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

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CHARLES F. KEMPLIN

and

KENNETH WOLFE

v.

Docket Nos. 89-20-582/89-20-583

**KANAWHA COUNTY
BOARD OF EDUCATION**

D E C I S I O N

Grievants, employed by Respondent Kanawha County Board of Education as service personnel, initiated grievance proceedings in Summer 1989, alleging that Respondent violated W.Va. Code §18A-4-8b in awarding the position of Supervisor of Maintenance-General Crafts [Supervisor] to a "less senior" employee. The Level I evaluators waived consideration, due to lack of authority, and the grievances were heard together at Level II, where they were denied. Consideration was apparently waived at Level III, and Grievants appealed to Level IV. The grievances were consolidated and were heard January 16, 1990. With receipt of

proposed findings of fact and conclusions of law,¹ this matter may be decided.

Grievants cite the legal rule, "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," and allege that each of them had greater seniority than the successful applicant for the position, William Hughart, because, while he has been employed by Respondent as a heavy equipment operator and truck driver since 1979, Grievant Kemplin has worked for Respondent as a painter since 1978 and Grievant Wolfe has been employed as a brick mason by Respondent for sixteen years, continuously since 1980 and previously for seven years.² Respondent, agreeing at the Level IV hearing that the Supervisor job is a service position, contended, as it

¹Proposals only from Grievants have been received. Respondent has apparently waived its briefing rights since the date for mailing proposals, February 14, 1990, has passed and none have been received from it.

²At the Level IV hearing Grievant Kemplin acceded that Grievant Wolfe, having worked for Respondent longer than he had, was entitled to the position. However, since he did not withdraw his grievance at the hearing and, as discussed infra, his conceding of Grievant's Wolfe's better entitlement to the position is based on a misunderstanding of the law, Grievant Kemplin's grievance has not been dismissed. Both Grievants contend that, although another applicant for the position had worked for Respondent longer than they, Grievant Wolfe was entitled to the position because that applicant had not filed a grievance.

has throughout these proceedings, that it was entitled to hire the most qualified applicant for the job.³

Respondent's view has been rejected previously, recently in another case in which it was the respondent, Basham v. Kanawha Co. Bd. of Educ., Docket No. 89-20-581 (Nov. 21, 1989), where it was stated,

[T]he law does not allow [a] board of education to hire service personnel on the "most qualified" basis so clearly enunciated for professional educational staff in Code §18A-4-8b(a). Instead, as long as a person meets the minimal standard, i.e., holds a classification title in his category of employment or meets the definition of the Code §18A-4-8 job title, he is qualified, and, as long as his evaluations of past service are acceptable, he must be selected for the position if it is filled at all if he is the most senior applicant, as defined above.

Grievants therefore state the proper rule of law.

Apparently because Respondent did not consider whether Grievants were qualified for the position as critical for disposition,⁴ the issue was not addressed until Level IV,

³At hearing Respondent relied on Bd. of Educ. v. McNeel, C.A. # 85-Misc-403 (May 4, 1988). In Gillespie v. Kanawha Co. Bd. of Educ., Docket No. 89-20-684 (Jan. 17, 1990), Respondent's contention that McNeel is authority that a "most qualified" standard is appropriate was rejected, as follows: "Although the successful applicant in that case, who was allowed to retain his position thereby, earned a higher score than the complainant on the qualifying examination, the complainant was not qualified in the first instance. Therefore, McNeel does not stand for the proposition posed[.]"

⁴Grievants submitted copies of their most recent evaluations showing "commendable" ratings, which established that their evaluations were satisfactory. Respondent conceded that Grievants were more senior than the successful applicant. The correctness of the concession is not addressed here.

where at hearing Respondent's Counsel, in response to an inquiry of the undersigned whether Respondent was conceding Grievants were qualified, merely responded that their lack of supervisory experience "may have disqualified" them.

