JACLYN McLAUGHLIN,

Grievant,

v. **Docket No. 04-40-142**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant, Jaclyn McLaughlin ("Grievant"), challenges the decision of her employer, respondent Putnam County Board of Education ("BOE"), to award the position of General Buildings Construction Aide to another applicant.

GROUNDS ALLEGED AND RELIEF SOUGHT

The Statement of Grievance contains the statement that "Grievant, a substitute aide, contends that Respondent placed a less senior substitute aide into an aide position, General Buildings Construction Aide. Grievant alleges a violation of West Virginia Code §§ 18A-4-8, 18A-4-8b, 18A-4-8e & 18A-4-8g." For relief, Grievant seeks "instatement into the position, compensation for all lost wages and benefits (pecuniary and nonpecuniary) with interest." Basically, Grievant launched a three-pronged attack on the selection process based upon 1) the fact that the successful applicant had less seniority as a substitute aide than Grievant; 2) the fact that BOE supplemented the requirements for the position when it was posted; and 3) the fact that BOE required the applicants to take a substantive test relating to tools and the construction trade. BOE questions Grievant's standing to bring this grievance because she was not the most senior of the unsuccessfulapplicants and, thus, would not have received the position on the basis of seniority. In light of the fact that seniority is not the sole basis for Grievant's challenge to BOE's actions, the standing issue must be resolved in Grievant's favor.

PROCEDURAL BACKGROUND

Grievant filed her written Level I grievance on or about January 12, 2004. (See footnote 1) A written decision denying her Level I grievance was issued on January 15, 2004. Upon appeal, a Level II hearing was held on March 16, 2004. The Level II decision, which was served on April 5, 2004, denied the grievance on the basis that 1) Grievant had not suffered an injury and 2) BOE properly evaluated the relative qualifications of the applicants.

On April 14, 2004, the West Virginia Education and State Employees Grievance Board ("the Grievance Board") received Grievant's Level IV appeal. A Level IV hearing was conducted on June 22, 2004, at the Grievance Board's hearing room in Charleston. Grievant was represented by attorney John Everett Roush of the West Virginia School Service Personnel Association. BOE was represented by Greg Bailey, Esquire. This grievance matured for decision on July 21, 2004, upon receipt of Grievant's post-hearing submission. (See footnote 2)

After careful review of the entire record, including the Level II hearing transcript, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. On September 18, 2004, BOE posted a vacancy bulletin for a position as a classroom aide (hereafter sometimes "construction aide") at the Putnam Career and Technical Center. The aide in question was to assist in the building construction class.

2 2. In addition to qualifications such as having a high school diploma or GED and being classified as an aide, the posting also contained a requirement that the applicant have "knowledge and skills necessary to properly supervise the safe use of power tools and equipment used in the instructional program." Asterisks after this qualification referred the reader to a statement that indicated an applicant "[m]ay be required to demonstrate competence in the use of tools and equipment to insure safety of students."

3 3. Safety concerns led BOE to include this supplemental requirement in the posting for the construction aide position. Excerpts from "The Public School Safety Manual," which was issued by the State of West Virginia Board of Risk and Insurance Management, illustrate the basis for such safety concerns in a class where students and power tools come together. Respondent's Exhibit 1 at Level II.

4 4. At the time the construction aide position was posted, Kathryn Hill, Debbie Bailey, and

Grievant were substitute aides.

5 5. Grievant and other applicants for the posted position filled out a survey indicating their respective proficiency and familiarity with such things as tools, construction techniques, and construction-related practices, all of which would be needed for the position.

6 6. A number of applicants withdrew after seeing the survey. The remaining applicants were required to take a test designed to evaluate how well they met thesupplemental requirement that they possess the knowledge and skills to "properly supervise the safe use of power tools and equipment used in the instructional program."

7 7. The position was awarded to Kathryn Hill, who attained the highest score on the test with only seven incorrect answers.

8 8. Grievant had twenty incorrect answers on that same test.

9 9. As a substitute aide, Grievant had an earlier seniority date than Kathryn Hill.

10 10. Debbie Bailey, who also applied for the position in question, had greater seniority than Grievant as a substitute aide.

11 11. Debbie Bailey accepted a different position after she was not selected for the construction aide slot.

DISCUSSION

This is not a disciplinary matter. Therefore, Grievant bears the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000); *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).

Grievant takes issue with the fact that BOE expanded the requirements for the construction aide position by adding that the applicant needed "knowledge and skills necessary to properly supervise the safe use of power tools and equipment used in the instructional program." In support of her position on this point, Grievant cites *Scott v. Randolph County Bd. of Educ*., Docket No. 01-42-071 (July 27, 2001) for the proposition that "[b]oards of education may not post aide positions with requirements beyond thatspecified in statute." Proposed Findings of Fact and Conclusions of Law Filed on Behalf of Grievant at 3. This is not a fair characterization of the *Scott* decision.

