

5/22/87

THE STATE OF NEW HAMPSHIRE  
COMMISSION FOR HUMAN RIGHTS

ES 2760-85

Louise Girard

v.

Berlin School District

FINDINGS AND ORDER

I. PROCEDURAL HISTORY

On November 20, 1984, Complainant Louise Girard filed a timely complaint of discrimination on the basis of sex against respondent Berlin School District with the New Hampshire Commission for Human Rights. The Commission staff investigated the complaint and Investigating Commissioner Barry Palmer's Probable Cause finding was issued on January 27, 1986. A public hearing was held on September 16, 1986, before Commissioners Gail Paine, Celina Tamposi and George McAvoy, with Commissioner Paine serving as hearing chair.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant Louise Girard was employed by respondent Berlin School District, hereinafter "the District", as a bus driver from 1975 until June 17, 1985.
2. Mrs. Girard first applied for a position as a permanent custodian in May, 1984. She was hired as a permanent custodian in June, 1985. Prior to hiring Mrs. Girard in June, 1985 the District had never employed a female custodian.
3. Job bidding and promotion for both bus drivers and custodians in the District are controlled by the provisions of a Collective Bargaining Agreement (CBA), dated November 5, 1984 and covering the period July 1, 1984 to June 30, 1987 between the Berlin Board of Education and Local 1444 of the American Federation of Stated, County and Municipal Employees (AFSCME), herein after "the union."

As a bus driver, Mrs. Girard was classified as a part-time seasonal employee.

5. Maurice Tibbetts was hired as a temporary custodian on September 12, 1983.
6. From time to time the District needed temporary custodians to assume the positions of employees who were ill or disabled. There was no practice of posting temporary positions nor did the CBA require the posting of temporary positions.
7. The usual practice of filling temporary openings was for the Superintendent to request the foreman of maintenance, Armand Vachon, to find a temporary employee within the district. Temporary positions were uncertain as to duration and received no fringe benefits. Therefore, it was the practice in the district to seek out individuals who might be otherwise employed to fill temporary positions until the sick or disabled employee could return.
8. Prior to March, 1984, Louise Girard did not relate to anyone that she might be interested in a custodian position in the Berlin School District.
9. Robert Caron, a custodian who was employed on September 12, 1973, suffered a heart attack and became disabled in the spring of 1983. As a result thereof, a temporary position became available and Mr. Vachon offered this temporary position to Moses Tibbetts. Mr. Tibbetts and his wife owned and operated a local grocery store which Mrs. Tibbetts was capable of running.
10. Moses Tibbetts assumed the duties of Mr. Caron on May 13, 1983. At that time and for sometime thereafter, Superintendent Perrin fully expected Mr. Caron to return and assume the duties of his position.
11. Under the CBA, a permanent employee is defined as an employee who has completed his/her probationary period. Section 1.12. The probationary period is defined as being of ninety (90) days duration. Section 2.14. Therefore, to insure that Moses Tibbetts did not become a permanent employee, Superintendent Perrin instructed Assistant Superintendent Melanson and his secretary to insure that Moses Tibbetts' employment with the Berlin School District was terminated every ninety (90) working days so that he never became a permanent employee.
12. Thus, during the period from May 13, 1983 through May 13, 1984, Moses Tibbetts had to be notified four times that his employment was terminated for one day. Further, Moses Tibbetts was notified again in August 1984 that his employment was terminated for one day.

