as passing. . .it was more a comparative type thing." As explained in this Decision, such a comparison standard would clearly seem to depart from the intent of Code §18A-4-8b(b). Furthermore, the law is well-settled that a county board of education must set clear standards and openly advise applicants of what specific requirements they must fulfill in order to be eligible for vacant positions. Koontz v. Marshall Co. Bd. of Educ., Docket No. 25-89-001 (Feb. 28, 1989); W.Va. State Board of Education Policy 5300(7).

It is not possible to say on this record whether or not Grievant should have been selected for the post for which he applied. What is crystal clear is that the process was severely flawed, and that, if the flaw had not existed, the outcome could reasonably have been different, i.e., Grievant

might have been chosen.²⁰ Therefore, this matter shall be returned to the Kanawha County Board of Education for further action.

In addition to the foregoing, the following formal findings of fact and conclusions of law are rendered:

FINDINGS OF FACT

1. Grievant, a permanent employee of Respondent for several years, was formerly a Supervisor of Transportation and is currently a bus operator. He was recently an unsuccessful applicant for a Supervisor of Transportation vacancy at the Dickinson school bus terminal.

2. The county board of education administered tests and conducted interviews with applicants for this opening and two parallel ones at other terminals, and while seniority, qualification and evaluation of past service were all considered, the candidates deemed "most qualified," who like Grievant were regularly-employed by Respondent, were successful.

²⁰ The Level II evaluator committed a rather crucial, albeit good-faith, error when he overruled a question posed by Grievant's attorney at the hearing at that stage. Specifically, counsel asked that Mr. Beckett give explanation as to the relative weight seniority was afforded in this process. T. 86. The evaluator sustained Respondent's attorney's objection to the query, even after Grievant's counsel explained his intent. T. 87. It is apparent the question was quite relevant and appropriate, particularly in the context of this case. A similar inquiry was made at T. 84-85 and not objected to, but the role of seniority was not addressed in the answer. T. 85.

CONCLUSIONS OF LAW

1. "A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment. . . on the basis of seniority, qualifications and evaluation of past service." W.Va. Code §18A-4-8b(b). Since Grievant and all successful candidates were regular employees of Respondent, their time-in-service within the relevant Code §18A-4-8 class title, "Supervisor of Transportation," must be compared to determine relative seniority. See Code §18A-4-8b(b).

2. "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." Code §18A-4-8b(b). "Other employees then must be considered and shall qualify by meeting the [Code §18A-4-8] definition of the job title. . . ." Id.

3. County boards of education may require reasonable testing and interviewing to determine whether service position vacancy applicants are "qualified" per Code §18A-4-8b(b). Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (Jan. 27, 1989). However, standards for determining how such qualification is achieved, e.g., "passing" examination scores, must be established and clearly communicated to candidates such that they may have reasonable opportunity to make preparations. See Koontz v. Marshall Co. Bd. of Educ., Docket No. 25-89-001 (Feb. 28, 1989).

4. Once an applicant "holds a classification title in his category of employment" or "meets the . . . definition of the job title," he is qualified and may not be compared to other qualified candidates to determine which is best-suited for the particular vacancy. In other words, there is no "most qualified" standard for service personnel hirings under Code §18A-4-8b(b). See Jervis v. Wayne Co. Bd. of Educ., Docket No. 88-50-084 (Nov. 2, 1988). One already holding the title has priority over one "meeting the definition." Code §18A-4-8b(b).

5. An employee who once served under a certain class title of employment might reasonably be required to submit to updated testing and/or interviewing in order to "qualify" for vacancies in that classification, if circumstances have appreciably changed since his original "qualification." See Jones v. Ohio Co. Bd. of Educ., Docket No. 35-86-051 (May 30, 1986). However, if circumstances have not so changed, qualification is retained.²¹

Accordingly, this grievance is **GRANTED**. Respondent is ordered to determine if Grievant has maintained "qualification" for the Supervisor of Transportation class title; to establish clear standards for qualification for the Supervisor of Transportation class title, e.g., test scores,

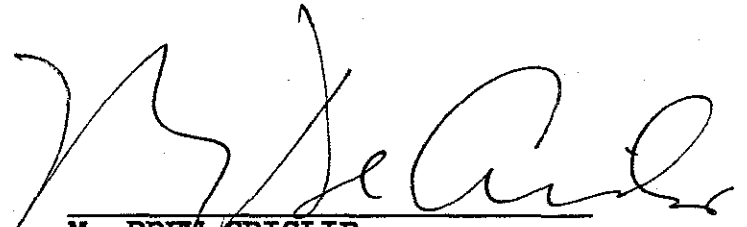
²¹ Any burden of proving changed circumstances would seem to rest upon the employer.

interview scores, etc., and to communicate those to Grievant and the successful applicant for the Dickinson position, Mr. James Cobb; to administer these procedures to the successful applicant, if he has not previously "qualified" for the category and does not maintain that qualification, and to Grievant if his qualification has lapsed; and to thereafter instate Grievant in the position if his qualification is renewed and if his seniority is superior to Mr. Cobb's. If Grievant's qualification has stayed intact since his supervisory service and Mr. Cobb has no employment history with Respondent as a Supervisor of Transportation, Grievant is automatically entitled to the job since his past performance evaluations are acceptable to Respondent.²²

Either party may appeal this decision to the Circuit Court of Kanawha 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 Hearing Examiners is a party to such appeal, and should not be so named. This

²² For further analysis of Code §18A-4-8b(b) and its application of qualifications and seniority to a county board of education's selection process for a "Coordinator of Transportation," the reader's attention is invited to Dalton v. Mercer Co. Bd. of Educ., ___ F.2d ___, (4th Cir., Oct. 16, 1989), No. 88-3972.

office should be apprised of any intent to appeal so that the record can be prepared and transmitted to the court.


M. DREW CRISLIP
HEARING EXAMINER

Date: November 21, 1981