CHARLES A. ROTE,

Grievant,

v.

Docket No. 04-54-438

WOOD COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

This grievance had its genesis in the action of the respondent, Wood County Board of Education ("BOE"), in reclassifying an employee to a Technician position. The grievant, Charles A. Rote ("Rote") challenges BOE's action, as follows:

> Grievant [Rote], a regularly employed Electrician II/General Maintenance, contends that Respondent [BOE] erred in filling a technician position without posting and without requiring the employee to pass the appropriate test. Grievant also contends that he is entitled to reclassification to technician with the consequent salary increase. Grievant alleges a violation of West Virginia Code §§ 18A-4-8, 18A-4-8b, 18A-4-8e & 18A-4-8g.

For relief, Rote asks that the Technician position be posted, and, if Rote is the successful applicant, that he receive "back pay and all benefits retroactive to June 24, 2004, with interest." In the alternative, Rote "seeks reclassification to technician with back pay and benefits retroactive to June 24, 2004 with interest."

Rote appealed to Level II after his grievance was denied at Level I on July 19, 2004. An evidentiary hearing was held on September 21, 2004. An undated, written Level II decision denying this grievance was distributed to the parties on November 3, 2004. At its meeting on December 14,

2004, BOE voted to waive proceedings at Level III.

A Statement of Grievance appealing the action to Level IV was received by the West Virginia Education and State Employees Grievance Board ("the Grievance Board") on December 21, 2004. An evidentiary hearing was held on April 7, 2005, in the Charleston office of the Grievance Board. Rote was represented at the Level IV hearing by John Everett Roush, Esquire. BOE was represented by Dean Furner, Esquire. At the conclusion of the hearing the parties agreed that proposed findings of fact and conclusions of law would be submitted on or before May 9, 2005. This grievance matured for decision on May 9, 2005, upon receipt of proposed findings of fact and conclusions of law submitted on behalf of Rote. No post-hearing submissions were received from BOE.

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

Findings of Fact

1 1. Rote is currently employed by BOE as an Electrician II/General Maintenance. He is assigned to the transportation facility. At the time of the Level II hearing, Rote had been a BOE employee for eleven years.

2 2. Rote claims to have passed the test for "Office Technician I" (See footnote 1) but not for "Electronic Technician."

3 3. Robert Marlow ("Marlow") was employed by BOE as a Mechanic. While so employed, Marlow voluntarily undertook to develop or adapt the computer programs that are now being used by the Transportation Department for such things as inventory control, fleet maintenance, fuel monitoring, and planning bus routes.

4 4. Marlow maintains and upgrades all of the computer technology for the Transportation Department.

5 5. The majority of Marlow's work day is spent working with a computerized fleet management program known as "EDULOG."

6 6. Marlow is the only Transportation Department employee who adjusts the parameters of the electronically controlled engine systems in the buses. These systems interface with computer-run diagnostic equipment.

7 7. Marlow trains bus operators on the use of such things as Palm Pilots and the

Transportation Department's computer system.

8 8. Marlow installed security surveillance systems at bus garages.

9 9. As they have evolved over time, Marlow's job duties are truly unique in the Transportation Department. Based upon their review of these unique duties performed by Marlow, the transportation director, W. Larry Edwards and the assistant superintendent in charge of service personnel, Lawrence Hasbargen, developed a job description for a “Mechanic/Technician I” position. Their recommendation that Marlow be reclassified to thismulticlassified job title was adopted by the superintendent and, thereafter, presented to BOE.

10 10. This reclassification proposal was approved by BOE on June 24, 2004.

11 11. BOE claims it has created Technician I and Technician II classifications with their own salary schedules. (See footnote 2) Grievant's Exhibit 1 at Level IV.

12 12. As a result of his reclassification, Marlow was paid at the higher level applicable to a Technician I under BOE's salary schedule.

13 13. There was no posting of any vacancy in a Technician position in relation to Marlow's reclassification.

14 14. Rote's current duties include working on computer boards in fire alarm systems and in bell systems. If a computer board needs to be replaced, Rote has to reprogram the affected system. Although probably tedious, Rote acknowledged that this is “relatively, an easy procedure.” (See footnote 3)

15 15. Rote also works on solid state kitchen equipment containing computer boards.

16 16. Rote does not work with computers at the same level of complexity and originality as Marlow does.

Discussion

This is not a disciplinary grievance. Therefore, Rote bears the burden of proving the elements of his grievance by a preponderance of evidence. W. Va. Code St. R. § 156-1- 4.21(2004); *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). “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

Rote acknowledges that, pursuant to the provisions of West Virginia Code section 18A-4-8, BOE may reclassify service personnel such as Marlow. In fact, this statute actually requires a board of education to "review each service personnel employee job classification annually and . . . reclassify all service employees as required by the job classifications." W. Va. Code § 18A-4-8(l). Failure to comply with this requirement can result in adverse financial consequences for a county board of education. W. Va. Code § 18A-4-8(l) and (n).

Rote argues that West Virginia Code section 18A-4-8 must be read in conjunction with that portion of West Virginia Code section 18A-4-8b that requires a board of education "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." Rote tries to read the quoted language as requiring BOE to post a Technician position before it could be awarded to Marlow or anyone else. The flaw in Rote's analysis is in his reading of West Virginia Code section 18A-4-8b. This statute requires BOE to post any positions, old or new, in which a vacancy occurs. In this case, BOE did not have a vacancy. Instead there was an existing employee, Marlow, whose job duties exceeded the scope of his classification. This triggered the requirement, under West Virginia Code section 18A-4-8(l), for reclassification. Because there was no vacancy, the posting requirement was not implicated. There has not been a violation of West Virginia Code section 18A-4-8b.

Rote has no standing to challenge the reclassification of Marlow. In order to meet the standing requirement, Rote must have a "personal stake in the outcome of the controversy." *Elliott v. Randolph County Bd. of Educ*., Docket No. 98-42-304 (May 26, 1999)(citing *Wagner v. Hardy County Bd. of Educ*., Docket No. 95-16-504 (Feb. 23, 1996)).
A personal stake would mean that Rote had suffered damages or had otherwise been harmed. *Elliott v. Randolph County Bd. of Educ*., Docket No. 98-42-304 (May 26, 1999) (citing *Farley v. W. Va. Parkway Auth*., Docket No. 96-PEDTA-204 (Feb. 21, 1997)).

Where, as here, a grievant is not adversely affected he does not have standing to challenge the reclassification of a fellow employee. *Elliott v. Randolph County Bd. of Educ*., Docket No. 98-42-304 (May 26, 1999). This is true even in circumstances where the employer misapplies a statute. If the grievant "is not personally harmed, there is no cognizable grievance." *Elliott v. Randolph County Bd. of Educ*., Docket No. 98-42-304 (May 26, 1999)(citations omitted). Rote makes an alternative argument that he should be reclassified as a Technician. (See footnote 4) According to Rote's counsel,

"[i]f you can, in fact, justify reclassification of Mr. Marlow" then the same reasoning would entitle Rote to be reclassified. This appears to be a claim on Rote's part that he is misclassified in his current position as Electrician II/General Maintenance.

Rote bears the burden of proving that he is misclassified. "In order to prevail on a claim that his position is misclassified, an employee must establish, by a preponderance of the evidence, that his duties more closely match those of another classification defined by W. Va. Code § 18A-4-8, other than that under which his position is categorized. Pope v. Mingo County Bd. of Educ., Docket No. 91-28-068 (July 31, 1992)." *Rogers v. Fayette County Bd. of Educ*., Docket No. 03-10-004 (Apr. 29, 2003)(gender of pronouns altered). In other words, Rote would need to prove that his duties more closely match the duties of the classification Rote claims is most appropriate.

