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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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NORMAN LILLY/CARL MOTEN

v.

DOCKET NO. 10-86-251-4

FAYETTE COUNTY BOARD OF EDUCATION

DECISION

This grievance comes before the West Virginia Education Employees Grievance Board on appeal from a level three review denying the grievance. The record reveals that following the level one response, the level two grievance evaluator, Howard P. Hurt, without holding a hearing, declared the grievance to be null and void.¹ Thereafter, respondent, the Fayette County Board of Education, reviewed the actions taken at levels one and two and denied the grievance.

An examination of the above described procedure reveals serious deficiencies, namely, the absence of a mandatory level two hearing and a level two decision containing findings of fact and conclusions of law. WV Code §18-29-4(4) 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

¹The Superintendent reasoned that he was without authority to deal with the grievance because the matters alleged therein were believed to be controlled by the Governor.

[§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.

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

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

Finally, in this regard, WV Code §18-29-9, provides:

Any institution failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the institution for court costs and attorney fees, as determined and established by the court. (1985, c.71.)

In the case of Yeager v. Nicholas County Board of Education, Docket No. 34-86-229-4, the Education Employees Grievance Board has previously determined that the failure to hold a level two hearing or render a written decision containing findings of fact and conclusions of law will result in the grievance being remanded. However, the respondent, prior to the hearing, acknowledged these deficiencies and the parties requested that the Hearing Examiner permit the presentation of evidence at level four in order to expedite the disposition of the grievance, to which request the Hearing Examiner agreed.

At the level four hearing, the evidence presented revealed that the grievants, Norman Lilly and Carl D. Moten, were regularly employed service personnel who complained that the respondent, and, more particularly, Wayne Wriston, Director of Services, withheld information relating to summer employment in the Governor's Summer Youth Program (GSYP) which prevented them from timely applying for the supervisor positions. The grievants believe this to be in

violation of WV Code §18A-4-8b. They seek wages they lost and an end to the practice which permitted professional employees to be preferred and recommended for service positions before qualified service personnel.

The respondent denies any violation of law and asserts that it had no control over nor was it responsible for the hiring or payment of wages to any employees working in the GSYP.

The evidence further revealed that as early as February 14, 1986, the Fayette County Board of Education was invited to make application to become a sub-grantee in the GSYP. This invitation contained sample applications, a request for recommendations of persons to be supervisors, and a legal notice explaining the positions available and application procedure. The Director of Services, Wayne Wriston, received this information and did not post it, and when inquiry was made by the grievants about summer employment, Mr. Wriston assumed ignorance about the summer situation. However, Mr. Wriston at or near the same time, gave copies of the applications to three professional employees, two of which were later hired.² Mr. Wriston's explanation at the level four hearing was that the Fayette County Board of Education's application regarding the GSYP had not yet been approved and the Board had not determined whether or not it would have its own summer crew in addition to the GSYP.

The grievants contend that the respondent exhibited bad faith and favoritism by not making the information and applications

² Only two supervisor positions were allocated to the respondent board under the contract with the West Virginia Employment and Training Office.

available to them. The respondent's position was that it owed no duty to the grievants to reveal the existence of the supervisor applications because the application to become a sub-grantee participant in the program had not been approved and the jobs to be filled were not being provided by the Fayette County Board of Education.

A review of the contract entered into by the respondent board to participate in the GSYF reveals that only those participants certified by the Department of Employment Security could be hired. The record is silent as to the number of applications actually received by the State Employment and Training Office but only those who had filed applications were considered for employment as supervisors.³ Thus, the question remains as to whether the respondent had a duty to inform the grievants of potential employment and make recommendations in accordance with WV Code §18A-4-8b(b), even though the respondent had no contractual obligation to pay anyone employed through the GSYF.

The grievants argue that WV Code §18A-4-8b(b) applies to the supervisory positions because the board had the opportunity to make recommendations. WV Code §18A-4-8b(b), in part, provides:

- (b) A county board of education shall made 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 [§18-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service. (Emphasis added)

³ Joint Exhibit #3 established the deadline for supervisor applications as April 10, 1985. The board did not enter into the GSYF agreement until June 16, 1985. Thus, by that time the respondent board's application to participate in the program was formally approved, the deadline for filing applications by the grievants for supervisor positions had passed.