Scott arose out of circumstances in which the Randolph County Board of Education needed to hire an aide to assist two students who were diabetic. "[T]he two students needed constant

assistance from a licensed health care professional, in order to administer insulin and to monitor their conditions throughout the day. After reviewing the students' conditions, their medical records, and consultation with the special education director, it was determined that an aide was not qualified to meet the students' medical needs." *Scott* at 2-3. Therefore, the Randolph County Board of Education posted a position for an aide who was also a licensed practical nurse.

The problem in *Scott* arose from that fact that, under the pertinent statute, the health care needed by the two students could only be performed by a registered nurse or an employee who was specially trained and supervised. Nothing in the statute authorized a board of education to hire a licensed practical nurse to provide the type of care the diabetic students in *Scott* required.

The Randolph County Board of Education argued that "it simply expanded the minimum qualifications by requiring an LPN licensure in order to meet the needs of the students involved." This argument fails under the particular circumstances of *Scott* because, by statute, a licensed practical nurse could not perform the procedures that the two diabetic students required. The Grievance Board noted that Randolph County Board of Education's

> point is well taken, and it is well-established that county boards of education have substantial discretion in matters relating to the hiring, transfer, andassignment of school personnel, provided that discretion is not exercised arbitrarily or capriciously and is exercised in the best interests of the schools. *Dillon v. [Wyoming County] Bd. of Educ. , 177 W. Va. 145, 351 S.E.2d 58 (1986).* However, the current situation cannot be characterized as a simple expansion of qualifications, due to the . . . [existence of the] statute governing the performance of specialized health procedures[.]

As reflected in the foregoing discussion, under the appropriate circumstances a board of education may expand the requirements for a posted position. This is consistent with the analysis undertaken by the Supreme Court of Appeals of West Virginia in its *per curiam* opinion in *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999). *Hawken* involved a posting for a position as supervisor of maintenance. Both Mr. Hawken and the successful applicant passed the test for this classification title. However, the posting contained additional qualifications that were met by the successful applicant but not by Mr. Hawken.

Mr. Hawken brought an unsuccessful challenge to the circuit court's decision "that the Hancock County Board of Education had the right to expand upon the statutory definition of 'Supervisor of Maintenance.'" *Hawken*, 209 W. Va. at 260, 546 S.E.2d at 259. Mr. Hawken argued that the provisions of West Virginia Code section 18A-4-8e foreclosed a board of education from looking

beyond the question of whether the applicant for a position had passed the competency test for the applicable classification title. That statute provides that "[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title." W. Va. Code § 18A-4-8e (1996). Mr. Hawken's argument was that "the Legislature intended a passing grade on the test to serve as a replacement for any review of qualifications; once two candidates have passed the test, both are equally qualified, and the job must go to the applicant with the most seniority." The *Hawken* Court rejected this argument, stating that "[i]n light of the importance we place upon providing students with 'a thorough and efficient system of free schools,' we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process." *Hawken*, 209 W. Va. at 263; 546 S.E.2d 262 (citations omitted). Citing an earlier decision, *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991), the *Hawken* Court expressly found that "the Hancock County Board of Education did not abuse its discretion by demanding additional qualifications beyond the passing of the competency test[.]" *Hawken*, 209 W. Va. at 263, 546 S.E.2d 262.

Upon similar reasoning, BOE could expand the requirements for the construction aide to require that an applicant have the demonstrable "knowledge and skills necessary to properly supervise the safe use of power tools and equipment used in the instructional program." The BOE's ability to expand qualifications for a given position is of particular importance where, as here, the safety of students must be given priority. The Supreme Court of Appeals of West Virginia offered important guidance in *Hawken* by stating that "in all cases dealing with our public schools, our first concern must be the impact our decision will have on the education that the State's children will receive." *Hawken*, 209 W. Va. at 262, 546 S.E.2d 261. Entitlement to a free public education will mean little if that education cannot be delivered safely. BOE did not abuse its discretion by adding the very reasonable supplemental requirement that the successful applicant for the construction aide position have the requisite skill and knowledge to safely supervise the use such inherently dangerous items as power tools. The *Hawken* decision is also helpful in analyzing Grievant's claim that the aide position in question should have been awarded on the basis of seniority. The ability of BOE to tailor a posting to the needs of a particular position by requiring additional, pertinent qualifications would be meaningless if all other considerations were trumped by seniority. This should not be taken to mean that BOE can tailor a posting to a particular employee to ensure that the position goes to that

particular employee. Rather, the additional qualifications need to bear a meaningful relationship to the requirements of the posted position. In this case, it is reasonable and prudent to require that an applicant be knowledgeable about the safe use of power tools before placing them in a hands-on environment with students.

