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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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TERESA MITCHEM

v.

Docket No. 50-88-244

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievant Teresa Mitchem, an itinerant elementary and middle school music teacher for Respondent Wayne County Board of Education, filed a grievance on September 8, 1988, alleging that Respondent violated W.Va. Code §18A-4-8b in not promoting her to a position posted August 22, 1988, for "Vinson High/Itinerant Multischool Assignment, Vocal Music and General Music," Ex. D. Grievant's supervisor declared himself without authority to decide the grievance at Level I. After hearing on November 2, 1988, at Level II the grievance was denied November 18, 1988. Upon no action of the Respondent at Level III Grievant appealed to Level IV on

December 12, 1988.¹ A hearing was held January 18, 1989.² With receipt of proposed findings of fact and conclusions of law from both parties on March 1, 1989, the record is complete.

Throughout these proceedings Grievant has contended that she was entitled to reinstatement to the position. Grievant proposes as a conclusion of law,

The final decision should have been made based on seniority in keeping with the holding in Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986), in which the West Virginia Supreme Court of Appeals held seniority has a bearing on the filling of a vacant position when the applicants have otherwise equivalent qualifications or the differences in qualification criteria are insufficient to form the basis for an inform[ed] and rational decision.

Grievant's statement of the law of Dillon v. Board of Educ. of Wyoming County is correct. Furthermore, the parties agree that Grievant was qualified to teach high school music and that she was the most senior candidate for the position. However, not one iota of evidence was presented on the qualifications of any of the other candidates, including the successful candidate, whose identification is not even provided by the record.³ Since on this record Grievant has

¹ On December 14, 1988, Grievant was notified that Respondent waived the Level III hearing.

² At the Level IV hearing the parties agreed that the decision should be based on the evidentiary records of both Level II and Level IV. Transcript and exhibit cites herein refer to the Level II record.

³ While Grievant proposes as a finding of fact, "The
(Footnote Continued)

as a matter of law not proven that she had equivalent or better qualifications than the other candidates, she is not entitled to instatement.

The crux of Grievant's complaint is actually that justified absenteeism due to illness was unfairly held against her by the Superintendent of Schools of Wayne County Michael Ferguson in not recommending her to Respondent for the position. At the Level II hearing, Mr. Ferguson, as the representative for Respondent, conceded that absenteeism "was the main reason for her nonselection" (Tr. 18).⁴ When notifying Grievant on September 2, 1988, why she had not received the job, Mr. Ferguson wrote,

You were not awarded the job because you were not the best qualified applicant.

The vocal music teacher who retired from Vinson High School had developed and maintained a high quality music program for 32 years and great care was taken to appoint the teacher to that position that was best qualified to carry on that program.

One of the factors by which you were determined not to be the best qualified person for the job is your very poor attendance record.

Payroll records indicate the following:

<u>School year</u>	<u>Days Absent</u>
1987-88	19 days
1986-87	13.5 days
1985-86	17 days
1984-85	13 days
1983-85	23.5 days

(Footnote Continued)
successful candidate is a first-year teacher[,]" there is no supporting evidence for that statement.

⁴ Mr. Ferguson was not called as a witness at either hearing.

1982-83

15 days

It is noted that you have consistently used all 15 days of sick leave each year. Further, you have reported to your building principal that you will be off work for several weeks at the beginning of this year and I find that you are currently on sick leave.

Certainly a teacher cannot carry on a high quality program when absent.

To improve your qualifications, I suggest you improve your attendance.

(Ex. D).

The issue in this case therefore is whether the selection process used to fill the position was flawed so as to require reevaluation of the applicants, including Grievant.

When a grievant has the greatest seniority of the candidates for a professional position he was denied, in order to prove a violation of Code §18A-4-8b(a), he must prove by a preponderance of the evidence that he was [at least] equally qualified for the position as the other candidates or that the interview/selection process used to fill the position was flawed.

Kizer v. Roane Co. Bd. of Educ., Docket No. 44-88-143 (Jan. 12, 1989). Accord, Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989); LeMaster v. Cabell Co. Bd. of Educ., Docket No. 06-87-074-1 (June 16, 1988); Milam v. Cabell Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988).⁵ In this case, in fact, since Grievant was not

⁵ It is incumbent upon a grievant's representative to frame the issues which should be addressed in the decision. It should have been recognized that the evidence in this case is only relevant to whether Respondent's selection process was flawed and does not relate to whether Grievant was equally or better qualified than the other applicants. However, in that Grievant argued at the

(Footnote Continued)

interviewed for the position, the issue is whether Grievant established by a preponderance of the evidence that, at the time her application was reviewed, the superintendent improperly decided that her application did not warrant further consideration, i.e., that Grievant should be denied the position without being interviewed.⁶

The record is limited on what information Mr. Ferguson considered, although he must have considered Grievant's application and personnel file.⁷ Grievant did submit into

(Footnote Continued)

hearings that legitimate health problems should not have penalized her from further assignments, the validity of Respondent's selection process is here addressed.

⁶ There was much evidence presented at both hearings that Grievant's absences were reasonably due to a very severe health problem that had been plaguing her for at least five years, that she had made up missed time with her students, and, indeed, that she had been operated on to correct the condition in August, 1988. Unfortunately, any such evidence is irrelevant to the issue of whether the Superintendent's review of Grievant's application and file was improper or arbitrary. Similarly, while there was much evidence regarding whether Grievant was a good teacher submitted at the hearings, that evidence is also irrelevant without any indication that such information was considered by Mr. Ferguson.

