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RICHARD HAUGHT

v.

DOCKET NO. 89-52-77

WETZEL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Richard Haught is employed by respondent Wetzel County Board of Education as a substitute bus operator. In January, 1989, he filed a grievance in which he alleged his seniority rights were violated when he was not selected for a regular position as bus driver aide. The grievance was denied at levels one through three and was acknowledged at level four by letter dated March 3, 1989. The parties indicated their desire that the matter be decided on the record developed below and the record and respondent's proposals were submitted by April 12, 1989.

The essential facts giving rise to this grievance are not in dispute. On November 5, 1988, respondent posted a school bus aide position for a special education bus. The successful applicant was required to hold a valid license to drive a special education bus. None of the personnel who bid on the position held the classification of school bus aide.

Pursuant to respondent's "GCD" policy, it administered a test to all applicants to determine "that they are qualified to perform the duties on which they are bidding." Findings of Fact No. 3, Level Two Decision. Additionally, each applicant was interviewed by a selection committee comprised of Edward Glover, Transportation Coordinator; Cindy Clark, Director of Special Education; and Kate Lowe, bus driver representative. During interview, candidates were asked various questions related to the job function. Applicants' responses were evaluated and attributed points in the following manner: 3 - Correct Response, Full Explanation; 2 - Correct Response, Brief Explanation; 1 - Short, Unclear Response; and 0 - No or Incorrect Response. Respondent employed the applicant with the highest overall test and interview score,¹ based on the committee's determinations and recommendations.

¹The level two transcript does not show that there were any exhibits placed into the record at that January 19, 1989, proceeding. However, a blank copy of respondent's written test and interview questions were submitted with the level two transcript. The written "Examination" had three distinct sections, the first having 21 questions, five of which required a written response. There were 20 additional math multiple
(Footnote Continued)

At the level two hearing, grievant questioned the purpose of the arithmetic section of the test and claimed he should have been apprised of it so that he could have brought an adding machine. He thought the written test questions and oral interview questions were the same and he said he had answered the interview questions properly and to the best of his ability (T.7,14,15).² According to grievant, he relied on knowledge and experience he gained as a volunteer aide for one-and-one-half years on the students' bus (T.2). Further, according to grievant's un rebutted testimony, certain officials had intervened on his behalf to ensure he could continue to perform his volunteer aide service on that bus when some question had arisen about the matter (T.14).

Grievant maintains that besides his familiarity with the duties of the job, he holds a valid license to operate a handicapped bus and thus meets the posted qualifications for the aide position. He further contends he was the most senior employee and was entitled to be instated to the position accordingly.

(Footnote Continued)

choice questions involving the computation of decimals and fractions, in part, and 13 "Language Expression" entries. The last page invited the testee to write a paragraph on why he or she wanted the position of bus aide. Many of the 15 oral "Interview Questions" required only a yes or no response. The undersigned cannot determine how the committee designated points, zero to three, to responses for question number 12, "When could you begin work?" and number 15, "Are you currently certified to drive a school bus?"

²In cross-examination, the personnel director admitted that the committee had to make judgements and "subjective call[s]" and it was possible committee members could harbor bad feelings about an applicant which could sway their judgements (T.6).

Based on the record as developed, the issue of this grievance is whether a board of education has the authority to fill service personnel positions on the sole basis of qualifications, ignoring, in some cases, all other criteria for selection, to-wit:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions . . . 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 . . . that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;
- (2) Service personnel whose employment has been discontinued in accordance with this section;
- (3) [temporary service only];
- (4) Substitute service personnel; and
- (5) New service personnel.

W.Va. Code §18A-4-8b(b) (emphasis added).

The statute makes it abundantly clear that a regularly employed applicant with the most overall seniority does enjoy a preferred status with respect to the filling of any position. Further, inasmuch as it contemplates the consideration of employees within or without the classification title and from all employment ranks, i.e., regular, substitute, etc., it would appear that employee applicants with the most seniority in each denoted employment status beyond regularly employed personnel

also must be considered first when no candidate is available, qualified or appropriate from each previously considered rank.

Further language in Code §18A-4-8b(b) supports the position that for employment purposes seniority and length of employment are synonymous, e.g.,

[F]or purposes of determining seniority under this section an employee's seniority begins on the date that he enters into his assigned duties.

The statute defines advantages for extra-duty work for employees with time within a particular category of employment, i.e., classification title. It also defines disadvantages for such employees:

[a]ll decisions by county boards of education concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided.

The seniority of any such service personnel shall be determined on the basis of the length of time the employee has been employed by the county board of education within a particular job classification.

W.Va. Code §18A-4-8b(b) (emphasis added).

