DAVID R. ROGAR,

Grievant,

v. **Docket No. 97-41-295**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

David R. Rogar (Grievant), currently a social studies teacher employed by Respondent Raleigh County Board of Education (RCBE), filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that he had not been selected to fill a Physical Education/Health Teacher position because of gender discrimination. By memo of April 15, 1997, the grievance was denied at Level I by principal Ronald Bee Cantley, II. The grievance was advanced to Level II where an evidentiary hearing was conducted on May 22, 1997. Grievant was represented at this hearing by Gary Archer of the West Virginia Education Association. Subsequently, by correspondence dated June 12, 1997, the grievance was denied at Level II by RCBE Superintendent Dwight D. Dials. The record is devoid of any mention of any proceedings at Level III. Thereafter, Grievant requested that a decision be made at Level IV on the evidence presented at Levels I through III. This matter became mature for decision on October 28, 1997. (See footnote 1)

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing and documentary evidence admitted at Levels I and II.

FINDINGS OF FACT

1. Grievant, a male, was employed by the Raleigh County Board of Education as a Physical Education/Health Teacher at Beckley Junior High School, which was to be consolidated with Stratton Junior High School.

2. Grievant is certified in Health, Physical Education and Social Studies.

3. An election was held under W. Va. Code § 18A-4-8f, with the faculty voting to grant "super seniority" status to faculty members displaced by the consolidation.

4. On February 24, 1997 RCBE posted the faculty positions for the new Beckley-Stratton Junior High School. The posting specified two male and two female Physical Education/Health Teacher positions. The posting specified an application deadline of March 3, 1997.

5. Grievant was third in seniority among preference-eligible male applicants, and had greater seniority than all of the preference-eligible female applicants except one.

6. Grievant was not selected as one of the Physical Education/Health teachers at Beckley-Stratton Junior High School, but was instead placed in a position there as a social studies teacher.

7. Grievant filed this grievance on April 14, 1997, some 25 working days after the application deadline, alleging a violation of W. Va. Code § 18A-4-8f, West Virginia Board of Education Policy 4200, and Public Law 92-318, Title IX of the Education Amendments of 1972.

8. Students are assigned to physical education activities in a co-ed manner, but are separated by gender for dressing and showering. All physical education students are required to change from their regular clothing into shorts and gym shoes. Many choosean optional shower after physical education class.

9. Junior high school students exhibit a wide range of sensitivity to issues concerning bodily self-perception and disrobing.

10. RCBE policy forbids a male from supervising a female locker room, and a female from supervising a male locker room, at any time when students are present. RCBE policy requires all locker rooms to be supervised at all times students are present, because students may victimize one another if left unsupervised.

11. Grievant conceded that if he was assigned to teach a physical education class to female students he would require a female aide to supervise the shower and dressing rooms of the female students.

12. RCBE is concerned that, should Grievant be selected to fill a position held by one of the female physical education teachers, the public might not understand or approve of hiring an aide to supervise the female locker room.

13. RCBE is concerned that a female student might make a claim of sexual abuse against Grievant, although RCBE believes, based on its long knowledge of Grievant, that any such claim

would be completely baseless.

14. It is RCBE policy to employ only those teachers who can supervise students throughout the course of their assignment to that teacher.

15. Exhibits regarding gender discrimination in employment were submitted into evidence. These included material from the West Virginia Human Rights Commission, RCBE, U.S. Equal Employment Opportunity Commission, W.V. Department of Education, and the U.S. Department of Education.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

At Level II RCBE argued that the grievance was not timely filed. A party asserting that a grievance is untimely bears the burden of proving this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). The dispute over timeliness stems from the fact that Grievant filed this grievance within 15 working days of RCBE's announcement of its selection of successful applicants for the new positions, but some 25 working days from the application deadline for the positions. Grievant argued that, as an applicant for one of the positions, he had no grievance to file until he learned of his non-selection. E.g. Morefield v. Mercer County Bd. of Educ., Docket Nos. 91-27-481, 482 (August 19, 1992). This argument has merit. Furthermore, RCBE apparently rejected its own timeliness defense in both its Level II decision and its Proposed Findings of Facts and Conclusions of Law at Level IV by stating “[t]he Grievant is entitled to rely on the action of the Board of Education concerning hiring questions before being required to file a grievance in accordance with the provisions of W. Va. Code [§§]18-29-1, et seq.”

A grievant claiming discrimination is limited to alleging that an employer's acts violated this Board's authorizing legislation, W. Va. Code § 18-29-2. Vest v. Bd. of Educ. of County of Nicholas, 453 S.E.2d 781 (W.Va. 1995). W. Va. Code § 18-29-2(m) definesdiscrimination 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.” In order to establish a prima facie case of

discrimination, a grievant must prove:

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

(b) that he has, to his detriment, been treated by his 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).

