FRANK RAKES

v. Docket No. 93-41-448

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

The grievant, Frank Rakes, is employed by the Raleigh County Board of Education (Board) as a homebound teacher. He filed a grievance September 1, 1993, protesting his nonselection for a social studies teaching position at Woodrow Wilson High School (WWHS). His supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held September 13, 1993. The Board, at Level III, waived consideration of the matter and an appeal to Level IV was filed October 28, 1993. A hearing was held January 13, 1994 and the parties submitted proposed findings of fact and conclusions of law by January 28, 1994.

There is essentially no dispute over the facts of the case. The grievant has been employed by the Board for approximately twenty-seven years, most of which was served as a social studies teacher at Shady Springs High School (SSHS). His performanceduring his tenure there was generally rated high and prior to 1991 he had not been the subject of disciplinary action. SSHS Principal James Richmond gave him overall scores of "Exceeds Standards" on his 1989-90 and 1990-91 evaluations.

On or about October 1, 1991 the grievant, while off-duty, was involved in a traffic accident and was charged with driving under the influence of alcohol. It was subsequently determined that S. B., a sixteen-year old female SSHS student, was a passenger in his car at the time of the accident (See footnote 1). By letter dated October 4, 1991, Superintendent of Schools Dwight Dials suspended the grievant with pay pending a more complete investigation of the incident. In an October 9, 1991 letter, Mr. Dials advised the grievant that he was suspended for twenty-eight days without pay for "immorality, intemperance, willful neglect of duty and insubordination."

Mr. Dials sought confirmation of the suspension during an October 15, 1991 meeting of the Board. (See footnote 2) Apparently, there was much discussion at this meeting over the seriousness of the grievant's behavior and the propriety of the punishment imposed with at least one member

proposing a more severe penalty. Evidently, Mr. Dials' representations that a twenty-eight day suspension was adequate were persuasive as the grievant wasadvised, via an October 22, 1991 letter, that the Board had approved the disciplinary measure. The grievant did not protest the suspension.

On or about January 28, 1992, the grievant was again charged with driving while under the influence of alcohol. Subsequently, in a meeting with the grievant and his West Virginia Education Association representative, Superintendent Dials advised the grievant that his continued employment was in jeopardy unless he immediately sought professional help and strongly suggested that he take a medical leave of absence. (See footnote 3) The grievant agreed. Mr. Dials confirmed the substance of their conversation in a January 29, 1992 letter to the grievant and it appears his leave began on that date. He did not work the remainder of the 1991-92 school term. Principal Richmond submitted an evaluation form dated June 4, 1992, to the Board's central office which merely noted, "Teacher on extended medical leave. Not present for evaluation."

During the summer of 1992, the grievant approached Mr. Dials about returning to his position at SSHS in the fall and was advised that he could not return to any teaching position until he obtained a release from his doctor. After the grievant provided an August 25, 1992 release, his attorney and Board counsel reached an agreement whereby the grievant would be assigned to the homebound teaching position he presently holds and be evaluated on or before April 1, 1993. The agreement further provided that if hisperformance was evaluated favorably he would "be free to bid on any subsequent vacancies." In return, the grievant pledged to continue whatever treatment his doctor prescribed and not to have any contact whatsoever with S.B. The grievant received an overall rating of satisfactory on an April 7, 1993 evaluation.

On August 2, 1993, the Board posted the social studies teaching position at WWHS in issue. The only requirement for the position was a teaching certificate for Social Studies, grades 9 through twelve. Twenty-three persons, including the grievant, made timely applications. The Board's Director of Personnel, Emily Meadows, reviewed the applications and determined that eight persons, including the grievant, met the criteria in the posting. (See footnote 4) She then developed a matrix whereby the applicants were assigned a numerical value from 1 to 8 in each of the following seven categories: Appropriate certification and/or licensure; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly

related to the performance of the job as stated in the job description; total amount of teaching experience; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority. In any category in which all the applicants were deemed equal or "tied", all received scores of 4.5, the average of the total allowable points in a given section. The applicants were considered tied in the first five categories and all received scores of 4.5 therein.

