DAVID BAYS, .

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Grievant, .

.

v. . DOCKET NO. 93-10-439

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FAYETTE COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by David Bays (Grievant), a Bus Operator employed by the Respondent Fayette County Board of Education (FCBE), alleging a violation of W. Va. Code §§ 18-5-39, 18A-4-8, 18A-4-8b, and 18A-4-8g in regard to his not being selected for a summer position as a Carpenter/Painter in 1993. Grievant initiated his grievance at Level I on June 29, 1993. The grievance was waived to Level II where a hearing was conducted on August 10, 1993. After an adverse decision was rendered at Level II on August 16, 1993, Grievant appealed to Level III where FCBE affirmed the Level II decision on October 19, 1993. A timely appeal to Level IV was received by this Board on October 22, 1993. Following a series of continuances which were granted for good cause, a hearing was held in the Board's office in Charleston, West Virginia, on March 9, 1994. This matter became mature for decision upon receipt ofthorough post-hearing submissions from the parties on April 10, 1994.

The basic facts are not in dispute. On May 4, 1993 FCBE posted a Notice of Vacancy for two summer positions of Carpenter I/Painter. The Job Description for these positions stated: "Personnel employed to perform minor carpentry duties as assigned (make repairs to bus stop shelters) and to perform duties of painting and finishing wood and/or other surfaces." The posting further provided that applicants would be considered in the following order:

1. An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer.

2. Regularly employed service personnel who have had prior summer employment as Carpenter I/Painter for the Fayette County Board of Education or who have successfully passed the applicable State tests.

3. Regularly employed service personnel who have not had prior summer employment as Carpenter I/Painter for the Fayette County Board of Education but who have passed the applicable tests.

4. Service personnel whose employment has been discontinued.

5. Professional personnel who held temporary service personnel jobs or positions prior to June 9, 1982, and who apply.

6. Substitute service personnel.

7. New service personnel.

During the summer of 1989 FCBE hired two service employees to fill Bus Driver/Crew Leader positions with the Governor's Summer Youth Program (GSYP). Norman Lilly, another FCBE service employee regularly employed as a Bus Driver, applied for the Carpenter I/Painter positions noting that he had held the previously noted GSYP summer position in 1989 "working exclusively on fixing andpainting of bus sheds." In addition, Mr. Lilly indicated that he worked "last year as a Paint Crew Leader." Grievant likewise filed a timely application for the positions. Both Grievant and Mr. Lilly had prior experience with FCBE as Painters and both requested to be tested for the Carpenter I portion of the vacant positions. Grievant testified that he had prior experience in carpentry but had not previously worked for FCBE in that capacity. Two FCBE Bus Operators who testified in behalf of

Grievant, Diane Muncey and Carolyn Wills, provided no evidence relevant to resolution of this grievance.

David Clagg, FCBE's Coordinator of Transportation and Custodial Services, testified that he checked records for bus stop shelters which indicated that Mr. Lilly worked on those shelters during the Summer of 1989. Mr. Clagg's research verified Mr. Lilly's claim that he had previously worked on fixing bus sheds in conjunction with the GSYP. (See footnote 1) (R Ex 1) Mr. Clagg further testified that he determined that the work to be performed on the bus shelters in the Summer of 1993 required Carpenter I and Painter skills in accordance with the classification definitions contained in W. Va. Code § 18A-4-8.

Manuel Domingues, a professional educator employed by FCBE, testified that he worked as Supervisor of the students in the GSYP during the Summer of 1989. He worked with Mr. Lilly in repairing school bus shelters. The students were restricted from using powerequipment for safety reasons so Mr. Lilly did most of the actual carpentry work on the shelters. Mr. Lilly would gather the necessary materials for repairing the bus shelters during the morning while the students were in class. Mr. Lilly operated a school bus, transporting the students to the bus shelters where they worked during the afternoon.

Gary Hough, employed by FCBE as the Principal of Mount Hope Middle School, testified that during the Summer of 1989 he was responsible for overseeing the GSYP in Fayette County. He supervised Mr. Lilly, along with Mr. Domingues and others. Mr. Hough indicated that FCBE elected to perform the bus shelter work in 1989 because of safety restrictions that prohibited the students from operating power equipment, such as lawn mowers, as they had done during previous summers.