Based on Grievant's seniority argument, BOE claims that Grievant lacks standing to bring this grievance. “Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy.” *Drain v. Monongalia County Bd. of Educ.,* Docket No. 03-30-050 (May 27, 2003)(citing *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996)). The standing requirement comports with the statutory definition of a grievance as “any claim by one or more **affected employees** of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work[.]” W. Va. Code § 18-29-2(a) (emphasis added). The question is whether Grievant is an “affected employee” who can state a grievance under the facts of this case. There is no dispute that if the position in question had been awarded solely on the basis of seniority it would have gone to Debbie Bailey, who has an earlier seniority date as a substitute aide than either Grievant or the successful applicant. Based on this fact, BOE argues that Grievant cannot prove that she has suffered any injury from the manner in which the construction aide position was awarded. “Without some allegation of personal injury, a grievant is without standing to pursue the grievance.” *Drain v. Monongalia County Bd. of Educ.*, Docket No. 03-30-050 (May 27, 2003)(citations omitted).

Despite the foregoing, Grievant argues that she has standing to obtain relief in this grievance because Debbie Bailey accepted a different position (See footnote 3) after she was not selected for the construction aide slot. This assertion by Grievant regarding Debbie Bailey's status is speculative and does not really assist Grievant on the standing issue.

The question of whether Grievant has standing to pursue this complaint depends upon the factors relied upon by BOE in awarding the position to Kathryn Hill. In addition to seniority, Grievant also challenged whether BOE could properly administer and rely upon any test other than the uniform test used to determine whether an employee meets the basic requirements for the aide classification. Kathryn Hill received the construction aide position based, in part, upon her performance on the

substantive test administered to the applicants. The result is that Kathryn Hill has “leap-frogged over Grievant in priority for future positions and will, unless this grievance alters the circumstances, remain ahead ofGrievant for the rest of their prospective careers.” In light of Grievant's challenge to the use of the substantive test, it is impossible to state definitively that Grievant “has suffered no real injury[.]” *Champ v. Pendleton County Bd. of Educ.,* Docket No. 01-36-419R (July 14, 2003)(citing *Khoury v. Public Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17, 1998)). Therefore, Grievant has standing to bring this grievance.

In terms of challenging the test administered to the applicants by BOE, Grievant claims that such test was contrary to the provisions of West Virginia Code section 18A-4- 8e. This statute provides for uniform competency tests for classification titles. W. Va. Code § 18A-4-8e(b). Grievant points to West Virginia Code section 18A-4-8e(e), which states, in pertinent part, that “[c]ounty boards of education may not use a competency test other than the test authorized by this section.” However, the test administered to Grievant and the other applicants was not a competency test within the meaning of West Virginia Code section 18A-4-8e because it was not administered for purposes of determining whether the applicants could be classified as aides. The purpose behind the challenged test was to determine if the applicants met the additional requirement of being knowledgeable about tools and construction practices.

Grievant is correct that, by virtue of having passed the test to be classified as an aide, she is “qualified” for an aide position. “[O]nce an employee holds or has held a classification title in a category of employment, that employee is considered **qualified for the classification title** even though that employee no longer holds that classification.” W. Va. Code § 18A-4-8e(i) (emphasis added). However, as discussed above, there arecircumstances under which a board of education may be entitled to ask for supplemental skills, abilities, knowledge or other qualifications that extend beyond this minimal qualification that is established by passing the competency test for classification purposes. It would make no sense for BOE to identify additional qualifications required for a specific position if BOE could not also test for those qualifications. Grievant's argument on this point must fail.

Based upon the foregoing facts and upon review of the pertinent law, as well as consideration of the arguments of the parties, the undersigned concludes as follows:

CONCLUSIONS OF LAW

1 1. This is not a disciplinary grievance. Therefore, Grievant bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2000); *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).

2 2. Grievant must prove her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2000). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

3 3. Grievant has standing to pursue this grievance, even though she was less senior than another unsuccessful applicant, because seniority was not the single determinative factor in filling the position in question.

4 4. Grievant failed to prove by a preponderance of the evidence that BOE acted in an arbitrary and capricious manner or violated any applicable law, rule or policy in connection with posting and awarding the aide position at issue in this grievance.

Based upon the foregoing, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 West Virginia Code section 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.

Dated: October 28, 2004

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

This date is drawn from the Level II statement of grievance.

Footnote: 2

The delay in issuance of this decision was caused by the undersigned's error in failing to note the receipt of correspondence, dated June 24, 2004, that was being submitted in lieu of proposed findings of fact and conclusions of law.

Footnote: 3

Debbie Bailey was awarded a half-time position.