

DAVID LEE TETER,

Grievant,

v. DOCKET NO. 95-42-535

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Mr. David Lee Teter (Grievant) filed this grievance against the Randolph County Board of Education (Respondent) following an unsuccessful attempt to secure a posted position. "Grievant alleges that the Respondent violated West Virginia Code §18A-4-15 and §18A- 4-8b in filling a temporary vacancy for a Printroom Operator/Receptionist/[Mail] Clerk [position] with an employee inferior in seniority and employment status." As relief, "Grievant seeks compensation for the days of work he was unable to work in the position in question."

Grievant was denied relief at Levels I and II. Pursuant to W. Va. Code §18-29-4(c), Respondent waived the Level III hearing and appealed the Level II decision directly to Level IV. At Level IV, an evidentiary hearing was scheduled at the Grievance Board's office in Elkins, West Virginia, on February 27, 1996. The case became mature on April 12, 1996, with the receipt of Respondent's post-hearing submission.

BACKGROUND

Grievant has held many different school service personnel positions with Respondent including the printroom operator/receptionist/mail clerk (hereinafter designated "printroom") position in question. He held that position during the summer of 1994. The position had been posted and

Grievant gained regular status while filling in for an employee, Ms. White, who was off work on sick leave.

Prior to Grievant obtaining this position, he was employed by Respondent in a substitute capacity. When Grievant filed this grievance, he was employed by Respondent as a full-time custodian. Ms. White's printroom position was posted the following summer on June 28, 1995. The posting for the printroom position stated that "[t]his position will be a temporary one and work will continue only until August 25, 1995 or may end sooner if the regular employee returns to work."

Grievant, the most senior applicant, was not selected because his custodian contract overlapped with the position in question. His 1995-96 contract with Respondent began on August 21, 1995. The successful applicant was a substitute employee who did not have a continuing contract for the fall of 1995.

DISCUSSION

Even though it is undisputed that Grievant was the most senior applicant, his non-selection by Respondent does not violate W. Va.

Code §18A-4-8b ([See footnote 1](#)) and should not be disturbed. ([See footnote 2](#)) Grievant was ineligible for the printroom position because he was not available to work during the time period specified in the posting. The posting specifically stated: "This position will be a temporary one and work will continue only until August 25, 1995 or may end sooner if the regular employee returns to work." However, Grievant's custodian position began on August 21, 1995. Even though Respondent brought the five day overlap to Grievant's attention, he did not offer to resign his custodian position. Instead Grievant desired to "work it out" by use of annual leave and substitute personnel.

W. Va. Code §18A-4-8b does not require Respondent to accommodate Grievant's schedule. Respondent properly contended that such concessions to Grievant could easily lead to allegations of favoritism, discrimination, etc., by other employees.

For example, in Barber v. McDowell County Bd. of Educ., ([See footnote 3](#)) Docket No. 94-33-405 (Apr. 21, 1995), a classroom teacher protested his non-selection for a summer position. Specifically, Grievant:

complain[ed] that the Board should have made arrangements to accommodate his teaching schedule so that he could have performed the duties of the [new] position. He

suggests that if the board had used other teachers to cover his classes; permitted him to occasionally leave [the school] early; permitted him to take compensatory and annual leave; and/or allowed him to perform at least some of the duties by telephone and at times other than the regular work day, he would have been the most qualified candidate for the post. It is not an exaggeration to say that the grievant believes the Board should have gone to considerable lengths to procure the benefits of his prior Governor's Summer Youth Program experience.

Id. at 2-3. See also, Blume v. Fayette County Bd. of Educ., Docket No. 95-10-560 (Apr. 29, 1996).

The Grievance Board has also addressed this issue in the context of school service personnel in the case of Walls v. Wyoming County Bd. of Educ., Docket No. 95-55-157 (Aug. 29, 1995), wherein the grievance was denied. In Walls, a half-time custodian, working from 3:00 p.m. to 6:30 p.m., filed a grievance after she was not selected for a half-time cook position at a different school in the county.

At the time Ms. Walls made application for the position, she advised the Board's central office that she would not relinquish her half-time custodian position. The Board of Education determined that there would be scheduling conflicts, particularly in the area of state-mandated in-service training, if Ms. Walls were allowed to hold both positions. Walls further states that:

Implicit in the provisions of W. Va. Code §18A-4-8b governing the appointment of school service employees is that an employee making application must be available to assume the duties of a position at the times designated by the Board. See, Barber v. McDowell County Bd. of Educ., Docket No. 94-33-405 (April 21, 1995). When an employee places conditions, such as retention of a currently held position, on his application and those conditions are rejected for reasons which are not arbitrary or capricious, the employee has essentially made no application. Since county board administrators are clearly in a better position to appraise the feasibility of allowing an employee to concurrently occupy two positions, deference should be afforded their determinations in the matter. Id. at 4.

Walls is also similar to the instant case, in that the evidence was "unclear as to whether the grievant was told she would be awarded the position or that she would only be considered therefor if she gave up her Custodian position." Walls, supra at 2. Regardless, while Grievant, in the instant case, did not have to resign from his custodian position to bid upon the printroom position, it was incumbent upon Grievant to inform Respondent that he would resign his current position if he was the successful applicant for the conflicting printroom position.

FINDINGS OF FACT

1. When Grievant filed this grievance, during the 1994-95 school year, he was employed by Respondent as a custodian.

2. A printroom position was posted by Respondent. The posting for the printroom position stated

that "[t]his position will be a temporary one and work will continue only until August 25, 1995 or may end sooner if the regular employee returns to work."

3. Grievant, the most senior applicant, was not selected because his custodian contract overlapped with the position in question for five days, from August 21-25, 1995.

4. Respondent awarded the printroom position to a substitute employee.

CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995). 2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W. Va. 1994). 3. Implicit in the provisions of W. Va. Code §18A-4-8b governing the appointment of school service employees is the premise that an employee making application must be available to assume the duties of a position at the times designated by the Board. See, Barber v. McDowell County Bd. of Educ., Docket No. 94- 33-405 (Apr. 21, 1995).

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Randolph 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.

DATED: May 9, 1996 _____

JEFFREY N. WEATHERHOLT
ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

W. Va. Code §18A-4-8b, in pertinent part, provides:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8], article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Applicants shall be considered in the following order:

- (1) Regularly employed service personnel;*
- (2) Service personnel whose employment has been discontinued in accordance with this section;*
- (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;*
- (4) Substitute service personnel; and*
- (5) New service personnel.*

[Footnote: 2](#)

The record is unclear as to whether the position in question is only a summer position and whether W. Va. Code §18-5-39, entitled "Establishment of summer school programs; tuition," is applicable. Neither party lent any legal significance to this particular Code section in this case. However, this issue does not need to be addressed as the analysis and result would be the same.

[Footnote: 3](#)

Barber involved a professional employee and was decided under the hiring provisions of W. Va. Code §18A-4-7a. The principle on which the ultimate holdings in the case were based, however, is equally applicable here.