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**WEST VIRGINIA EDUCATION AND
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JERRI BLACK

v.

Docket No. 89-06-707

**CABELL COUNTY
BOARD OF EDUCATION**

D E C I S I O N

Grievant Jerri Black filed a grievance September 1989 alleging a violation of W.Va. Code §18A-4-8b(b), discrimination and favoritism upon being denied a Secretary position at Huntington High School and requesting as relief reinstatement to the position. The evaluators ruled against Grievant at Levels I through III; hearings were held at both Levels II and III. A further hearing was held on appeal at Level IV. At the request of the parties the evidence presented at all three hearings is here considered.¹

The facts relevant to the alleged violation of Code §18A-4-8b(b) are not in contest. Grievant was initially employed by Respondent as an aide, at first on a substitute basis and from 1985 as a regular employee. In August 1986

¹The parties submitted proposed findings of fact and conclusions of law on and before February 26, 1990.

Respondent enacted its Policy GCB, "Minimum Qualifications for Initial Employment - Service Personnel," which required, inter alia, that a Secretary "Type a minimum of 55 words per minute at 95% accuracy[.]" In August 1987 Grievant applied for a position classified as "Secretary I/Clerk II, Absent Hotline." The essential responsibility of the job is to obtain substitute teachers and service personnel to replace absent regular employees. While the job requires good communication skills, it does not require very much typing.

Grievant's application for a regular job as an aide, apparently filled out in 1982 or 1983, in response to the query, "Do you Type?," stated, "Some," "35 - 40 wpm [words per minute]." At the time she applied for the Hotline position Grievant admittedly could not type 55 words per minute. Nevertheless, she was offered the job on the condition that she sign a "Position Agreement," which provides in pertinent part,

The position of secretary I/clerk II, absent hotline, personnel department, requires the following secretarial skills for a person to successfully complete the requirements for the position: communication, organization, working independently, confidentiality, record keeping and productive under time constraints. These secretarial skills are not the same skills required for other secretarial positions.

It is understood that placement in the absent hotline position will not allow me to bid on other secretarial positions unless I have demonstrated through testing that I meet or exceed the minimum qualifications as identified in Cabell County Board Policy GCB, "Minimum Qualifications for Initial Employment."

The policy was attached. Grievant signed the agreement August 17, 1987.

However, she did bid on the job at issue in this case and her bid was considered. Furthermore, because she had greater seniority in Respondent's view than any other candidate, she was given the opportunity to take a typing test in order to qualify. She refused. Another applicant, who did pass the typing test, was thereafter selected.

Grievant, relying on the language of W.Va. Code §18A-4-8b(b) that

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[,]

contends that, because she holds the classification title of Secretary, she must be considered fully qualified for any secretarial position, and, as the most senior applicant for the Huntington High School position, she is entitled to it.

It is well-accepted that a board of education may require competency testing for an individual to qualify for a classification, see Cook v. Wyoming Co. Bd. of Educ., Docket No. 55-87-014 (May 14, 1987). Furthermore, even where an employee has previously fulfilled a board's competency requirements for a classification but the board later determines that changed circumstances require further skills for continued qualification for the classification, it does not violate Code §18A-4-8b(b) for the board to require proof of such competency by reasonable testing. Basham v. Kanawha Co. Bd. of Educ., Docket No. 89-20-581 (Nov. 21, 1989); see also Blankenship v. Mingo Co. Bd. of Educ., Docket No. 89-29-575 (Dec. 18, 1989), where it was held that reasonable

testing was proper for substitute secretaries to gain permanent status.

Grievant has not contended that the requirements that a secretary be able to type 55 words per minute with 95% accuracy of Policy GCB are unreasonable. Furthermore, she concedes that she is still unable to type 55 words per minute. Accordingly, Grievant's position is even more tenuous than the grievants in the cited cases, for she has never been fully qualified for the Secretary classification, having never met the requirements set by Policy GCB. Although throughout these proceedings Grievant has referred to the position agreement as a "waiver," she has failed to point to any right she waived by signing it. Rather, because the Hotline position required less typing than secretarial jobs normally do, Respondent waived the typing competency otherwise required by Policy GCB in order to give Grievant the Hotline post; the agreement simply made clear that those competency requirements would still apply upon Grievant's wishing to bid upon further secretarial positions. In short, Grievant benefited from the agreement by getting the Hotline position without fulfilling the typing competency requirements of Policy GCB and has not been harmed by it since the requirements it holds her to now are those of Policy GCB. Grievant's proposed findings of fact state, "The grievant was denied the position due to her position agreement." That is patently not true; Grievant was denied the Huntington High School position, which

requires substantial typing, due to her failure to fulfill the typing competency required by Policy GCB. No violation of Code §18A-4-8b(b) has been established.

