

MARY MAYNARD,

Grievant,

v.

Docket No. 96-29-012

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

NADINE SNELL,

Intervenor.

DECISION

Mary Maynard (Grievant), employed by the Respondent Mingo County Board of Education (MCBE) as a substitute custodian, filed a timely grievance pursuant to W. Va. Code §§ 18-29-1, et seq., contesting MCBE's selection of Nadine Snell (Intervenor) for a part-time Custodian I position at Matewan High School (MHS). As authorized under W. Va. Code § 18-29-3(u), Ms. Snell intervened at Level II. A Level II hearing was held on December 28, 1995, and the grievance was denied on January 10, 1996, by John Fullen, the Superintendent's designee. Grievant appealed to Level IV on January 16, 1996, by- passing Level III in accordance with W. Va. Code § 18-29-4(c). Thereafter, a Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on March 2, 1996. This matter became mature for decision following receipt of post-hearing arguments from all parties on May 6, 1996. There is no significant dispute regarding the pertinent facts in this

matter. Accordingly, the following Findings of Fact have been developed from the record created at Levels II and IV.

FINDINGS OF FACT

1. Grievant has been employed by Mingo County Board of Education (MCBE) as a substitute custodian since October 1992.
2. Intervenor was first employed by MCBE as a substitute cook/custodian in 1986. Subsequently, MCBE employed Intervenor as a regular cook in 1991. She was thereafter laid off and placed on the preferred recall list at the end of the 1994-95 school year.
3. On November 7, 1995, MCBE posted a vacancy for a part-time Custodian I position at Matewan High School.
4. Grievant and Intervenor both applied for the Custodian I position described in Finding of Fact Number 3.
5. MCBE selected Intervenor for the Custodian I position, conditioned upon her passing the competency test for the classification of Custodian. See G Ex A.
6. Intervenor was provided inservice training on or about December 18, 1995, and obtained a passing score on the competency test for Custodian on December 21, 1995. See R Ex 1 at L II.

DISCUSSION

In grievances of this nature, Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-8b requires county boards of education to "make decisions affecting promotion and filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." This statute further provides that applicants for vacant service personnel positions are to be considered in order of their current status, with regularly employed personnel receiving preference over persons whose employment has been discontinued and, in turn, those persons having priority over substitute service personnel. See, e.g., Harrison v. Logan County Bd. of Educ., Docket No. 95-23-459 (May 31, 1996); Messer v. Mingo County Bd. of Educ., Docket No. 93-29-479 (Aug. 1, 1994). Further, § 18A-4-8b declares:

No position openings may be filled by the county board, whether temporary or permanent, until all employees on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment.

Also pertinent to resolution of this grievance is W. Va. Code § 18A-4-8e, entitled "competency testing for service personnel," which provides:

The state board of education shall develop and cause to be made available competency tests for all of the classification titles defined in section eight [§ 18A-4-8] and listed in section eight-a [§ 18A-4-8a] of this article for service personnel. Each classification title defined and listed shall be considered a separate classification category of employment for service personnel and shall have a separate competency test, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment and shall have a single competency test. The cafeteria manager class title shall be included in the same classification category as cooks and shall have the same competency test. The executivesecretary class title shall be included in the same classification category as secretaries and shall have the same competency test. The classification titles of chief mechanic, mechanic and assistant mechanic shall be included in one classification title and shall have the same competency test.

The purpose of these tests shall be to provide county boards of education with a uniform means of determining whether school service personnel employees who do not hold a classification title in a particular category of employment can meet the definition of the classification title in another category of employment as defined in section eight of this article. Competency tests shall not be used to evaluate employees who hold the classification title in the category of their employment.

The competency test shall consist of an objective written and/or performance test: Provided, That applicants shall have the opportunity of taking the written test orally if requested. Oral tests shall be recorded mechanically and kept on file. Persons administering the oral test shall not know the applicant personally. The performance tests for all classifications and categories other than Bus Operator shall be administered by a vocational school which serves the county board of education. A standard passing score shall be established by the state department of education for each test and shall be used by county boards of education. The subject matter of each competency test shall be commensurate with the requirements of the definitions of the classification titles as provided in section eight of this article. The subject matter of each competency test shall be designed in such a manner that achieving a passing grade will not require knowledge and skill in excess of the requirements of the definitions of the classification titles. Achieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title. Once an employee passes the competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b [§ 18A-4-8b] of this article and shall not be required to take the competency test again.

