NANCY GWILLIAM

v. DOCKET NO. 95-39-255

PRESTON COUNTY BOARD OF EDUCATION

DECISION

Nancy Gwilliam (Grievant), is employed by the Preston County Board of Education (Respondent) as a counselor with .50 of her counseling duties assigned at South Preston Junior High School and .50 at West Preston Junior High school. Grievant filed her grievance on May 15, 1995, alleging:

> W.Va. Code §18A-4-7a. Grievant was the most qualified person who applied and did not get the position. W.Va. Code §18-29-2 favoritism was shown by posting the position as .40 since no other counselor except the one already at Bruceton had a .60 position. Grievant applied for the .40 position as counselor at Bruceton school and the position was given to the counselor already employed at Bruceton.

As relief "Grievant would like the .40 position at Bruceton combined with the .50 at West Preston Junior High School."

Grievant's immediate supervisor denied relief at Level I because she did not have the authority to grant the relief sought. At Level II, the grievance was denied after a hearing, and waived at Level III. At Level IV, Grievant desired to submit the case onthe record. This case became mature on December 6, 1995, upon receipt of the lower level documents.

After careful consideration and analysis, the following findings of fact have been made from the record developed at Level II.

Findings of Fact

1. Grievant has been employed by the Preston County Board of Education for over ten years and

is currently serving as a guidance counselor, with .50 of her duties at South Preston Junior High School and .50 of her duties at West Preston Junior High School.

2. The Preston County Board of Education, by posting dated March 20, 1995, posted a .40 counselor position at Bruceton School. 3. Grievant was the most qualified applicant for the .40 Bruceton School guidance counselor position; however, Grievant did not want the position unless it was combined with her half-time counselor position at West Preston Junior High School.

4. The .40 Bruceton School guidance counselor position was filled by the only other applicant, Ms. Annette Culberson.

Position of the Parties

Grievant asserts that, since she is the most qualified person who applied for the .40 Bruceton School guidance counselor position, not only should she be awarded the position but she should also be allowed to combine that position with the .50 position that she currently maintains at West Preston Junior HighSchool and have the resulting position classified as a full-time position, even though both positions combined would only equal .90 of a position. Grievant also argues that Respondent, by posting a .40 Bruceton School guidance counselor position at Bruceton School, was showing favoritism to Ms. Culberson, who is also a guidance counselor employed by Respondent and had a .60 guidance counselor position at Bruceton School.

Respondent contends that the 50-50 positions at South and West Preston Junior High Schools constitute a single position which can not be split. Therefore, since Grievant did not want the .40 position alone, it was given to the only other applicant.

Discussion

From March 20-24, 1995, Respondent posted a .40 guidance counselor position for the Bruceton School. Grievant applied for the .40 Bruceton position on March 24, 1995. The only other applicant for this position was Ms. Culberson.

On March 28, 1995 and April 4, 1995, Grievant spoke with Mr. Dave Miller, Director of Personnel and Instructional Services, about the .40 Bruceton School guidance counselor position. By letter dated May 16, 1995, Mr. Miller responded to Grievant's inquiry as to why she was not awarded the .40 position at Bruceton School. In this letter, Mr. Miller stated "[t]he reason you were not selected to the forty percent (.40%) counselor position is that you did not want to become a forty percent (.40%)

counselor." (Exhibit III, Level II.) Therefore, Ms. Annette Culberson wasawarded the position.

The posting provision of W.Va. Code §18A-4-7a provides:

> Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job. No vacancy shall be filled until after the five-day minimum posting period.

Furthermore, favoritism is defined in W.Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees". In order to support a showing of favoritism under W.Va. Code §18-29-2(o)'s broad definition of the term, the Grievance Board has held that a grievant must initially establish that s\he is similarly situated, in a pertinent way, to one or more other employees who have been unjustifiably treated with preference. See Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1991).

As far as the actual posting in this case is concerned, the Grievant has failed to prove that Respondent has violated W.Va. Code § 18A-4-7a in any manner or form. According to the evidence, the actual posting of the .40 Bruceton position, including the length of posting, position description, period of employment, etc., was in accordance with the posting provision of W.Va. Code §18A-4-7a, and Grievant does not challenge any of the statute'sposting requirements. Grievant's point of contention appears to be the determination of the .40 allocation to the Bruceton guidance counselor position and the fact that Respondent refused to let her combine this position with her .50 West Preston High School position.