Grievant alleges that she has been discriminated against because other individuals have been classified as Secretary without taking a typing test.² "Discrimination" is defined by W.Va. Code §18-29-2(m) as

any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

In Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989), it was held that, in order to make a prima facie showing of discrimination under Code §18-29-2(m), the grievant must establish

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

²The framing of the discrimination issue has varied throughout these proceedings. See, for example, the Level II Transcript at 13, "Discrimination [wa]s shown toward the Grievant when she was required to sign the agreement since she was given the secretary I classification"; and at 21, "The reason I feel that I have been discriminated against is because substitute secretaries have been put on the secretarial list without ever being required to take a timed-typing test, which I was told was standard for all secretaries." No framing of the issue is provided by Grievant's proposed conclusions of law, which, merely citing the statute's definition of discrimination, do not address how the facts of this case constitute discrimination. The statement of the issue given here is drawn from discussion at the Level IV hearing.

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

At Level III Grievant and Tammy Glover, who also holds a Hotline job and signed the same agreement as Grievant, named certain secretaries who they said became full-time secretaries without ever having to take the typing test. There is only an implication from the record that the named individuals became full-time secretaries since passage of Policy GCB, for no dates were provided, and there was no evidence supporting that they were hired as substitutes since then. Moreover, Respondent correctly asserts that Policy GCB requires ability to type 55 words per minute with 95% accuracy; it does not require that such proficiency always be established by testing. Billy Adams, Service Personnel Manager for Respondent, testified that with the named employees,

[W]e were dealing with a known quality. We had people who had worked as substitutes, had exhibited their skills, demonstrated their skills through computer work and through typing or working through different schools at the central office and various locations. Also they indicated on their application[s] that their skills did exceed 55 words per minute.

Level III Tr. 40-41.³ Mr. Adams and Ed McNeel, Assistant Superintendent for Respondent in charge of Personnel,

³Mr. Adams also testified that since October 1988 all substitutes are tested for typing competency.

testified that, in contrast, Grievant's performance of her Hotline job-duties fails to establish such proficiency; she can do so therefore only by taking the typing test. Accordingly, while Grievant may have established that she is treated differently than the substitutes in that she is being required to take the test, she has failed to establish that difference is significant or that it is not job-related since testing is required in her case to prove competency that the others may have proven on the job as substitutes.

At Level IV Grievant based her claim of discrimination on the fact that Judith Slash, a witness for Grievant who testified that she is the "financial aid secretary at the vocational center," was allowed to advance to that classification without proving typing competency and without signing a position agreement such as Grievant's. Ms. Slash testified that she had held the Hotline job, which was then classified as a Clerk position, prior to Grievant, and moved from there to her present position in May 1987. She further stated that she had refused to take the typing test and she cannot type 55 words per minute with 95% accuracy.

Mr. McNeel testified that Ms. Slash's position, like the Hotline position, requires little typing and that in her file is a document stating that she has not proven typing skills and that, should she bid on another secretarial position, she will have to verify she has those skills, i.e., she will have to take the typing test.

Grievant has also failed to make a prima facie showing based on Ms. Slash's circumstances, for the record fails to show that Grievant has been treated in any significant way differently from Ms. Slash. Ms. Slash, like Grievant, is limited to a secretarial position entailing little typing, i.e., in order to transfer to a secretary job requiring typing, she must prove competency in that skill. The agreement Grievant signed has not resulted in treatment in any significant way different than that accorded Ms. Slash, for even without signing such an agreement Ms. Slash is legally being held to the requirement of Policy GCB that she prove typing competency when needed for a future secretarial position. See Basham.⁴

Grievant's final contention, of favoritism, defined by W.Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees," apparently duplicates her charge of discrimination,⁵ and is rejected for the

⁴At one point in the Level IV hearing Grievant also contended that she was discriminated against because Ms. Slash was given the opportunity to move into a secretarial position and prove herself, referring to the fact that Ms. Slash was given thirty days to prove herself in her present job. Grievant fails to recognize that she too is presently in a secretarial position in which, in fact, she was placed without any probationary period such as Ms. Slash's.

