JEFFERY HALSTEAD,

Grievant,

v. Docket No. 99-03-066

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jeffery Halstead, filed this grievance sometime in January 1999 against his employer, the Boone County Board of Education ("BCBOE" or "Board"). The statement of Grievance reads:

> **Grievant is a regularly employed Custodian III at Sherman Junior High School and currently holds a 240-day employment contract. The Respondent recently advertised and filled a 261-day custodial vacancy at Sherman High School. The Grievant and the successful applicant perform identical custodial duties and work in adjoining buildings. Grievant alleges a violation (sic) of W. Va. Code §§ 18-29-2(m) and (o) and 18A-4-5b. Grievant requests a 261-day employment term, any benefits arising therefrom, back wages, and interest on all monetary sums.**

This grievance was denied at all lower levels and was appealed to Level IV on February 16, 1999. A Level IV hearing was held on March 17, 1999, and this case became mature for decision on April 27, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant alleges that because he performs the same type of work as the successful applicant, who has a 261-day contract, he is entitled to have the same type of contract.Failure to place Grievant in a 261-day position is a form of discrimination and favoritism, and also a violation of the uniform pay requirements. Grievant maintains he took the posted 240-day, contract term without complaint when he applied for the position because he believed BCBOE was in the process of eliminating all 261-day employment contracts by attrition, but did not

want to disturb the contract of any employee who currently held a 261-day contract.

Respondent argues the successful applicant's building is three times larger than Grievant's, and the successful applicant has more grounds for which he is responsible. Respondent also indicated that the successful applicant's building is occupied during part of the summer, and two meals a day are served there during much of August. Respondent notes Grievant's building does not have any summer usage. BCBOE maintains the length of the contract is determined by the duties of the position and notes Grievant did not apply for the posted 261-day position. Respondent also noted the rationale for each custodian's contract varied according to the size, use, etc., of the assigned area.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact based on the evidence of record.

Findings of Fact

1. Grievant has been employed as a Custodian III at Sherman Junior High School ("SJHS") since 1996. He has a 240-day contract, and performs the normal duties of a Custodian III. (See footnote 2) **2. The terms of employment for Custodian III's vary within the Boone County School system from 200 to 261 days.**

3. The Custodian III who had Grievant's position at SJHS just prior to his leaving was in a 261-day position.

4. On November 18, 1998, BCBOE posted a 261-day contract for a Custodian III at Sherman Senior High School ("SHS"). Mr. Nelson was awarded this position.

5. Grievant did not apply for this position as he was "happy" with where he was.

6. The SHS building is 66,428 square feet in size and is situated on 8 acres. SJHS is 24,446 square feet in size and has 3 acres to maintain. There are multiple out buildings on SHS's grounds and most are cared for by SHS's custodians. In August, SHS is in heavy use by the band, cheerleaders, and football team. Breakfast and lunch are served to these students. Occasionally during the summer, SHS is the site of classes, meetings, and other activities. SJHS does not have summer usage. Additionally, there are no eating facilities in SJHS, and during the school year all SJHS students eat at SHS. 7. BCBOE determined the custodial position at SHS should remain as a 261- day contract, and it was posted as such.

At times, when a 261-day Custodian had retired or changed positions, the vacancy would later be posted as a 240-day position. All employees with a 261-day contract receive vacation based on their tenure with the Board. This vacation can be taken at any time with prior approval.

8. There are three custodians at SHS for a total of 671 working days, and there is one custodian at SJHS for a total of 240 days of work. Mr. Nelson is the only Custodian who works during the summer at SHS as the other two Custodians have 200-day and 210-day contracts.

9. There was no evidence presented to demonstrate that Grievant had any difficulty completing the duties assigned to him.

10. There are few 261-day custodial positions within the Boone County School system. Both the Central Office and the Vocational School have 261-day Custodian III's because of the heavy and frequent use of these buildings.

11. There is one other 261-day Custodian position in the Boone County School system. This position is a Custodian IV position at Madison Middle School. Grievant did not address this issue, or cite this employment as a factor or issue in this grievance.

12. Only one school has a greater interior and exterior size than SHS, Scott Senior High School. This school has three and one half Custodians with a total number of days of 760, as compared to SHS with three Custodians with a total number of days of 671. The employment terms of the Custodians at Scott Senior High School are: 240 days, 220 days, 200 days, and 100 days. There was no information offered by the parties as to the summer usage of the Scott Senior High School facility.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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. LoganCounty 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 contends the uniformity provisions of W. Va. Code § 18A-4-5b have been violated,

and this Code Section requires BCBOE to place him in a 261-day contract at his school. W. Va. Code § 18A-4-5b states, in pertinent part::

> **The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.**
>
> **These county schedules shall be uniform throughout the county with regard to any training[,] classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county . . . .**
>
> **Counties may provide, in a uniform manner, benefits for service personnel which require an appropriation from local funds including, but not limited to, dental, optical, health and income protection insurance, vacation time and retirement plans excluding the state teachers' retirement system.**

