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WAYNE O. LEMASTER

v.

DOCKET NO. 50-87-331-1

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievant, Wayne O. Lemaster, is employed by the Wayne County Board of Education as a substitute custodian. Mr. Lemaster filed a level four grievance appeal form on December 22, 1987 in which he alleged that four custodial positions have been filled with employees who had earned less seniority than he. The relief requested is a regular position with back pay from the date the employees hired from the first posting began work. A level four hearing was scheduled for February 15, 1988 in Charleston, West Virginia at which time appearances were made by both parties and witnesses. The grievant's representative indicated that the matter could be submitted for decision upon the record; the board did not object and submitted proposed findings of fact and conclusions of law at that time. The grievant submitted proposed findings and conclusions on March 9, 1988.

The grievant asserts that he entered into his duties as a substitute custodian on January 28, 1985 and has worked at numerous schools in Wayne County. On September 16, 1987 six regular custodian positions were posted and he bid on all six. Two custodians with less seniority than the grievant received two of these positions. On September 26, 1987 four regular custodian positions were posted and again two substitutes with less seniority than the grievant received two of these positions. The grievant argues that this action was in violation of W.Va. Code, 18A-4-8b(b) which requires that service personnel positions be filled on the basis of seniority, qualifications and evaluations of past performance.

The board of education agrees that the grievant did have more seniority as a substitute than four of the individuals hired for the regular positions and that he is qualified by statutory definition as he holds the classification title of substitute custodian.

However, Superintendent Michael Ferguson testified that the grievant was not hired for any of the posted vacancies based upon his evaluations of past performance. Documents submitted into evidence indicate that the grievant had received a satisfactory evaluation on March 4, 1985 from Principal

Simpkins; an unsatisfactory evaluation on his work of November 22, 1985, was rated as satisfactory by Reba Thompson on January 29, 1986 and unsatisfactory by Mr. Simpkins on February 2, by Mr. Hussell on April 30 and by Ms. Daniels on September 29.

Superintendent Ferguson developed a plan of assistance in September which required the grievant to report to the principal of each building and request specific instructions from them regarding their job expectations. The principals were then to complete an evaluation of his work. The superintendent stated that he believed the plan to have been successful when evaluations of October 31, 1986 and January 15, 1987 were satisfactory. However, on February 10 and 13 his work was again rated unsatisfactory, was determined to be satisfactory on February 16 but unsatisfactory on March 10, September 28, October 2 and 19, 1987. Comments made by those principals who had rated the grievant's work as unsatisfactory indicate that he required a great deal of supervision and lacked interest, initiative and ability. Two principals specifically requested that he not return to their schools.

The grievant argues that the evaluations should not be heavily weighted when considering him for a regular position as they were based on short-term substitutions and when in an unfamiliar school it is difficult to perform to the best of his ability. The grievant also faults the evaluation process as he did not receive them from the principal at the time they were completed depriving him of an opportunity to discuss their findings with them.

While a regularly employed individual would receive his evaluation directly from his building principal, the grievant was assigned to various schools on a short term, frequently one day, basis. The evaluations were completed afterwards when he was no longer at that school. His deficiencies were brought to his attention by the superintendent who met with the grievant three times and developed a plan of improvement for him. Since that time the grievant continues to receive unsatisfactory evaluations with strongly worded negative comments by the principals, nearly all of whom do not recommend him for a regular position. As the comments reflect the grievant's lack of initiative and ability to adequately perform relatively simple duties such as sweeping and collecting trash, it does not appear that his unfamiliarity with a school is the source of his unsatisfactory performance. As noted by

grievant's representative there are three statutory criteria for filling service personnel positions, none of which is valued more heavily than the other two. Therefore, the superintendent must consider all factors when making a recommendation for employment and, if the employee so requests, must show valid cause why the employee with the most seniority is not promoted or employed in the position for which he applies.

In addition to the foregoing it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant has been employed by the Wayne County Board of Education since January 1985 as a substitute custodian assigned to various schools.

2. Six regular custodian positions were posted on September 16, 1987, two of which were awarded to individuals with less seniority than the grievant.

3. Four regular custodian positions were posted on September 26, 1987, two of which were again awarded to individuals with less seniority than the grievant.

4. Superintendent Michael Ferguson indicated that the grievant had not been awarded any of the positions posted in September due to the unsatisfactory evaluations of his past performance.

5. Of six evaluations completed during the period of January 1985 through September 1987, four were rated "unsatisfactory" by the building principals.

6. In September 1986 Superintendent Ferguson developed a plan of improvement for the grievant who subsequently received two "satisfactory" evaluations on October 31, 1986 and January 14, 1987.

7. Between February 6 and October 19, 1987 the grievant was rated as "unsatisfactory" for six out of seven assignments.

8. Comments included by the principals on the evaluations indicate the grievant lacks initiative, interest and ability when assigned to their schools. Overall he has received ten unsatisfactory evaluations out of a possible fifteen and two principals specifically requested that he not return to their schools.

9. Although four individuals hired in September 1987 had earned less seniority the grievant does not dispute that their evaluations of past performance were superior to his.

Conclusions of Law

1. W.Va. Code, 18A-4-8b(b) requires that service personnel positions be filled on the basis of seniority, evaluations of past performance and qualifications, defined as the applicant holding a classification title in his category of employment.

2. Applicants for service personnel positions shall be considered in a specified order of five classifications including: (4) substitute service personnel. W.Va. Code, 18A-4-8b(b).

3. A county board of education has substantial discretion in the hiring of school personnel so long as it is exercised reasonably, in the best interest of the schools, and not in an arbitrary or capricious manner. Dillon v. Wyoming County Board of Education, 351 S.E. 2d 58 (W.Va. 1986); Lafayette v. Randolph County Board of Education, Docket No. 42-87-227-21; McBride v. Wayne County Board of Education, Docket No. 50-87-186-1.

4. The superintendent's decision to not recommend the grievant, who had established an unsatisfactory record as a substitute employee, for a regular employment was not an abuse of his discretion or done in an arbitrary and capricious manner.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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.

DATED April 29, 1988

Sue Keller

SUE KELLER
HEARING EXAMINER