Resolution of this grievance requires application of W. Va. Code § 18-5-39, which provides in pertinent part:

> An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer. If such employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code. (emphasis added)

This Board recently addressed the issue of what constitutes a "newly created" position under W. Va. Code § 18-5-39 in Francis v. Logan County Board of Education, Docket No. 93-23-346 (Dec. 29, 1993). Francis found that W. Va. Code § 18-5-39 is a narrowly drafted exception to the more general

statutory rule in § 18A-4-8b requiring competitive posting for school service personnel positions. Moreover, the West Virginia Supreme Court of Appeals has consistently construed § 18A-4-8b to favor competitive posting. See e.g., Board of Educ. v. DeFazio, 378 S.E.2d 656 (W. Va. 1989); State ex rel. Rose v. Raleigh County Bd. of Educ., 367 S.E.2d 223 (W. Va. 1988); Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W.Va. 1988). In DeFazio, supra, teachers from schools selected for closing were transferred to schools receiving an influx of students from those same schools. In essence, the Court nullified those transfers, finding that the positions at the receiving schools should have been posted for bid as "newly-created" positions.

In Francis, a decline in the number of handicapped students requiring transportation resulted in a reduction of the number of summer bus runs from three to two. This Board determined that the two remaining bus runs should have been treated as "newly-created" runs under § 18-5-39 and posted for competitive bidding in accordance with § 18A-4-8b.

Grievant contends that the factual situation here is more compelling than existed in Francis since the positions in question involved completely different classification titles, Bus Driver/Crew Leader and Carpenter I/Painter. In this regard, W. Va. Code § 18A-4-8 contains the following pertinent definitions:

> "Bus operator" [driver] means personnel employed to operate school buses and other school transportation vehicles as provided by the state board of education.
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> "Crew leader" means personnel employed to organize the work for a crew of maintenance employees to carry out assigned projects.
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> "Carpenter I" means personnel classified as a carpenter's helper.
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> "Painter" means personnel employed to perform duties of painting, finishing and decorating of wood, metal and concrete surfaces of buildings, other structures, equipment, machinery and furnishings of a county school system.
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> "Multi-classification" means personnel employed to perform tasks that involve the combination of two or more class titles in this section or as created by the West Virginia Board of Education.

Moreover, while the respective classification titles of Bus Driver/Crew Leader and Carpenter I/Painter involved the same ultimate objective, i.e., repairing and painting school bus shelters, the method the employer elected to accomplish the task in 1993 was substantially different from what was described in 1989. (See footnote 2) In 1989, the summer employee worked as a Bus Operator, transporting youthful employees to the job sites. That same employee spent the mornings planning the work and gathering materials necessary to repair bus shelters while the students were in a classroom environment. In 1993, the shelters were repaired exclusively by service personnel with no students to transport or supervise. Given these circumstances, Grievant has compellingly demonstrated that the 1993 Carpenter I/Painter positions should have been recognized as "newly created" within the meaning of W. Va. Code §18-5-39. Francis, supra. See Fletcher v. Berkeley County Bd. of Educ., Docket No. 02-87-017-02 (May 15, 1987).

Since the service personnel position that Mr. Lilly held in 1989 no longer existed in 1993, FCBE was required by § 18-5-39 to fill the "newly created" Carpenter I/Painter vacancies in accordance with § 18A-4-8b. Francis, supra. W. Va. Code §18A-4-8b, entitled "Seniority rights for school service personnel," provides as follows:

> A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.
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> 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 as defined in section eight, article four of this chapter, 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) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

* * *

Since Grievant and Mr. Lilly are both regular employees, they fall in the first category of applicants to be considered for such vacancies under § 18A-4-8b(1). FCBE contends that, if § 18A-4-8bapplies, Mr. Lilly still has a better claim to the position than Grievant since Mr. Lilly had previously served as a carpenter while repairing school bus shelters, even though he had not formally been awarded that classification title.

The record before the undersigned provides substantial evidence that, in addition to working as a Bus Operator and Crew Leader during the Summer of 1989, Mr. Lilly performed the duties of a Carpenter I while repairing school bus shelters. Had FCBE properly documented Mr. Lilly's employment in 1989, it would have noted that he also worked as a Carpenter I. Mr. Clagg's testimony that the Carpenter I and Painter classifications under § 18A-4-8 encompassed the skills necessary to repair bus shelters essentially acknowledged that those same skills were required in 1989 but were not properly documented in the posting for that earlier position or in Mr. Lilly's personnel records.

It is further noted that Grievant must establish all allegations in his complaint by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88-020-4 (May 5, 1988). While Grievant established that he was willing to take a competency test for Carpenter I, he offered no evidence to establish whether the State Board of Education has developed a competency test for the position of Carpenter, thereby failing to demonstrate that FCBE was obligated under W. Va. Code §

18A-4-8e to administer such a test to Grievant. Shrewsbury v. Mercer County Bd. of Educ., Docket No. 93-27-100 (Sept. 24, 1993).