3. Quite suddenly, on March 5, 1984, a janitor, George Treamer, dropped dead while on duty at the Berlin Schools.
14. Shortly thereafter in March 1984, Mr. Treamer's position was posted according to the Collective Bargaining Agreement. Three employees of the Berlin School District bid for the position: Louise Girard (a bus driver), Doris Bergeron (a bus driver) and Jean Losier (a custodian on the night shift).
15. Mr. Losier was a full-time non-seasonal employee in accord with Section 1.6 of the Collective Bargaining Agreement hereinafter "CBA". Ms. Girard and Ms. Bergeron were part time seasonal employees under Section 1.9 of the CBA. Therefore, Mr. Losier had contractual priority over Ms. Girard and Ms. Bergeron for the vacant Treamer position, and Mr. Losier was transferred into it. Mr. Losier's former position was then vacant.
16. On May 14, 1984, Superintendent Perrin posted this vacancy, which had been created by Mr. Losier changing positions. This posting, for a permanent custodian, remained opened through May 28, 1984 in accordance with Section 2.2 of the CBA. During this hiatus Mrs. Girard was the only employee of the Berlin School District to bid on the position. She applied on May 16, 1984.
17. No one was hired for the May, 1984 custodian vacancy, and Mrs. Girard received no response from the Berlin School District following her bid.
18. In the usual course, the District normally notifies an applicant whether his or her job bid has been accepted.
19. By letter of September 27, 1984, Mrs. Girard's husband complained to the Berlin School Board in connection with the fact that his wife's application had not been acted upon, and raised the issue of sex discrimination.
20. As a result of the letter of September 27, 1984, Mr. Girard was invited to meet with the Berlin School Board in early October. At this meeting he testified he could not produce any evidence relative to the three areas of concern he had raised, including the allegation of discrimination.
21. During the winter and spring of 1984, the Berlin Board of Education was involved in intensive difficult negotiations with its custodians and bus drivers represented by Union Local No. 1444.

- As early as September 27, 1982, the administrators of the Berlin School District had commenced discussions with a janitorial service for the contracting out of such services in the Berlin School District. These discussions continued into the winter of 1984.
23. In the spring of 1984, Superintendent Perrin sought and received advice from the District's legal counsel on the legality of contracting out janitorial services during negotiation with the union.
  24. On May 28, 1984 the posting for the Losier position closed. On that same date, Sylvio A. LaPlante, Chairperson of the Berlin Board of Education, sent a letter to George Coulombe, President of Local No. 1444, informing the Union that the Berlin Board of Education was terminating the Collective Bargaining Agreement as of midnight June 30, 1984. This letter was received by Mr. Coulombe on May 29, 1984.
  25. Mr. Coulombe immediately notified the shop steward, Dewey Levigne, of the letter terminating the contract. Mr. Levigne then called a meeting of all custodians and bus drivers to inform them that the CBA was being terminated as of midnight June 30, 1984.
  26. Paul Girard, husband of Louise Girard, testified that the termination of the CBA with the custodians and bus drivers became immediate public knowledge and was in the local newspapers.
  27. The failure to notify Louise Girard that the Losier position was not being filled in May or June of 1984 was an oversight by the school administration. Louise Girard and her husband were nevertheless aware of the termination of the CBA within a few days of the closing of the bid on May 28, 1984.
  28. The District and the union negotiated on a new CBA during the late summer of 1984, but a new CBA was not executed until November 5, 1984. Therefore, there was no valid and binding CBA from July 1, 1984 through November 4, 1984.
  29. During the spring of 1984, the Berlin School District was experiencing a very serious budget crunch having received excessive appropriation cuts two years in a row. As a result, activities such as football were cut from the budget and the curriculum, and have not been reinstated.

The notification of termination of the contract in May, 1984 and the exploration of contracting out said janitorial services were sincere efforts by the Berlin Board of Education and its administrators to make meaningful budgetary cuts and were not a ruse to allow them to discriminate against Louise Girard because of her sex.