⁵This statement of the issue is drawn from the record as a whole, for Grievant's representative did not frame the issue at any hearing or in the proposals. Nevertheless, it must be noted that at Level III Grievant stated in her
(Footnote Continued)

reasons already given and for the simple reason that Grievant has failed to establish that any employee has been treated in any significant way better than she has.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Findings of Fact

1. In August 1986 Respondent enacted Policy GCB, "Minimum Qualifications for Initial Employment - Service Personnel," which requires that a Secretary "Type a minimum of 55 words per minute at 95% accuracy[.]"

2. Grievant stated on her application for employment in 1982 or 1983 that she was able to type 35 to 40 words per minute. She admits she is still unable to type 55 words per minute.

3. Grievant, initially employed by Respondent as an Aide, in August 1987 was promoted to the "Secretary

(Footnote Continued)
testimony, "Since Tammy [Glover] and I have been the only ones . . . that have been required to sign a position agreement and to go by this position agreement, I feel like that is favoritism." Tr. 25. Clearly, since the agreements signed by Grievant and Ms. Glover have added no requirements other than those of Policy GCB and Grievant and Ms. Glover have benefited from the agreements by being placed in their Hotline secretarial positions without having to establish typing competency, this charge that others have been shown favoritism has no validity.

I/Clerk II, Absent Hotline" position, which requires little typing. In order to get the job she signed a "Position Agreement" that she would not bid on another Secretary position "unless I have demonstrated through testing that I meet or exceed the minimum qualifications as identified in" Policy GCB.

4. In Summer 1989 Grievant applied for a Secretary position at Huntington High School, requiring substantial typing. She refused to take a typing test that was required in order for her to qualify for the job.

5. Another applicant, who had passed the test, was placed in the position.

6. Certain substitute secretaries were placed in Secretary positions without being required to take the test. However, they had established typing competency on the substitute jobs they had filled.

7. Judith Slash, who had been in the Hotline position prior to Grievant, was placed in the position of Financial Aid Secretary at Respondent's vocational center, which requires little typing, without taking a typing test. She will not be allowed to move into a Secretary job requiring substantial typing without proving typing competency by testing.

Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his or her complaint by a preponderance of

the evidence. Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988); Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-1 (June 7, 1988).

2. It is not violative of W.Va. Code §18A-4-8b(b) for a board of education to require reasonable competency testing of an employee who holds a classification title without having fulfilled competency requirements for the classification in effect at the time of his or her entry into the classification. Compare Blankenship v. Mingo Co. Bd. of Educ., Docket No. 89-29-575 (Dec. 18, 1989); Basham v. Kanawha Co. Bd. of Educ., Docket No. 89-29-581 (Nov. 21, 1989). Since Grievant has never established that she is capable of typing competency required by Policy GCB, either by testing or by carrying out the duties of the Hotline position, Respondent has not violated W.Va. Code §18A-4-8b(b) by requiring her to prove such competency by testing in order to qualify for the Huntington High School Secretary position.

3. In order to make a prima facie showing of discrimination under W.Va. Code §18-29-2(m), a grievant must establish

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other

employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne Co. Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

4. Since the substitute secretaries established typing competency on the job while Grievant had not, Grievant did not establish that they were treated in any significant way differently than she was in being required to prove typing competency by testing. Furthermore, she failed to establish that the different treatment was not job-related.

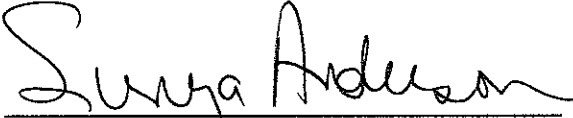
5. Grievant failed to establish that Judith Slash was treated significantly differently from her because both Grievant and Ms. Slash have been allowed to fill Secretary positions requiring little typing without proving typing competency but must do so by testing upon application for another Secretary job.

6. Grievant accordingly failed to make a prima facie showing of discrimination under W.Va. Code §18-29-2(m).

7. Since Grievant failed to establish that any employee has been treated better than she has in any significant way, she also failed to establish favoritism under W.Va. Code §18-29-2(o).

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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.



SUNYA ANDERSON
HEARING EXAMINER

Date: March 23, 1990