The grievants also cite a State Superintendent of Schools decision in the matter of Toney v. The Board of Education of Lincoln County, et al., wherein the Superintendent stated:

Assuming that The Board of Education of the County of Lincoln really was not the employer in fact for the GSYF of Lincoln County, the statutory language just quoted appears to have obligated the board in the summers of 1982 and 1983, nevertheless, to have made whatever recommendations it did--or may have done--on the basis of seniority, qualifications, and evaluation of work. [NOTE: the reference to "statutory language" related to WV Code §18A-4-8b(b) cited above.]

Black's Law Dictionary (5th Edition) defines employer as:

One who employs the services of others; one for whom employees work and who pays their wages or salaries. The correlative of "employee".

In the case of Bonnel and Carr v. Coffman, 294 S.E.2d 910 (W.Va. 1982), the West Virginia Supreme Court of Appeals, in examining the relationship of service personnel whose salaries were federally funded under the Comprehensive Employment and Training Act (CETA), determined that such employees were not precluded from being employed by local boards because they were paid by federal funds at the state level. Similar circumstances are present in this grievance where the participants and supervisors were paid at the state level under the federally funded Job Training Partnership Act (JTPA).

In the present grievance the respondent, as the sub-grantee, was a co-employer even though it did not select the supervisors or provide the funds for payment of the participants.⁴ This relationship is further revealed in the nature of the duties of the respondent as

⁴The participants in the program who filled the "ground maintenance worker positions" were disadvantaged youth between the ages of 14 and 21 years.

the sub-grantee. These duties were set forth in the contract wherein the respondent as the sub-grantee agreed to:

1. Hire as participants only individuals certified as eligible for the program and referred by the Department of Employment Security.
2. Comply with the rules and regulations governing JTPA as outlined in the Federal Register hereto attached and made a part of this assignment.
3. Supervision of participants, numerically no less than one (1) supervisor per ten (10) participants, will insure the safety and welfare of each participant.
4. Keep properly recorded signed timesheets for participants and submit same in the fashion and on the schedule established by the Grantee in the Sub-grantee Handbook attached and made a part thereof.
5. Subrecipient agrees that it will not discriminate against any employee, participant, or applicant for training or employment because of race, creed, color, age, religion, sex, national origin, handicap, political affiliation or belief. Subrecipient agrees that it will take affirmative action to insure that the working environment will be maintained free of discriminatory insult, intimidation or other forms of harassment.
6. Establish a personnel policy which is provided each participant. Said policy should include the grievance procedure for JTPA Program participants as addressed in the Sub-grantee Handbook.
7. Provide safe working conditions and insure participants are not employed in occupations which are hazardous to the participants health and safety as outlined in the Child Labor Laws as attached and made part thereof. (These Child Labor Laws shall be strictly adhered to.)
8. Understands that program participants are trainees of the Sub-grantee and the Grantee exercises no employer responsibility except as outlined in this agreement.

9. Comply with section 143 (b) (1) (3) of the Job Training Partnership Act which states:
(b) (1) No currently employed worker shall be displaced by any participant (including partial displacement such as a reduction in the hours of nonovertime work, wages, or employment benefits) . . (3) No participant shall be employed or job opening filled (a) when any other individual is on layoff from the same or any substantially equivalent job, or (B) when the employer has terminated the employment of any regular employee or otherwise reduced its work force with the intention of filling the vacancy so created by hiring a participant whose wages are subsidized under this act. . .
10. Provide the Grantee's staff or Grantee's designated representative access to all documents, records, etc., pertaining to the Summer Jobs Program including access to audit, make copies, transcripts, to examine or to remove the same for audit purposes.
11. Assurance that participants will not be paid for unexcused absences, unworked hours or recreational activities.
12. Assurance of adequate accountability to occupy participants during working hours and a contingency plan for outside work-sites during inclement weather.
13. Assurance that sufficient material and/or equipment is made available to carry out work assignments.

It is apparent, the necessary employer relationship existed between the respondent board and the potential supervisors in the GSYP which would require that the board comply with WV Code §18A-4-8b (b), in making recommendations for those supervisory positions.

