DONALD CYPHERS

v. Docket No. 94-24-134

MARION COUNTY BOARD OF EDUCATION

DECISION

Grievant, Donald Cyphers, employed by the Marion County Board of Education (Board) as a bus operator, advanced a grievance to level four on April 11, 1994, in which he alleged a violation of W.Va. Code §18A-4-8b when a position for which he was qualified was not filled within twenty days of the posting. (See footnote 1) A hearing was conducted at level four on June 1, 1994, and the matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before July 7, 1994.

Because the facts of the matter are essentially undisputed the following findings may be made.

1. Grievant has been employed by the Marion County Board ofEducation since 1990 and currently holds the classification title of bus operator.

2. By posting dated October 26, 1993, the Board advertised a vacancy for an Electrician II/General Maintenance. The posting noted that the successful applicant for this position was required to possess or to obtain, at the first available opportunity, a Journeyman Electrician's License issued by the State Fire Marshal.

3. Five individuals bid on the position; none held the classification title of Electrician II/ General Maintenance at that time.

4. Three applicants: Grievant, Gary Holcomb, and Ronald Robe, achieved a passing score on the Electrician's Competency Test, administered by the Board on December 1, 1993.

5. Grievant and Ronald Robe achieved a passing score on the General Maintenance Test, also given on December 1, 1993. The record does not establish when Mr. Holcomb became qualified in this area.

6. In October 1993 Grievant was the only applicant in possession of a Journeyman Electrician's License.

7. Mr. Holcomb and Mr. Robe sat for the Journeyman Electrician's License examination on January 11, 1994. On January 14, 1994, the Board was notified that Mr. Holcomb had successfully completed the requirements for a Journeyman Electrician's License.

8. On January 25, 1994, the Board awarded the position of Electrician II/General Maintenance, effective January 31, to the most senior applicant, Mr. Holcomb.

Grievant argues that he is entitled to the position at issue by virtue of his possession of the requisite license at the time of the posting. In support of this position Grievant cites Yeager v. Kanawha Co. Bd. of Educ., Docket No. 20-88-050 (October 3, 1988), and Wilson v. Marion Co. Bd. of Educ., Docket No. 93-24-084 (July 27, 1993), which held that the appropriate certification was necessary for placement as a bus operator and truck driver, respectively. (See footnote 2) Grievant further argues that the delay incurred by allowing another applicant to secure the license resulted in a violation of the W.Va. Code §18A-4-8b requirement that all vacancies be filled within twenty working days of the posting date.

The Board argues that it has two options when filling a service personnel position requiring a license. It may post the position with a requirement that the successful applicant possess the license at the time he makes application, or it may allow the employee to attain the license prior to assuming the duties of the position. In this case, the Board determined that it was in the best interest of the school system to follow the second option. Addressing the issue of whether the position was timely filled, the Board asserts that it has no control over the StateFire Marshal's testing schedule and that it should not be penalized for attempting to accommodate the rights of its more senior employees in a fair and equitable manner. Because the position was filled within twenty days after the test results were released, the Board argues that it did not act in an arbitrary or capricious manner but simply exercised its substantial discretion in this matter.

Several statutory provisions are applicable herein. W.Va. Code §18A-4-8 defines "Electrician II" as "personnel employed as an electrician journeyman or who holds a journeyman electrician license issued by the state fire marshal."

Code §18A-4-8b provides that service personnel positions shall be filled on the basis of seniority, qualifications and evaluation of past service. Qualifications is defined as the applicant holding a classification title in the particular category of employment. Without a classification title applicants may become qualified by competency testing as provided by W.Va. Code §18A-4-8e.

Code §18A-4-8e directs the state board of education to develop and make available competency tests for all of the service personnel classification titles defined in Code §18A-4-8. The purpose of these tests is to provide county boards of education a uniform means of determining whether currently employed service personnel who do not hold a classification title in a particular category of employment can meet the definition of the classification title in another category of employment, and/or todetermine the qualifications of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee.

Code §18A-4-8b also requires a board to post and date notices of all job vacancies for at least five working days. After the five day minimum posting period the vacancy shall be filled within twenty working days from the posting date.

No statutory provisions address the filling of service personnel positions requiring certification or licensure; however, the state board of education has been statutorily endowed with a broad authority to exercise general supervision of the public schools of the state. See generally W.Va. Code §18-2-5. Further, the determination of educational policies by the board shall not be controlled by the courts unless shown to be unreasonable or arbitrary. Detch v. Board. of Educ., 145 W.Va. 722, 117 S.E. 2d 138 (1960).

In fulfilling the statutory directive to create and provide competency tests for service personnel positions, the state board promulgated "Guidelines for Administering School Service Personnel Tests" (1992). A review of this document establishes that while a competency test was developed for the classification of electrician the board determined that "[i]f an applicant holds a license or certification from an accepted institution or agency in the following classifications, said applicant will be considered

qualified and will not be required to take the test: electrician .. . ."

Thus, by virtue of his possession of the required license, Grievant was considered qualified for the position of electrician when the position was posted on October 26, 1993. On December 1, Grievant also became qualified for the General Maintenance classification when he achieved a minimal passing score on that competency test. It is noted that twenty working days from the date of posting, October 26, was on or about December 1, 1993. The evidence is clear that Grievant was the only applicant qualified in both the Electrician II and General Maintenance classifications when the twenty day period for filling the position expired.

Although the Board's decision to allow a service employee the opportunity to obtain a required licensure prior to his assuming the duties of a position is not precluded by statute, utilizing this alternative does not negate the Code §18A-4-8b requirement that the position be filled within twenty working days. In the present matter the most senior applicant was not qualified to hold the position at the time it was to be filled. Grievant, the only applicant qualified in both classifications on the pertinent date, was then entitled to the position of Electrician II/General Maintenance. (See footnote 3)

CONCLUSIONS OF LAW

1. The determination of educational policies of the public schools is vested in the state board of education, and, unless unreasonable or arbitrary, its actions relating to such policies will not be controlled by the courts. Detch v. Board of Educ., 145 W.Va. 722, 117 S.E. 2d 138 (1960).

2. In the absence of relevant statutory provisions, state board of education guidelines which determine that if an applicant for a service personnel position holds a license or certification from an accepted institution or agency in certain named classifications, including electrician, said applicant will be considered qualified and will not be required to take a competency test, is neither unreasonable nor arbitrary.

3. The position of Electrician II/General Maintenance, posted on October 26, 1993, was not filled within twenty working days as is required by W.Va. Code §18A-4-8b.

4. Grievant, the only applicant qualified in both classifications at the end of the twenty day period, was entitled to the position of Electrician II/General Maintenance.

Accordingly, the grievance is GRANTED and the Board Ordered to instate Grievant to the position of Electrician II/General Maintenance, effective twenty working days from the posting date on the notice of job vacancy.

DATED: Oct. 31, 1994 Sue Keller, Senior Admn. Law Judge

Footnote: 1 The grievance had previously been denied at levels one and two. The Board waived consideration at level three.

Footnote: 2In Wilson v. Marion County Bd. of Educ., a posting for the position of Truck Driver/Groundsman specifically required the appointed individual hold a Commercial Driver's License. Grievant did not hold said license at the time but offered to obtain the document. The position was awarded to the most senior applicant who already held the license.

In Yeager, the Kanawha County School Pupil Administrative Regulations and Personnel Manual expressly provides that valid certification is required of applicants who bid on bus operator positions.

Footnote: 3Due to the holdings on the foregoing issues it is unnecessary to address the Board's inconsistent practice regarding licensure required of certain service personnel.