The grievant, with twenty-seven years of employment with the Board, received a score of eight in the seniority category; applicant Cynthia Blevins, who had twenty-two years, received a seven rating in that category; and the remaining applicants, who had less seniority, received scores in that section ranging from six to one. The grievant also received a score of 8 in the "total amount of teaching" section. All applicants save the grievant and Bill Richmond were considered tied in the "evaluation" category and thus were given scores of 5.5 (33, the total of the top six scores available, divided by six). The grievant's 1.5 rating (3, the total of the last two scores available, divided by 2) in this section was due to Ms. Meadows' determination that he had received no evaluation for the 1991-92 school year and that W.Va. Code §18A-4-7a mandated that under those circumstances he not be assigned the same score as the other applicants. The grievant received an overall score of 35.5 and Ms. Blevins received a total of 37.5. The remaining applicants received scores ranging from 35.5 to 28.5.

Prior to the completion of Ms. Meadows review of the applicants' credentials and relative rankings, the grievant's application for the position became known to Board members, employees on the WWHS staff, and members of the community. Board members and Superintendent Dials began receiving calls from individuals opposed to the grievant's appointment to the post. In reaction to the calls, and perhaps its own concerns over thegrievant's fitness for the job, the Board, in an August 24, 1993 meeting, convened an executive session with Ms. Meadows and the superintendent. During the meeting Ms. Meadows advised the Board that the review of applicants and a recommendation would be made in accordance with applicable law and that the review had not then been completed. The Board then informed her and the superintendent that it would not accept a recommendation that the grievant be awarded the job and directed her to so advise him. Ms. Meadows then represented to the members that it appeared that Ms. Blevins might be recommended and the Board directed her to call Ms. Blevins to see if she would accept. According to Ms. Meadows' Level IV testimony, she made the call and then advised the members that Ms. Blevins declined to make a commitment at that time. The conclusion that the grievant should receive a 1.5 ranking in the evaluation category was reached

subsequent to this Board meeting.

On or about September 3, 1993 Ms. Meadows and Principal Hall recommended to Superintendent Dials that Ms. Blevins be awarded the job. The Board ultimately accepted Mr. Dials' recommendation to that effect.

The grievant first contends that the Board did not give equal weight to the seven criteria as mandated by Code §18A-4-7a in that scores from 1 to 8 were used instead of 1 and 0 rankings. The grievant points out that had a 1 and 0 system been used, the grievant would have achieved a higher total than Ms. Blevins regardless of the score assigned him in the evaluation section. Second, he asserts that the 1 to 8 system was a deviation from theBoard's past practice and was used to eliminate him from consideration. Third, the grievant takes exception to the Board's August 24, 1993 directive to Ms. Meadows and asserts that it improperly interfered with the selection process. Finally, he maintains that it would have been in keeping with the intent of the pertinent provisions of Code §18A-4-7a, for the Board to have looked to his satisfactory 1990-91 evaluation to determine his score in that category when it deemed his 1991-92 evaluation unacceptable. The grievant seeks instatement to the position as relief.

The Board asserts that there was no impropriety in the scoring system used by Ms. Meadows and that the pertinent statute is clear on which personnel evaluations are to be used in the selection process. The Board contends the statute does not permit reference to evaluations prior to the previous two school years and that such resort would be particularly improper where the reason for the employee's absence was misconduct on his part. For reasons hereinafter discussed, the undersigned concludes that the grievant must prevail.

It is clear that but for Ms. Meadow's determination that Code §18A-4-7a mandated that the grievant not receive the allowable points in the evaluation category, he would have achieved a higher total score than Ms. Blevins. (See footnote 5) Thus, if that determination wasin error, the grievant's instatement to the position is the appropriate relief.

"The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent. In case the board refuses to employ any or all of the persons nominated, the superintendent shall nominate others and submit the same to the board at such time as the board may direct."

W.Va. Code §18A-2-1. This language effectively divides the power to hire equally between the

superintendent and the county board. No person may be appointed to a professional position until both have exercised their authority under the statute. Implicit in the statute is that the respective roles in the hiring process must be distinct, i.e., that the superintendent must exercise his statutory duty to nominate independent of the county board and that the board, in fulfilling its obligations under the statute, must reject or accept without undue influence from the superintendent. Otherwise, the division of authority is rendered meaningless.

