

ORVILLE FIELDS, JR.,

Grievant,

v.

DOCKET NO. 99-20-491

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Orville Fields, Jr., filed this grievance against his employer, the Kanawha County Board of Education ("Board") on or about July 9, 1999:

Grievant, a regularly employed mechanic, applied for a crew leader/mechanic's vacancy. The Respondent gave its own competency examination for the crew leader classification and the Grievant failed this examination. The State Department of Education has designated a state examination for the crew leader classification. This position was awarded to an applicant who is less senior than the Grievant. Grievant alleges a violation of West Virginia Code § 18A-4-8e, § 18A-4-8b & § 18A-4-8g.

Relief sought: Grievant requests the opportunity to take the state-mandated examination for the crew leader classification. If he passes this examination, Grievant requests instatement to this vacancy and prospective and retroactive payment of wages, benefits & regular employment seniority since the date of the filling of this vacancy. Grievant additionally requests interest on all monetary sums.

The grievance was denied at level one, and appealed to level two. A level two hearing was held on October 26, 1999, and a decision denying the grievance was issued on November 8, 1999. The grievant elected to bypass level three and appealed to level four on November 19, 1999. A level four hearing was held on February 1, 2000. This case became mature for decision on March 1, 2000, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by James W. Withrow, Esq.

SUMMARY OF EVIDENCE

Evaluator's Exhibit

Ex. 1 -

Grievance documents.

Grievant's Exhibits

None

Board Exhibits

Ex. 1 -

Kanawha County Schools Vacancy Notice, dated April 1, 1999.

Ex. 2 -

School Service Personnel Testing List, April 1998.

Ex. 3 -

September 22, 1999 memorandum from Adam J. Sponaugle to Karen Williams.

Ex. 4 -

School Service Personnel Testing List, October 1999.

Testimony

Grievant testified in his own behalf, and presented the testimony of Melinda Isaacs, Wayne Clutter, and Karen Williams. The Board presented the testimony of Karen Williams and George Beckett.

FINDINGS OF FACT

The material facts in this grievance are undisputed and are set forth in the following findings.

1. Grievant is employed by the Board as a Mechanic.
2. On or about April 1, 1999, the Board posted a vacancy for a Crew Leader/Mechanic position at the Elkview bus terminal.
3. Grievant applied to fill the vacancy. Only one other applicant, Jerry Mullins, was more senior than Grievant.
4. At the time of the posting, Grievant had fourteen (14) years seniority as a regular school service personnel. Eleven of those years were as a Mechanic, and three were as a bus operator.
5. Grievant's performance evaluations have been acceptable.
6. Grievant and the other applicants were required to take a written essay test devised by the Board for the Crew Leader/Mechanic classification title. This test had been utilized by the Board for many years. Wayne Clutter, Transportation Director for the State Department of Education, graded the test for the Board. Mr. Clutter looked for the best answer among the tests he was asked to evaluate, scored them, and returned them to the county.
7. Grievant was advised the day after taking the test that he and all the other applicants for the position except one had failed the test.
8. The Board filled the vacancy with another Mechanic, Mr. Harper. Mr. Harper had passed the Board's test at an earlier date. Grievant is more senior than Mr. Harper.
10. The State Department of Education developed a competency test to be used for the Crew Leader classification title. This test has been available since 1992.
11. The April, 1998 State Department listing of school service personnel tests shows this test is titled "Maintenance Foreman and Crew Leader." Board Ex. 2.
12. The actual test which was distributed to the counties had the title "Maintenance Foreman" only on the first page, but the second page indicated it was the "Maintenance Foreman and Crew Leader" competency test. LIV Test., Isaacs.
13. When the testing for the subject position was scheduled, Karen Williams, Kanawha County Coordinator, Human Resources, looked through her file of competency tests and could not find one for "Crew Leader." LII Test., Williams, p. 33.
14. Working under the assumption that there was no "Crew Leader" competency test issued by the State Department of Education, Ms. Williams forwarded the Board- prepared test for Crew Leader, which had been in existence for a number of years, to the person responsible for testing the applicants.

DISCUSSION

Grievant contends the Board violated W. Va. Code § 18A-4-8e by utilizing its own Crew Leader test, when there was, in fact, a State Board of Education competency test for that position. The Board responds that it had used its own Crew Leader test in the past, and did not know in April/May 1999 that there was a State Department Crew Leader competency test.

W. Va. Code § 18A-4-8e provides as follows:

The state board of education shall develop and cause to be made available competency tests for all of the classification titles defined in . . . § 18A-4-8. . . and listed in . . . § 18A-4-8a . . . for service personnel. Each classification title defined and listed shall be considered a separate classification category of employment for service personnel and shall have a separate 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 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. (Emphasis added).

The evidence is uncontroverted that there was a State Department of Education competency test for the position of Crew Leader in April/May 1999, when Grievant and the other applicants were tested for the posted Crew Leader/Maintenance position. See LIV Test., Isaacs. While there was some confusion because the first page of the test was titled only "Maintenance Foreman", the State Department index of tests indicates the test was for Maintenance Foreman and Crew Leader. Clearly, the Board was not acting in bad faith or with malice when it gave Grievant and the others its own Crew Leader test, as it was under the mistaken assumption there was no State Department competency test. However, that mistake does not excuse the Board from correcting its error and

setting the matter straight. Grievant and the other applicants are entitled, by statute, to take the State Department of Education mandated Crew Leader competency test, and that opportunity must be afforded them now.

CONCLUSIONS OF LAW

1. 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 county boards of education utilize the State Department of Education competency tests for school service positions, and specifically prohibits the counties from using any other test not authorized by that Code section.

3. Grievant has proven by a preponderance of the evidence that there was in existence in April/May 1999 a State Department of Education mandated competency test for the position of Crew Leader. Grievant has also proven that the Board utilized its own competency test for that position in violation of W. Va. Code § 18A-4-8e.

Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to reschedule the competency test for Grievant and the other applicants who applied for the position in April/May 1999, utilizing the State Department of Education competency test for "Maintenance Foreman and Crew Leader". If Grievant passes the test, and is the most senior applicant, he is entitled to back pay with interest from the date the successful applicant entered into his duties until the date Grievant enters into those duties.

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

MARY JO SWARTZ

Administrative Law Judge

Dated: March 21, 2000