

# Bowles Rice

ATTORNEYS AT LAW

November 17, 2022

## Rejecting Superintendent's Recommended Applicant to Fill a Posted Position

**Question:** *Is it true that a school board cannot appoint someone to fill a vacant position unless the superintendent first recommends that the school board appoint that person?*

**Answer:** *Yes. West Virginia law requires the county superintendent to nominate all school personnel who are to be employed by the school board. Without the superintendent's prior recommendation, the school board cannot lawfully vote to hire service or professional school employees.*

**Question:** *But can the school board reject the superintendent's nominee?*

**Answer:** *Yes. The school board's authority to reject the superintendent's nominee is found in both Chapters 18 and 18A of the West Virginia Code. After the superintendent makes his or her recommendation, the school board president will often ask if there is a motion to accept the superintendent's recommendation. When no such motion is made, or if the motion fails for lack of a second, or if the motion fails by vote of the board, the motion dies, and the recommendation of the superintendent is rejected.*

**Question:** *When the school board rejects the superintendent's nominee, what steps must be taken to fill the vacant position?*

**Answer:** *Upon the rejection of the superintendent's nominee, the superintendent is required to nominate another applicant at a time the school board may direct. Some school boards expect the superintendent to present another nominee at the same board meeting. Others may instruct the superintendent to nominate other applicants at a future board meeting. In any case, for the position to be filled in a legal manner, the superintendent will have to nominate another candidate.*

Keep in mind that there are statutory deadlines for filling both professional and service personnel positions. Directing the superintendent to nominate another applicant after the deadline has passed could be problematic if a grievance is filed. School boards should be aware of those deadlines when rejecting a superintendent's nominee and instructing the superintendent when to present another name.

**Question:** *Are there legal risks the school board should consider before rejecting the superintendent's nominee?*

**Answer:** *Yes. The superintendent is tasked with nominating the qualified applicant who prevails over all applicants based on criteria specified in the school laws. Assuming that task was completed competently and in good faith, the school board may have trouble defending their decision if a grievance is filed by the superintendent's original nominee. That is not to say that*

*school boards cannot and have not prevailed in such grievances. They can and they have. But the school board should take extra care and time to consider the statutory hiring factors before rejecting the superintendent's nominee.*

The applicant entitled to fill a service position is determined by examining three factors: qualifications, past performance evaluations, and seniority. Those hiring factors are found in West Virginia Code §18A-4-8b. Ordinarily, a service employee qualifies for a position by passing a state competency test or by having held a job in the same classification as the posted vacancy. Seniority for service personnel is a date. The applicant with the greatest seniority is therefore usually easy to identify. Finally, while there can be some differences in employees' past performance evaluations (i.e., higher praises, lesser complaints), absent an unsatisfactory evaluation and/or a failure to complete an improvement plan satisfactorily, this factor will not usually impact which service applicant is the most qualified under West Virginia law.

Selecting the most qualified applicant for a professional position is a more subjective task and involves a different set of selection factors than those used to select service personnel. The professional vacancy-filling factors are found in West Virginia Code §18A-4-7a. If challenged in a grievance about why it rejected the superintendent's nominee for a professional position, the school board must be able to articulate its reasons for doing so. And those reasons must be based upon the hiring factors found in West Virginia Code §18A-4-7a.

#### **For further reading**

**W. Va. Code §18-4-10**, available at: <https://code.wvlegislature.gov/18-4-10/>

“No person or persons shall be employed except on the nomination of the county superintendent.”

If “the county board refuses to employ any or all of the persons nominated, the county superintendent shall nominate others and submit the same to the county board at a time the county board may direct.”

**W. Va. Code §18A-2-1**, available at: <https://code.wvlegislature.gov/18A-2-1/>

“In case the board refuses to employ any or all of the persons nominated, the superintendent shall nominate others and submit the same to the board at such time as the board may direct.”

**W. Va. Code §18A-4-7a**, available at: <https://code.wvlegislature.gov/18A-4-7a/>

“A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications.”

**W. Va. Code §18A-4-8b**, available at: <https://code.wvlegislature.gov/18A-4-8b/>

“A county board shall make decisions affecting promotions and the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service.”

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