In the present case it is entirely understandable that the Board had concerns over the grievant's application for the position in issue but it was nevertheless contrary to the intent of the statute for its members to direct Superintendent Dials not to nominate the grievant. Perhaps more disturbing is that the Board, through its order to the superintendent to communicate to the grievant its premature decision to reject his candidacy, was apparently attempting to dissuade the grievant from even exercising his right to apply for the position. Clearly, he possessed suchright pursuant to statute and by virtue of his adherence to the agreement reached with the superintendent. (See footnote 6) Whether or not the Board's directives actually interfered with or influenced the superintendent's assessment of applicants and his ultimate nomination is irrelevant. The directives were per se violations of Code §18A-2-1. This finding alone would entitle the grievant to relief.

While it is true that a 1 and 0 system would have produced different results than that used, there is nothing inherent in the latter which renders it violative of the mandate in Code §18A-4-7a that the criteria listed therein be afforded equal weight. Both numerical systems achieve that end. Further, while the Board's August 24 actions and Ms. Meadow's subsequent determinations regarding the grievant's personnel evaluations give rise to a strong inference that the 1 through 8 procedure was chosen in orderto eliminate the grievant from meaningful consideration, the testimony of Ms. Meadows at Level IV adequately established that she elected to use that system for other reasons. Her review of matrix sheets used in past hiring decisions (Grievant's Exhibits 1 through 15) was rather detailed and essentially demonstrated that the 1 and 0 process was used primarily when there were fewer than four applicants for a particular job and the higher point system was used when a larger field of candidates was available.

Code §18A-4-7a, ¶1 provides that when one or more regularly employed teachers apply for a vacancy, a county board of education must consider, among other things, whether the applicants received "an overall rating of satisfactory in evaluations over the previous two years." It appears that

the parties are in agreement that this language references school and not calendar years. Certainly, the lack of clarity on this point constitutes an ambiguity which requires interpretation of the language. See Lavender v. McDowell County Bd. of Educ., 327 S.E.2d 691 (W.Va. 1984).

Depending on the evaluation schedule of a particular county board of education and fluctuations therein, and the date a given job is posted, imposing a calendar year interpretation on the statute could effectively eliminate from consideration a great many applicants who received favorable evaluations during their previous two employment terms. For example, an employee who is given a favorable evaluation on or before April 30, 1991 for his 1990-91 school year service and receives a similar evaluation during calendar year 1992 for his 1991-92 service would be ineligible forconsideration for a position posted May 1, 1993, if he had not then been evaluated for his performance during the 1992-93 term. Since the overall purpose of Code §18A-4-7a is to insure that qualified persons are selected for professional positions and a calendar year interpretation would be contrary to that purpose, it must be concluded that the statute contemplates school years. The import of the remainder of the language is the more pertinent consideration and it also is ambiguous as to require analysis under Lavender. Further, the analysis is guided by the West Virginia Supreme Court of Appeals' mandate in Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), that "school personnel laws are to be strictly construed in favor of personnel."

W.Va. Code §18A-2-2a speaks to leaves of absence of employees of a county board and since it addresses, through the use of broad language, the right of an employee to bid upon other jobs, it must be read in pari materia with that portion of Code §18A-4-7a in issue. See Farley v. Zapata Coal Corp., 281 S.E.2d 238 (W.Va. 1981). Code §18A-2-2a, in pertinent part, provides,

> Any teacher who is returning from an approved leave of absence that extended for a period of one year or less shall be reemployed by the county board with the right to be restored to the same assignment of position or duties held prior to the approved leave of absence. Such teacher shall retain all seniority, rights and privileges which had accrued at the time of the approved leave of absence, and shall have all rights and privileges generally accorded teachers at the time of the reemployment.

It is clear from this language that an employee returning from a leave of absence has the right to benefits possessed prior to the commencement of the leave and any rights bestowed upon otherteachers during his absence. The right to rely on one's past favorable evaluations is certainly a benefit contemplated by the statute. Thus, to interpret Code §18A-4-7a, ¶1 as excluding persons

who have been on leave of absence from consideration for vacancies on the basis that they had not received satisfactory evaluations during the two school terms immediately preceding a posting would, at the very least, impose a restrictive interpretation on Code §18A-2-2a. Such a finding would be contrary to the basic rule of statutory interpretation that statutes which address the same subject matter should be read in such a fashion as to give both effect. See Smith v. State Workmen's Comp. Commissioner, 219 S.E.2d 361 (W.Va. 1975).