An applicant who fails to achieve a passing score shall be given other opportunities to pass the competency test when making application for another vacancy within the classification category.

Competency tests shall be administered to applicants in a uniform manner under uniform testing conditions. County boards of education shall be responsible for scheduling competency tests and shall not utilize a competency test other than the test authorized by this section.

When scheduling of the competency test conflicts with the work schedule of a school employee who has applied for a vacancy, said employee must be excused from work to take said competency test without loss of pay.

A minimum of one day of appropriate inservice training shall be provided employees to assist them in preparing to take the competency tests.

Competency tests shall be utilized to determine the qualification of new applicants seeking initial employment in a particular classification title as either a regular or substitute employee.

Notwithstanding any provisions in this code to the contrary, once an employee holds or has held a classification title in a category of employment, that employee shall be deemed as qualified for said classification title even though that employee no longer holds that classification.

The requirements of this section shall not be construed to alter the definitions of class titles as provided in section eight of this article nor the procedure and requirements of section eight-b of this article.

The testing procedures of this section shall be implemented effective the first day of July, one thousand nine hundred ninety-one. (Emphasis added).

It is understandable that Grievant believes she was the most qualified applicant for the part-time custodian position at issue, because she was working for MCBE as a substitute custodian, and she was performing her duties in a satisfactory manner. However, vacant school service personnel

positions must be filled by county boards of education in compliance with specific statutory provisions governing this category of employment. See Webster County Bd. of Educ. v. Johns, 191 W. Va. 664, 447 S.E.2d 599 (1994). In this particular case, the undersigned finds that MCBE's selection of Intervenor for the vacancy at issue was made in compliance with W. Va. Code §§ 18A-4-8b and 18A-4-8e.

In reaching this conclusion, the undersigned finds that as a laid-off employee on preferred recall status, Intervenor had priority over Grievant when competing for any service personnel job for which either of them could qualify based upon the priorities set forth in W. Va. Code § 18A-4-8b. See Messer, supra. It is further noted that Intervenor previously worked for MCBE as a substitute cook and custodian. W. Va. Code § 18A-4-8e specifically provides that an employee who has held a classification title of employment remains qualified to hold that title. It is not clear why MCBE felt obliged to require Intervenor to take the competency test for Custodian. However, having obtained a passing score on that examination, Intervenor became the "best-qualified" applicant for the vacancy as contemplated by §§ 18A-4-8b and 18A-4-8e, even if she had not held the Custodian classification at an earlier date.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving the allegations in her complaint by a preponderance of the evidence. Weaver v. Mason County Bd. of Educ., Docket No. 94-26- 129 (Nov. 22, 1994); Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. W. Va. Code § 18A-4-8b requires county boards of education to consider applicants for vacant school service personnel positions in order of priority with "service personnel whose employment has been discontinued" receiving preference over "substitute service personnel."

4. Under W. Va. Code § 18A-4-8e, once an employee has held a particular school service

personnel classification title, that employee remains qualified for such classification.

5. W. Va. Code § 18A-4-8e provides that an applicant for a school service personnel position who passes the competency test for a classification title shall be fully qualified to fill vacancies in that classification category of employment as provided in W. Va. Code § 18A-4-8b. See Sargent v. Cabell County Bd. of Educ., Docket No. 96-06-090 (May 2, 1996); Hawken v. Hancock County Bd. of Educ., Docket No. 95-15-577 (Apr. 29, 1996).

6. Grievant failed to establish by a preponderance of the evidence that MCBE violated W. Va. Code §§ 18A-4-8b, 18A-4-8e, or any other law, rule or regulation, in selecting Intervenor from the preferred recall list to fill a vacant part-time Custodian position at Matewan High School. See Harrison v. Logan County Bd. of Educ., Docket No. 95-23- 459 (May 31, 1996).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 28, 1996