



RECEIVED

REPLY TO:  
111 - 19th Street  
Martinsville, WV 26003  
Telephone: 238-1040

JUL 3 1989

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

**GASTON CAPERTON**  
Governor

W. Va. Education & State  
Emp. Grievance Board

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

**Members**  
James Paul Geary  
Chairman  
Orton A. Jones  
David L. White

THOMAS LASICK

v.

Docket No. 89-52-82

WETZEL COUNTY BOARD OF EDUCATION

DECISION

Grievant Thomas Lasick has been employed by the respondent Wetzel County Board of Education for approximately four years and is presently assigned as a Custodian II at New Martinsville Elementary School. On or about March 3, 1989, he filed a level four grievance in which he alleged that an inventory supervisor's position at respondent's board office was filled in-house without the statutory notice and posting of the vacancy. He requested that the position be posted. According to the filing form, respondent rendered adverse decisions at levels one through three November 29, 1988, December 19, 1988, and February 16, 1989, respectively. A level four hearing was conducted April 25, 1989. The parties submitted proposed findings of fact and conclusions of law on May 9 and 23, 1989.

At the onset of the hearing, the parties acknowledged that the status of the case had changed subsequent to the level four filing in that the supervisor's position had been posted and filled. Grievant announced that the grievance issue now involved a monetary award and he requested as relief that he be awarded the difference in his salary from the time the supervisor duties were allegedly improperly assigned to a worker in the central office until it was awarded to that same worker on his bid. Grievant was given leave to present the merits of the case with the amended relief and respondent was advised that it could request that the hearing reconvene at a later time to meet any and all of grievant's new-found allegations and theories. At the conclusion of the hearing, respondent opted to submit a written answer to grievant's request for a monetary award.

In essence, the issues of this grievance are whether respondent improperly placed a temporary worker in another worker's stead and, if so, whether grievant is entitled to a wage differential as a result of the action.

Portions of respondent's level two Findings of Fact appear to accurately describe the initial circumstances which led to the grievance dispute:

- On October 11, 1988, Ronald L. Lough, employed as Custodian/Inventory Supervisor at the Wetzel County Board of Education offices and warehouse, was granted an unpaid [medical] leave of absence, beginning October 6, 1988.
- Floyd W. Howell, Custodian/Mail Clerk (half-time), a regular employee at the Wetzel County Board of Education office was offered the opportunity to assume the position until Mr. Lough returned to work or resigned.
- Mr. Howell had frequently performed the functions of Mr. Lough's position in the past, helping to unload delivery vehicles, record information of and store

materials which were delivered. He had also filled orders from and delivered materials from the warehouse to schools as the schools' required them.

- Mr. Howell accepted the position and . . . expects, on return of Mr. Lough to work, to return to his regular assignment at the same work station.

- On October 25, 1988, the Wetzel County Board of Education appointed Floyd W. Howell, as substitute Inventory Supervisor, effective October 26, 1988.

According to level four testimony, Mr. Lough ultimately passed away. Superintendent Gerrita Postlewait testified that Mr. Lough's position had been the only classified inventory supervisor in the county. She said a determination was made that due to budgetary constraints, the supervisor's position would be reduced from full-time to half-time and the position was posted as a half-time appointment. Mr. Howell<sup>1</sup> was the only regular employee who bid on the position and was thus employed. The end result was that Howell attained full-time regular employment as Custodian/Mail Clerk/Inventory Supervisor.

Grievant testified that he did not bid on the half-time supervisor's position because he believed that he would have had to resign his full-time employment. Superintendent Postlewait testified that numerous employees in the past had bid on and been awarded half-time positions and subsequently resigned only one-half of their regular position. Grievant stated that employees should be apprised of opportunities such as described

---

<sup>1</sup>Ms. Postlewait said Mr. Howell's work status prior to Lough's illness was half-time regular employment in the morning although he also served occasionally as a substitute custodian in the afternoon.

by the superintendent but readily agreed that he made no inquiry on the matter. Ms. Postlewait responded that she would "make it public" as grievant suggested and apprise employees via a newsletter.

In support of his position that Mr. Howell's original appointment to the supervisor's position was improper, grievant relies on W.Va. Code §18A-4-15(2) which sets forth requirements for hiring substitute replacement personnel when a regular employee's leave is long-term:

[I]f such leave of absence is to extend beyond thirty days, the board, within twenty working days from the commencement of the leave of absence, shall give regular employee status to a person hired to fill such position. The person employed on a regular basis shall be selected under the procedure set forth in section eight-b [§ 18A-4-8b] of this article . . . [and] shall hold such position and regular employee status only until the regular employee shall be returned to such position . . . .

In support of his position that he is deserving of a monetary award for lost wages, grievant argues that when the job was not posted as required by law, he was denied the opportunity for a possible promotion. He contends that he was more senior than Howell and was equally qualified for the supervisor's duties inasmuch as he loaded trucks and stocked areas in his present employment.