Moreover, Code §18A-4-7a, ¶8, in addressing which professional employees may transfer to a vacancy occurring during an instructional term, specifically provides that "professional personnel who have been on an approved leave of absence may fill these vacancies prior to the next semester." While this provision does not specifically reference Code §18A-4-7a, ¶1, it rather conclusively establishes that the Legislature intended that persons on extended leaves of absence not be penalized in their subsequent bids for vacant positions. This language would also be rendered meaningless if Code §18A-4-7a, ¶1 was interpreted to mean that persons with favorable evaluations during their most recent employment terms must be excluded because they had availed themselves of their statutory right to take a leave of absence. Again, the overall intent of Code §18A-4-7a, ¶1 is to attract qualified individuals and not to deter them.

For the foregoing reasons, it is concluded that when an employee has not received a personnel evaluation due to an authorized leave of absence, a county board must look to his evaluation(s) performed prior to taking such leave when making hiring decisions pursuant to Code §18A-4-7a, ¶1.

Implicit in the Board's position is the assertion that the grievant's leave of absence from January 1992 to the end of the 1991-92 school term was a disciplinary measure necessitated by his off-duty conduct and as such should provide an exception to the statutory scheme. (See footnote 7) It is accepted that in certain circumstances a leave of absence could be of a disciplinary nature and that the employee's lack of an evaluation during the leave might be cause to exclude him from consideration for other posts. The evidence in the present case, however, does not support that the grievant's leave was disciplinary. Indeed, the only evidence tending to support that theory is Superintendent Dials' Level IV testimony that he gave the grievant "no other choice" but to take the leave. Instead, the record reflects that the grievant took the leave to address the emotional and perhaps physical problems which precipitated the off-duty conduct which led to his November 1992suspension and his January 1993 confrontation with the superintendent. Mr. Dials' remarks

merely confirm that he allowed the grievant to take the leave in lieu of imposing additional discipline. Accordingly, it is concluded that the grievant, during the pertinent period, was on an authorized, statutorily permissible medical leave of absence and should not have been penalized for not having an evaluation during that time. Further, it is concluded that the Board should have looked to his 1990-91 evaluation, which was favorable, in determining whether, under Code §18A-4-7a, he had satisfactory evaluations during the preceding two years.

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

FINDINGS OF FACT

1) The grievant, a twenty-seven year employee of the Board, was suspended in November 1991 for off-duty immoral behavior. Specifically, he was arrested for driving under the influence of alcohol and was in the company of a minor Shady Spring High School student at the time.

2) In January 1992 the grievant was again charged with driving under the influence of alcohol. He met with Superintendent of Schools Dwight Dials on or about January 29, 1993 and was either urged or directed to take a medical leave of absence to address the problems which precipitated his off-duty behavior. The grievant acquiesced and was on a medical leave of absence from January 29, 1992 to the end of the 1991-92 school term. The grievant's supervisor tendered to the Board's central office an evaluationform which noted that the grievant was absent and unavailable for evaluation during that term.

3) During the summer of 1992 the grievant approached the superintendent about returning to his former position and was refused. The grievant's counsel and the Board's attorney subsequently reached an agreement whereby the grievant would be assigned to a homebound teaching position; would be evaluated in that position by April 1, 1993; and he would have no further contact with the minor student. The grievant was to have all rights and privileges afforded him by law, including the right to bid upon other positions if his April 1, 1993 evaluation was satisfactory. The grievant's evaluation was satisfactory and he complied with the requirement that he have no contact with the minor student.

4) In August 1993 the Board posted the position of social studies teacher at Woodrow Wilson High School and the grievant made application.

5) Board Personnel Director Emily Meadows and Woodrow Wilson Principal Miller Hall began

an assessment of the candidates per the guidelines of W.Va. Code §18A-4-7a on or about August 10, 1993. Prior to the completion of their assessment, the Board convened on August 24, 1993 and directed Ms. Meadows and Superintendent Dwight Dials not to nominate the grievant for the position. The Board also directed them to communicate to the grievant that it would not accept if he were nominated.

6) Subsequent to the Board meeting, Ms. Meadows completed the ranking of the applicants using a numerical system designed to afford equal weight to the seven criteria listed in Code §18A-4-7a, ¶1. Ms. Meadows concluded that the grievant's absence in 1992 was due to his off-duty misconduct and that he should, therefore, receive a low score in the category "receiving favorable evaluations over the previous two years." The applicant receiving the highest total score in Ms. Meadows' calculations was ultimately awarded the position. But for her conclusion regarding the grievant's evaluations, the grievant would have received the highest score of all the applicants.

