DARRELL GANDEE, ET AL.

v. DOCKET NUMBER: 93-26-476

MASON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants, Darrell Gandee, Judy Ball, and Jim Crowder, are employed by the Mason County Board of Education ("MCBOE"). They are grieving the selection of Mr. Gene Haer to fill the multi-classified position of Supervisor/Mechanic. This grievance was initiated on October 26, 1993 and denied at all lower levels. A Level IV hearing was held on April 11, 1994 and this case became mature on May 18, 1994.

Findings of Fact

1. On September 1, 1993 MCBOE posted the position of Supervisor/Mechanic. Minimum qualifications for the position were a "high school diploma and classification as a mechanic/supervisor of transportation or successful completion of the West Virginia Test for mechanic/supervisor of transportation. Minimum 5 years as Bus Operator."

2. Ten people applied for the position. None of them currently held the multi-classified title or were qualified in both areas.

3. On September 11, 1993 service personnel tests for these positions were held. One hour of in-service training was conducted prior to these tests. The applicants took the tests under protest because the training had not met the requirements of W. Va. Code §18A-4-8e.

4. Mr. Gene Haer, the successful applicant, was working in the mechanic classification at the time. He had worked six years as a bus operator and seven years as a mechanic. He took the test and passed the supervisor's portion of the test. Grievants Ball and Crowder took both tests and passed the one for supervisor. Grievant Gandee took both tests and passed the one for mechanic.

5. On September 14, 1993 MCBOE placed Mr. Haer in the position at issue.

6. On September 23, 1993 a group of applicants filed a grievance charging a violation of

W. Va. Code §18A-4-8e, which requires "[a] minimum of one day of appropriate in-service training" prior to taking the tests.

7. As a result of this grievance, MCBOE scheduled a second in-service training on October 16, 1993 and a second testing session on October 23, 1993. At that time Grievant Gandee passed the supervisor's test and Grievants Ball and Crowder passed the mechanic's test.

8. Grievants filed this grievance on October 26, 1993 alleging that Mr. Haer's selection was incorrect because he was not the qualified employee with the most seniority. Mr. Haer has 13years of overall seniority, and Mr. Gandee has 22 years of overall seniority. **(See footnote 1)**

9. All Grievants and the successful applicant are qualified for the position and have satisfactory or above evaluations.

10. Since Grievant Gandee was classified as an assistant mechanic for 5-6 weeks during 13 summers and occasionally during the winter, it is unclear why he was required to take the mechanics test. The test administered for chief mechanic, mechanic, and assistant mechanic is the same. W. Va. Code §18A-4-8e.

11. Grievant Gandee's unrebutted testimony is that he performed the same mechanic's duties as the successful applicant when he worked with him in the summers.

12. Grievant Gandee ran his own garage and gas station from 1965 to 1968.

Issues

Grievants argued Mr. Haer's selection was improper because 1) MCBOE filled the position before statutorily required in-service training and testing were completed; and 2) MCBOE failed to follow the requirements of W. Va. Code §18A-4-8b in making its selection. Grievants contend they qualified for the position by passing the tests, and since their evaluations met or exceeded the standards, the hiring should have been based on seniority.

MCBOE argues the failure to provide the minimum of one day of in-service training prior to the testing was harmless error because even if Grievants passed the test it would still have been "justified" in selecting Mr. Haer as he was the only applicant who was currently working in one of the classification categories of the posting. In other words, MCBOE's reasoning is that a qualified applicant in a multi-classification situation who has worked or is working in

one of the classifications "shall" be preferred over an applicant who has not been employed in any of the pertinent classifications. Respondent's Finding of Fact and Conclusion of Law at 2. Respondent states this reasoning is supported by the newly enacted W. Va. Code §18A-4-8g.

