ALAN BAILEY,

Grievant,

v. **Docket No. 97-23-436**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Alan Bailey (Grievant), a regular Bus Operator employed by Respondent Logan County Board of Education (LCBE), filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that LCBE violated W. Va. Code §§ 18A-4-8b, 18-5-39, and 18A-4-8e, by the manner in which it filled a school service personnel position for a Painter in the summers of 1996 and 1997. The grievance was advanced to Level II where an evidentiary hearing was conducted on September 24, 1997. Subsequently, by correspondence dated September 29, 1997, the grievance was denied at Level II by LCBE Assistant Superintendent Brenda Skibo, the Superintendent's designee. Grievant elected to by-pass Level III as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on October 2, 1997. Thereafter, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia. The parties agreed upon a briefing schedule at the conclusion of the hearing, and this matter became mature for decision on January 12, 1998, following receipt of the parties' post-hearing proposals. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript (See footnote 1) of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Levels II and IV.

FINDINGS OF FACT

1. Grievant has been employed by the Logan County Board of Education in the school service personnel classification of Bus Operator for over four years.

2. In June of 1996, Grievant bid on a summer school service position as a Painter.

3. In order to be hired as a Painter, Grievant was required to take and pass the state competency test for Painters. Grievant took and failed the Painter's competency test. As a result, a Painter's position was awarded to a less senior school service employee.

4. Prior to taking the Painter's competency test discussed in Finding of Fact Number 3, Grievant was not afforded an opportunity for a day of inservice training.

5. Grievant filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., complaining that he had not been provided a day of inservice training prior to taking the competency test, as required by W. Va. Code § 18A-4-8e.

6. Prior to Level II, Grievant reached an agreement with LCBE General Counsel John Sims to settle the grievance. LCBE agreed to allow Grievant another opportunity to take the Painter's competency test after receiving proper inservice training. ShouldGrievant pass a make-up competency test, he would receive backpay and appropriate seniority as if he had worked as a Painter during the summer of 1996. This agreement was not reduced to writing.

7. Consistent with the settlement agreement, Grievant and another school service employee, Eleanor Dingess, were scheduled to receive a day's inservice training on October 5, 1996, to prepare for a make-up competency test.

8. The inservice training was given by Scott Chapman, a regular school service employee of LCBE, who then held the classifications of Plumber II and Painter. Mr. Chapman had been classified as a Painter for eleven years. In addition, Mr. Chapman had done painting for a contractor prior to being hired by LCBE.

9. Mr. Chapman explained various types of paint, brushes, tools and techniques for painting, spending at least three and one-half hours instructing Grievant and Ms. Dingess. The balance of the eight-hour inservice involved informal discussions among the participants.

10. Grievant and Ms. Dingess questioned Mr. Chapman regarding certain information which they remembered being contained in the questions on the Painter's competency test they had previously taken and failed. Mr. Chapman answered some of their questions, but he was unable to authoritatively answer all of their questions. Mr. Chapman had never taken the Painter's competency test, nor had he seen the test questions.

11. Mr. Chapman did not provide Grievant or Ms. Dingess with a Painter's job description or sample test questions. See J Exs 9-11. Grievant had previously seen the Painter's job description in

conjunction with the most recent posting of a summer Painter'sposition. Mr. Chapman had not previously conducted an inservice to assist someone in preparing to take a competency test.

12. Grievant did not report for the make-up competency test which was held on October 8, 1996, shortly after the inservice training. See G Ex B. Grievant attempted to notify LCBE officials by facsimile advising that he would not take the test, but he did not speak directly with anyone with authority to modify the terms of his agreement with LCBE. Grievant was subsequently called by Joyce Sanders, an employee in LCBE's Central Office, regarding his failure to take the competency test. Grievant advised Ms. Sanders that he had sent a "fax" to LCBE Assistant Superintendent Brenda Skibo that he was not taking the test, and wanted to "continue with the grievance" because he had not been provided an appropriate inservice.

13. Ms. Dingess took and failed the make-up competency test on October 8, 1996. See G Ex B.

14. Following the inservice training conducted by Mr. Chapman in the fall of 1996, Grievant engaged in independent study through a local library to prepare for the Painter's competency test.

15. In March of 1997, Grievant spoke to Ms. Skibo regarding the date for the next Painter's competency test. Ms. Skibo advised Grievant that the next test would be advertised and conducted sometime prior to hiring Painters for the summer of 1997.

