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KIMBERLY SALL

v.

Docket No. 54-86-311-3

WOOD COUNTY BOARD OF EDUCATION

DECISION

Grievant, Kimberly Sall, is employed by the Wood County Board of Education as a substitute aide. She alleges that the board violated seniority laws and unlawfully displayed discrimination and favoritism when it hired a male substitute aide less senior than she to fill a posted position for a male aide. The parties waived an evidentiary hearing at level four and submitted the matter for decision based on the record and written briefs.

The facts giving rise to this grievance are uncontroverted. Grievant was employed as a substitute aide September 25, 1984. On March 7, 1986, a position was posted for a full-time male aide who would be assigned a special duty as a one-on-one caretaker attending to the non-instructional needs of a fifteen year old quadriplegic male student.

Grievant and another female substitute aide, hired January 17, 1984, and more senior than she, inquired about the position. They were informed they could not apply as the special requirements and qualifications for the position required a male aide be employed to care for the student.

The record reveals that the student had been seriously injured when he fell from a cliff in 1983. He suffered severe neurologic injury and was initially hospitalized in critical condition; he was in a deep coma for seven months and comatose for five more months. He must depend on others for movement in space and for total care of all toileting, feeding, personal hygiene and physical activity needs.

After the youth's release from the hospital, Wood County Schools assumed educational responsibilities for him. Following initial homebound services, it was found that the boy, formerly enrolled in a Gifted Program in school, was again demonstrating the traits of a gifted student. A Placement Advisory Committee or PAC determined that for social, emotional and educational considerations the boy required academic instruction in a school setting and he entered junior high school in January, 1986.

Based on the wishes of his parents, the advice of the other members of the PAC and the recommendation of several psychologists, a male aide was deemed necessary to take care of the boy's intimate and sensitive needs while at school.

Greg Rymer, who had been employed as a substitute aide on October 12, 1984, was assigned to care for the student at that time. Later, Rymer was hired as the full-time aide as a result of the July, 1986, posting when a more senior male aide withdrew his application.

The grievant maintains she is qualified for the position by virtue of her classification as aide and that she was more senior than the successful applicant, Greg Rymer. She cites seniority law and school personnel laws prohibiting discrimination and favoritism in support of her allegations that Rymer was wrongfully hired. The statutory language grievant relies on, W.Va. Code, 18-29-2, is as follows:

(m) "Discrimination" means any differences 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.

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

Respondent contends grievant is entitled to no relief in this matter. It avows there were legitimate gender-based requirements for the position and argues that the dignity and privacy concerns in this case constitute a bona-fide occupational qualification of male personnel. In any event, it argues, grievant in this matter was not even in a preferred or superior position for the vacancy seniority-wise. Thus, respondent maintains, grievant was not entitled to be hired over the more senior female substitute aide also interested in the position, all other factors being equal.

The facts and evidence in this grievance demonstrate that grievant was not entitled to employment in the subject position of full-time aide on the basis of seniority as she was not the most senior available personnel. The school board offered unrebutted testimony that the gender based requirement for the position rose to the level of a bona-fide occupational qualification. The respondent board met its burden of proof that it properly complied with all posting and hiring requirements for the position as posted and that it did not discriminate against or show favoritism toward any qualified male applicant or otherwise violate school personnel laws as contemplated by W.Va. Code, 18-29-2(m), (o) when it hired Greg Rymer.

If grievant alleges sex discrimination with respect to the hiring of Greg Rymer, the proper forum to adjudicate that matter would be before the West Virginia Human Rights Commission. See, State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908, 917. (W.Va. 1980).

FINDINGS OF FACT

1. At least three service personnel, substitute aides in Wood County Schools, expressed interest in a posted position for a full-time male aide to attend to the personal needs of a fifteen year old male student on a one-on-one basis.

2. The three employees in question were ranked in seniority as follows: Lynda Wigel, hired January 17, 1984; Kimberly Sall, grievant herein, September 25, 1984; and Greg Rymer, October 12, 1984.

3. Male-gender requirements for the position stemmed from the special circumstances of the student to be served. He is a bright adolescent rendered a spastic quadriplegic as the result of a near fatal accident nearly four years ago. Among other things, the youth would need to be totally disrobed from the waist down for certain toilet needs while at school.

4. The determination that a male aide/caretaker was required to assist with the delicate non-instructional needs of this student was made by his parents and the other members of the PAC, consisting of professional personnel who provided various services to the boy. Several psychologists also advised that it would be in the best interests of the adolescent student to have a male caretaker for privacy reasons and due to his age and the fact that his peers would be aware when he was assisted in toileting.

5. The grievant herein offered no rebuttal evidence that the posted position for a male aide was not based on a bona-fide occupational qualification.

6. The grievant herein suffered no loss or damage nor was the hiring of Greg Rymer detrimental to her since she was not the most senior available substitute aide and entitled to the position as a matter of law.

CONCLUSIONS OF LAW

1. W.Va. Code, 18A-4-8b(b) requires a board of education to make decisions affecting the promotion and filling of service personnel positions on the basis of seniority, qualifications and evaluation of past service. Robert Phares v. Randolph County Board of Education, Docket No. 42-86-232-2.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, however, this discretion must be exercised reasonably and not in a matter which is arbitrary and capricious. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908 (W.Va. 1980); Robert Phares v. Randolph County Board of Education, supra.

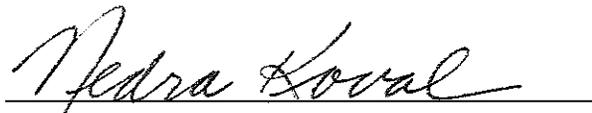
3. An employer may not discriminate against any person for hiring purposes unless a gender-based requirement constitutes a bona-fide occupational qualification or BFOQ. W.Va. Code, 5-11-9.

4. Any individual claiming to be aggrieved by unlawful sexual discrimination in the hiring of another shall bring complaint to the Human Rights Commission against the employer so named. W.Va. Code, 5-11-10; See generally, State ex rel. Hawkins v. Tyler County Board of Education, supra at 917.

5. Grievant did not show hiring of Greg Rymer was not due to BFOQ, and it is incumbent upon a grievant seeking relief pursuant to W.Va. Code, 18-29-1, et seq., to prove all of the allegations constituting the grievance by a preponderance of the evidence. June Richards, et al. v. Hancock County Board of Education, Docket No. 15-86-170-2.

For all of the foregoing reasons and the record in its entirety, this grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Wood County or Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. 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.



NEDRA KOVAL

Hearing Examiner

Dated: March 20, 1987