DIANE ROCCHIO,

Grievant,

v. DOCKET NO. 98-15-007

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Diane Rocchio, challenges Respondent's refusal to allow her to view a copy of the Secretary competency test which she took and failed on August 27, 1997. She requests as relief that she be allowed to see the test and her answers, so that she can verify that she failed and surmise in which areas she needs to improve. This grievance was filed at level one on September 9, 1997, where her immediate supervisor was without authority to grant relief. She appealed to level two, where a hearing was conducted on December 17, 1997, followed by a denial of the grievance on January 12, 1998. Consideration at level three was waived pursuant to W. Va. Code § 18-29-4, and Grievant appealed to level four on January 19, 1998. A level four hearing was held on February 20, 1998, where Grievant was represented by John Roush, counsel for the School Service Personnel Association, and Respondent was represented by its attorney, William Fahey. The parties submitted proposed findings of fact and conclusions of law on March 18, 1998, at which time this matter became mature for decision.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is regularly employed as a Cook by Respondent, Hancock County Board of Education (HCBOE).

2. In order to qualify for vacant positions in the Secretary classification, Grievant took the competency test for that classification title, as promulgated by the State Board of Education pursuant to Code § 18A-4-8e.

3. Grievant took the Secretary competency test on August 27, 1997, and was advised

that she did not achieve a passing score.

4. After failing the test on August 27, 1997, Grievant asked HCBOE Assistant Superintendent Mary Ann Bucci if she could see the test she had taken and failed.

5. Ms. Bucci consulted a representative of the State Department of Education, who advised her that, due to security concerns, the standardized test could not be provided to a job applicant for review.

6. The competency test is only administered when there is a job vacancy in that classification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. See W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

Grievant does not contend that any law, policy, or rule has been violated by HCBOE's refusal to allow her to review her test results. Rather, she argues that it merely is common sense that review of the test would be helpful to an applicant who has failed,enabling her to ascertain in what areas she needs to improve her skills and/or knowledge. She contends that the State Board of Education's concern regarding security is misplaced, because the Secretary test is largely a "skills" test, and does not lend itself to memorization. For example, one portion of the test involves typing from dictation, which is not something an applicant could pass on to others in order to assist them in successfully passing the test. However, the undersigned does not agree with Grievant's contention that the other portions of the test involve skills, rather than knowledge. In areas such as math, spelling and grammar, there is a "right" answer for each question.

HCBOE contends that it is merely complying with the State Board of Education's mandate that the standardized test be kept confidential. Pursuant to Assistant Superintendent Bucci's inquiry, the Coordinator for the Department of Education, Marshall Hamilton, stated that allowing applicants to review their tests after taking them would destroy test security, because the standardized test is given repeatedly without alteration. However, Mr. Hamilton did explain that an applicant may be informed which major portions of the test she failed,

such as math, typing, or the written section. See Respondent's Exhibit 1, Level Four. Ms. Bucci also testified at level two that HCBOE is required to sign an agreement with the State Board, stating that it will keep all tests secure and confidential.

W. Va. Code § 18A-4-8e requires the State Board of Education to develop and make available competency tests for each service personnel classification, which tests are to be administered by the county boards of education. However, nothing in the statute addresses security or confidentiality issues with regard to these tests. Grievant contends that, since nothing in the statute prevents an applicant from reviewing a test after takingit, HCBOE has no right to prohibit her from doing so.

"The determination of the educational policies of the public schools of the State is vested in The West Virginia Board of Education, and, unless unreasonable or arbitrary, its actions relating to such policies will not be controlled by the courts." Syl. Pt. 1, Detch v. Bd. of Educ., 145 W. Va. 722, 117 S.E.2d 138 (1960). This principle has been cited in decisions of the Grievance Board regarding qualification requirements, where it was held that, in the absence of statutory provisions, the State Board of Education is permitted to deem employees having particular licenses or certifications to be qualified for service personnel positions, without having to take a competency test. Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994).

Similar logic applies here. There are no relevant statutory provisions regarding the right of an applicant to review a test after taking it. Accordingly, as the entity which is responsible for competency testing, it is appropriate for the State Board of Education to determine that security interests should prohibit such a practice. The State's policy in this regard cannot be said to be unreasonable or arbitrary, and it is based upon a substantive concern for preserving the integrity of the standardized test.

However, Grievant testified that, contrary to Mr. Hamilton's statements to Ms. Bucci, she was not allowed to be informed which portions of the test she failed. As Mr. Hamilton has stated that it is State Board of Education policy to inform applicants in this regard, HCBOE is hereby directed to give the information to Grievant as to which areas of the test she failed. In accordance with the foregoing findings and discussion, the following conclusions

of law are made.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. See W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. "The determination of the educational policies of the public schools of the State is vested in The West Virginia Board of Education, and, unless unreasonable or arbitrary, its actions relating to such policies will not be controlled by the courts." Syl. Pt. 1, Detch v. Bd. of Educ., 145 W. Va. 722, 117 S.E.2d 138 (1960). See Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994).

3. There being no relevant statutory provisions, it is within the State Board of Education's authority to refuse to allow applicants to review competency tests after taking them, due to security concerns, and such a policy is not unreasonable or arbitrary.

4. Grievant did not prove by a preponderance of the evidence that she was entitled to review of the Secretary competency test after taking and failing it.

5. Grievant is entitled, pursuant to State Board of Education policy, to be informed which portions of the competency test she failed.

Accordingly, this grievance is GRANTED IN PART and DENIED IN PART. The Hancock County Board of Education is directed to inform Grievant, within ten days of thedate of this Decision, which portions of the Secretary competency test she failed on August 27, 1997.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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.

Date: June 8, 1998 _____

V. DENISE MANNING

Administrative Law Judge