Grievant asserts he was a victim of gender discrimination because he was denied a position in his major teaching field when a female teacher with less seniority was selected. RCBE responds that a gender-based bona-fide occupational qualification (BFOQ) justifies its hiring of two male and two female physical education teachers. Grievant's contentions have some merit. He relies upon language selected from a manual, published by the West Virginia Board of Education and last revised in 1991, titled “Complying with Title IX in Physical Education and Athletics.” Specifically, Grievant cites an annotation within this document explaining §106.51 of Title IX, which reads “[f]or example, a female physical education teacher may not be denied employment because she cannot supervise the male locker/shower area.” Another annotation, explaining §106.61 of Title IX, which discusses gender as a BFOQ, states “Individuals are hired for their qualifications to coach, not for their ability to supervise the locker area. To avoid problems in this area, other teachers, teacher aids or paraprofessionals of the same sexmay be used to supervise the locker area[.]” (emphasis added). The undersigned notes that this language is not the language of the statute itself, but is provided to give examples of how the statute is to be applied.

However, the preponderance of the evidence in this grievance demonstrates that gender is a BFOQ for physical education teachers. The advisory language cited by Grievant is contradicted by the written Title IX regulations of RCBE, which state

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based on alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall

prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex. (emphasis added)

Furthermore, it is well established that gender can be an appropriate basis for a BFOQ. A requirement that certain prison guards be male has been held to be a BFOQ. Dothard v. Rawlinson, 433 U.S. 321 (1977). In a more factually analogous case, a gender-based BFOQ was found to exist when female mental health workers were laid off differently than male mental health workers within the same classification. “We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.” Local 567 AmericanFed'n of State, County and Mun. Employees v. Michigan Council 25, 635 F. Supp. 1010 (E.D. Mich. 1986), (quoting York v. Story, 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964)).

The West Virginia Supreme Court of Appeals has approved the limitation of applicants for the position of child care worker to males when the job entailed close, intrusive supervision, including supervision of undressing and showering, of male adolescents housed in the boys' cottage of a school for delinquent children. St. John's Home for Children v. W. Va. Human Rights Comm'n., 180 W.Va. 137, 375 S.E.2d 769 (1988). The Court also found that a gender-based BFOQ existed where less senior male health service workers were retained in a reduction-in-force action, displacing more senior female health service workers, because the male employees supervised male patients during their dressing, bathing, and toileting. Gibson, et al. v. W. Va. Dept. of Health and Human Resources, 192 W.Va. 372, 452 S.E.2d 463 (1994).

Prior decisions of this Grievance Board also hold that gender can be a BFOQ in a co-educational setting. A school board may properly release a more senior female aide while retaining a less senior male aide under a reduction-in-force action when a gender- based BFOQ exists for a certain position. Higginbotham v. Putnam County Bd. of Educ., Docket No. 40-88-069 (Feb. 27, 1989).

Grievant has failed to establish a prima facie case of discrimination under W. Va. Code § 18-29-2. He has established that he is similarly situated to other physical education teachers at Beckley-Stratton Junior High School, and that he has, as a male physical education teacher, been treated to his detriment in a manner that female physical education teachers have not. However, for reasons explained above, he has notestablished that the different treatment accorded him was unrelated to his job responsibilities.

Finally, Grievant argues that W. Va. Code § 18A-4-8f does not permit the use of gender as a hiring criterion, allowing only certification, job standards, and seniority as hiring factors. This argument misreads the statute. The statute provides for the selection of teachers who "are certified and meet the standards set forth in the job posting[.]" (emphasis added). Thus, a job posting for a female teacher, based upon a gender-based BFOQ, is one for which Grievant is not qualified.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. This grievance was timely filed.

2. In a non-disciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

3. County school boards are authorized to control and manage all of the schools and school interests for all school activities and upon all school property. W. Va. Code § 18-5-13.

4. County school boards may employ such qualified teachers as are necessary to fill existing or anticipated vacancies. W. Va. Code § 18-5-4. 5. An annotation explaining §106.61 of Title IX, which discusses gender as a BFOQ, and states that other teachers, teacher aids or paraprofessionals of the same gender may be used to supervise a locker area, is permissive and not compulsory in nature, and so does not require RCBE to alter its policy of employing only those teachers who can supervise children throughout the course of their assignment to that teacher.

6. The Title IX regulations of RCBE permit establishment of a gender-based BFOQ when one is essential to successful operation of the employment function.

7. The Title IX regulations of RCBE permit consideration of gender in relation to employment in a locker room or toilet facility used only by members of one gender.

8. Public Law 92-318, Title IX of the Education Amendments of 1972, prohibits gender discrimination in employment unless a BFOQ exists.

9. The West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 et seq., prohibits gender discrimination in employment unless a BFOQ exists.

10. Grievant has failed to establish a prima facie case of discrimination under W. Va. Code § 18-29-2.

11. RCBE has met its burden of establishing that a gender-based BFOQ justifies its decision to hire only females as physical education teachers of female students.

Accordingly, this Grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: April 14, 1998

Footnote: 1 *For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on March 18, 1998.*