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EMPLOYEES GRIEVANCE BOARD**  
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**RONALD SIX**

**v.**

**Docket No. 43-86-283-3**

**RITCHIE COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Ronald Six, had been employed by the Ritchie County Board of Education for approximately eleven years prior to being placed on a preferred recall list in 1986. He alleges that a job opening occurred in the county; that he was entitled to be employed in that position and should have been had the board heeded mandates concerning lateral placements and other factors.

A level four hearing was conducted on December 8, 1986. It is noted that the matter originally came before this Board with certain procedural deficiencies; that on October 20, 1986 the grievance was remanded to the county for a level two evidentiary hearing. A hearing was set by the school superintendent but difficulties arose among the parties regarding the date of the hearing and it was cancelled. Therefore, the undersigned hearing examiner set the case for a level four hearing out of consideration for grievant's position and to expedite matters.

Some facts in this grievance are not in dispute. Grievant was a nondegreed professional employee instructing students at the Cairo School. His permit and certification to instruct building and maintenance skills to vocational students was based on ten years field experience in carpentry and thirty hours college work attained over a period of several years. In addition, prior to 1982, he had been employed by the board during the summer months for approximately seven years in a temporary service personnel position in maintenance. Grievant's professional employment was terminated when the county reorganized its school and eliminated his program at Cairo School. The program, instructed and conducted by grievant, offered certain students, who were handicapped and/or disadvantaged, hands-on experiences in building construction and building maintenance.

It was acknowledged by school officials that there is little likelihood that the program will be reinstated or that grievant will be reemployed in a professional capacity as a vocational instructor since his "professional" field is both unique and limited. A board member referred to grievant as a "surplus employee". (T. 33) He is presently on a preferred recall list (professional) but has applied for various positions in the service personnel classifications.

During March and May of 1986, grievant was properly notified of the termination of his teaching position effective the end of the 1985-86 school year. Sometime in August, 1986 a position was posted for a custodian at the Cairo School effective the 1986-87 school year and grievant applied for that vacancy. Upon the county

superintendent's recommendation, another board employee, Burl Wyer, was hired for the position. The successful applicant had nearly three years experience as a substitute custodian in the county.

One of the grievant's contentions is that he is entitled to placement from the professional preferred recall list into a lateral area for which he is certified and qualified. He further avers that he is well qualified for the custodian position that became available at the Cairo School in August, 1986 and that he should be instated in the position since no other personnel considered for the position had better priority or claim to that placement. Conversely, the board maintains that the governing laws preclude grievant from benefit of a lateral placement from a professional personnel position to that of a school service personnel position and that grievant has no other legal right to the position.

Over respondent's objection, grievant's counsel introduced materials pertaining to a previous grievance in which grievant prevailed at level three when the Ritchie County Board of Education reversed the county superintendent's level two decision. (T. 23, 24). That dispute involved temporary summer maintenance employment and the issues do not relate to the present grievance. The evidence did establish, however, that grievant had accrued seniority for temporary maintenance (service personnel) summer

employment and only as long as he remained a professional employee. However, grievant alleges that the evidence established that Burl Wyer, who was employed for the permanent custodian position grievant seeks, was not technically "under contract" with the board as a substitute custodian in August, 1986 at the time of the hiring. Thus, grievant appears to be relying on the premise that Wyer had no priority for the custodian position in question.

Ritchie County Superintendent, F. Dixon Law, indicated that the county did not generally award substitute contracts until after the completion of an academic year and sometimes as late as September in a new academic year. He testified that those contracts would then be "retroactive" to July 1 of that year. In effect, the substitute hiring was conducted on an annual basis from July 1 until June 30 of the next year. (T. 77, 79).<sup>1</sup>

Notwithstanding the superintendent's testimony regarding "retroactive" contracts and despite grievant's perception that Wyer was not "under contract", Wyer's employment status is clearly resolved by examining the mandates of W.Va. Code, 18-2-8a.

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<sup>1</sup> The board seems to justify this unorthodox practice out of concern for budgetary matters, but one board member, Nelson Mahaney, testified that "...that would not really have a bearing on it because a substitute is not paid unless they work." (T. 36).

That statute clearly protects the employment rights of probationary employees and in pertinent part provides:

The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at the meeting... The board at this same meeting shall also act upon the retention of other probationary employees... Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such person's last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring. (Emphasis added)

Wyer's status as a substitute does not diminish his employment rights. According to W.Va. Code, 18A-4-15, "Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel...." Thus, even if the school board failed to comply with the law regarding Wyer's employment status, his reemployment as a substitute custodian for the 1986-87 academic year was preserved as a matter of law due to the board's failure to timely notify him that he would not be retained.

