T. JOE SNODGRASS,

Grievant,

v v.

Docket No. 97-20-255

KANAWHA COUNTY BOARD OF EDUCATION,

Respondents.

D E C I S I O N

Grievant, T. Joe Snodgrass, believes he was guaranteed a certain salary for the position of vice-principal of Carver Vocational Center ("CVC"), a position he accepted with the Kanawha County Board of Education ("KCBOE"). He later found out the salary he was to be paid for the position was different from the amount he had expected. He then asked to be returned to his former position and Superintendent Jorea Marple refused to grant this request. (See footnote 1) At the lower levels of the grievance procedure, Grievant requested the relief of either being placed in his former position or receiving the pay he thought he would receive in the new position. At the Level IV Hearing held on July 24, 1997, Grievant changed his relief and requested he receive either the former position, or the same rate of pay in his new position as he had received in his former position, even though the current position was a 240-day position and his former position was a 261-day position. (See footnote 2) This grievance became mature for decision August 25, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

After a review of the record in its entirety the undersigned Administrative Law Judge makes the following findings.

Findings of Fact

1. Grievant has been employed by KCBOE for thirty-four years. He spent several years as a teacher, but has been in administration for numerous years.

2. Before he took the position of vice-principal at CVC, Grievant was the Director of Student

Affairs at the Cabell Alternative School ("CAS"), a 261-day position. At CAS he served as the Acting Director of the middle school division and completed all in-county transfers.

3. Grievant talked with Mr. Jack McClanahan, his supervisor, several times about his dissatisfaction with the position at CAS. In January 1997, he began to exhibit stress related symptoms such as; vomiting before he left for work and on his way to work and becoming highly anxious when he thought about work. On January 22, 1997,Grievant's physician diagnosed Situational Anxiety, prescribed medication, and suggested Grievant be reassigned to another position for 45 days to assess the effect this would have on his stress level.

4. Some time between January 14, 1997, and January 20, 1997, Grievant talked with Mr. McClanahan about the possibility of his being placed in the vice-principal position at CVC until the end of the school year. (See footnote 3) Mr. McClanahan indicated this would not be possible as the position had already been posted, but offered Grievant the alternative of applying for the position at CVC or taking sick or personal leave.

5. Grievant did not want to take any type of leave, as it could affect his retirement income.

6. Grievant was concerned about how much of a decrease in salary he would have to take if he took the CVC position. With Grievant in the room and listening in on the conversation, Mr. McClanahan called the Personnel office and requested the salary of the individual currently in the position, Mr. Don Joe Hunt. As Grievant did not know his own current salary, and Mr. McClanahan requested this information at Grievant's behest as well.

7. Grievant and Mr. McClanahan compared the salaries and calculated a $1,800.00 difference between the two salaries. 8. All KCBOE positions are filled pursuant to an established pay scale. This pay scale is published and distributed to all the schools on a yearly basis. Thus, an employee is able to calculate what his pay would be in any position, as the provided information takes into account an employee's years of experience and degree level.

9. Grievant decided to think about the possibility of applying for the CVC position and to talk over the issue with his family.

10. Grievant applied for the CVC position on the last day it was posted, January 21, 1997. This job posting states the salary of the position would be in accordance with the established pay scale.

11. Grievant was selected for the position and recommended by Dr. Marple for the position to KCBOE. KCBOE approved Grievant's appointment on or about February 3, 1997.

12. At that same Board meeting, KCBOE approved a supplemental contact for Grievant at his request. Grievant agreed to continue to perform all the transfers for the rest of the 1996-1997 school year and in return, his salary for that school year would continue the same as if he had remained a director. Thus, Grievant's salary would not be decreased until the start of the 1997-1998 school year.

13. On February 4, 1997, Grievant discovered the salary differential between the CVC position and the CAS position would be $2,700.00 as opposed to the $1,800.00 he thought it would be. The former vice-principal of CVC had a Masters +45 and Grievant had a Masters +30, and this difference in degree level resulted in a lower salary.

14 Grievant was very upset and immediately went to see Mr. McClanahan. He stated he either wanted the higher salary or to be returned to his former position. Mr.McClanahan explained the salary was based on the salary scale and could not be changed. He encouraged the Grievant to “sleep on it” before he made his decision.

15. Grievant returned the following day and discussed the situation with Superintendent Marple. She indicated she would not recommend rescinding the vice- Principal contract, and told him he could file a grievance over the salary issue.

16. Sometime after Grievant left CAS, the administrative positions at CAS were realigned and two positions were posted, a director's position and a principal's position. Neither position is the same as the position Grievant held. It is unclear when the Director's position was posted. The principal's position was posted in May 1997. Grievant did not apply for either position.