CONCLUSIONS OF LAW

1) W.Va. Code §18A-2-1 provides that a county board of education and its superintendent must share equally in hiring decisions. The respective roles of each should remain distinct and it is contrary to the intent of the statute for either to take actions designed to influence or interfere with the other's decision as to which candidate should be appointed to a particular post. Such actions are per se violations of the statute.

2) The Board's August 24, 1993 directives to Superintendent Dials and Personnel Director Emily Meadows regarding the grievant's candidacy for the Woodrow Wilson position were violative of Code §18A-2-1.

3) When one or more regularly employed persons apply for a vacant professional position, a county board must consider, among other things, whether an applicant has received "an overall ratingof satisfactory in evaluations over the previous two years." W.Va. Code §18A-4-7a, ¶1. This language references school and not calendar years.

4) W.Va. Code §18A-2-2a provides that county board employees may take an extended medical leave of absence without pay and that upon their return they are to be given all benefits and rights which they possessed at the commencement of the leave. The statute encompasses the right of an employee returning from a leave of absence to bid upon other positions and to rely upon his

previous favorable evaluations in the selection process.

5) When read in pari materia, Code §§18A-2-2a and 18A-4-7a, ¶¶1 and 8 disclose a legislative intent that applicants for a professional position who have returned from an authorized leave of absence not be penalized for such absence and that the board should consider their most recent personnel evaluations when considering whether the applicant meets the criteria listed in Code §18A-4-7a.

6) Since the grievant's January to June, 1992 leave of absence was authorized by Superintendent Dials, the Board was statutorily obligated to consider his 1990-91 and 1992-93 evaluations, which were overall satisfactory, in determining his relative ranking among the candidates for the position in issue. But for the Board's failure to do so the grievant would have been the lead candidate for the position.

Accordingly, the grievance is **GRANTED** and the Raleigh County Board of Education is hereby **ORDERED** to instate the grievant to the position at Woodrow High School for which he applied.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Raleigh 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 17, 1994

Footnote: 1There being no need to identify the student by name she is referred to herein by her initials only. The record does not reflect whether she was one of the grievant's students at the time of the accident or had previously been one of his students.

Footnote: 2W.Va. Code §18A-2-7 empowers a superintendent of schools to suspend for a period of up to thirty days but requires that he present the matter to the county board of education for its approval.

Footnote: 3*In his Level IV testimony Mr. Dials stated that he gave the grievant "no other choice but to take the leave."*

Footnote: 4*Ms. Meadows was assisted in the assessment of the applicants' credentials by WWHS Principal Miller Hall. It appears that he may have conducted interviews of some or all of the candidates to confirm those credentials.*

Footnote: 5*The grievant would have received a 5 (the total of the top 7 allowable scores divided by 7) in the evaluation category and would have received a total score of 39. Ms. Blevins would also have achieved a 5 on her evaluations for a total score of 37.*

Footnote: 6*At Level IV, Board counsel intimated that there was evidence that the grievant had had contact with S.B. during the term covered by the agreement and thus, had violated the agreement. No such evidence was produced. The grievant's testimony that he did not initiate any contacts with the student was unrebutted.*

It should also be noted that it is doubtful that the agreement was legally enforceable against either party. Essentially, both parties were merely agreeing to do what they were already legally obligated to do. The grievant was pledging to refrain from having a personal relationship with a minor student and perform satisfactorily in the homebound teaching position, terms which were implicit in his contract of employment, and the Board was allowing him to bid upon other jobs, a right he already possessed under statute. It appears, however, that there was an "underlying" agreement to the effect that Superintendent Dials would not pursue further disciplinary action against the grievant if the grievant would cease his contact with S.B. and otherwise take steps, including the leave of absence, to correct the problems which necessitated the previous disciplinary measure. This agreement also was most likely unenforceable since it too lacked consideration.

Footnote: 7*Interestingly, Ms. Meadows testified at the Level II hearing that persons returning from a maternity leave of absence were not penalized in the selection process for not having two satisfactory evaluations preceding a posting.*

It is also noted that the Board does not argue and the record does not support that the grievant's suspension in the fall of 1992 was the reason he was not evaluated.