WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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PEARLEY J. JACKSON and
VINCE DAMRON, JR.

v. Docket No. 89-50-658

WAYNE COUNTY BOARD OF EDUCATION

D E C I S I O N

On September 8, 1989, Pearley J. Jackson and Vince Damron, Jr., initiated the following complaint at Level I:[1]

> Grievants, a regular employee and a substitute employee who has preferred recall status, applied for carpenters' [Carpenter II] positions. The positions were awarded to new employees in violation of W.Va. Code §18A-4-8b(b). Grievants request instatement to the position, wages, benefits and seniority retroactive to the date of the filling of the positions.

After denials there[2] and Level II[3] and waiver at Level III, Grievants advanced their claim to Level IV November 13,

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[1] Each man's complaint was considered individually prior to Level II, where they were consolidated into one grievance.

[2] The Level I action was based on a lack of authority
(Footnote Continued)

1989, where it was the subject of a February 16 hearing.[4] With the parties' submission of fact-law proposals by March 16, the matter is mature for disposition.

Grievants were both hired by Respondent Wayne County Board of Education as "general maintenance" employees on April 23, 1986; W.Va. Code §18A-4-8 defines that classification as "personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system." On May 2, 1988, each lost his post due to a reduction-in-force and then or shortly thereafter became a substitute janitorial worker for Respondent. Mr. Jackson has held this latter status continuously since then; in August 1989, Mr. Damron commenced service as a regular custodian at Respondent's Fort Gay Elementary School.[5] Neither man has ever held either Code §18A-4-8 "carpenter" classification title, namely, Carpenter I, "personnel classified as a carpenter's helper," or

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(Footnote Continued)
to offer the relief requested.

[3] The Level II transcript and decision are of record at Level IV. "T. #" references are to Level II proceedings.

[4] A scheduled January 10, 1990, hearing was continued upon the motion of Respondent's counsel, for reason of his involvement with criminal proceedings on that date. Grievants did not object to the delay.

[5] Mr. Damron became a regularly-employed custodian after his application to become a carpenter, but before the carpentry positions were actually filled.

Carpenter II, "personnel classified as a journeyman carpenter."

Evidence reveals that on December 9, 1985, Respondent adopted the following policy, titled "Proficiency Tests Required for Service Applicants":

> It is the policy of the Wayne County Board of Education that examinations or tests to prove proficiency in the skills required for given service positions be administered to all new service applicants, substitute service personnel and regular service personnel, not holding that classification, who apply for (submit a ~~bid) a given~~ regular service position.
>
> The purpose of the test is to satisfy the Board [of Education] that the applicant can meet the qualifications of the service position as defined in. . .[W.Va. Code] §18A-4-8. . .and is competent in the skills necessary to function successfully in the given service position.
>
> This policy does not imply that the person achieving the highest score on the test will be awarded the job and does not supersede any provisions of. . . [Code] §18A-4-8b[(b)]. . ..
>
> Service jobs will continue to be awarded in compliance with §18A-4-8b[(b)]. . ."on the basis of seniority, qualifications and evaluation of past service."

Respondent's Exhibits I, K.

Grievants presented uncontroverted evidence, Gr. Ex. 1-5, that they each have good past performance ratings in Respondent's hire. Further, since three of the four successful Carpenter II candidates were not employed by Respondent at the time they applied, had Grievants then been "qualified" per Code §18A-4-8b(b) for those jobs, they certainly would have had priority for hiring over at least

the three.[6] This is because regular service personnel, persons on preferred-recall status and even substitute staff enjoy favored treatment in job-selection decisions over those not then-currently working for Respondent. Id.; Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988), rev'd on other grounds, C.A. No. 88-C-518 (Wayne Co., W.Va., Cir. Ct., May 5, 1989).[7]

However, the evidence reflects neither Grievant met the "qualification" standard of the statute. Code §18A-4-8b(b) provides, "Qualifications shall mean that the applicant holds a classification title in his category of employment . . .[or] meet[s] the definition of the job title as defined in. . .Code. . .§18A-4-8. . .." Neither Grievant had the classification title of carpenter; there is no dispute on that point, and no applicant enjoyed that status. T. 39. Therefore, all candidates were required to demonstrate their meeting of "the definition of the job title." It has been repeatedly held that a county board of education may direct this "demonstration" be, or at least include, the successful completion of a skills test administered be the county

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[6] The fourth, Jack Thompson, commenced working for Respondent as a general maintenance worker at the same time as did Grievants. Also like Grievants, he was laid off and placed on preferred recall May 2, 1988. At the time of his carpenter's application, Mr. Thompson apparently was a substitute employee of the Wayne County Schools.