Issue

There are two issues in this grievance. The first is whether Grievant is entitled to the amount he thought he would receive for the position at CVC. The second is whether Superintendent Marple's decision not to rescind his contract was arbitrary and capricious. Grievant contends he was assured by Mr. McClanahan that the difference in salary between the position he was leaving, and the new position he was assuming would be only $1,800.00. (See footnote 4) Grievant also contends Superintendent Marple's failure to allow him to return to his former position was incorrect. Respondent argues Grievant, as a long term employee with many years of experience, knew that all salaries were based on multiple factors and each individual's salary in a position was the result of the individual's degree level and his years of experience. Respondent also notes

Grievant could easily have verified what his exact salary would have been in the position if he had either called Personnel for this information or checked in the books provided at each school. Respondent asserts it was unreasonable for Grievant to rely on the data received in Mr. McClanahan's office as he knew what questions were asked of Personnel, and that no discussion of Grievant's degree level or experience was included. Additionally, Respondent argues Superintendent Marple had no duty to rescind the appointment, as Grievant had accepted the position, and his hiring had been approved by KCBOE.

Discussion

In a non-disciplinary grievance, the grievant has the burden of proving his case 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.

Grievant has not met this burden of proof on either issue. He has not demonstrated any violation of a statute, regulation, policy, rule, or written agreement. Although it is a shame that Grievant assumed his salary would be they same as the individual who previously held the position, Mr. McClanahan never said the salary he reported to Grievant would be Grievant's salary. Grievant knew Mr. McClanahan had asked for the salary of Mr. Hunt and also knew that all KCBOE salaries are established by the pay scale. Thus, whileit is unfortunate that Grievant assumed what his salary would be, and it is unfortunate Grievant did not verify this information for himself, KCBOE committed no violation.

Even assuming arguendo that Mr. McClanahan did promise Grievant an incorrect salary such a promise would have been an ultra vires one. “Ultra vires promises are nonbinding when made by public officials, their predecessors, or subordinates functioning in their governmental capacity, and such ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); [S]ee also Lee v. Hampshire County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994).” Cook v. Mason County Board of Educ., Docket No. 96-26-105 (Aug. 19, 1996). Thus, ultra vires acts are not

enforceable, and the alleged oral agreement between Grievant and Mr. McClanahan is not enforceable. Id.

The second issue of rescinding the appointment is judged by the arbitrary and capricious standard. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). It was not arbitrary and capricious forSuperintendent Marple to refuse to replace Grievant at CAS after Grievant had accepted the CVC position and had been approved by KCBOE. Further, it cannot be seen as arbitrary and capricious to not rescind that appointment when this position had caused Grievant so much stress that he was forced to take medication, exhibited physical symptoms, and requested placement into another position.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this is a non-disciplinary grievance, the grievant has the burden of proving his case 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.

2. KCBOE committed no violation of a statute, regulation, policy, rule, or written agreement by placing Grievant in a position for which he applied and accepted at the salary mandated by the established pay scale.

3. "Ultra vires promises are nonbinding when made by public officials, their predecessors, or subordinates functioning in their governmental capacity, and such ultra vires representations do not give rise to a due process property interest. Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991), citing Freeman v. Poling, 338 S.E.2d 415 (W. Va. 1985); [S]ee also Lee v. Hampshire

County Bd. of Educ., Docket No. 95-14-424 (Jan. 22, 1996); Rose v. Nicholas County Bd. of Educ., Docket No. 93-34-063 (June 29, 1994)." Cook v. Mason County Board of Educ., Docket No. 96-26-105 (Aug. 19, 1996).

4. Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

5. Superintendent Marple's decision not to rescind the appointment of Grievant to the vice-principal position at CVC was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

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

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 19, 1998

Footnote: 1

Prior to the Level IV hearing, the undersigned Administrative Law Judge noted the grievance statement at Level II, and the grievance statement at Level IV were different, in that Grievant alleged KCBOE had refused to grant his doctor's request. Grievant's attorney was asked to speak to that discrepancy. In reply to this request, Grievant's attorney indicated Grievant also now wished to grieve age discrimination, retirement issues, and favoritism as they related to his not receiving the pay he thought he should receive in the new position, as well as the doctor request issue. Respondent's counsel objected to the raising of these issues for the first time at Level IV. Pursuant to the West Virginia Supreme Court's direction in W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357 (1993), the undersigned Administrative

Law Judge ruled these new issues could not be dealt with at Level IV over Respondent's objection.

Footnote: 2

Grievant did not put forth any legal theory why he should receive more than he expected to earn when he took the position. He merely stated it was a matter of principle.

Footnote: 3

There were some discrepancies in the dates when events occurred, as identified in the record. Grievant testified he took the physician's note to this meeting with Mr. McClanahan, but he could not have done so as the note was written on January 22, 1997, and the meeting with Mr. McClanahan took place before the posting for the CVC position closed on January 21, 1997. Of course the dates for the posting may have been extended, and this information was not shared with the undersigned Administrative Law Judge. While this discrepancy is interesting, it makes little difference exactly when Mr. McClanahan saw the doctor's note, as the outcome of this decision does not revolve around this issue.

Footnote: 4

Grievant's testimony about what happened during the conversation with Mr. McClanahan changed during the course of the grievance. Initially, Grievant indicated he knew the information Mr. McClanahan requested and received pertained to Mr. Hunt. Later, Grievant indicated he thought the information pertained to what he would make in the new position.