

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**Mitch Nelson, Petitioner Below,
Petitioner**

vs) No. 11-0278 (Kanawha County 09-AA-49)

**The Board of Education of Boone County,
Respondent Below, Respondent**

FILED

**February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Kanawha County, wherein the circuit court affirmed the decision of the West Virginia Public Employees Grievance Board denying petitioner's grievance. The appeal was timely perfected by counsel, with petitioner's appendix from the circuit court accompanying the petition. Respondent Boone County Board of Education has filed a summary response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In February 2008, petitioner, a Board employee classified as a Custodian III, initiated a Level I grievance related to the Respondent Board's filling of two posted positions; this grievance was denied.¹ Mediation was then conducted by the Grievance Board in September 2008, but was unsuccessful. Petitioner then appealed his grievance to Level III that same month. An Administrative Law Judge ("ALJ") held a Level III hearing on December 4, 2008, and the grievance was denied by decision dated February 24, 2009. Shortly thereafter, petitioner appealed the decision to the circuit court, which ultimately upheld the Grievance Board's decision. The basis for petitioner's grievance below was that he was discriminated against due to other employees receiving different treatment. Petitioner alleged that the individuals who were ultimately hired for the two positions were allowed to obtain the

¹Although petitioner applied for two positions and grieved the filling of both positions, he has indicated a preference for only the position of General Maintenance/Plumber II/Sanitation Plant Operator, and that is the only position addressed herein.

training necessary for the positions and take the required testing prior to or at the time of the positions being posted. Petitioner, however, claims that he was told he would not be able to do the same for approximately four to five months. On appeal, petitioner argues that both the Grievance Board and the circuit court erred in holding that an applicant for a position may be required to request the opportunity to take and to pass the appropriate competency test prior to the posting of a position. He further alleges that both the Grievance Board and the circuit court erred in failing to hold that respondent engaged in discrimination and/or favoritism in the different treatment accorded petitioner compared with other employees. However, a review of the record shows that petitioner was not subjected to discrimination, and that he was denied the position he sought because he lacked almost all of the requisite qualifications.

“A final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W. Va. Code, [6C-2-1], et seq. [], and based upon findings of fact, should not be reversed unless clearly wrong.’ Syllabus Point 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989).” Syl. Pt. 2, *Darby v. Kanawha Cnty. Bd. of Educ.*, 227 W.Va. 525, 711 S.E.2d 595 (2011). Petitioner first argues that it was error to hold that an applicant for a position may be required to request the opportunity to take and to pass the appropriate competency test prior to the posting of a position, since West Virginia Code § 18A-4-8E clearly contemplates that an employee can take the tests after he applies for a posted vacancy as part of the application process. Petitioner relies on the use of the term “applicant” in this code section when discussing the opportunities to take competency tests, which petitioner argues makes clear that an applicant is someone applying for the job and not simply applying to take a test. Additionally, West Virginia Code § 18A-4-8E(e) requires the board of education to notify applicants of the time and place for both the day of training and the administration of the test. Even if this code section were read to permit a board to give the test disconnected from the posting of a specific vacancy, the board would still be required to notify applicants of the date and time the test was being offered, and the Respondent Board in this matter failed to provide petitioner such notice. Petitioner’s assignment of error, however, misstates the circuit court’s ruling.

Simply put, both the Grievance Board and the circuit court denied the grievance because regardless of whether petitioner passed the competency tests, he would not have been qualified for the job. The posting for the job at issue, General Maintenance/Plumber II/Sanitation Plant Operator, required that applicants possess the following qualifications: a high school diploma or GED; two years experience as a plumber; hold a valid 1 S Waste Water Operator Certificate; and, have general knowledge of drawings, blueprints, and work assignments. The circuit court correctly found that petitioner “possessed none of the qualifications for the job except that he is a high school graduate.” It is true that West Virginia Code § 18A-4-8B requires boards of education to fill openings in service positions

by posting the job and then filling the position on the basis of seniority, qualifications, and evaluations of past service. However, as the circuit court correctly pointed out:

“the hierarchy requires that only *qualified* applicants be favored. An applicant must be qualified to fill the position regardless of where he is on the hierarchy. Applicants for bus driving positions must be able to drive buses, secretaries must be able to type, electricians must be able to wire; if not, the applicant cannot be hired regardless of his/her position in the hierarchy.”

(emphasis in the original). As provided for in West Virginia Code § 18A-4-8E, employees can acquire classification for a position through a procedure for competency testing. This mechanism allows employees to become classified in a specific area of employment in anticipation of an opening being posted. At the time the position in question was posted, however, petitioner had not taken the competency tests for plumber or general maintenance, nor had he obtained the state training or licensure test to be a sanitation plant operator. As such, both the Grievance Board and the circuit court were correct in holding that petitioner was properly denied the position because he was not qualified. Because of the evidence related to petitioner’s lack of qualifications, the circuit court’s finding on this issue was not clearly wrong.

Petitioner next argues that both the Grievance Board and the circuit court erred in failing to hold that respondent engaged in discrimination and/or favoritism in the different treatment accorded petitioner compared with other employees. Specifically, he alleges that other employees were permitted to take appropriate training to obtain water treatment licensure and to take the competency test, while petitioner did not receive this opportunity, which constitutes discrimination. Petitioner argues that it was apparently respondent’s long-time practice to hire employees and then have them acquire training and licenses at the Board’s expense. Relying upon *Powell v. Brown*, 160 W.Va. 723, 238 S.E.2d 220 (1977), petitioner argues that an administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs, and the fact that a regulation may be generous beyond statutory or constitutional requirements does not preclude an employee from availing himself of the rights provided by the procedure set out in the regulation. Having established the practice of sending employees to take training and obtain certification after being employed in the position, the Respondent Board was not free to abandon that practice, even if the practice was voluntary and discretionary when adopted.

However, the circuit court found no evidence that such discrimination or disparate treatment took place, noting that some individuals in the past were allowed to take the state wastewater training after being hired for positions that did not require that specific certification as a qualification for the specific job. It was noted that prior employees were hired as plumbers and then permitted to obtain wastewater training, which is wholly different

from the particular set of facts before the Court. In this matter, petitioner was required to hold the wastewater certification as a qualifying prerequisite to obtaining the specific position he sought. As addressed above, only qualified employees will be considered for a position, and petitioner lacked the wastewater certification, among other qualifications. West Virginia Code § 6C-2-2(d) defines discrimination as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” In this specific matter, it is true that the individual who was hired for the position petitioner sought was allowed to take the general maintenance and plumber II test well in advance of the posting of the position at issue. However, there is no reason to believe that petitioner would have been denied this same right had he so requested, which he admits that he did not do prior to initiating his grievance below. For these reasons, it is clear that petitioner was not subject to discrimination, and the circuit court’s failure to hold that petitioner was so situated was not clearly wrong.

For the foregoing reasons, we find no error in the decision of the circuit court and the order affirming the decision of the grievance board is hereby affirmed.

Affirmed.

ISSUED: February 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISQUALIFIED:

Justice Margaret L. Workman