

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Michael Ray Prince,
Petitioner Below, Petitioner**

vs) **No. 11-1300** (Kanawha County 11-AA-49)

**The Board of Education of the County of Boone,
Respondent Below, Respondent**

FILED

September 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Michael Ray Prince, by counsel John Everett Roush, appeals the Circuit Court of Kanawha County's order entered on August 19, 2011, affirming the decision of the West Virginia Public Employees Grievance Board ("Grievance Board") that denied petitioner's grievance. The Board of Education of the County of Boone ("Board"), by counsel Timothy R. Conaway, has filed its response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner was employed as a substitute custodian by the Board since approximately 2004. During his employment, several complaints were made about petitioner's job performance, including complaints that he was not completing his work and that he had been found sleeping on the job in a custodian's closet. In 2008, petitioner filed a grievance and argued that other substitute custodians were receiving calls for jobs, but that he, as the most senior substitute custodian, was not. The grievance was settled in January of 2009, and, in the written settlement agreement, petitioner acknowledged that there had been several complaints regarding his job performance.

In late 2009, several more complaints were made regarding petitioner's performance, including that he had again been found sleeping on the job on several occasions, that he was playing basketball in the gym while he was supposed to be working, and that he was chewing tobacco in the school. During this period, the Board posted two jobs for custodians. Petitioner applied for both positions. One position was filled by a regular employee of the school system, while the other was filled by a substitute custodian with less seniority than petitioner, given petitioner's past negative work assessments. Petitioner filed a second grievance, which was denied at Level I, and was unsuccessful at his Level II mediation. After a Level III grievance hearing, petitioner's grievance was denied. The Grievance Board found that while petitioner had

the most seniority and was qualified for the position, he had several poor evaluations and knew there were deficiencies in his work, as evidenced by the settlement agreement from January of 2009. The Grievance Board found that petitioner did not meet his burden of proof in showing that the Board's actions were arbitrary and capricious. Petitioner appealed to the Circuit Court of Kanawha County, which affirmed the Grievance Board's decision.

This Court has recently stated that “[w]hen reviewing the appeal of a public employees' grievance, this Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the administrative law judge.” Syl. Pt. 1, *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W.Va. 238, 719 S.E.2d 406 (2011). Moreover,

“Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.” Syl. pt. 1, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

Syl. Pt. 2, *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W.Va. 238, 719 S.E.2d 406 (2011). Additionally, “[a] final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W.Va.Code, [6C–2–1], *et seq.* [], and based upon findings of fact, should not be reversed unless clearly wrong.” Syl. pt. 1, *Randolph Cnty. Bd. of Educ. v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989).” Syl. Pt. 3, *Martin v. Barbour Cnty. Bd. of Educ.*, 228 W.Va. 238, 719 S.E.2d 406 (2011).

On appeal, petitioner argues that the observations of his performance as a substitute custodian do not constitute evaluations and do not justify denying him employment in the custodial position. Petitioner argues that pursuant to West Virginia Code § 18A-4-8b(a), three criteria should be utilized in filling a service personnel position: seniority, qualifications, and evaluations. Petitioner argues that he was the most senior candidate and was qualified for the position. Petitioner further argues that the custodian assessments regarding his past performance do not qualify as “evaluations” and cannot be used to deny him the position. Petitioner argues that evaluations are not primarily disciplinary instruments and that pursuant to the Board's policy, an employee has a right to a conference concerning his evaluations, and a right to an improvement plan. Petitioner argues that the Board failed to share the assessments with him, and did not utilize the assessments to improve his performance. Petitioner also questions the validity of the assessments since most came in the same period of time that the job posting in question was to occur. Petitioner asserts that if the custodial assessments are eliminated from the equation, he is entitled to the custodian position.

In response, the Board argues that although petitioner had seniority over the person eventually hired, his past service was fraught with employment problems. The Board argues that all of petitioner's assessments should be considered under the evaluation of past service and that it had valid cause not to hire petitioner who had performed poorly in the past, including seeking

out secluded locations to sleep when he was supposed to be working. The Board also argues that its formal evaluation policy does not apply to petitioner, as he was a substitute employee. Moreover, almost a year before he applied for the jobs at issue, petitioner acknowledged that he had complaints about his work performance in the past. Thus, the Board argues that there is ample evidence that the problems with petitioner's performance were ongoing, and were not in any manner fabricated to keep him from getting the instant custodial position.

West Virginia Code § 18A-4-8b provides, in pertinent part, as follows:

(a) A county board shall make decisions affecting promotions and the 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 of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies.

Petitioner has failed to show that his multiple poor job performance assessments should not be considered under "evaluation of past service." Also, as this Court has previously found, "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, in part, *Dillon v. Board of Educ.*, 177 W.Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 3, *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000). This Court finds no error in the circuit court's order affirming the Grievance Board's denial of petitioner's grievance.

For the foregoing reasons, we affirm the circuit court's decision.

Affirmed.

ISSUED: September 24, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISQUALIFIED:

Justice Margaret L. Workman