JUDITH BYRD,

Grievant,

v. **DOCKET NO. 97-06-071**

CABELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Judith Byrd, alleges various violations of W. Va. Code § 18-29-2 related to her employment by Respondent. The majority of her allegations relate to the elimination of her position as financial aid secretary for the Cabell County Vocational-Technical Center ("Center") at the end of the 1995-1996 school year pursuant to a reduction in force. (See footnote 1) A private consultant was hired on an hourly basis to perform financial aid services for the Center, which Grievant alleges was improper. She seeks as relief to have the consultant position posted or to be reinstated to her position as financial aid secretary.

This grievance was initiated at level one with Grievant's immediate supervisor on July 25, 1996. It was subsequently denied at levels one, two, and three, and appealed to level four on February 7, 1997. In lieu of a level four hearing, the parties agreed to resubmit their proposed findings of fact and conclusions of law as submitted at level two. This matter became mature for decision on March 3, 1997.

The following findings of fact are made from the record developed below.

Findings of Fact

1. Grievant is employed as the evening secretary at the Center, where she works from 12:00 noon until 8:00 p.m. Monday through Thursday and from 7:30 a.m. until 3:30 p.m. on Fridays.

2. Grievant's previous position as financial aid secretary for the Center was eliminated at the

end of the 1995-1996 school year, due to financial cutbacks. The record does not indicate that there was any break between Grievant's employment as financial aid secretary and evening secretary.

3. On August 2, 1996, Diann Clothier signed a Consultant Services Agreement with Respondent. This agreement stated that Ms. Clothier would serve as a consultant regarding financial aid for adult education programs at the Center for the period of August 2, 1996, to June 30, 1997, at a rate of pay of $40 per hour, plus expenses, not to exceed $10,000 for the contract period. Resp. Ex. 2.

4. The consultant position assumed by Ms. Clothier was not posted.

5. Ms. Clothier was not required to work specific hours, but she normally visited the Center on Thursdays around 2:00 p.m., in order to serve both daytime students and evening students. Records from August and September of 1996 show that her hours varied from 2 hours to over 6 hours during individual visits.

6. In addition to contracting with Ms. Clothier, Respondent divided other financial aid duties previously performed by Grievant among other secretaries at the Center. Grievant does not contest this action. (See footnote 2) 7. Other employees of Respondent have “supplemental” or “hourly”contracts with the Center to provide specialized services, which contracts are separate from their regular employment contracts. No evidence has been presented regarding how these “supplemental” positions were filled.

8. Grievant has alleged that public defamatory and harassing statements were made about her regarding her ability to perform, that she would be “written up” if she made a mistake, and that the assistant principals did not “want her in the building” because of problems between Grievant and her husband. (See footnote 3) None of these statements were corroborated by any witness, and the assistant principal of the Center and Grievant's supervisor had no knowledge of them. (See footnote 4)

9. Grievant feels that, because a private consultant was hired to perform some duties which she was qualified to handle, other employees would believe that she was not capable of handling the job or that she had performed her financial aid duties badly.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant must prove all of her

allegations by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). Applying this standard to the instant case, several of Grievant's claims can be dispensed with easily. Grievant contends that the following matters have constituted discrimination, favoritism, or harassment, within the meaning of Code § 18-29-2:

1.

The hiring of an outside financial aid consultant made it appear to other employees that Grievant was incapable of doing the job. It also made it appear to financial aid people in other counties that Grievant was not doing her job as the financial aid person.

2.

Statements were made publicly by an assistant principal that Grievant could not be evening secretary and do financial aid at the same time.

3.

Statements were made publicly that, if Grievant was hired as the evening secretary, her every move would be watched, and if she made one mistake, she would be written up.

4.

Statements were made to Grievant's colleagues by the assistant principals that they were concerned about problems with Grievant's husband, and they did not want her in the building.

Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” “Favoritism” is defined in Code § 18-29-2(0) and refers to “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” Finally, “harassment” is defined as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Code § 18-29(2)(n).

Grievant did not produce any witnesses at the level two hearing to corroborate any of her

allegations. She also failed to specify, in each case regarding alleged “defamatory” statements, by whom and to whom the statements were made. Not only has Grievant failed to prove that any of the above-listed incidents occurred, but she has not proven that any of them involved discrimination, favoritism, or harassment as defined by statute. There has been no comparison between Grievantand other employees in the context of these allegations, nor is there any evidence that she has been subjected to any “repeated or continual disturbance, irritation or annoyance.” Grievant's unsubstantiated allegations do not meet her burden of proof.