31. During March, April and May of 1984, the Berlin School District received twenty-one (21) separate applications for the position of custodian.
32. The Berlin Board of Education's decision not to fill the Losier vacancy on its janitorial staff in late May or June 1984 was not based upon the sex of Louise Girard.
33. As the Berlin Board of Education got closer to agreeing to a new CBA in the fall of 1984, the Board and the administration decided to fill the Losier vacancy. Therefore, the position was posted for the second time in early October 1984.
34. During the ten (10) day mandatory posting period, both Louise Girard and Moses Tibbetts bid for the position. Under the contract neither would have had seniority rights nor priority to the position.
35. When Mrs. Girard bid for the job a second time as the result of the October, 1984 posting, Assistant Superintendent Melanson raised questions as to whether her bid could be accepted, since she was not part of the bargaining unit. However, the bid was routinely accepted and considered.
36. While neither Mrs. Girard nor Mr. Tibbetts would have had any contractual seniority or priority rights under the CBA, Mr. Tibbetts had seventeen (17) months of actual satisfactory experience as a janitorial employee of the Berlin School District.
37. Superintendent Perrin testified that had he not received Mr. Girard's letter of September 27, he would have been awarded the Losier position to Mr. Tibbetts based on the extensive experience and satisfactory performance of his janitorial duties in the Berlin School District.
38. Because of the questions raised in Mr. Girard's letter, Superintendent Perron decided to utilize a custodial test, and such a test was administered to both Mrs. Girard and Mr. Tibbetts on October 19, 1984.

9. The custodial test administered to Mrs. Girard and Mr. Tibbetts was administered to both employees who bid for the posted job opening in October. Since outside applications were not being considered pending disposition of the employee applications, the test was not administered to all applicants for the position.
40. The test was developed in 1974 by an out-of-state firm specifically for the District custodial position. Dube and Norbert Labrecque) and 1984 (when the test was administered to Mrs. Girard and Mr. Tibbetts), five custodians were hired who were not required to take the test: Ronald Plaisance (permanent), Robert Rodrique (permanent), Kevin Walsh (temporary), Larry Charest (temporary), and Maurice Tibbetts (temporary).
42. Ronald Plaisance was hired on November 16, 1981 as a permanent custodian. He was the only applicant at that time and had been a CETA employee at the school department for eighteen months prior to being hired. Because he was the only applicant and because the school district knew his capabilities, there was no need to give him a test, particularly where he was the only employee applicant.
43. Robert Rodrique was hired on July 11, 1983. Mr. Rodrique was the only employee who applied for the position. A check with his references determined that he had the necessary skills to do the job. Since there was no other employee applicant, there was no need to administer the custodial test.
44. Prior to October, 1984, it was District policy not to administer the custodial test to applicants for temporary positions.
45. The custodial test involved the testing of 12 tasks, only one of which was a cleaning task.
46. The job description for the custodian position lists twenty-four job functions, a large majority of which are cleaning functions. There is no meaningful test that could be developed for most of these cleaning functions or for such functions as picking up trash, taking in the flag, and the like.
47. The only really meaningful factor that can be tested for the cleaning functions is an individual's ability to enter a room and determine what needs to be done to clean the room. This was adequately tested in the custodial test in Section VI.
48. As a full-time custodian now Mrs. Girard does not perform the majority of the tasks which were included in the test. However, both of Mrs. Girard's janitorial

witnesses, Dewey Levigne and Armand Vachon, stated under oath that members of the janitorial staff perform all twelve tasks found in the custodial test on a weekly, and usually daily, basis.