16. Neither Ms. Skibo nor any other LCBE employee agreed to modify or extend the terms of the earlier settlement agreement between Grievant and LCBE.

17. Grievant subsequently took the Painter's competency test in May of 1997 after voluntarily waiving any further inservice training. Grievant received a passing scoreand was subsequently hired by LCBE as a Painter for the summer of 1997 in accordance with W. Va. Code §§ 18A-4-8b and 18-5-39.

18. Painters who had been hired by LCBE as Painters in the summer of 1996 were rehired for the summer of 1997 in accordance with W. Va. Code § 18-5-39. Those employees worked for six days before Grievant began working in a newly-created summer Painter's position. LCBE declined to accept Grievant's successful passing of the competency test in May 1997 as evidence that he would have passed the make-up test in October 1996, had he been provided appropriate inservice training.

19. In accordance with the terms of the settlement agreement, had Grievant taken and passed the make-up Painter's competency test in the fall of 1996, Grievant would have been hired as a

Painter for the summer of 1997 in accordance with W. Va. Code § 18-5-39, and received an additional six days' pay. See J Exs 2 & 3.

20. The West Virginia Department of Education requires county boards of education to control competency tests strictly in a secure environment, in order to avoid compromising the validity of the test instrument.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. Resolution of this grievance primarily revolves around the question of whether the inservice training LCBE provided Grievant through Mr. Chapman complied with the county board's obligations under W. Va. Code § 18A-4-8e. The West Virginia Legislature enacted § 18A-4-8e in 1990, providing for competency testing of school service personnel in the following manner.

> The state board of education shall develop and cause to be made available competency tests for all of the classification titles defined in section eight [§ 8A-4-8] and listed in section eight-a [§ 18A-4-8a] of this article for service personnel. Each classification title defined and listed shall be considered a separate classification category of employment and shall have a separate competency test, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment and shall have a single competency test. The cafeteria manager class title shall be included in the same classification category as cooks and shall have the same competency test. The executive secretary class title shall be included in the same classification category as secretaries and shall have the same competency test. The classification titles of chief mechanic, mechanic and assistant mechanic shall be included in one classification title and shall have the same competency test.

> **The purpose of these tests shall be to provide county boards of education a uniform means of determining whether school service personnel employees 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** as defined in section eight of this article. Competency tests shall not be used to evaluate employees who hold the classification title in the category of their employment.

> The competency test shall consist of an objective written and/or performance test: Provided, That applicants shall have the opportunity of taking the written test orally if

requested. Oral tests shall be recorded mechanically and kept on file. Persons administering the oral test shall not know the applicant personally. The performance test for all classifications and categories other than Bus Operator shall be administered by a vocational school which serves the county board of education. A standard passing score shall be established by the state department of education for each test and shall be used by county boards of education. The subject matter of each competency test shall be commensurate with the requirements of the definitions of the classification titles as provided in section eight of this article. The subject matter of each competency test shall be designed in such a manner that achieving a passing grade will not require knowledge and skill in excess of the requirements of the definitions of the classification titles. Achieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title. Once an employee passes the competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [§ 18A-4-8b] of this article and shall not be required to take the competency test again.

An applicant who fails to achieve a passing score shall be given other opportunities to pass the competency test when making application for another vacancy within the classification category.

Competency tests shall be administered to applicants in a uniform manner under uniform testing conditions. County boards of education shall be responsible for scheduling competency tests and shall not utilize a competency test other than the test authorized by this section.

When scheduling of the competency test conflicts with the work schedule of a school employee who has applied for a vacancy, said employee must be excused from work to take said competency test without loss of pay.

A minimum of one day of appropriate inservice training shall be provided employees to assist them in preparing to take the competency tests.

Competency tests shall be utilized to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee.

Notwithstanding any provision in this code to the contrary, once an employee holds or has held a classification title in a category of employment, that employee shall be deemed as qualified for said classification title even though that employee no longer holds that classification.

> The requirements of this section shall not be construed to alter the definitions of class titles as provided in section eight of this article nor the procedure and requirements of section eight-b of this article.

