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**WANDA OOTEN**

**v.**

**Docket No. 89-29-230**

**MINGO COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Wanda Ooten, is employed by the Mingo County Board of Education (Board) as a cook assigned to Chafin Grade School (CGS). She filed a grievance at Level I December 8, 1988, protesting her nonselection for an aide position at CGS. Her immediate supervisor ruled he had no authority to grant the relief requested and the grievance was denied at Level II following a hearing held May 3, 1989.<sup>1</sup> The Board waived Level III proceedings May 22, 1989, and a Level IV hearing was held July 14, 1989. The parties declined to submit proposed findings of fact and conclusions of law.

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<sup>1</sup>There was no explanation made for the delay in holding this hearing. The record reveals grievant filed her appeal to Level II December 15, 1988.

The facts giving rise to the grievance are undisputed. In November 1988 the position in question was posted and eight persons, including grievant, initially notified Mr. John Fullen, the Board's Personnel Director, of their desire to be considered for the job.<sup>2</sup> Of the applicants grievant and a part-time custodian at CGS were the only ones regularly employed by the Board. The others were either substitute aides or cooks. The Board ultimately accepted the recommendation of Mr. Harry Cline, Superintendent of Schools, that Ms. Rosetta Spaulding, a substitute aide, be awarded the position. At the time Ms. Spaulding had worked as a substitute aide a total of seven days since she had first signed a contract with the Board at the beginning of the 1985-86 school term.

Grievant contends she was the more qualified candidate for the position and the Board's decision to hire Ms. Spaulding was in direct contravention of W.Va. Code §18A-5-8(d), which in pertinent part provides:

Notwithstanding the provisions of section eight-b [~~§18A-4-8b~~], article four of this chapter, an aide shall be employed on the basis of (1) qualifications, including, but not limited to, education, training and experience, and (2) seniority. Qualifications shall not include additional college credits beyond that currently required. With regard to such qualifications, the county board shall establish and make available to service personnel a written policy to be used when regular service personnel who are employed in a

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<sup>2</sup>No formal applications were completed and various letters from the applicants noted only their interest in the position and, in some cases, a very brief employment history.

different category of employment other than an aide are to be employed in an aide position.

In support of her assertion, grievant cites her excellent overall high school grade point average and seventeen years service as a cook, which entailed a great deal of work with grade school children.

The Board's position is difficult to discern as the testimony of Mr. Fullen revealed a great deal of confusion on both his and the Board's part over the meaning of the above-cited statutory provisions and how they were applied when the position was filled.<sup>3</sup> He stated the position was filled on the basis of qualifications and essentially made no other response to questions concerning what was considered the relevant qualifications of the applicants. His testimony did show that no interviews sufficient for exploring those qualifications were held and that four applicants were not given consideration because "they were either substitute cooks or custodians". Because one of the remaining four candidates withdrew her application, only grievant and two substitute aides were considered for the position. When

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<sup>3</sup> Adding to this confusion was Mr. Fullen's appearance at the Level IV hearing as the Board's representative, as well as a witness subpoenaed by the grievant. The difficulties inherent in such a situation were made obvious by Mr. Fullen's understandable inability to separate his answers to direct questions from an articulation of the Board's legal position. It should be noted that in the future the undersigned may be obligated, upon objection, to require the Board to name as its representative a person not called as a witness or having substantial involvement in the circumstances giving rise to a grievance. See W.Va. Code §18-29-6(b).

asked if the seven days Ms. Spaulding worked as an aide were considered a qualification, Mr. Fullen responded "that is not correct". It was also apparent from his testimony that the Board has no reasonably defined policy which provides the criteria by which one achieves placement on a substitute aide list.<sup>4</sup> Also clear was the fact that the Board had not yet complied with the provisions of W.Va. Code §18A-5-8(2) requiring it to establish and distribute a policy to be used when regular service personnel who are employed, as is grievant, in a different category of employment other than an aide are to be employed in an aide position.

As there was no testimony elicited from either Mr. Fullen or grievant which indicated any manipulation of the selection process in favor of the successful applicant, it can only be concluded that this was not the case. It is obvious, nonetheless, that the process was severely flawed.

The exclusion from consideration of four applicants simply because they hold titles of substitute cook or custodian indicates the decision to hire Ms. Spaulding could not have been in accordance with the mandate of W.Va. Code §18A-5-8(2) that aide

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<sup>4</sup>Mr. Fullen did say he talked to persons wanting to work as substitute aides and, if they had a high school diploma or G.E.D., their names were generally passed along to the Board for approval. From his further testimony it appears regularly employed aides were required to attend in-service training before entering into their duties but substitutes were not because of the Board's conclusion that "court rulings" mandated payment for any time spent at such training.

positions be filled on the basis of qualifications. The failure to conduct interviews or even simply review aspects of the applicants' backgrounds other than their classification and seniority with the Board is also supportive of this conclusion. Finally, Mr. Fullen's testimony that Ms. Spaulding's time worked as an aide was not considered a factor reveals that not only were not qualifications assessed, they most likely had no bearing on the filling of the position.

Ordinarily, a finding that the process by which a position was filled was seriously flawed would require a new evaluation of applicants. Milam v. Kanawha County Board of Education, Docket No. 20-87-270-1 (May 2, 1988). Such relief would, however, be of little benefit to the grievant since she would still be without the policy required by W.Va. Code §18A-5-8(2) instructing her as to what steps she would have to take in order to become qualified for an aide position. Inasmuch as it was the Board's failure to adopt the policy and conduct a fair assessment of the respective qualifications of the applicants, it would be inequitable to deny the grievant the position.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

#### FINDINGS OF FACT

1. Grievant, a cook employed by the Mingo County Board of Education for the past seventeen years, along with seven other persons, applied for the posted position of aide at Chafin Grade School in November 1988.

2. The Board accepted the recommendation of Mr. Harry Cline, Superintendent of Schools, that Ms. Rosetta Spaulding, a substitute aide with seven days' experience, be awarded the position.

#### CONCLUSIONS OF LAW

1. A county board of education must fill vacancies in aide positions primarily on the basis of qualifications. W.Va. Code §18A-5-8(d). Accordingly, such positions are exempt from the provisions of W.Va. Code §18A-4-8b(b) requiring school service personnel positions to be filled in the order contained therein.

2. A county board of education has substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel but that discretion must be exercised reasonably in the best interests of the schools and in a manner which is not arbitrary and capricious. Dillon v. Board of Education of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

3. The exclusion from consideration of four applicants for the position in question and the Board's failure to adequately assess the qualifications of all applicants rendered its decision to award Ms. Spaulding said position an arbitrary and capricious action.

4. W.Va. Code §18A-5-8(d) requires a county board of education to establish a written policy to be used when


service personnel who are employed in a different category of employment other than an aide are to be employed in an aide position. At the time the position at CGS was filled, the Board had not adopted such a policy.

5. The failure of the Board to adopt the policy and the manner in which qualifications of applicants were ascertained effectively prevented the grievant from receiving the position.

Accordingly, the grievance is **GRANTED** and the Mingo County Board of Education is hereby **ORDERED** to instate the grievant into the position of Aide at Chafin Grade School and to compensate her for any loss of wages she may have incurred less any appropriate set-off.

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

  
JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: August 23, 1989