Consistent with this Board's authority under W. Va. Code § 18-29-5(b) to "provide such relief as is deemed fair and equitable" it would be unjust to disregard Mr. Lilly's prior experience as a carpenter for FCBE and award the position to Grievant based solely on his superior seniority as a regular employee (Bus Operator). Such a result is not compelled by § 18A-4-8b and would not be fair and equitable, considering the facts in this particular case. See Meredith v. Monongalia County Bd. of Educ., Docket No. 93-30-264 (Dec. 28, 1993). Moreover, Morgan v. Pizzino, 256 S.E.2d 592 (W. Va. 1979), cited by Grievant for the proposition that school personnel laws and regulations must be strictly construed in favor of the employees they are designed to protect, is inapposite, given that §§ 18-5-39, 18A-4-8, 18A-4-8e and 18A-4-8a were all ostensibly enacted to protect both Grievant and Mr. Lilly.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. On May 4, 1993 the Fayette County Board of Education (FCBE) posted two vacancies for summer positions of Carpenter I/Painter to perform minor carpentry duties making repairs to bus stop shelters.

2. Grievant, who is regularly employed by FCBE as a Bus Operator, submitted a timely application for one of the Carpenter I/Painter positions.

3. On or about June 5, 1989 FCBE posted and filled two Bus Driver/Crew Leader positions related to the Governor's Summer Youth Program (GSYP).

4. Norman Lilly was one of two employees hired to fill the Bus Driver/Crew Leader positions for the Summer of 1989.

5. During the Summer of 1989 Mr. Lilly and Manuel Domingues, a professional educator employed as a Supervisor in the GSYP, worked with a crew of students repairing school bus shelters. Mr. Domingues verified that Mr. Lilly did most of the actual carpentry work performed on the bus shelters.

6. Relying on W. Va. Code § 18-5-39, FCBE selected Mr. Lilly for one of the Carpenter I/Painter

positions because he had held the position during the last Summer when the work was performed.

7. During the Summer of 1985 both Grievant and Mr. Lilly had been employed by FCBE as Painters.

8. Grievant had greater regular seniority as a bus operator than Mr. Lilly but was not selected for one of the Carpenter I/Painter summer vacancies.

CONCLUSIONS OF LAW

1. W. Va. Code § 18-5-39 is a narrowly drafted exception to the general statutory rule in § 18A-4-8b which requires competitive posting for school service personnel positions. Francis v. Logan County Bd. of Educ., Docket No. 93-23-346 (Dec. 29, 1993).

2. "Bus Operator," "Crew Leader," "Carpenter I," and "Painter" are separately defined classifications of employment for school service personnel. W. Va. Code § 18A-4-8.

3. Where school service personnel hired as Bus Driver/Crew Leaders transported GSYP students to job sites where they jointly repaired and painted school bus shelters during the Summer of 1989 and school board next performed repair work on the bus shelters during the Summer of 1993, electing to employ school service personnel in Carpenter I/Painter positions not involving transportation or supervision of students, such Carpenter I/Painter jobs were "newly created" positions within the meaning of W. Va. Code § 18-5-39. Francis, supra. See Fletcher v. Berkeley County Bd. of Educ., Docket No. 02-87-017-02 (May 15, 1987).

4. Newly created summer positions are to be filled in accordance with the competitive provisions set forth in W. Va. Code § 18A-4-8b, rather than awarded to individuals who held similar positions during a previous summer under the narrow exception set forth in W. Va. Code § 18-5-39. Francis, supra.

5. Grievant may not invoke W. Va. Code § 18A-4-8e to require that the school board administer a competency test to determine whether he could meet the definition of the classification title in another classification of employment, unless he demonstrates that the State Board of Education has developed a competency test for the position at issue. Shrewsbury v. Mercer County Bd. of Educ., Docket No. 93-27-100 (Sept. 24, 1993).

6. Where school board established that employee selected to fill Carpenter I/Painter position had previously performed the duties of the Carpenter I classification as defined in W. Va. Code § 18A-4-

8, it was not error under W. Va. Code § 18A-4-8b to creditsuch employee with holding the Carpenter I classification for purposes of summer employment and to select that employee for Carpenter I/Painter vacancy over Grievant who held greater regular seniority but had never worked for school board as a Carpenter.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: August 23, 1994

Footnote: 1Mr. Clagg testified that it took him nearly a month to research and verify Mr. Lilly's claims relating to prior bus shelter work.

Footnote: 2The fact that four years elapsed between these positions being filled was not deemed significant by either party. Since the issue was not raised by the parties, this decision does not necessarily constitute an endorsement by this Board of their interpretation of the language in § 18-5-39 "during the immediate previous summer . . . if such exists during any succeeding summer."