GENEVA ALIVETO

v. DOCKET NO. 93-H-525

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

Grievant, Geneva Aliveto, employed by the West Virginia Division of Highways, (Department or Respondent) as a custodian, filed a grievance at level one on or about July 16, 1993, in which she alleged "this grievance is being filed due to the selection of the Custodian Supervisor position on bulletin #288. I have the qualifications and experience to fill this position and feel that I should have been selected through upward mobility."

At level one Grievant's immediate supervisor opined that she was qualified for the position but that another employee was selected because he "had some janitorial experience and displayed a positive attitude towards the job." The level two evaluator also concluded that Grievant was qualified for the position but determined that Respondent acted properly in hiring someone from outsidetheDepartment. At level three the hearing Board stated that the evidence did not establish that the successful applicant met the minimum qualifications for the position; however, pending the provisional appointment process and a letter of approval from the Division of Personnel, it would be assumed that the successful applicant was qualified until such time Personnel completed its procedures which would finally determine the matter.

Notwithstanding this finding, the Board further concluded that the evidence established that the position of Custodial Supervisor was neither necessary nor desired by District Four management and that the successful applicant's current job responsibilities were those of a Custodian, not a Custodial Supervisor. Based upon these conclusions, the Board denied the grievance and recommended that the successful applicant either be demoted to custodian or be required to fulfill the job responsibilities of the custodial supervisor.

An appeal was advanced to level four on December 22, 1993. An evidentiary hearing was held on February 3, 1994; a written closing statement was filed by Grievant on February 22 and proposed

findings of fact and conclusions of law were submitted by Respondent on March 7, 1994, at which time this matter became mature for decision. The facts of this matter are as follows. In May 1993, Respondent posted a vacancy in Division Four for the position of Custodial Supervisor. Four applications were received, including those of Grievant and the successful applicant, Jeff Findo. Documentation establishes that Grievant has been employed as a custodian by Respondent since March 1979. From 1963 to 1979 Grievant worked in a beauty shop where her duties included cleaning of floors, windows, mirrors, restrooms, dusting and polishing the furniture and collecting the garbage. Grievant's evaluations for 1992 and 1993 indicates her job performance was satisfactory or above. Respondent does not dispute Grievant's claim that she has functioned as a lead worker, training new employees and bearing the responsibilities for building security.

The successful applicant's application reveals three employment experiences. From October 1988 through March 1989 he was employed as a clerk for the West Virginia Alcoholic Beverage Commission where he "did a little janitor work." He was also employed as a laborer by the Division of Highways from July 1990 to September 1990 and August 1991 to January 1992; his listed responsibilities in this position did not include janitorial work. (See footnote 1) Mr. Findo was subsequently awarded the position of Custodian Supervisor and the grievance ensued.

At the level four hearing Maintenance Supervisor Pat Bruffy stated that he had not requested a custodial supervisor and did not believe that such a position was needed because Grievant essentially filled that role. However, Mr. Bruffy did hope to increase the custodial staff and opined that Mr. Findo was experienced and capable. He also based his decision on the hope that hiring an individual from outside the department would soothe the minor disharmony which sometimes arose between the two custodians employed at the District Four Headquarters.

Grievant argues that the position of Custodial Supervisor was posted establishing that a need existed for such an employee when Mr. Findo was selected. She asserts that she is qualified and that this will perhaps be her onlychance for advancement. Respondent asserts that Mr. Findo did not pass the test for Custodial Supervisor and is no longer employed. It states that a vacancy does not now exist and no future posting for the position of Custodial Supervisor is anticipated. With only two custodians on staff, Respondent has concluded that a supervisor is unnecessary.

Grievant concedes that the selection of Mr. Findo is now moot. Testimony of Respondent's

administrators indicate that the posting of Custodial Supervisor was erroneous. Although it is somewhat curious that this error was not corrected prior to the hiring of Mr. Findo, it is apparent that the position was not needed as evidenced by the level three hearing board's finding that he was not fulfilling supervisory duties. Grievant cannot be awarded a position which does not presently exist and for which there is no need. Contrary to her assertion, it appears there was never a need for a supervisor. Grievant raises the issue of political favoritism in her written summation; however, there is no evidence in the record to substantiate this claim.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the West Virginia Division of Highways since 1979 and is presently assigned as one of two custodians at the District Four offices in Meadowbrook.

2. A posting of Custodial Supervisor was posted in May 1993.

3. Grievant and three other individuals applied for the supervisory position which was ultimately awarded to Jeffrey Findo.

4. Mr. Findo later failed to pass the test required for this position and was dismissed by Respondent.

5. Since Mr. Findo's departure the supervisory position has remained vacant and Respondent does not anticipate posting the position.

6. The position was apparently erroneously posted in May after the Buildings and Grounds Supervisor had requested an additional custodian.

7. The lack of need for a custodial supervisor is demonstrated by the level three hearing board's findings that Mr. Findo performed only custodial, not supervisory duties.

Conclusions of Law

1. In order to prevail in a non-disciplinary matter, a grievant must prove the allegations of the complaint by a preponderance of the evidence. Britner, Millinger and Hessv. W Va. Dept. of Health and Human Resources, Docket No. 91- DHS-059 (April 26, 1994).

2. Grievant failed to prove that she is entitled to a position which is not currently available at her

worksite.

Accordingly, the grievance is **DENIED.**

JULY 26, 1994 SUE KELLER

SENIOR ADMN. LAW JUDGE

Footnote: 1

Respondent offered two letters at level four which establish additional experience not included on Mr. Findo's application. The first letter from the sales manager of Star Motor Company stated "This is to verify the employment of Jeffery Findo with Star Motor Company. His duties included being a used car salesman, making bank deposits, ordering supplies as well as seven months of janitorial work." The second letter stated that Grievant worked at Lou's Auto World from April 1986 to December 1987. "His duties included taking care of inventory, office manager, taking care of bank deposits, managed sales personnel and bills of sale."