⁷ At the Level II hearing Mr. Ferguson introduced, over Grievant's objection, a January 8, 1986, letter to him from Charles M. Oshel, Assistant Superintendent of Wayne County Schools, which discussed Grievant's absenteeism and indicated that Grievant was absent on Mondays and Fridays. In the letter Mr. Oshel stated he admonished her for missing instructional time (Ex. I). In introducing it Mr. Ferguson stated, "I have different background information that was available on Ms. Mitchem concerning absenteeism[.]" He did not state whether at the time he reviewed her application he had had any personal memory of the memo or of Grievant's absenteeism. Accordingly, the memo may not have had any influence on his determination to deny Grievant's application.

the record evaluations for school years 1986-87 and 1987-88 (Ex. F), which must have been in her personnel file. In these evaluations her supervising principal at East Lynn Elementary and Middle Schools, two of the three schools at which she teaches, found that Grievant met or exceeded all standards and, in particular, rated her as meeting and exceeding the standard requiring compliance with the personal leave policy of the county schools.

The evaluations therefore support that Grievant did not abuse leave policy or at least show that Grievant was not advised by evaluation that her absenteeism needed improvement. Indeed, there is no indication on this record as a whole or from Mr. Ferguson's explanation to her, supra, that he thought she had abused her leave time. Further, his explanation does not rely on the fact that the number of days she was absent were more than were covered by her sick leave but rather indicates that Grievant's using authorized sick leave was held against her. That is especially supported by Mr. Ferguson's statement, "It is noted that you have consistently used all 15 days of sick leave each year." Further, from Mr. Ferguson's conclusion that "a teacher cannot carry on a high quality program when absent" it is clear that he simply determined that because Grievant had

been absent more than other applicants she was less qualified.⁸

While it may not be illogical to make the conclusion Mr. Ferguson made,⁹ his reasoning strikes at the heart of the right of an ill employee to use the sick leave he or she has earned. Mr. Ferguson's reasoning is especially troublesome in this case since Grievant, although the most senior applicant, was not even granted an interview, when she would have had the opportunity to explain her history of absences. Considering an employee's proper use of leave to which he or she is entitled as a disqualifying factor or even as a factor that makes the employee less qualified than other applicants cannot be countenanced.¹⁰

In addition to the foregoing narrative, the following findings of fact and conclusions of law are appropriate.

⁸ The record does not raise the issue whether it is proper to disqualify an employee from further promotion because illness forced the employee to use more leave time than he or she was entitled to.

⁹ In fact, Mr. Ferguson's reasoning could apply to use of any leave or free time allowed an employee. A supervisor could just as logically reason that because an employee never uses his vacation time and instead works every holiday and weekend he or she is more qualified than the individual who uses such leave to which he or she is entitled.

¹⁰ That is not to say that an employee with a history of high absences would not be well-advised to supplement his or her personnel file with information in explanation of the history, especially where assurances can be made that the high level of absences will cease, as is true in this case.

Findings of Fact

1. Grievant, an itinerant music teacher, was the most senior of the candidates who applied for a position of itinerant music teacher at the high school level.

2. Grievant was qualified for the position.

3. While Grievant's records show absences of 13 to 23.5 days for each school year between 1982-83 and 1987-88, since Grievant's evaluations rated her as meeting and exceeding the leave requirements, it is accepted that her use of sick leave was due to health problems.

4. Grievant's absenteeism was the main reason why Superintendent of Schools Michael Ferguson thought Grievant was not the most qualified applicant for the position. His explanation on why she was not considered the most qualified did not indicate that he thought she had abused her sick leave but rather indicated that he held against her her use of sick leave to which she was entitled.

5. Mr. Ferguson did not recommend Grievant for the position and in fact she was not interviewed for the position.

Conclusions of Law

1. "When a grievant has the greatest seniority of the candidates for a professional position he was denied, in order to prove a violation of Code §18A-4-8b(a), he must

prove by a preponderance of the evidence that he was [at least] equally qualified for the position as the other candidates or that the interview/selection process used to fill the position was flawed." Kizer v. Roane Co. Bd. of Educ., Docket No. 44-88-143 (Jan. 12, 1989). Accord, Black v. Cabell Co. Bd. of Educ., Docket No. 06-88-238 (Jan. 31, 1989); LeMaster v. Cabell Co. Bd. of Educ., Docket No. 06-87-074-1 (June 16, 1988); Milam v. Cabell Co. Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988).

2. Grievant did not establish that her qualifications were equivalent or better than the other candidates.

3. It is against public policy for a board of education or a superintendent of schools to consider an employee's proper use of his or her leave to which he or she is entitled when considering his or her qualifications for a position.

4. Because the evidence demonstrated that Grievant's proper use of sick leave was a negative factor in the determination that she was not the most qualified candidate for the position, Grievant established that Respondent's selection process was flawed. See Conclusion of Law 1.

This grievance is accordingly **DENIED** in part, insofar as Grievant seeks reinstatement to the position of music teacher at Vinson High School and elsewhere; and **GRANTED** insofar as it seeks fresh review of the qualifications of the applicants for that position as posted. Respondent is

ORDERED to reevaluate the applicants interested in the job at this time and, in as uniform a manner as practicable, to determine whether any applicant is more qualified than Grievant, and if Grievant is found to be equally or better qualified, to instate her into the position.

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. See W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.



SUNYA ANDERSON
HEARING EXAMINER

Dated: March 23, 1989