Moreover, the record is limited on the issue, establishing that Grievants did not hold the class title of "Supervisor of maintenance," nor had they previously held the position. It is also uncertain from this record whether they met the definition of that class title, which requires the ability to carry out supervision of maintenance personnel. This record actually fails to even establish whether supervisory experience was required for the job because the vacancy announcement, which would normally provide the minimal required qualifications for the job, was not submitted into the record.

Grievant Wolfe testified⁵ that he had been a "crew leader" during his first stint with Respondent, but only with one individual under him. He also testified that he was familiar with what plasterers and general maintenance men do, having forty years experience in the building trades, and, although he had not worked with heavy equipment, he believed he could act as a supervisor in the trades discussed. Grievant Kemplin testified that he had filled in

⁵All testimony referred to is from the Level II hearing transcript. At Level IV the parties agreed that that evidentiary record should be considered, merely supplemented by Mr. Hughart's testimony at Level IV.

for the regular supervisor when absent, indicating that he alone had had that responsibility for five years but stating that since four years ago it has been rotated among the workers. He also stated he had knowledge of crafts other than painting since he had had different construction jobs in private industry prior to his employment with Respondent. Asked if he had supervisory experience, he replied, "Nothing more than just jobs that I took on my own outside where I would hire people to work for me," adding that he had had as many as three men under him. When asked why he considered himself qualified for the position he acknowledged that he did not know all the crafts "because I don't believe one individual could know thoroughly that many different crafts. But I have a general knowledge of all the crafts."

David Sneed, Acting Assistant Superintendent for Planning and Operations, who had served on the committee which interviewed the candidates, testified, contrary to Grievant Kemplin's testimony that he could read blueprints, that during the interview Grievant Kemplin had indicated he did not know how to read blueprints and also that he had not had experience in procuring materials, filling out purchase requisitions, or writing orders for materials. His testimony did not further indicate whether or not Grievants were qualified but was instead directed to why Mr. Hughart's experience in running his own construction business better suited him for the job.

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

Findings of Fact

1. Grievants Wolfe and Kemplin, employed by Respondent, respectively, for approximately sixteen years as a brick mason and eleven years as a painter, applied for the service position of Supervisor of Maintenance - General Crafts.

2. Respondent selected William Hughart, employed by it as a heavy equipment operator for approximately ten years, on the grounds that he was most qualified for the position by his experience in running his own construction business, which involved supervision.

3. Neither Grievant had previously been the Supervisor of Maintenance - General Crafts nor did either hold the class title of "Supervisor of maintenance."

4. The record does not establish what were the required qualifications for the position of Supervisor of Maintenance - General Crafts" and whether Grievants were qualified for it. However, the lack of evidence on the issue may have been due to the fact that Respondent relied on its contention that they were less qualified than the successful applicant and did not defend on the grounds that they were not qualified.

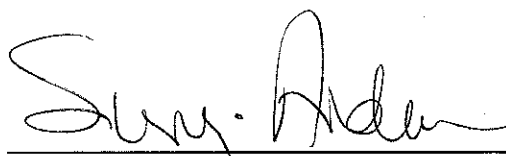
Conclusion of Law

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. Basham v. Kanawha Co. Bd. of Educ., Docket No. 89-20-581 (Nov. 21, 1989), and cases cited therein. "There is no 'most qualified' standard for service personnel hirings under [W.Va.] Code §18A-4-8b(b)." Basham.

Accordingly, this grievance is **GRANTED** only insofar as further consideration of Grievants' entitlement to the position is ordered. Respondent is ORDERED to determine if Grievants were qualified for the position of Supervisor of Maintenance - General Crafts and to place in that position a Grievant if he was qualified for the position at the time of posting and is more senior than the other Grievant and Mr. Hughart.

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

A handwritten signature in cursive script, appearing to read "Sunya Anderson", is written above a horizontal line.

SUNYA ANDERSON
HEARING EXAMINER

Date: March 19, 1990