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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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VINCENT R. YARBER

v.

DOCKET NO: 10-86-258-4

FAYETTE COUNTY BOARD OF EDUCATION

DECISION

The grievant, Vincent R. Yarber, filed his grievance on July 15, 1986, which was denied at level one by his supervisor, Wayne A. Wriston, on July 22, 1986.¹ Thereafter, grievant timely appealed to the Superintendent of Schools in Fayette County, Howard P. Hurt. Superintendent Hurt denied the grievance without holding a hearing or issuing a decision containing findings of fact or conclusions of law.²

¹Wayne A. Wriston is the Director of Services of the Fayette County Schools.

²WV Code §18A-29-4(b) in pertinent part provides:

(b) Level two. Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six [§18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from.

WV Code §18-29-6 provides in pertinent part:

. . . every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law. . .

Thereafter, the Fayette County Board of Education reviewed the decisions at level one and two, whereupon, the grievance was denied.³

A level four evidentiary hearing was held on October 6, 1986, at Beckley, West Virginia, before John M. Richardson, Hearing Examiner, at which the grievant appeared in person and by his counsel John Roush. The Fayette County Board of Education appeared by its representative, Wayne A. Wriston, and by counsel Ervin L. Conrad.

The grievant, a regularly employed bus operator, complains that contrary to WV Code §18A-4-8b(b), he was not hired as a summer painter and that professional personnel were hired instead.

The Fayette County Board of Education contends that it did not violate WV Code §18A-4-8b(b) in its hiring procedure, in that, the professional employees hired had previous experience as summer painters. The Fayette County Board of Education further contends it acted in accordance with the State Superintendent of Schools

³ WV Code §18-29-4(c) provides in pertinent part:

Within five days of receiving the appeal, such governing board may conduct a hearing in accordance with section six [§18-29-6] of this article, may review the record submitted by the chief administrator and render a decision based on such record, or may waive the right granted herein and shall notify the grievant of such waiver. Any decision by the governing board, including a decision to waive participation in the grievance, must be in writing, and, if a hearing be held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or reversing the decision of the chief administrator within five days of such hearing.

response to its inquiry about the matter.

The record is silent as to the contents of the Fayette County Board of Education's letter of inquiry; however, upon reading the State Superintendent of Schools response, the letter of inquiry apparently contained a given factual situation. That factual representation is conspicuously absent and the facts as presented at the hearing were for the most part uncontested. The applicable provisions of WV Code §18A-4-8b(b) are clear and unambiguous.

WV Code §18A-4-8b(b) in pertinent part provides:

(b) A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§18A-4-8], article four of this chapter, on the basis of seniority, qualifications, and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight [§18A-4-8], article four of this section, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. Applicants shall be considered in the following order:

(1) Regularly employed service personnel;

⁴The Fayette County Board of Education offered as evidence in Respondent's Exhibit #1, a letter dated August 20, 1986, and signed by Tom McNeel, State Superintendent of Schools. The letter gives responses to factual situations that were not clear and not consistent with the facts as presented in this hearing.

- (2) Service personnel whose employment has been discontinued in accordance with this section;
- (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
- (4) Substitute service personnel; and
- (5) New service personnel.

The county board of education may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date [June 3, 1983] of this section and thereafter.

Thus, it is clear that (1) regularly employed service personnel shall be considered before (3) professional personnel who held temporary service personnel jobs without regard to seniority as between the two classifications.

In the instant case, the professional personnel had been painters the previous summer and for preceding summers. The grievant had worked as a painter for the Fayette County Board of Education in the summer of 1984, but not in the summer of 1985. No question was raised as to the qualifications of the grievant.

The argument that the grievant was not a regularly employed painter and that by not having worked the previous summer, (1985), he was not regularly/continuously employed, is without merit. It is uncontested that this grievant was a regularly employed bus operator and that a "bus operator" is by designation contained in WV Code §18A-4-8, a title given to service personnel.

Further, WV Code §18A-4-8b(b) does not require that for regularly employed service personnel to be considered before professional, that an applicant be continuously employed as a painter from summer to summer. WV Code §18A-4-8b(b) does require that any jobs that are to be performed by service personnel be filled

by applicants who have been considered in a specified order.⁵

FINDINGS OF FACT

1. Grievant, Vincent R. Yarber, is a regularly employed bus operator for the Fayette County Board of Education.

2. Grievant applied for and was initially rejected as a painter on the summer crew employed by the Fayette County Board of Education.

3. Grievant was selected after his initial rejection and was employed as a painter on August 11, 1980.

4. As a result of being initially rejected, the grievant lost 21 days (8 hours each) of wages.

5. The grievant's hourly wage is \$7.2563 per hour.

6. The grievant requested payment of the wages he would have earned.

7. No level two hearing was held.

CONCLUSIONS OF LAW

1. WV Code §18-29-4(b) requires that the Chief Administrator or his/her designee conduct a hearing and issue a written decision at level two.

2. WV Code §18-29-6 requires that every decision pursuant to a hearing be in writing and accompanied by findings of fact and conclusions of law.


3. WV Code §18A-4-8b(b) requires that regularly employed service personnel who apply for jobs to be performed by service personnel, as provided in WV Code §18A-4-8, be considered before applicants falling into any other category.

⁵See WV Code §18A-4-8b(b), supra.

4. The award of lost wages is a proper form of relief in this case, and is authorized by WV Code §18-29-5(b).

For all of the foregoing reasons, the grievance is granted and accordingly the Fayette County Board of Education is **ORDERED** to pay the grievant for 168 hours at the rate of \$7.2563 per hour and to deduct those items which would have been deducted/withheld had he been employed on June 11, 1986. The grievant is also awarded any rights and privileges to which he would have been entitled had he been employed as a painter on the summer crew beginning on July 11, 1986.

Either party may appeal this decision to the Circuit Court of Fayette County or Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (WV Code §18-29-7) Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.


JOHN M. RICHARDSON
Hearing Examiner

DATED: Nov. 19, 1986