Discussion

The issue before this Board is a legal one and one in which the statutes do not clearly delineate the outcome. W. Va. Code §18A-4-8 lists "multi-classification" as a separate class title. W. Va. Code §18A-4-8g [1993] discusses multi-classification classifications, and clarifies how they are to be treated in a reduction in force situation. It states

> [s]chool service personnel who hold multi-classification title shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his multi-classification title. Multi-classified employees shall be subject to reduction in force in any category of employment contained within their multi-classification title based on the seniority accumulated within said category of employment: Provided, That if a multi-classified employee is reduced in force in one classification category, said employee shall retain employment in any of the other classification categories that he holds within his multi-classification title.

Further, W. Va. Code §18A-4-8g states " [s]ervice personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill such vacancy." W. Va. Code §18A-4-8b contains a similar sentence and says "[q]ualifications 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." Employees who otherwise meet the job qualifications are considered next. Id.

W. Va. Code §18A-4-8b also states service personnel positions shall be filled on the basis "of seniority, qualifications, and evaluations of past service." A preference for hiring the employee with the most seniority is indicated by the statement that if the most senior employee is not hired a board "must show valid cause." Id. This emphasis on seniority was discussed in Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273 (1993). The West Virginia Supreme Court stated "the legislative intention to emphasize seniority as the

determinative factor in decisions affecting the promotion and filling of school service personnel positions is . . . clear." Id. at 274.

The issue of filling multi-classes positions was raised in Wilson v. Marion County Bd. of Educ., Docket No. 93-44-084 (July 27, 1993). Although this case was decided on other grounds, ALJ Keller stated "[i]t is likely that an individual would be required to hold all of the class titles included in a multi-classifiedposition to be qualified." Id. at 2. Judge Keller noted that since "multi-classification is listed as a separate class title in W. Va. Code §18A-4-8, it should not be viewed fractionally."

Respondent argues that enactment of the above-stated W. Va. Code §18A-4-8g "undercut" any force this dictum may have had. This Code section does require multi-classified positions to be fractionalized during a RIF. However, it does not discuss the filling of multi-classified positions in any way.

Given the above-stated statutes and case law, it would appear that MCBOE improperly filled the Supervisor/Mechanic multi-class position. This reasoning flows from the facts that multi-classification is listed as a separate title and the Code Sections which grant the current employee priority refer to being "in the same classification category of employment" or holding "a classification title in his category of employment." Thus, if multi-classification is a separate class title, possessing only a portion of the class title would not grant a preference. Seen from this perspective both Grievant Gandee and Mr. Haer were qualified for the position. Since neither of them held this multi-classed position, and the applicants were equal in qualifications and evaluations, then the amount of service personnel seniority must become the determinative factor. Utilizing seniority in this way is supported by statute and case law. W. Va. Code §18A-4-8b; Harrison County, supra. Indeed Brewer v. Mercer County Bd. of Educ., Docket No.91-27-002 (Mar. 30, 1992) states "when no applicant has in-classification seniority . . . total countyseniority [is] determinative among applicants who 'qualify' for a service position." Id. at 11. Grievant Gandee has 22 years of total seniority, Mr. Haer has 13, thus Grievant Gandee should receive the position.

Conclusions of Law

1. The Legislature has shown a clear intent that seniority is to be a determinative factor

in promotion and filling of vacant positions. W. Va. Code §18A-4-8b; Harrison, supra.

2. Qualified for a multi-classification class means qualified for each class within the multi-class title.

3. Since "multi-classification" is listed as a separate classification in W. Va. Code §18A-4-8, an employer may not consider an applicant's possession of one of the required classifications as granting that applicant priority over another applicant who is qualified and has more seniority.

4. MCBOE filled the position in question improperly and this decision must be reversed.

Accordingly this grievance is GRANTED and MCBOE is ORDERED to place Grievant Gandee in the Supervisor/Mechanic position and to pay him the difference between his present salary and the salary he would have received from October 23, 1993 to the time he is instated into the position.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1994

Footnote: 1*Since Mr. Crowder and Ms. Ball stated in their brief that they have more seniority than Mr. Haer, but not as much seniority as Mr. Gandee, this Decision will examine the selection of Mr. Haer vis-a-vis Grievant Gandee.*