> The testing procedures of this section shall be implemented effective the first day of July, one thousand nine hundred ninety-one. (Emphasis added.) This Grievance Board has previously determined that providing a full day of inservice training prior to administration of a competency test to a regularly employed school service personnel employee is mandatory. Quintrell v. Lincoln County Bd. of Educ., Docket No. 95-22-051 (Aug. 31, 1995), aff'd, Cir. Ct. of Kanawha County No. 95-AA-241 (Apr. 30, 1996). See Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988). Grievant complains that the inservice training he was provided by LCBE did not comply with W. Va. Code § 18A-4-8e, because the employee conducting the training was not personally familiar with the competency test, and was not able to answer some of questions regarding matters which Grievant or Ms. Dingess knew to be covered by the test.

Grievant's contentions are without merit. The statute clearly states that the inservice training is provided to "assist" employees "in preparing to take the competency tests." The term "assist" in W. Va. Code § 18A-4-8e must be accorded its common meaning. See Byrd v. Bd. of Educ., 196 W. Va. 1, 467 S.E.2d 142 (1995); State ex rel. Frazier v. Meadows, 193 W. Va. 20, 454 S.E.2d 65 (1994). In the context of § 18A-4-8e, "assist" is synonymous with "help." See Webster's New World Dictionary 84 (2d College Ed. 1976). Although W. Va. Code § 18A-4-8e obviously requires the employer to do something more than relieve the employee taking the test from his or her regular duties for eight hours, the undersigned administrative law judge concludes that LCBE provided helpful inservice training to Grievant in substantial compliance with W. Va. Code § 18A-4-8e.

According to the record, Mr. Chapman was the most experienced Painter employed by LCBE. Although Mr. Chapman was primarily employed to perform the duties of a Plumber II, he had been employed by LCBE as a Painter for eleven years during thesummer. Grievant did not suggest any other LCBE employee who could have conducted the inservice for the Painter's competency test better than Mr. Chapman.

Grievant's dissatisfaction with Mr. Chapman's inability to provide answers to specific test questions is inconsequential. LCBE reasonably explained that the specific questions on a test may not be revealed in advance, in order to assure that the test provides a meaningful instrument to measure the applicant's knowledge, not merely the ability to memorize "correct" answers. Therefore, a county school board need not provide an inservice trainer who is familiar with the test, as opposed

to the subject matter covered by the test. Indeed, even if Mr. Chapman had personal knowledge of the test questions and answers, he could properly refuse to reveal specific questions and answers to Grievant. The inservice instructor is expected to disseminate generic information which would be helpful to an employee taking the competency test, not provide the "correct" answers to specific questions included on the test.

In accordance with standard practice described by LCBE Assistant Superintendent Skibo, Mr. Chapman should have provided Grievant and Ms. Dingess with sample questions to familiarize them with the nature of the test instrument. However, because Grievant had previously taken the Painter's competency test less than a year earlier, this failure to provide sample questions had no impact on whether Grievant was properly assisted in preparing to take the make-up test. Therefore, in the context of this grievance, LCBE's failure to provide sample test questions during the course of the inservice was harmless error.

In summary, LCBE substantially complied with the inservice mandate in W. Va. Code § 18A-4-8e through the instruction provided by Mr. Chapman on October 5, 1996. Once LCBE provided an appropriate inservice opportunity, the county board fulfilled its obligation under the terms of the settlement reached in a previous grievance. Therefore, Grievant's failure to take the make-up competency test on or about October 8, 1996 was without justification, and Grievant thereby forfeited any relief he might have attained in accordance with the earlier settlement. Because Grievant failed to establish by a preponderance of the evidence that LCBE violated any law, rule, policy or regulation through the method in which it provided inservice training, he is not entitled to any relief through this grievance.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket

No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-4-8e mandates that a school service employee be provided a minimum of eight hours inservice training prior to taking a competency test, unless the employee voluntarily waives the training opportunity. Quintrell v. Lincoln County Bd. of Educ., Docket No. 95-22-051 (Aug. 31, 1995), aff'd, Cir. Ct. of Kanawha County No.95-AA-241 (Apr. 30, 1996). See Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988).

3. Grievant failed to establish by a preponderance of the evidence that the Logan County Board of Education violated W. Va. Code § 18A-4-8e in regard to the nature of the inservice training provided Grievant on October 5, 1996, to assist Grievant in preparing for the Painter's competency test.

Accordingly, this Grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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: February 27, 1998

Footnote: 1

The Level II hearing transcript was incomplete due to an apparent mechanical problem with the recording equipment. The parties were aware of this deficiency at Level IV and supplemented the Level II record accordingly.