[7] A petition for appeal to the Supreme Court of Appeals of West Virginia is pending in Jervis.

board. See, e.g., Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (Jan. 27, 1989); Jervis[8]; Cook v. Wyoming Co. Bd. of Educ., Docket No. 55-87-014 (May 17, 1987).

Such a test was offered, in line with Respondent's policy, to each applicant including Grievants. Mr. Damron refused to take the examination, although he admitted Respondent allowed him more than one opportunity to do so.[9] T. 19. Mr. Jackson did complete the test, also at his convenience, T. 39, 45, but failed it, earning a score of only 13% out of 100% with 70% considered passing.[10] Grievants argue, nonetheless, that they performed carpentry duties as general maintenance workers and that they have private carpentry experience, both of which should have been considered in the determination of whether they met "the definition of the job title." Significantly, however,

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[8] See n. 13, infra.

[9] At Level II, Mr. Damron explained he felt his "'test ought to be the two years and forty-six days I worked. . .because I. . .[did] everything that there was to do.'" T. 18. At Level IV, he cited "advice" from an unclearly-identified individual that he refuse the examination. These were the only reasons Mr. Damron offered as to why he did not take the carpentry proficiency test.

[10] The four successful applicants scored 83%, 77%, 73%, and 70%. Interestingly, no one else passed the examination. T. 42-43.

The Level II Decision, at Finding of Fact 5, stated the purpose of the proficiency test was "to determine the most qualified applicant." It should be noted that this Grievance Board has repeatedly rejected the usage of a "most qualified" standard in service personnel hirings. See, e.g., Savilla v. Putnam Co. Bd. of Educ., Docket No. 89-40-546 (Dec. 21, 1989).

Grievants disavowed any claim that they have ever been misclassified during employment with Respondent. Further, certain of the private experience Mr. Jackson testified about occurred after his within application, and so is not appropriate for consideration in any event. While Mr. Damron's related background, "just what I did for myself and family," T. 20, and some of Mr. Jackson's, did occur prior to the application period, apparently neither provided this information to Respondent; nor did Respondent otherwise have reason to be aware of it. Regardless, it is not at all clear that it would have been relevant in the context of this case. Grievants further contend that the law in Wayne County, based upon the Circuit Court decision in Jervis, was that test results should not be the sole basis for establishing whether one is "qualified" for a given job.

Lawrence Thompson, a plumber for Respondent since 1977, testified at Level IV that he had worked occasionally on crews with each Grievant while they were general maintenance employees. He opined that Grievants then "did carpentry work," but explained that staff officially classified as carpenters were always the "head carpenters" who "did the real technical work." He added that Grievants and others, including himself, would do "little [carpentry] stuff" if that was what was needed.[11]

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[11] It is the essence of Mr. Thompson's Level IV (Footnote Continued)

Paul Fulks, Wayne County Schools' Assistant Superintendent in charge of maintenance, presented at Level IV and offered testimony. He opined convincingly that, as general maintenance workers, Grievants might have been called upon to perform or assist in very basic carpentry, plumbing, electrical or masonry duties but that they would not have been asked to perform complex or independent tasks in these areas. He stated that there have been no employees classified as "Carpenter I," or apprentice carpenters, during relevant times, and that "Carpenter I" and "Carpenter II" are among the "skilled maintenance" categories referenced in the Code §18A-4-8 definition of "general maintenance," reproduced supra.

Jim Ross, Respondent's Personnel Director, testified that he obtained the carpentry proficiency test from a local carpenter's union which requires successful completion thereof before it will place an individual on its professional roster. Mr. Fulks added that he had discussed the content of the test with several professional carpenters and that these persons had viewed the examination as basic and and an appropriate measure of crucial skills.[12]

(Footnote Continued)
testimony, and not necessarily his exact words, which appears.

[12] Although Mr. Jackson suggested at one point that the test was unfair because it used technical and not colloquial terminology, Grievants' counsel abandoned any argument in this regard. It is noted that the great weight of evidence augers against this point, in any event.

Even if it can be said that Jervis, in its present posture, requires Respondent to consider information beyond testing to determine Code §18A-4-8b(b) "qualifications," it clearly does not suggest individuals may, with impunity, choose not to comply with Respondent's testing policy, or that that policy is in any way invalid.[13] Further, when one fails a proficiency examination, such fact could unarguably be weighted heavily against other data. Quite simply, neither Grievant has proven, by a preponderance of the evidence, that he was qualified to be a carpenter in Respondent's employ at the time he sought that status, or for that matter that he is now so qualified.[14]

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[13] The Circuit Court decision in Jervis is extremely brief, in essence consisting of findings that Respondent did not abuse its discretion in its original hiring decision and that the undersigned's reversal of that decision was "clearly wrong." However, the arguments posed at Level II by Grievant's attorney regarding the case may be found without merit. Specifically, counsel contended that in the original Jervis hiring decision, Respondent "took the position that you have to consider someone's work experience and their other. . .[credentials], as well as the test score when filling a. . .[job]. . .[but] the Hearing Examiner overturned that particular position. . .[b]ut that position was, to the best of my knowledge, reinstated by the Wayne County Circuit Court." T. 51-52. Respondent's testing policy expressly disclaims that the person earning the highest score will necessarily be selected, Resp. Ex. I, K. Further, at the Grievance Board level, Mr. Jervis, who ranked highest on a skills exam, prevailed, but that position was deemed insignificant, Conc. Law 4; at the Circuit Court stage, neither testing nor scores were mentioned.