Similarly, Grievant contends that Respondent's failure to post the financial aid consultant position was discriminatory, because other full-time employees have supplemental contracts to perform duties at the Center, which are in addition to their usual responsibilities. Again, Grievant has not established the prerequisites for a prima facie case of discrimination, which are:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) have not, in a significant particular; and
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> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant has introduced no evidence regarding whether or not any of the subject positions were posted. She merely alleges that, if other regular full-time employees perform additional duties under supplemental contracts, she should have been allowed to do the same as a financial aid consultant. Agreed Exhibit I includes a listing of employees who have supplemental or hourly contracts, which indicates that they perform a wide variety of services, either on or regularly scheduled or an as- needed basis. Without evidence regarding how those contracts were awarded and what type of contracts they are, Grievant cannot prove a prima facie case of discrimination.

The final claim raised by Grievant is that the consultant position should have been posted as an “extracurricular assignment” under Code § 18A-4-16. That section states, in pertinent part, as follows:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.
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> (5) The board of education shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b, article four of this chapter: Provided, That an alternative procedure for making extracurricular and supplemental school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board of education and by an affirmative vote of two thirds of the employees within that classification category of employment.

If an assignment is extracurricular, it is subject to the posting and filling requirements of Code § 18A-4-8b, which is applicable to all jobs to be performed by school service personnel. In this case, the consultant position is neither a service personnel position, nor is it extracurricular. “Financial aid consultant” is not a position defined by Code § 18A-4-8, which designates the various classifications for all service personnel. It is not a secretarial position, because Ms. Clothier does not perform secretarial duties as set forth in the various secretarial classifications. Accordingly, it is an assignment not covered by the various statutes regulating the employment of school service personnel. See Ray v. Cabell County Bd. of Educ., Docket No. 96-06-373 (Feb. 21, 1997); Froats v. Hancock County Bd. of Educ., Docket Nos. 93-15-251-257 (Sept. 28, 1995). Moreover, the consultant position does not fall within the statutory definition of “extracurricular assignment,” because such assignments must have a clearly defined number of hours per school year to be deemed to “occur on a regularly scheduled basis.” Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-1108 (July 18, 1996). The evidence is clear that Ms. Clothier's hours were at her discretion underthe contract.

Because the consultant position was not a service personnel position, Grievant had no entitlement to it under any of the laws governing posting and filling of school service personnel jobs. It is within a school board's discretion to contract for services to be rendered on a hourly, as-needed basis with

persons who are not board employees. Accordingly, Grievant has not proven by a preponderance of the evidence that the position at issue should have been posted. She has also failed to prove any entitlement to her previous position as financial aid secretary, as the reduction of the position has previously been decided by this Grievance Board. See Byrd, supra.

In addition to the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters, a grievant must prove all of her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. Grievant failed to prove discrimination, favoritism, or harassment in violation of Code § 18-29-2.

3. In order to establish a prima facie case of discrimination, a grievant must prove:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 4. 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).

5. The financial aid consultant position at issue in this grievance is an assignment which is not covered by the various statutes regulating the employment of school service personnel. Ray v. Cabell County Bd. of Educ., Docket No. 96-06-373 (Feb. 21, 1997); Froats v. Hancock County Bd. of Educ., Docket Nos. 93-15-251-257 (Sept. 28, 1995).

6. In order to constitute an "extracurricular assignment," as governed by Code § 18A-4- 16, the position must have a clearly defined number of hours per school year, and occur on a regularly scheduled basis. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-1108 (July 18, 1996).

7. Grievant failed to prove by a preponderance of the evidence that Respondent violated Code § 18A-4-8b, or any other law, rule or regulation, in failing to post the financial aid consultant position and in contracting with Diann Clothier to perform such services.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance occurred, 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 appropriatecourt.

DATE: July 10, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

The actual elimination of the financial aid secretary position is the subject of a separate grievance, which was denied by this Grievance Board in Byrd v. Cabell County Bd. of Educ., Docket No. 96-06-316 (May 23, 1997).

Footnote: 2

The record was ambiguous regarding whether Ms. Clothier performed exactly the same duties Grievant had performed as financial aid secretary. However, it is clear that Ms. Clothier's responsibility was to advise and inform students regarding financial aid matters, and she did not perform any secretarial duties for or assist any administrative personnel.

Footnote: 3

Apparently, at one time, Grievant's husband had a drug problem, and there were domestic disputes between them. Grievant was concerned that people in her office feared altercations between her and her husband in the workplace.

Footnote: 4

Grievant had made other allegations which, according to her testimony and statements of her representative, were abandoned at level two. These include the matters of inferior equipment, not being allowed to clean out a desk, a "rude attitude" on the part of her supervisor, and having to type letters.