As noted, Rote argues that he should be reclassified as a "Technician." This is not, however, one of the class titles for school service personnel that are established under the provisions of West Virginia Code section 18A-4-8. It is recognized that a county board of education "may expand the qualifications for a position found in W. Va. Code 18-4-8, so long as this expansion is consistent with the statutory definition." *Blake v. Kanawha County Bd. of Educ*., Docket No. 02-20-343 (Mar. 11, 2003)(citing *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995))(additional citations omitted). However, there is no provision authorizing a county board of education to supplement thestatutory list of job classifications. In discussing a job posting for a position that was not found within West Virginia Code section 18A-4-8, the Grievance Board has previously noted that "a county board of education may not depart from the class titles for service personnel defined in the Code[.]" *Stollings v. Logan County Bd. of Educ*., Docket No. 04- 23-209 (Aug. 24, 2004). *See also, Haer v. Mason County Bd. of Educ.*, Docket No. 99-26- 292 (Nov. 30, 1999)("[West Virginia School Service Personnel Association] attorneys reacted by advising the Assistant Superintendent that the Supervisor of Mechanics class title was illegal because the West Virginia Code does not authorize such a classification.").

The only job classes with "technician" in the title are Electronic Technician I and II. The Electronic Technician I class is defined as an apprentice level position (W. Va. Code § 18A-4-8(i)(38), which clearly does not apply to Rote. Nor is it likely that he would want to be reclassified as an Electronic Technician I, which is a pay grade F, when he is already employed at pay grade G as an Electrician II.

An Electronic Technician II is defined as someone “employed at the journeyman level to repair and maintain electronic equipment[.]” W. Va. Code § 18A-4-8(i)(39). This position is at pay grade F and would not necessarily lead to any increase in Rote's salary. Rote was quite clear that his goal in seeking reclassification was to improve his earning potential so it is unlikely that he would really be asking to be reclassified as an Electronic Technician I or II.

In any event, Rote has failed to establish that the duties he currently performs would be more closely aligned with either Electronic Technician class. His testimony clearly indicated that, although he worked on some electronic equipment, he also worked on such things as fire alarm systems and bell systems. These would not seem to be “equipment,”as this term implies discrete entities, such as telephones, copiers, or fax machines. In sum, Rote has failed to meet his burden of proving, by a preponderance of the evidence, that he should properly be classified as an Electronic Technician rather than an Electrician II.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. Rote bears the burden of proving the elements of this nondisciplinary grievance by a preponderance of evidence. W. VA. CODE ST. R. § 156-1-4.21(2004); *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. “The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).” *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. Rote failed to establish any violation of the posting requirement of West Virginia Code section 18A-4-8b because the change to Marlow's job title did not involve a vacancy or newly created position.

4 4. Rote lacks the requisite standing to challenge the reclassification of Marlow because he has failed to demonstrate that he has a personal stake in this matter resulting from having suffered damages or having otherwise been harmed. *Elliott v. Randolph County Bd. of Educ*., Docket No. 98-

42-304 (May 26, 1999).

5 5. Rote failed to prove that he was misclassified because he was unable to establish "that his duties more closely match those of another classification than that under which his position is categorized." *Rogers v. Fayette County Bd. of Educ*., Docket No. 03- 10-004 (Apr. 29, 2003)(citations omitted). Accordingly, this grievance is **DENIED**.

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

Date:

August 2, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

This is not a classification title established by West Virginia Code section 18A-4-8. Office Equipment Repairman I and II are classifications that appear in the statute.

Footnote: 2

There is no legal authority for a board of education to create a new classification beyond those defined in West Virginia Code section 18A-4-8. However, this issue is not before the Grievance Board.

Footnote: 3

It sounds like a more complicated version of reprogramming a videocassette recorder after the power goes off.

Footnote: 4

Interestingly, under this scenario, Rote does not suggest that a Technician position would have to be posted before he could be reclassified into it.