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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
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FREDA MOON

v.

Docket No. 50-88-245

WAYNE COUNTY BOARD OF EDUCATION

DECISION

Grievant Freda Moon, presently employed as an Aide by Respondent Wayne County Board of Education, filed a grievance August 9, 1988, alleging she was improperly denied a secretarial position with Respondent. Her grievance was denied at Level I and at Level II on November 3, 1988, after hearing that day. Respondent waived a Level III hearing on December 2, 1988, and Grievant filed at Level IV on December 12, 1988. A hearing was held March 2, 1989,¹ where it was agreed that the record of the Level II hearing would constitute the evidentiary record for this decision, supplemented by documentary evidence submitted at Level IV. Proposed findings of fact and conclusions of law were received from the parties on and before April 7, 1989.

¹A hearing scheduled January 26, 1989, was continued at the joint request of the parties.

The parties are in agreement on the pertinent facts in this matter. Grievant applied for a Secretary II position at Buffalo High School posted July 1988. At the time of her application she was classified as Custodian with 9 1/2 years seniority. She had passed the proficiency test required for secretarial positions with Respondent² with a grade of 92 in April 1986.³ While five individuals applied for the position, Respondent considered and interviewed the only two regular employees, Grievant and Jewell L. Burton, who was classified as a Clerk with five years of seniority. Ms. Burton was hired because she was considered by Wayne County Superintendent of Schools to be the better qualified candidate.

²Respondent's policy, "Proficiency Tests Required for Service Applicants," provides in pertinent part,

It is the policy of the Wayne County Board of Education that examinations or tests to prove proficiency in the skills required for given service positions be administered to all new service applicants, substitute service personnel and regular service personnel, not holding that classification, who apply for (submit a bid) a given regular service position.

The purpose of the test is to satisfy the Board that the applicant can meet the qualifications of the service position as defined in §18A-4-8 of the Code and is competent in the skills necessary to function successfully in the given service position.

Grievant's Exhibit 4.

³A score of 70 showed minimum competence.

At the Level IV hearing the following exchange occurred among Ms. Levy, Grievant's counsel; Mr. Ketchum, Respondent's counsel; and the undersigned:

Ms. Levy: We rely on W.Va. Code §18A-4-8 that Mrs. Moon is the most senior applicant and that she has shown her proficiency by taking the examination and passing it and by meeting the minimum standards as required by the Board and that there have been no questions raised regarding her evaluations. Since she is the most senior applicant she should be awarded the position.

.....

Mr. Ketchum: That's the single issue. The single issue here is, is that of the two applicants involved Freda Moon was the more senior and that after the testing and then interview by Superintendent Ferguson that he felt like that Ms. Burton, who got the job, was more qualified. I don't think there's any dispute that Ms. Moon was the more senior and the single issue here as I see it is whether or not Superintendent Ferguson was correct in awarding the position to Jewell Burton by determining that she was more qualified.

Ms. Anderson: Is it your position that Ms. Moon was not qualified for the position?

Mr. Ketchum: That is not my position that she was not qualified.

Ms. Anderson: So you will concede she was qualified?

Mr. Ketchum: I will concede she was qualified.

Tr. 4-5. The undersigned suggested to Mr. Ketchum that the case may be controlled by Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988), appeal pending, C.A. No. 88-518 (Cir. Ct. of Wayne Co. W.Va.). Jervis held that the seniority requirements of W.Va. Code 18A-4-8b(b) mandated that Respondent award a mechanic position to a regular maintenance employee who had passed the mechanic's proficiency test of Respondent, although a substitute employee

was better qualified as a mechanic than the regular employee. Mr. Ketchum contends in his letter-brief that the Jervis decision is distinguishable because it involved a substitute employee rather than two regular employees.

Respondent's position must be rejected, for Jervis is based on the ruling that, where service employees with favorable evaluations of prior work apply for a position for which they are qualified, the position must be awarded to the most senior service employee. The regular employee was awarded the position in Jervis because under W.Va. Code §18A-4-8b(b) any seniority as a regular employee is greater than that earned by a substitute. In this case Ms. Moon's seniority was greater than the other applicants. She was accordingly entitled to the secretarial position.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate:

Findings of Fact

1. Grievant, a service employee of Respondent with 9 1/2 years seniority, applied for a Secretary II position posted July 1988.

2. Grievant's evaluations have been satisfactory.⁴

⁴Grievant testified that her most recent evaluation had
(Footnote Continued)

3. Grievant had scored a 92 on Respondent's proficiency test for secretarial positions in April 1986.

4. Ms. Jewell Burton, who was a Clerk with 5 1/2 years seniority as a service employee, had scored 99 on Respondent's proficiency test August 1987.

5. Grievant and Ms. Burton were the only applicants who were regular employees of Respondent.

6. Grievant and Ms. Burton were interviewed for the secretarial position.

7. Ms. Burton was awarded the secretarial position because she was considered more qualified than Grievant by Superintendent of Wayne County Schools Michael Ferguson.

Conclusions of Law

1. In filling a service personnel post, a county board of education in West Virginia must consider seniority, qualifications and evaluations of past service. W.Va. Code §18A-4-8b(b). King v. Ritchie Co. Bd. of Educ., Docket No. 43-87-308-3 (Oct. 31, 1988); Jervis v. Wayne Co. Bd. of Educ., Docket No. 50-88-084 (Nov. 2, 1988); Hyre v. Upshur Co. Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988).

2. Pursuant to the requirement of Code §18A-4-8b(b) that "[f]or purposes of determining seniority under this

(Footnote Continued)

been "sort of negative," but it was changed to an "average evaluation." Tr. 10. Grievant's testimony indicated that her evaluations have otherwise always been satisfactory.

section, an employee's seniority begins on the date that he enters into his assigned duties[," Grievant was the most senior applicant for the secretarial position.

3. If the most senior candidate for a service position is qualified for the position and has had satisfactory evaluations, he or she is entitled to the position. King; Hyre. See also Jervis.

4. Grievant's score on the secretarial proficiency test of Respondent qualified her for the secretarial position. Accord Jervis. Furthermore, Respondent conceded she was qualified for the position.

Accordingly, the grievance is **GRANTED**. Respondent is ordered to instate Grievant in the secretarial position at issue in this case and to pay her the difference between the pay she has earned and the pay for the secretarial position for the time since the date the secretarial position was filled.

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. 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

Date: April 20, 1989