Turning to the applicable law, it is apparent that the board had properly hired Wyer for the custodial position. Relevant portions of W.Va. Code, 18A-4-8b(b) provide:

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...on the basis of seniority, qualifications and evaluations 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....

Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;
- (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. (Emphasis added)

First, Wyer held the classification title of custodian; at best grievant's temporary summer work as a service personnel was in maintenance, and the position in this grievance was not one of a temporary nature and was in the custodian classification. Second, Wyer

also had a superior position for consideration as (4) substitute service personnel over that of grievant as a (5) new service personnel. In his closing argument, grievant's counsel readily acknowledged that if Wyer were under contract with the board at the time of the job posting, "...he certainly would have had priority over Mr. Six who must be considered as a new applicant." (T-85). It was shown above that Wyer's contract had never been terminated.

Grievant's contention that he was entitled to the position by virtue of recall rights and placement into a lateral area is not supported by the law as it now exists. Grievant was a professional employee and W.Va. Code, 18A-4-8b(a) provides in part:

As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular full-time professional personnel, or those returning from leaves of absence with greater seniority are qualified, apply for and accept such position. (Emphasis added)

Clearly, this provision does not contemplate a professional employee having any recall rights regarding placement in a lateral area comprised of a service personnel position.

In addition to the foregoing the following findings and conclusions are incorporated herein.

## FINDINGS OF FACT

1. Ronald D. Six, grievant, had been employed by the Ritchie County Board of Education for eleven years as a professional employee instructing disadvantaged vocational students at Cairo School in building construction and maintenance which encompassed "hands-on" experiences.

2. Grievant was non-degreed but qualified for the professional position by virtue of ten years work experience in building construction and maintenance field and further remained certified for his teaching permit by completing thirty hours of college courses over a period of several years.

3. Grievant also accrued seven years experience as a temporary (summer) service employee in maintenance and was a legitimate candidate for such limited employment as long as he remained a professional employee.

4. Grievant was properly notified of the elimination of his professional position at the end of the 1985-86 school term due to the reorganization of county schools. He was placed on a preferred recall list for professional reemployment but the likelihood of recall was slim since his teaching certification was unique and limiting.

5. Since recall into an available professional position was virtually nonexistent, grievant has attempted to secure employment with the county in a service personnel position in such classifications as cook, custodian or maintenance, but his

efforts have been unsuccessful to date.

6. In August, 1986 a service personnel position was posted for a custodian at Cairo School. Grievant and Burl Wyer, a three-year substitute custodian, both applied for or "bid" on the job.

7. Wyer's employment status was in question since the board had not formally rehired him prior to the termination of the school year in June, 1986 but Wyer had employment rights as a probationary employee.

8. In an earlier grievance, grievant prevailed in matters relating to summer employment. The school board's determination was correct because grievant was entitled to a temporary maintenance service position the summer of 1986 and had seniority and priority for that position over Wyer, whose classification was custodian. Grievant had proven that the temporary employment which actually occurred was building construction and maintenance and not custodial work. However, as part of its rationale the school board found that "(2) There was no person employed by the...Board...for temporary or substitute custodian occupied by Mr. Wyer as of July 1, 1986." (Gr. exhibit, #10). The board either did not consider or was unaware of Wyer's legal entitlement to reemployment as a substitute custodian due to its failure to notify him of non-retention.

9. Burl Wyer held a superior position to that of grievant for employment as permanent custodian at Cairo School as a matter of law and was otherwise qualified for the job.

## CONCLUSIONS OF LAW

1. A probationary employee must be informed in writing of non-retention by a board of education no later than ten days following the first Monday in May of each year. W.Va. Code, 18A-2-8a.

2. Substitute service employees, after thirty days employment, shall have similar employment rights to those of regular service personnel. W.Va. Code, 18A-4-15.

3. A school board shall fill service personnel positions on the basis of seniority, qualifications and evaluation of past service and substitute service personnel shall be considered before new service personnel. W.Va. Code, 18A-4-8b(b).

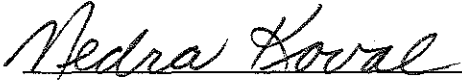
4. Present school personnel laws do not contemplate that professional employees placed on a preferred recall list have rights to lateral placement into a service personnel position even though he or she may be qualified in some respects for service personnel positions. W.Va. Code, 18A-4-8b(a).

For all of the foregoing reasons, this grievance is DENIED.<sup>1</sup>

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<sup>1</sup> The hearing examiner notes that grievant has performed a valuable service to the disadvantaged students of Ritchie County and to that school board; it would seem that the board has a moral obligation to attempt to employ grievant in some capacity as soon as possible.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ritchie County and such appeal must be filed within thirty (30) 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.

  
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NEDRA KOVAL  
Hearing Examiner

Dated: 2-3-87