[14] As an aside, it is noted that Grievant Damron does not hold a high school diploma or its equivalent, a listed requirement on the job posting. Resp. Ex. J. It was not argued that it was unreasonable or improper of Respondent to insist upon this credential.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant Pearley J. Jackson, formerly a regular employee of Respondent Wayne County Board of Education in the "general maintenance" category, was subject to reduction-in-force some time ago. Sometime thereafter, he was hired as a substitute custodian.

2. Grievant Vince Damron, Jr., formerly a regular employee of Respondent in the "general maintenace" category, was subject to a reduction-in-force, became a substitute employee and, in August 1989, moved into a regular custodian job.

3. While both Grievants, consistent with the W.Va. Code §18A-4-8a definitions of their "general maintenance" positions, occasionally assisted with or performed minor carpentry-related duties, neither engaged in skilled carpenter's work.

4. Neither Grievant has ever held a Code §18A-4-8a "carpenter" classification title of employment.

5. Grievants unsuccessfully sought promotion to Carpenter II vacancies.

6. Respondent's official policy requires all service applicants not then holding the relevant employment classification title to submit to skills testing. Grievant Damron refused to take this examination, although Respondent gave

him more than one opportunity to do so. Grievant Jackson completed the test but scored only 13% out of 100%, with a 70% score required for passing.

7. The specific test required in this case was fair and reasonable.

CONCLUSIONS OF LAW

1. Service personnel vacancies must be filled by county boards of education in West Virginia on the basis of "seniority, qualifications, and evaluation of past service." W.Va. Code §18A-4-8b(b). "Qualifications shall mean that the applicant holds a classification title in his category of employment. . .[or] meet[s] the definition of the job title as defined in. . .Code §18A-4-8. . .."

2. It is reasonable for a county board of education to require job applicants to submit to skills testing to assist in determining whether they meet "the definition of the job title" in question. Black v. Cabell Co. Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Moran v. Marion Co. Bd. of Educ., Docket No. 24-88-178 (Jan. 27, 1989); Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988), rev'd on other grounds C.A. No. 88-C-518 (Wayne Co., W.Va. Cir. Ct. 5/19/89), app. pet. pending; Cook v. Wyoming Co. Bd. of Educ., Docket No. 55-87-014 (May 17, 1987); see also Jones

v. Ohio Co. Bd. of Educ., Docket No. 35-86-051 (May 30, 1986).[15]

3. "Applicants who do not hold the appropriate classification title and must qualify by meeting the definition of the job title shall do so using a standard method and not in an arbitrary manner, i.e., requiring one applicant to take a test while another has advanced education [or experience]." Jones v. Berkeley Co. Bd. of Education, Docket Nos. 02-87-324/etc. (Jan. 31, 1989).

4. In order to prevail, Grievants must prove the allegations of their complaint by a preponderance of the evidence. Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989).

5. Grievants have failed to prove that they, at the time of their applications, were "qualified" per Code §18A-4-8b(b) to serve Respondent as carpenters, or that Respondent erred in its like determination.

Accordingly, this grievance is **DENIED.**

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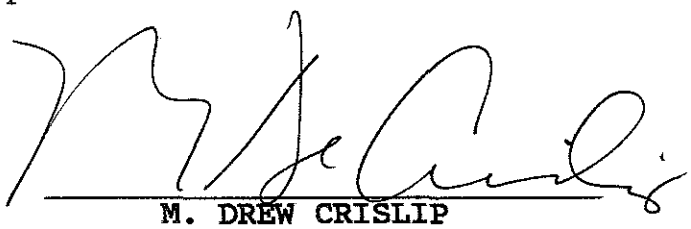
[15] As an aside, the undersigned is aware that on March 10, 1990, the West Virginia Legislature passed an act titled "Competency testing for [school] service personnel" and designated House Bill 4846. At this writing, the Bill has not yet been signed by the Governor or otherwise become law; if that occurs, it will be codified as W.Va. Code §18A-4-8e and take effect in July 1990.

Of course, since it did not exist at pertinent times, H.B. 4846 has no applicability to the instant case.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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 office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



M. DREW CRISLIP
Hearing Examiner

Date: March 27, 1990