

CHARLES HACKNEY,

Grievant,

v.

Docket No. 00-18-113

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Charles Hackney, is a regular bus operator with the Jackson County Board of Education ("JCBOE" or "Board"). He filed this grievance on December 17, 1999. His Statement of Grievance reads:

I believe that the procedures for job posting have been misapplied in my case. The procedures have been in the past to post the job for mechanic in the department of transportation with the minimum qualifications as outlined by the state as well as the added qualifications by the county. In the job posting for which I applied on September 20, 1999, [\(See footnote 1\)](#) the qualifications were listed as I previously noted; however, with two applicants for the job in place for the job, the job posting was removed and replaced with another posting listing only the minimum requirements for the job. I believe the established procedure was done away with in a capricious manner. In doing so the other applicant was favored over the most qualified as noted in the first job posting.

Grievant's initial Relief Sought was "I wish to be hired for the job with back pay to the day the job was filled." Grievant later changed this relief to reposting of the position after JCBOE considered the changes in the Job Description, and then selection of the successful applicant without family involvement. This grievance was denied at Levels I and II, and apparently a Level III hearing was waived. Grievant appealed to Level IV on March 29, 2000, and the parties agreed to submit this case on the record developed below. This grievance became mature for decision on May 22, 2000, the date of the receipt of the parties' proposed Findings of Fact and Conclusions of Law. [\(See footnote 2\)](#)

Issues and Arguments

Grievant made multiple arguments. First, Grievant questioned whether the JCBOE administration had the "legal authority to withdraw the job posting when they had at least one applicant who met all the qualifications listed in the job description." Second, Grievant asked if the JCBOE administration "violate[d] the practice of having changes in job description[s], particularly major changes which substantially alter the qualifications for the position, approved by the Jackson County Board of Education." Third, Grievant argued the review process was tainted because the Supervisor of Transportation, the successful applicant's father, was involved in the selection process.

Respondent argues the posting and selection process were properly conducted, the reposting was proper and did not result in favoritism to the successful applicant, the involvement of the successful applicant's father was minimal, and if error did occur through this involvement, it was harmless error, and JCBOE does not have a policy or practice of requiring Board approval for the type of changes that were made in this Job Description.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by JCBOE as a regular bus operator with a seniority date of February 27, 1995.
2. David Farra was employed by JCBOE as a regular bus operator with a seniority date of February 8, 1993.
3. In October 1999, Respondent posted a position for a temporary Mechanic.
4. This posting listed multiple qualifications, including a minimum of three years of experience, as well as successful completion of the competency examination.
5. Both Grievant and David Farra applied. Neither employee had ever worked as a mechanic in the school system, nor had they taken the competency examination.
6. Both applicants took and passed the competency test on October 23, 1999. Prior to the examination, Assistant Superintendent Dolores Ranson, who is in charge of personnel matters, explained to the applicants that if they both passed the test the applicant with the most seniority would receive the position. [\(See footnote 3\)](#)
7. Since David Farra had the most seniority, Assistant Superintendent Ranson planned

to recommend David Farra for the position at the next meeting of JCBOE.

8. Shortly before this meeting, Mr. Bernard King, who was then Board member, called Assistant Superintendent Ranson. He was angry and stated he had heard David Farra had passed the competency examination, but that he was not qualified to fill the position because he did not have the three years of experience. He also informed Assistant Superintendent Ranson he had heard David Farra had trouble passing the competency examination. [\(See footnote 4\)](#)

9. Because of this complaint, Assistant Superintendent Ranson asked Assistant Superintendent Gary Samples, who is in charge of Non-instructional Programs, Jack Farra, Supervisor of Transportation, [\(See footnote 5\)](#) and Jim Stewart, Chief Mechanic, to develop questions to ask the candidates to double check their competency.

10. These three men asked both candidates the same questions while Assistant Superintendent Ranson observed. Both candidates were deemed qualified for the position.