Respondent's reliance on the portion of the statute which sets forth reduction-in-force seniority calculations to make its hiring decision in the instant grievance was misplaced. See Level Two Decision, Conclusions of Law Nos. 1 and 2. Respondent concluded that since none of the applicants held the bus operator aide classification, overall seniority could be ignored. Code §18A-4-8b(b) clearly does not make exceptions to the stated procedure for hiring or promoting personnel to position vacancies, including consideration of seniority and evaluations,

and does not provide for a comparative assessment of a candidates' actual skills.³

While respondent is correct that a board of education does not have to hire unclassified persons who do not possess skills to perform the duties of the position, when such a determination is made on the basis of qualifying tests, the test information must clearly denote an acceptable qualifying score. Canestraro v. Marshall Co. Bd. of Educ., Docket No. 25-88-255 (February 28, 1989); Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (January 26, 1989).

Thus grievant has proven his case to the extent that respondent's selection process for the school bus aide position at issue was contrary to statutory requirements. On the other hand, grievant has not proved his entitlement to the position, notwithstanding the fact that respondent offered no rebuttal to grievant's assertion that he was the most senior candidate.

The remainder of this Decision will be set forth in specific findings of facts and conclusions of law.

³It must be noted that W.Va. Code §18A-5-8 provides that any aide class title as defined in Code §18A-4-8 shall be employed on the basis of qualifications and seniority and the employment has identified restrictions on matters such as transfer options. Pursuant to Code §18A-4-8, aides are defined as classroom personnel who are supervised by professional personnel and Code §§18A-4-8(a),(b) provide that said classroom aides can be utilized for classroom supervision "as is required of a teacher." A class title for bus driver aide does not exist in Code §18A-4-8, but inasmuch as respondent requires such school bus aides to be certified as bus operators, the position seems to be an adjunct or component of the bus operator title and has nothing in common with a classroom aide as defined by statute.

FINDINGS OF FACT

1. Grievant is employed as a substitute bus operator for respondent school board but his length of employment was not made part of the record herein. He has served as a volunteer school bus aide for approximately one-and-one-half years according to his un rebutted testimony.

2. Respondent posted a job for a school bus aide which stated that the candidate must possess a valid license to drive a special education school bus.

3. Grievant and at least ten other persons applied for the position. Grievant met the posted requirement for the position but was not classified as an aide. The employment status of the other applicants was not made part of the record.

4. Pursuant to its "GBD" policy, respondent qualifies out-of-classification employee applicants and new employee applicants for a vacant position by administering qualifying tests. Testees for the school bus aide position at issue were not apprised of the qualifying score required of them on the written test.

5. Respondent utilized a selection committee to interview and question applicants to further determine the "most" qualified applicant. It is not known whether the applicants were informed that their responses, in part to questions such as "would you be willing to clean up body spills," and "are you willing to help put on chains" which required only a yes or no

answer, were going to be "scored" from zero to three to attain an overall interview-test score.

6. Respondent employed a person other than grievant for the aide position upon a selection committee's determination of the most qualified applicant. The seniority employment status, i.e., regularly employed, newly hired or substitute employee, and evaluations of past service of the applicants were not considered by respondent to fill the bus aide position, based on its perception that, in part, those considerations were not necessary for out-of-classification applicants.

7. Grievant did not pursue the matter of the employment status of the other ten or so applicants and the successful applicant was not named by either party.

CONCLUSIONS OF LAW

1. A county board of education shall make decisions affecting the promotion and filling of service personnel positions on the basis of seniority, qualifications and evaluation of past performance. Qualifications shall mean that the applicant holds a classification title in the category of employment and must be given first opportunity for promotion and filling vacancies. W.Va. Code §18A-4-8b(b); Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (January 27, 1989).

2. W.Va. Code §18A-4-8b(b) requires that when applicants vie for a vacant position and none hold a classification title

for the position, a school board must then consider out-of-classification employees who shall qualify by meeting the statutory definition of the job title.

3. A board of education may require competency-testing for out-of-classification employees, Cook v. Wyoming Co. Bd. of Educ., Docket No. 55-87-014 (May 14, 1987), and a basic skills test and other reasonable and uniformly administered selection procedures are viable means by which to qualify applicants for a school bus aide position.

4. Absent a clear positional need a school board may not impose unwarranted qualification standards as selection determinators, e.g., select the "most qualified applicant" to fill service personnel positions or otherwise deviate from the statutory requirements for such determinations. King v. Ritchie Co. Bd. of Educ., Docket No. 43-87-308-3 (October 31, 1988).


5. A grievant must prove each and every element of his grievance by a preponderance of the evidence; in the instant matter grievant proved the selection process did not meet statutory requirements but he did not meet his burden of proof that he, among all of the applicants, was entitled to instatement to the position at issue.

Accordingly, the grievance is **DENIED** as to grievant's instatement to the school bus aide position but respondent

Wetzel County Board of Education is Ordered to vacate the bus operator aide position and to reconsider grievant and all of the original applicants for the position in a manner consistent with the statutory requirements of W.Va. Code §18A-4-8b(b) and the Decision herein.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: May 31, 1989


Nedra Koval
Hearing Examiner