

DONNA HEADLEY,

Grievant,

v.

Docket No. 96-52-024

WETZEL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Donna Headley, Grievant, a substitute custodian, is challenging the action of the Board of Education of Wetzel County (hereinafter Board or Respondent) in employing a less senior applicant as a Custodian II at New Martinsville School. As relief, Grievant seeks reinstatement into the position with retroactive wages, benefits and regular employment seniority from the date of the incumbent's promotion to the Custodian II position. This grievance was denied at Level I and Level II and was appealed directly to Level IV. The parties agreed to submit the grievance for decision on the record on January 22, 1996. The matter became mature for decision with the submission of fact/law proposals on or before March 15, 1996.

FINDINGS OF FACT

1. Grievant has been employed by the Wetzel County Board of Education as a substitute custodian since November 29, 1989.
2. On or about August 25, 1995, Wetzel County Schools posted a Custodian II position at New Martinsville School.
3. Grievant applied for the posted position and was interviewed by Principal Larry West.
4. Grievant was not selected for the Custodian II position at New Martinsville School. The successful applicant has worked with the Board as a substitute custodian since October 29, 1990.
5. The posted position requires, among other responsibilities, that the custodians shovel snow from sidewalks. In addition, the custodians have the responsibility of raising various flags including

the United States flag, the West Virginia State flag, and the "D.A.R.E" (Drug Abuse Resistance Education) flag.

6. Grievant was questioned in her interview for this position as to whether she could shovel snow, climb ladders, fold lunch tables and run a high speed buffer.

7. Grievant indicated during her interview for the posted Custodian II position that she would have difficulty folding the "old-type" lunch tables with stools in the cafeteria by herself and cleaning and replacing lights in the gym because of the height which is twenty-seven (27) feet. Grievant stated she can climb but not that high and that she would need someone at the bottom of the ladder.

Grievant also stated that she was skeptical of her ability to shovel snow. 8. When Grievant had been called in the past to work as a substitute custodian, someone would help her lift the "old-type" lunch tables.

9. On September 13, 1994, after Grievant was instructed to hang the three flags, she hung two flags, the West Virginia State flag and the "D.A.R.E" flag upside down. Assistant Principal Brian Jones assumed that Grievant would "re-hang" the flags in the correct manner and Grievant failed to do so. As a result, a "Letter of Documentation" was placed in her personnel file regarding the incident. (Administration Exhibit #2).

10. Grievant has received only two evaluations while working as a substitute custodian. Grievant's most recent performance evaluation was in September, 1992. In the latest evaluation, there were deficiencies in six (6) areas including: deficient in following the daily schedule of the regular employee; deficient in taking the initiative in going beyond the minimum acceptable standards; deficient in the area of accepting responsibility for getting any assignments completed; deficient in the area of following instructions of the supervisor to the letter and completing tasks as required; deficient in the area of coordinating work with others at the job site; and deficient in insuring that all tasks are completed. Moreover, Grievant was found to be deficient in performing related duties as assigned.

11. Grievant has never been placed on a plan of improvement.

DISCUSSION

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, and in a manner which is not arbitrary and capricious. Webster County Bd. of Educ. v. Johns, 447 S.E.2d 599 (W.Va.1994); Harrison County Bd. of Educ. v. Coffman, 430 S.E.2d 331 (W.Va. 1993); Butcher v. Gilmer County Bd. of Educ., 429 S.E.2d 903 (W.Va. 1993); Bd. of Educ. v. Enoch, 414 S.E.2d 630 (W.Va. 1992); Egan v. Bd. of Educ. of Taylor County, 406 S.E.2d 733 (W.Va. 1991).

Respondent argues that "county boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W.Va. 1991). This discretion, however, must be exercised reasonably, in the best interests of the schools, and in a manner that is not arbitrary or capricious. Id. Respondent contends that Grievant's responses at her interview for this position indicated that she would be unable or would have difficulty in performing various responsibilities inherent to the position.

W. Va. Code §18A-4-8b, outlining seniority rights for school service personnel, provides, in pertinent part:

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.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy. If the employee so requests, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he applies. 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.

The Supreme Court of Appeals of West Virginia in Ohio County Bd. of Educ. v. Hopkins, 193 W.Va. 600, 604; 457 S.E.2d 537, (1995), in interpreting W. Va. Code §18A-4- 8b which provides, in pertinent part:

that seniority alone is not the sole factor to be considered is clear from the language of W. Va. Code §18A-4-8b [1990], to the effect that a county board of education must show valid cause why an employee with the most seniority is not employed in the position for which he applies.

In this case, "valid cause" was shown by Respondent. Respondent had reservations concerning Grievant's work performance based on Grievant's past performance, Grievant's past performance evaluations and Grievant's responses at her interview. [\(See footnote 1\)](#) Grievant failed to prove that her seniority was not properly considered by Respondent.

In addition to the foregoing discussion, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a non-disciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95- 39-255 (Dec. 22, 1995).

2. While W. Va. Code §18A-4-8b mandates that seniority is a factor to be considered, it alone is not the sole factor. Qualifications and past service evaluations of the service personnel applicant must also be considered. However, a county board of education must show valid cause why an employee with the most seniority is not employed in the position for which he applies. Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995). See, Harrison County Bd. of Educ., 430 S.E.2d 331 (W. Va. 1993).

3. "Valid cause" for not selecting Grievant for the position was shown by Respondent.

4. Grievant failed to show a violation, misapplication, or misinterpretation of any statute, policy, rule, or regulation.

5. Grievant failed to prove by a preponderance of the evidence that seniority was not properly considered by the Respondent, or that she was entitled to the Custodian II position at New Martinsville School.

Accordingly, the grievance must be DENIED.

Any party may appeal this DECISION to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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 15, 1996

MARY BETH ANGOTTI-HARE

Administrative Law Judge

[Footnote: 1](#) *The record is silent as to whether competency tests were administered.*