On the matter of whether the supervisor's position should have been posted at the onset of Mr. Lough's leave for illness, respondent stands by its level two decision:

1. A board of education may reserve an employee's position when he has been granted a leave of absence for illness and when the present staff is capable of performing the duties of said absent employee. [cite omitted]

2. A county board of education may reclassify an employee without posting when the employee had been previously performing the duties of the reclassified position. [cite omitted]

3. [I]f there are regular employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating basis, with the substitute then filling the regular employee's position. [W.Va. Code §18-4-15(6)]

4. [Respondent] followed the requirements of W.Va. Code §18A-4-15 in giving Floyd W. Howell first opportunity to replace Ronald L. Lough during the period Mr. Lough was on medical leave.

Respondent additionally contends that, had the position originally been vacant and posted, i.e., Mr. Lough had resigned, grievant, with less seniority than 26 other custodians, would have had to first qualify as a supervisor via the county's testing procedure for out-of-classification applicants. Respondent argues that grievant has no basis for his monetary claim because he has no basis to conclude that he would have been a successful applicant for the position had it been vacant.

With respect to its level two conclusions, respondent has correctly stated the law but not necessarily the law which pertains to all the factual circumstances in this case. Code §18-4-15(6) clearly contemplates the replacement of absent personnel so that normal staffing is maintained at a work-site and respondent did not hire a substitute to maintain normal staffing during Mr. Lough's absence. Therefore respondent errs when it relies on subsection (6) of W.Va. Code §18-9-15 in this matter. Moreover, subsection (6) does not address the long-term absence of a service employee while subsection (2) of 18-9-15

clearly requires that a service vacancy of 30 or more days must be posted after 20 days for the selection of a substitute for temporary employment, and the substitute would in turn gain regular employee status, but only for the duration of the employment. It was not grievant, but rather respondent's substitute employees who were disadvantaged by the employment of Howell for the substitute supervisor's assignment in October 1988, inasmuch as they were precluded from bidding on the temporary position.

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

#### FINDINGS OF FACT

1. Respondent employed a half-time custodian/mail clerk at the central office for a temporary additional assignment as Inventory Supervisor at that site to fill a regular employee's absence without posting the position after 20 days for all of its substitute ranks to consider for bid.

2. Grievant herein held full-time regular employment as a custodian at another site and grieved that the position had not been posted as a vacancy or "newly created position" for the consideration of employees at large.

3. When the regular employee passed away and the supervisor position was legally vacant, respondent posted it as a half-time position.

4. Grievant did not bid on the position as he believed he would have had to resign his full-time employment. He did not inquire about the matter to school officials.

5. Grievant amended the relief he sought when he initially filed the grievance at level four and asked only for the difference in his custodian salary and what he would have earned as Inventory Supervisor, \$90 per month, from the time the absent employee originally took leave until the position was posted and filled.

6. At level four, respondent's superintendent assured grievant that it was possible for a full-time employee to bid on and be awarded a half-time position and subsequently resign only one-half of the held full-time employment to accommodate the new employment.

#### CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Piscitani/Pugh v. Hancock Co. Bd. of Educ., Docket No. 15-88-042-3 (April 24, 1989); Butler v. McDowell Co. Bd. of Educ., Docket No. 33-88-208 (March 31, 1989).

2. Pursuant to W.Va. Code §18A-4-15, when an absent employee's services are deemed necessary, a substitute service employee shall be hired to fill the temporary vacancy of the absent service employee.

3. When a substitute is employed to maintain normal staffing, the substitute service employee may be assigned to perform the duties of a regular service employee not absent from work but filling the job of an absent employee in the same service classification and work site. W.Va. Code §18A-4-15(6); Adams v. Doddridge Co. Bd. of Educ., Docket No. 09-87-152-3 (August 20, 1987).

4. Respondent correctly preserved a position for an absent employee but erred when it did not post the position as temporary employment after 20 days for its substitute employee ranks to consider for bid. W.Va. Code §18A-4-15(2).

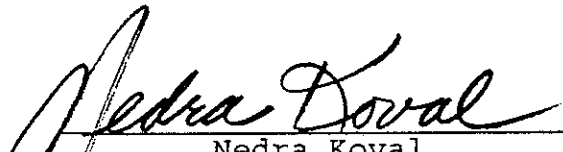
5. Regular employees should not normally be considered for temporary substitute employment via W.Va. Code §18A-4-15(2) inasmuch as a permanent position vacancy does not exist.

6. Grievant, a regular employee, failed to establish that he was entitled to a monetary award for wage differential in this matter.

Accordingly, this grievance is DENIED.

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

DATED: June 29, 1989

  
Nedra Koval  
Hearing Examiner