In addition, the actions of Mr. Wriston in providing applications and information to professional employees but not to service employees, is prohibited by WV Code §18-29-2(a) (m) and (o).

WV Code §18-29-2(a), in pertinent part, provides:

(a) "Grievance" means any claim by one or more affected employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging . . . any specifically identified incident of harassment or favoritism; . . .

WV Code §18-29-2(m), provides:

(m) "Discrimination" means any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

WV Code §18-29-2(o), provides:

(o) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

The following findings of fact and conclusions of law are incorporated herein.

FINDINGS OF FACT

1. The grievants, Norman Lilly and Carl Moten, are bus operators employed by the respondent.
2. The respondent, the Fayette County Board of Education, was notified on February 14, 1986, that upon the filing of an application, it would be given consideration as a possible participant (sub-grantee) in the Governor's Summer Youth Program (GSYP).
3. In the same notification of February 14, 1986, the respondent also received through its' Director of Services, Wayne A. Wriston, a legal notice that applications were being accepted together with sample applications for supervisor positions and Mr. Wriston was requested to provide any recommendations for the filling

of these positions.

4. On several occasions after February 14, 1986, the grievants inquired of Mr. Wriston concerning any available summer jobs.

5. On each occasion, Mr. Wriston expressed no knowledge of any summer jobs; however, Mr. Wriston provided copies of sample applications for the supervisor positions to three professional employees.

6. Two professional employees who had received the sample applications were later hired. Only two supervisor positions were allotted to the respondent under the terms of the agreement entered into between the respondent and the West Virginia Employment and Training Office.

7. As a Sub-grantee the respondent did not pay any of the supervisors or participants in the GSYP.

8. As a Sub-grantee of the Governor's Summer Youth Program, the respondent was a co-employer of the supervisors and participants in the program.

9. Mr. Wriston deliberately denied the grievants access to applications resulting in their not being considered for employment.

10. The fact that respondent provided applications to the professional employees had the effect of being a recommendation which translated into their being employed.

11. The level two grievance evaluator declared the grievance null and void and denied the grievants a level two hearing.

12. The level two grievance evaluator did not render a decision containing findings of fact and conclusions of law.

CONCLUSIONS OF LAW

1. WV Code §18-29-4(b) 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." (Emphasis added)

2. Pursuant to WV Code §18-29-6, every decision pursuant to hearing, shall be in writing and accompanied by findings of fact and conclusions of law. ✓

3. WV Code §18-29-9 provides: "Any institution failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the institution for court costs and attorney fees, as determined and established by the court."

4. By the terms of the contract between the respondent and the West Virginia Employment and Training Office to participate in the Governor's Summer Youth Program, the relationship of co-employer was established between the respondent board and the employees of that program in Fayette County.

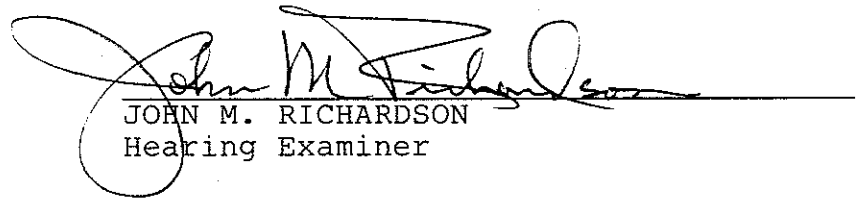
5. The grievants have failed to prove, as a matter of law, that they would have been employed had they been given the opportunity to apply.

6. The grievants have proven by a preponderance of the evidence that the respondent violated WV Code §18-29-2(a) (m) and (o).

7. WV Code §18A-4-8b(b) requires that a county board of education 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.

For all of the foregoing reasons, the grievants have proven that the respondent violated WV Code §18A-4-8b(b) and WV Code §18-29-2(a) (m) and (o); however, the grievants have not shown that they are entitled to any back wages or other monetary award. Therefore, the grievance is granted in part and denied in part.

Either party may appeal this decision to the Circuit Court of Fayette County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) 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: Feb. 11, 1987