In regard to the percentage determination of the posted position, Grievant did not provide any evidence, or even question Respondent's representatives, as to how the .40 figure was determined. Furthermore, Mr. Miller testified that Respondent posts vacant positions, or percentages of a position, according to the needs of the school. Also, the "Vacancy List" dated March 20, 1995, which included the .40 Bruceton position, contained nine other positions which were not full-time positions, one of which was another .40 counselor position at the Rowlesburg School. Likewise, postings from the "Vacancy List" dated March 6, 1995, contained seven positions which were less than full-time

positions, and this list also includes a less than full-time counselor position (.20 at Preston High).

Furthermore, even assuming that Grievant proved her case that the .40 figure was arbitrarily set or pulled out of thin air by Respondent, Grievant failed to prove that Respondent acted arbitrarily or capriciously in refusing to split the 50-50 South and West Preston Junior High School positions. Respondent had posted these positions together as a single position in 1991-1992, and Mr. Miller testified that these junior high school positions were considered as one position which could not be broken up. Grievant never inquired into why these two positions could not be split, nor did she prove Respondent's position was not in the best interest of the school system, or arbitrary and capricious.

Other than Grievant's testimony, which fails to provide examples, the record is devoid of any evidence which proves by a preponderance of the evidence that Respondent is just playing with numbers when it assigns a certain percentage to a vacant position. Grievant also failed to prove that Respondent will combine two, or more, less than full-time positions (which do not add together to make a full-time position) and whimsically make the resulting combination "position" a full-time position.

Therefore, Grievant did not prove by a preponderance of the evidence how she was similarly situated to other "most qualified" candidates who have applied for less than full-time positions, nor did Grievant demonstrate how Respondent's posting of a .40 position was unjustifiably a preference to another employee. As a result, Grievant simply did not prove any of the elements required to establish a claim of favoritism.

Last, even though Grievant was the most qualified candidate for the .40 position, Grievant did not want the .40 Bruceton School guidance counselor position for two reasons: (1) Grievant could not have accepted that position and also retained her .50 West Preston Junior High School position since it was tied to the .50 South Preston Junior High School guidance counselor position, and (2) acceptance of the single .40 Bruceton position would have dropped her status from full-time to part-time, unless she successfully bidupon and received another part-time position(s). Therefore, Grievant's refusal of the .40 Bruceton position is clear, because even though Grievant filed her grievance on May 15, 1995, and was asked, over three weeks later, during the Level II hearing on June 7, 1995, if she would have wanted the .40 position and therefore, resign from her full-time position, Grievant only responded "[w]ell, I would have thought about it". (Tr at 9) Grievant also never

responded when she was specifically asked if the remedy\relief she sought was to be placed in that single .40 position, nor did Grievant attempt to place such information into the record at Level IV before her August 21, 1995, request to submit this case on the Level II record.

Conclusions of Law

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Napier v. Logan Co. Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995). Grievant failed to meet this burden.

2. Pursuant to the provisions of W.Va. Code §18A-4-7a, decisions of a county board of education affecting teacher promotions and the filling of vacant teaching positions must be based primarily upon the applicants' qualifications for the job. Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

3. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers Co. Bd. of Educ., Docket no. 90-45-040(Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler Co. Bd. of Educ. and Roy Truby, State Superintendent, 375 S.E.2d 911 (W.Va. 1981).

4. Grievant has failed to show any violation by Respondent of the posting provision as defined in W.Va. Code §18A-4-7a.

5. Favoritism is defined in W.Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

6. Grievant did not show by a preponderance of the evidence that Respondent engaged in any form of favoritism prohibited under W.Va. Code §18-29-2(o) in posting the .40 guidance counselor position at Bruceton School.

7. Grievant failed to show a violation, misapplication or misinterpretation of any statue, policy, rule, regulation or written agreement relative: (1) to the posting of the .40 guidance counselor position at Bruceton School or (2) to Respondent's refusal to split the South and West Preston Junior High School guidance counselor positions.

Accordingly, the grievance is DENIED.

DATED: 12/22/1995 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE