DARIEL RICHARDSON,

Grievant,

v. Docket No. 05-40-333

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Dariel Richardson, is employed by the Putnam County Board of Education ("PCBOE"), as a bus operator. He filed this grievance on June 16, 2005, asserting:

> **Violation of WV Code 18A-4-8b and 18A-4-8e with regard to the posted position of mechanic. Further violations of WV Code 18A-4-15 with regard to illegal use of substitute who was the successful applicant for the position.**
>
> **Relief sought: Relief sought is to be granted the position and any compensation and benefits due.**

The grievance was denied at Level II, and Level III was bypassed. Grievant appealed to Level IV on September 14, 2005. A Level IV hearing was held on October 26, 2005, and this case became mature for decision on November 29, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant raises several issues. First, Grievant asserts a violation of W. Va. Code § 18A-4-15, and argues the successful applicant was improperly hired as a substitute because he had not passed the competency examination, and the substitute positionshould have been posted. Second, Grievant avers a violation of W. Va. Code § 18A-4-8b which requires all promotions of service personnel to be based on seniority, evaluations, and qualifications and regular

employees to be considered before substitutes. Further, Grievant maintains the passing of the competency examination indicates the applicant is qualified, and no additional requirements may be listed.

Respondent maintains the additional requirements added to the posting were necessary as they were designed to ensure all vehicles owned by PCBOE were properly evaluated and repaired. Respondent notes no additions were made to the competency examination, and Grievant did not demonstrate the hiring of the successful applicant as a substitute harmed him.

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 classified as a bus operator and has worked for PCBOE for sixteen years as regular employee.

2. Benjamin Bird was first employed by PCBOE as a substitute mechanic in March 2004. Although Mr. Bird has worked the majority of the time from the March 2004 hiring to the receipt of this full-time position, he substituted for different employees. These substitute positions were not to fill requested leaves of absence.

3. W. Va. Code § 18A-4-8e and PCBOE policy require all substitutes to pass the required competency examination prior to working in a service personnel position. Grt. No. 1 at Level IV. Mr. Bird did not pass the mechanic's competency examination until May 2005. 4. On January 29, 2005, Charles Hill, the Supervisor of Transportation, was killed in a motor vehicle accident, and Allen Johnson, the Coordinator of Transportation, assumed his duties. Mr. Hill was the only regular employee in the shop trained to work the scanner used to diagnosis a variety of mechanical, electrical, and technical problems in PCBOE's vehicles. The use of this piece of equipment is essential in identifying problems with vehicles and determining how to repair them.

5. PCBOE decided not to fill Mr. Hill's position, but to use that slot to hire another, much needed mechanic. Mr. Johnson discussed the position with Superintendent Harold Hatfield prior to posting and informed him of the need for someone with advanced training or updated

knowledge in the area of electronics and technology. On April 7, 2005, a position for a full-time mechanic was posted. The application deadline for this posting was April 13, 2005.

6. This posting stated the requirements for the position. These were

:

Holds a High School diploma or a GED

Holds or qualifies for "Mechanic" classification

Holds a commercial drivers license (CDL)

Holds or qualifies for certification as a school bus operator

Has completed two years of certified training in automotive technology

Verified successful automotive technology experience preferred

7. A prior posting in 2001 did not require two years of training.

8. On May 2, 2005, the written competency examination was given, and on May 19, 2005, the performance competency examination was given. Four applicants passedboth portions of the competency examination, including Grievant and the successful applicant. (See footnote 2)

9. At the time of his application, Mr. Bird was enrolled in a course to obtain his CDL.

10. Grievant's last paid experience working in a garage was in the late eighties and early nineties. Grievant has not completed any certified training in automotive technology, and does not have any automotive technology experience.

11. Mr. Bird completed an automotive technology course at the Putnam Career & Technical Center on May 27, 2003. He obtained multiple certificates indicating the completion of a variety of automotive courses, such as lubricants, fuel systems, and air conditioning. During his time as a substitute, Mr. Bird was able to complete all required work, could run the diagnostic scanner, and helped the other mechanics with new technology. Test. Johnson, Level II Hearing.

12. Mr. Bird was selected to fill the position because he met all the listed requirements. Mr. Bird received his CDL in May 2005, and was notified in June 2005 he had passed the competency examination he had taken in May 2005. (See footnote 3) **Mr. Bird wascertified as a bus operator in June 2005. He began his regular duties in late June or early July of 2005.**

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 § 4.21 (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). See W. Va. Code § 18-29-6. "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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Competency examination

Competency examinations are "used to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee." W. Va. Code § 18A-4-8e(h). First, it is clear Mr. Bird had not passed the competency examination required to work as a substitute. How this fact affects Grievant was unclear. With no harm alleged, this fact alone cannot be a reason for granting the grievance. (See footnote 4) **PCBOE is directed to follow its own requirements and those of W. Va. Code § 18-4-8e and ensure all substitutes have passed the competency examination required by each substitute's classification.**

II. Additional requirements

The real issue is whether PCBOE can add requirements to a posting. Grievant asserts the addition of two years of certified training in automotive technology is in error, and in violation of W. Va. Code § 18A-4-8e(c), which states "[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title." Grievant argued that since the passing of the competency examination demonstrates Grievant is qualified, and Grievant is a regular employee and Mr. Bird was a substitute, Grievant must be placed in the position pursuant to W. Va. Code § 18A-4-8b.

The case of The Board of Education of the County of Randolph v. Chewning, 217 W. Va. 128, 617 S.E.2d 478 (2005), is similar to this case and provides instruction. In Chewning, the board of education placed a requirement for an aide to have a Licensed Practical Nurse license to obtain a position caring for two students who were brittle diabetics and required

close observation and exacting care. The board of education did not believe an aide could be trained to provide this type of close supervision, and an individual possessing additional medical training was needed.

The West Virginia Supreme Court of Appeals noted the oft-quoted language of Syllabus Point 3 of Dillon v. Board of Education of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986) which states, "county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." The West Virginia Supreme Court of Appeals then reviewed the case of Hancock County Board of Education v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999), which held, that in the exercise of its discretion, a school board may consider job-related factors in addition to the specific statutory qualifications in selecting an applicant to fill a posted vacancy.

In Hawken, the grievant noted W. Va. Code § 18A-4-8e stated "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," and "achieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title." Hawken argued a passing grade on the test served as a replacement for any review of qualifications and once two candidates have passed the test, and both are equally qualified, the job must go to the applicant with the most seniority.

The West Virginia Supreme Court of Appeals rejected Hawken's reasoning and found that in light of the importance placed upon providing students with "a thorough and efficient system of free schools," (Pauley v. Bailey, 174 W. Va. 167, 324 S.E.2d 128 (1984)), the Legislature did not intend for the passing of the test to be "the alpha and the omega" for the board's hiring process and concluded the board of education did not abuse its discretion by demanding additional qualifications beyond the passing of the competency test. Id. See Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995)(outside applicant hired over regular employee for position because of greater experience.) The Chewning court applied the reasoning from Hawken and Hopkins and held it was within the discretion of the

board of education to hire the applicant who possessed the additional qualification of licensure as a practical nurse as the most qualified to provide assistance to the students. The West Virginia Supreme Court of Appeals also found the board of education did not abuse its discretion in adding this qualification, and the addition was not outside the statutory definition of the classification with this set of facts. As this decision was in the best interests of the students, it was not arbitrary or capricious.

In the past, the Grievance Board has held that additional requirements may only be placed in supervisory positions dealing with safety issues such as qualifications for the Director of Transportation or Maintenance. This argument was raised by the Chewning appellees, and the West Virginia Supreme Court of Appeals noted in note nine that "such a distinction has no legal relevance." See note 9.

PCBOE established that special skills and training in the area of technology and electronics are currently needed to perform the duties of the position and to maintain vehicles that are safe for its students and employees. The other mechanics in the shop either did not have this training or their training was limited. While certainly none of the older mechanics in the shop, who do not know how to use this equipment to diagnose technological and electrical problems will not be let go, it is important for PCBOE to meet the current needs and to ensure the vehicles that transport its students and employees are safe, reliable, and properly repaired and maintained. The way to address this problem is to require new employees to possess the needed training and skills. The undersigned Administrative Law Judge cannot find the addition of this additional requirement is an abuse of discretion in the area of hiring decisions. Chewning, supra. The above discussion will be supplemented by the following conclusions of law.

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 § 4.21 (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). See W. Va. Code § 18-29-6. "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).

2. Substitutes are required to pass the competency examination before they began the duties of any classification. W. Va. Code § 18A-4-8e

3. PCBOE violated the provisions of W. Va. Code § 18A-4-8e and its own policy and is directed to ensure all substitutes have passed the competency examination required prior to starting the duties of their classifications.

4. Grievant did not prove the failure of PCBOE to require the successful applicant to pass the competency examination harmed him, thus, the relief sought cannot be granted on this basis.

5. Grievant did not prove a long-term substitute position should have been posted.

6. "[C]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, thisdiscretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. The Legislature did not intend for the passing of the competency examination to be "the alpha and the omega" for the board's hiring process, and a board of education does not abuse its discretion by demanding additional qualifications beyond the passing of this test. Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999); Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995). See Bd. of Educ. of the County of Randolph v. Chewning, 217 W. Va. 128, 617 S.E.2d 478 (2005)

8. In this set of facts, the board of education did not abuse its discretion in adding additional qualifications. The additions were not outside the statutory definition of the classification.

Accordingly, 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 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: March 10, 2006

Footnote: 1

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by Attorney Greg Bailey from Bowles Rice McDavid Graff and Love.

Footnote: 2

Although Grievant testified he passed the competency examination in 1997, he was still required to take and pass the competency examination for this position.

Grievant also complained the length of time between posting and filling was too long. Given the position was posted in mid-April, two competency examinations had to be given, and the results of these tests were not known until June, the undersigned Administrative Law Judge cannot find any error on PCBOE's part. It is noted the competency examinations are under the jurisdiction of the State Board of Education, not the county boards of education.

Footnote: 3

Grievant's assertion that Mr. Bird was not qualified for the position at the time he applied because he did not have his CDL at the time of his application is without merit. Mr.Bird obtained this necessary qualification by the time he assumed the duties of the position. See Harper v. Putnam County Bd. of Educ., Docket No. 99-40-021 (Apr. 15, 1999).

Footnote: 4

The same reasoning applies to the allegation that Mr. Bird's substitute position should have been posted. There was no indication any absent mechanic had requesteda leave of absence that would allow PCBOE to post a long-term substitute position.