11. Assistant Superintendent Ranson saw no favoritism during this question and answer period.

12. Also before the Board meeting, Mr. King called Assistant Superintendent Samples and complained about the posting requirement that the applicant have three years of experience as a mechanic. Mr. King was upset and told Assistant Superintendent Samples there were other bus operators with greater seniority who would have applied for the position if this requirement had not been listed, and that there would be grievances

filed. 13. Because recent Grievance Board decisions had stated that an employee who had passed the competency examination was deemed qualified, Assistant Superintendent Ranson was concerned the posting had unfairly screened out qualified candidates. She sought legal advice as to whether the position should be reposted without the three year requirement. See Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-010 (May 29, 1998).

14. Assistant Superintendent Ranson called Perry Bryant, Grievant's representative at this hearing, who consulted with the West Virginia Education Association's general counsel before advising her to repost the position without the three year experience requirement.

15. Assistant Superintendent Ranson called John Roush, attorney with West Virginia

School Service Personnel Association, who advised her to repost the position without the three year experience requirement.

16. Assistant Superintendent Ranson also called Howard Seuffer, the Board's attorney, who advised her to repost the position without the three year experience requirement.

17. Based on this unanimous advice, Assistant Superintendent Ranson reposted the temporary Mechanic's position without the three year experience requirement.

18. Four applicants applied. including Grievant. None of them were more senior than David Farra. 19. Since David Farra was the most senior candidate, had satisfactory evaluations for the past two years, and had passed the competency examination, Assistant Superintendent Ranson recommended him for the position. This recommendation was accepted by the Board.

20. When the Job Descriptions were originally written, the Board added additional requirements that were not required by state law, such as the three years of experience for a mechanic.

21. In recent years, Assistant Superintendent Ranson has removed these requirements as positions were posted. When this position was posted she did not review the requirements prior to the position being advertised, and thus, they were not removed.

22. JCBOE does not have a policy or a past practice of voting on these type of changes in Job Descriptions. JCBOE did vote on September 2, 1999, to change the type of classifications within a multi-classified, vacant maintenance position prior to its posting upon the recommendation of the Superintendent.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

The arguments raised by Grievant will be addressed individually.

I. Did Assistant Superintendent Ranson have the legal authority to withdraw the first posting and repost the position?

With regard to Grievant's argument that the Board did not have the legal authority to withdraw the job posting and repost it, "this Grievance Board has found that no statutory or case law prohibits a county board from modifying a job posting, and thus, Grievant has failed to prove a violation" [\(See footnote 6\) Toney v. Lincoln County Bd. of Educ.](#), Docket No. 98-22-009 (Mar. 24, 1998). [See Otto v. Berkeley County Bd. of Educ.](#), Docket No. 89-02-369 (Dec. 28, 1990); [Fulk v. Monongalia County Bd. of Educ.](#), Docket No. 94-30-616 (Mar. 30, 1995). Grievant did not cite any statute to support his contention, and the undersigned Administrative Law Judge has not found any statute which supports Grievant's argument.

W. Va. Code § 18A-4-8e discusses competency examinations and states the following:

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 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.

This statute states that an applicant who passes the competency examination is qualified to fill the vacant position, and no mention of additional requirements is made. [\(See footnote 7\)](#)

Given this set of facts and considering the concerns of a Board member, the threat of grievances, and the advice of three different lawyers, Assistant Superintendent Ranson's decision to repost the position without the three year experience requirement could not be seen as capricious as asserted by Grievant in his Statement of Grievance, or illegal as argued by Grievant at hearing.

II. Did JCBOE violate its practice of approving substantial changes in Job Descriptions prior to posting?

The testimony did not demonstrate JCBOE had a policy or prior practice of approving these type of changes to Job Descriptions. In fact, the evidence submitted established just the opposite. Assistant Superintendent Ranson credibility testified to these facts. Further, the testimony that JCBOE had once voted to approve a change in the classifications within a multi-classified position prior to posting is not supportive of Grievant's argument.

Accordingly, this argument must fail. III. Was the review and selection process tainted so as to require reposting of the position?

It is clear that it was inappropriate for Jack Farra to be involved in the selection process that chose his son for the position. Even if he did not attempt to influence the process, and there was no testimony to demonstrate that he did, his inclusion gives the appearance of impropriety. However, the discussion of this issue cannot end there.

W. Va. Code § 18A-4-8b discusses "Seniority rights for school service personnel" and states the following:

A county board shall make decisions affecting promotions and the 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] of this article, on the basis of seniority, qualifications and evaluation of past service.