Grievant cited Flint v. Harrison County Board of Education, Docket No. 97-17-388 (Jan. 22, 1998) (See footnote 3) **, to support his position. In Flint, the grievants had varying terms of employment contracts, and they argued that these differences violated W. Va. Code § 18A- 4-5b. The administrative law judge found that only those individuals who worked side by side, on the same tasks were entitled to contracts of the same length. In its reversal, the Harrison County Circuit Court held that within the Harrison County School system the "awarding of 261 versus 240 contracts is not based on tasks performed or responsibilitiesof the personnel involved, but solely on the date of hire." The Circuit Court Judge additionally held that "the Grievants [240 day employees] perform substantially similar services to all 261-day service employees." That set of facts can easily be differentiated from the information presented in this case. The length of contract is not based on the date of hire, and Grievant and the successful applicant do not perform substantially similar duties within the meaning of the above-cited Code Section.**

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be

ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982).

The West Virginia Supreme Court of Appeals has consistently has acknowledged that "county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Triggs v. Berkeley County Bd. ofEduc., 188 W. Va. 435, 445, 425 S.E.2d 111, 121 (1992); Bd. of Educ. of County of Wood v. Enoch, 186 W. Va. 712, 414 S.E.2d 630 (1992); Syl. Pt. 3, Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

"A board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 SE 2d 487 (1994). "Determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education. Although W.Va. Code 18A-4-8 [1993] requires a minimum employment term of 'ten months' for service personnel, this Code section also states that a 'board of education may contract with all or part of these personnel for a longer term. (Emphasis added.)'" Id. (See footnote 4)

It is clear from the record that BCBOE's determination that the Custodian III position at SHS be posted as a 261-day position was not arbitrary and capricious, but was based on a reasonable rationale. Of course, it could have chosen to meet the need for summer Custodial

duties in another way, but the method by which the needs of SHS are met is "amanagement decision" that was within BCBOE's discretion. The above-cited W. Va. Code § 18A-4-5b indicates such decisions by a board of education can be based on "pupil participation", and "size of buildings". With the summer student activities, and the much greater size of the building and the larger grounds, BCBOE's decision to have a year around Custodian cannot be found to be arbitrary and capricious. In support of this rationale it must be noted Grievant has not alleged that he is unable to complete the work he is assigned in the contract time allotted to him. Thus, W. Va. Code § 18A-4-5b was not violated, but was followed.

Grievant also alleges discrimination and favoritism. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

It is clear Grievant does not have the evidence to support his case. To prove discrimination or favoritism a grievant must establish a prima facie case which consists of demonstrating:

> **(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) has/have not, in a significant particular;**

and,

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

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case. The differences in contract are related to the "actual job responsibilities" of the successful applicant. The successful applicant works in a much larger building, with more grounds, and his building is open and used for a greater amount of time during the year.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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.

2. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing." 3. W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

4. To prove discrimination or favoritism a grievant must establish a prima facie case which consists of demonstrating:

> **(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) has/have not, in a significant particular;**

and,

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

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5. Grievant has not met his burden of proof and has not established that BCBOE violated W. Va. Code §§ 18-29-2-(m) & (o). The differences in the employment terms are related to the assigned duties of the positions.

6. W. Va. Code §18A-4-5b requires uniformity of pay for "all persons . . . performing like assignments and duties within the county." 7. "A board of education has the discretion to determine the number of jobs for and the employment terms of a board's service personnel, provided that the requirements of W. Va. Code 18A-4-8 [1993] are met. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 SE 2d 487 (1994).

8. "Determinations of the number of service personnel and the length of their employment terms are primarily management decisions. Without a clear statutory requirement, such determinations should remain with a board of education. Although W.Va. Code 18A-4-8 [1993] requires a minimum employment term of 'ten months' for service personnel, this Code section also states that a 'board of education may contract with all or part of these personnel for a longer term. (Emphasis added.)'" Id

9. Grievant has not met his burden of proof and has not established that BCBOE violated W. Va. Code § 18A-4-5b. This Code Section specifically allows for a difference in the employment terms based on "pupil participation" and "size of buildings". BCBOE decision was not arbitrary and capricious or an abuse of discretion.

Accordingly, this grievance is DENIED. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Boone County. Any 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. However, the appealing

party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 1999

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Timothy Conaway.

Footnote: 2

It is unknown how long Grievant has worked for BCBOE.

Footnote: 3

Rev'd, in part, Harrison Circuit Court, (Nov. 10, 1998), appeal accepted, West Virginia Supreme Court (Mar. 30, 1999).

Footnote: 4

Following Grievant's argument to its logical conclusion appears to lead to the requirement that if one custodian, cook, etc. has a 261-day position, then all employees within that classification should have a 261-day position. This result would remove the discretion granted by statute.