49. Mrs. Girard works with three other janitors on her shift. The foreman, Mr. Vachon, assigns those janitors who excel in various maintenance functions to perform the maintenance functions on a given day. Thus, Mrs. Girard may not frequently perform the majority of tasks included in the test, but other janitors are performing these tasks on a daily basis.
50. Mr. Perrin and Mr. Melanson instructed maintenance foremen Vachon and Cochran to administer the custodial test as fairly as possible to both candidates. The evidence clearly reflects that both candidates received the same instructions and the same opportunity to perform the test.
51. The scores on the custodial test were 128 for Mrs. Girard and 146 for Mr. Tibbetts. There was no passing score for the test.
52. Mr. Tibbetts was hired for the permanent custodian position on November 13, 1984.
53. The District administered the test in an attempt to utilize an objective standard relative to the abilities of the applicants to perform on the job. Mr. Tibbetts had an advantage over Mrs. Girard in the test because he had been working as a temporary custodian for the prior seventeen months.
54. Although Mr. Melanson believed Mrs. Girard could do the job as well as Mr. Tibbetts, job experience, particularly when that experience is performed in a satisfactory manner, is an important consideration which may be used by management in determining the qualifications of candidates.
55. Mr. Tibbetts had been hired for the temporary position based on Mr. Vachon's knowledge of him in the community. The temporary position was not posted, Mr. Tibbetts did not take the test prior to being hired for the temporary position, and no other applicants were involved.
56. When Mr. Tibbetts was given the temporary job to fill Mr. Caron's position in May 1983, neither the Superintendent nor the School Board had any indication that another janitor would drop dead on the job the following March. There is no evidence that Mr. Tibbetts was given the temporary job to "groom" him for the next permanent position which might be available.

57. There is no evidence that the administration of the test in 1984 was a subterfuge to prevent Mrs. Girard from obtaining the janitorial position.
58. There is no evidence that Mr. Perrin made comments in a jesting manner about "not wanting a female janitor". The only evidence in this regard was that Mr. Perrin occasionally told office jokes, some of which involved women.
59. There is no evidence that Mr. Perrin "did everything in his power" to prevent Mrs. Girard from becoming a custodian in 1984 because she was a woman.
60. Mrs. Girard did not meet her burden of proof to show that the Berlin School District unlawfully discriminated against her on the basis of her sex in failing to award her the custodial position in 1984.
61. During his tenure as Assistant Superintendent and as Superintendent of the Berlin School District, Alan Perrin worked to improve the role of women in administration, both in the number of positions secured and also in regard to the compensation of woman administrators.
62. Both Louise Durrant and Dewey Levigne testified under oath that they have never heard Mr. Perrin make comments or jokes about women in male jobs or that he didn't want a woman in the janitorial position.
63. Other than idle rumor testified to by Mr. Coulombe, there was no evidence that Superintendent Perrin didn't want a woman in a janitorial position and no one testified to knowledge of any one who claims to have heard such a statement being made.
64. The evidence shows that Mr. Tibbetts was chosen for legitimate, non-discriminatory reasons: seventeen months of satisfactory job experience and better performance on the custodial test which measures daily maintenance and chores performed by custodians.
65. Mrs. Girard was subsequently employed by the Berlin School District as a permanent custodian, beginning her work in this position on June 17, 1985. By June 17, 1986, Mrs. Girard reached the highest level on the custodian pay scale. She continues to occupy this position.
66. The burden is not on the Berlin School District to persuade the Commission the offer of the job to Mr. Tibbetts was motivated by non-discriminatory reasons. The Berlin School District is required only to articulate a non-discriminatory reason for its actions, and it has satisfied this burden.

57. Although the District had never employed a female custodian prior to hiring Mrs. Girard for that position in June of 1985. We do not find that the District's policies had a disparate impact on female custodial applicants. Disparate-impact analysis is not appropriate for an employer such as the Berlin School District that hires only comparatively few employees from time to time. [See Fudge v. City of Providence Fire Department 38 FEP 648 US Ct. App, 1st Cir. 766 F.2d.650 (1985)]

68. The Commission finds that the Berlin School District did not discriminate against Mrs. Girard because of her sex.

III. ORDER

On the basis of the holding above, the complaint is hereby DISMISSED.

IV. REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

1. Complainant's requests numbered 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 are granted.
2. Complainant's requests numbered 8, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 are denied.
3. Respondent's requests numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60 are granted.
4. Respondent's requests numbered 36 and 39 are denied.

May 19, 1987  
Date

Gail F. Paine  
Gail F. Paine

5/14/87  
Date

Celina A. Tamposi  
Celina A. Tamposi

4/22/87  
Date

George E. McAroy  
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