ANTONIO MOSKO

v. **Docket No. 95-33-275**

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Antonio Mosko, is employed by the McDowell County Board of Education (Board) as a Mechanic assigned to the Central Office Bus Garage. He filed this grievance at Level I May 4, 1995, protesting his non-selection for the posted position of Mechanic Foreman. His supervisor was without authority to address the matter and the grievance was denied at Level II following a hearing held May 11, 1995. (See footnote 1) The Board, at Level III, affirmed the Level II findings, and appeal to Level IV was made June 27, 1995. The parties subsequently agreed that a decision could be made on the record developed at Level II. The grievant submitted proposedfindings of fact and conclusions of law by August 11, 1995, and the Board declined to submit proposals. (See footnote 2)

The position in issue was posted April 7, 1995. The posting listed the following minimum qualifications.

1) Must have completed ten years performing skilled duties in the maintenance and repair of automobiles, trucks and other mobile and mechanical equipment.

2) Able to obtain a valid West Virginia Department of Public Safety Vehicle Inspection License.

3) Must have a valid CDL license.

4) Negative biannual tuberculin skin test.

5)

Have a high school diploma or GED certificate.

The Foreman job description attached to the posting contained the language, "Must have a valid West Virginia Department of Public Safety Vehicle Inspection License" in its list of minimum qualifications for the post. There was no reference in the description to the CDL (Commercial Driver's License), high school diploma or GED certificate.

The grievant, who then had sixteen years' seniority, and James Kelly, a twenty-three year Mechanic, made timely applications. (See footnote 3) It is undisputed that at the time of the posting, the grievant possessed the vehicle inspection license and Mr. Kelly did not. The Board appointed Mr. Kelly to the post effective July 3, 1995, (See footnote 4) and he obtained the license on May 10, 1995. The record is somewhat unclear, but it appears that the only requirement for the license is a passing score on a written test.

The grievant equates the Foreman job description with official Board policy and asserts that since the description used the word "must" in reference to the vehicle inspection license, the posting for the position violated the policy. He further contends that the "policy" prohibited the Board from considering any applicant who did not possess the license at the time of the posting. (See footnote 5) The Board disputes the grievant's characterization of the job description and asserts that the posting and ultimate selection were in compliance with W.Va. Code §18A-4-8b.

The undersigned finds the grievant's contentions to be wholly without merit. The job description is simply that, and contains no language which even remotely suggests that, by promulgating it, theBoard intended to adopt binding personnel policy on the appointment of service personnel. Even if the description was accorded policy status, it would not be reasonable to interpret the cited language to mean that no person could be appointed to a Foreman position unless he held the vehicle inspection license at the time of the posting for the position. Rather, it is clear that to the extent that the description imposes any restriction on the manner in which such positions are filled, it is only that persons appointed should have the license prior to entering into their duties.

Moreover, the Grievance Board has consistently held that it is not necessarily improper for a

county board to even allow persons who have not obtained a particular license to enter into the duties of a position when it appears that licensure will be forthcoming within a short period. See, e.g., Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-402 (Feb. 23, 1993). (See footnote 6) The holding recognizes that, in many instances, licensure is a "paperwork" requirement and not a crucial factor in determining the candidate's fitness to perform the job. The record supports that such was the case here.

The grievant cites no other flaws in the selection process and after a thorough review of the record, the undersigned finds none. Rather, the evidence establishes, in clear and convincing fashion, that Mr. Kelly's appointment was in compliance with Code §18A-4-8b and the holdings in Brewer v. Mercer County Bd. of Educ., Docket No. 91-27-002 (Mar. 30, 1992).

Accordingly, the grievance is **DENIED**.

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

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 7, 1995

Footnote: 1At this hearing, Mr. James Kelly, the successful applicant for the position in issue, appeared and was granted leave to intervene per W.VA. Code §18-29-3(u). The undersigned did not learn of the intervention until after the parties agreed to submit the matter for decision on the record and the record was received. Because no further evidence was to be presented, and Mr. Kelly was provided full opportunity at the hearing to examine witnesses and make his legal position known, his further participation at Level IV was considered unnecessary.

Footnote: 2The Board's legal position, as set forth herein, is gleaned from the Level II evaluator's conclusions of law.

Footnote: 3Three other persons made applications but apparently did not meet the ten-year mechanical experience requirement. The parties agree that the grievant and Mr. Kelly were the only viable candidates for the post.

Footnote: 4Since the grievant confined his presentation to the posting and the Board's determination that Mr. Kelly was an eligible candidate, there is little if any evidence concerning the selection process beyond that stage. It is assumed that Superintendent of Schools J. Kenneth Roberts ultimately assessed the candidates, and determined that Mr. Kelly should be appointed and that the Board accepted his recommendation.

Footnote: 5At the Level II hearing, the grievant, during his testimony, announced that he had evidence to show that the Board engaged in "a past practice of favoritism towards Mr. Kelly." He then made vague references to a pay raise Mr. Kelly had received "but might have to pay back" and to a Board vehicle Mr. Kelly used in the summer months "for no apparent reason." The grievant produced no evidence whatsoever to substantiate that any Board administrator had ever engaged in preferential treatment of Mr. Kelly in any personnel matter, including his appointment to the post in question. Accordingly, the grievant's unfounded assertions in that regard are not further addressed herein.

Footnote: 6It is noted that in Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994), it was held that a successful applicant for an Electrician position was required to obtain a Journeyman Electrician's license within the twenty days allotted by W.Va. Code §18A-4-8b for filling service personnel positions. The holding was predicated primarily on the requirement in W.Va. Code §18A-4-8 that Electricians hold such licensure. The case is readily distinguishable from the present one in that here there is no statutory requirement that Foremen hold a vehicle inspection license.