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 of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies.

(Emphasis added).

This Code Section indicates David Farra, having met the stated requirements and being the most senior, was entitled to receive the position. This conclusion is a simple one. David Farra should not be punished because a former Board member obviously did not want him in the

position, and Assistant Superintendent Ranson went the extra mile to insure both applicants were qualified for the position. David Farra was not consulted about his father's placement on the committee, and the fact that this action occurred without his input should not now be held against him.

More importantly, when a grievant has alleged an error, he must prove that the error was harmful, in that "a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error." McFadden v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10. See Kloc v. Bd. of Trustees/ W. Va. Univer., Docket No. 96-BOT-507 (Aug. 20, 1997). Since David Farra was entitled to be selected for the position, Grievant has not proven harmful error occurred by Jack Farra's inclusion in a question and session. When "there is no reason to believe that the outcome would differ in any respect, to order such would be an exercise in futility." Fekete v. Bd. of Trustees, Docket No. 95-BOT-484 (Aug. 20, 1996); Glance v. Marion County Bd. of Educ., Docket No. 93-24-286 (Mar. 31, 1994).

Further, although it was not raised by the parties, it was incorrect to have the question and answer session to determine if the applicants were qualified, after they had passed the competency examination. W. Va. Code § 18A-4-8e.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2. There is no statutory or case law which prohibits a county board from modifying a job posting. Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-009 (Mar. 24, 1998). See Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd. of Educ., Docket No. 94-30-616 (Mar. 30, 1995); W. Va. Code §§ 18A-4-8b, 18A-4-

7a.

3. Grievant did not demonstrate JCBOE's failed to follow either a policy or its past practice when a change was made in a Job Description without prior Board approval.

4. David Farra is entitled to the temporary Mechanic's position on the basis of seniority, qualifications, and evaluation of past service, as he passed the competency examination. W. Va. Code §§ 18A-4-8b & 18A-4-8e.

5. When a grievant has alleged an error, he must prove that the error was harmful, in that "a different result would likely have occurred. . . . [s]imply stated, if the same result was inevitable, regardless of [adherence to proper procedure], Grievant has not suffered harm from the identified procedural error." McFadden v. W. Va. Dep't of Health and Human Resources, Docket No. 94-HHR-428 (Feb. 17, 1995) at 10. See Kloc v. Bd. of Trustees/ W. Va. Univer., Docket No. 96-BOT-507 (Aug. 20, 1997).

6. When "there is no reason to believe that the outcome would differ in any respect, to order such would be an exercise in futility." Fekete v. Bd. of Trustees, Docket No. 95-BOT-484 (Aug. 20, 1996); Glance v. Marion County Bd. of Educ., Docket No. 93- 24-286 (Mar. 31, 1994).

7. While, the placement of David Farra's father on the question and answer committee was inappropriate, this factor should not effect the outcome in this grievance, as David Farra was entitled to the position pursuant to W. Va. Code § 18A-4-8b.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Jackson County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 9, 2000

Footnote: 1

Grievant was incorrect on this date. The position at issue in this grievance was first posted on or about October 8, 1999.

Footnote: 2

Grievant was represented by Perry Bryant, a UniServ Consultant for the West Virginia Education Association, and Respondent was represented by Attorney Howard Seufer.

Footnote: 3

Assistant Superintendent Ranson explained she now gives all applicants this information prior to the testing, as she had received complaints in the past.

Footnote: 4

Because of the questions raised about whether David Farra had the three years of experience, David Farra submitted two letters which stated he had this experience. As noted by Assistant Superintendent Ranson, the type of required experience was not detailed, but she believed David Farra possessed the necessary experience. She, however, did not base her initial decision or her second decision on the candidates' experience, but on the factors listed in W. Va. Code § 18A-4-8b.

Footnote: 5

Mr. Jack Farra is David Farra's father.

Footnote: 6

W. Va. Code § 18A-4-8b is the Code Section which discusses posting of service positions and states:

Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of the job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

Footnote: 7

Given the outcome in this grievance, the undersigned Administrative Law Judge sees no need to revisit any of the Grievance Board's case law on this issue.