RONALD E. CROSS,

Grievant,

v.

DOCKET NO. 98-23-336

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Ronald E. Cross, filed the following grievance against his employer, the Logan County Board of Education ("Board"), on June 30, 1998:

> I am grieving because I feel that I was discriminated against. I also feel that because of this discrimination, the board arbitrarily and capriciously cut Coordinator II position. Redress: The position plus all back pay and benefits and any legal and/or attorney fees incurred. (See footnote 1)

In addition, Grievant filed another grievance on June 22, 1998, as follows:

> Logan County Bd. of Ed. Failed to follow the hiring mandates for service personnel found in W. Va. Code 18A-4-8a. Redress: I be awarded the position plus all back pay and benefits.

These two grievances were consolidated at level two, and a level two hearing was held on August 18, 1998. A level two decision denying the grievance was issued on August 21, 1998, by the Superintendent's designee, Dr. Pat J. White. Grievant appealed to level four on August 28, 1998, and the parties agreed to submit this case on the recorddeveloped at level two. This matter became mature for decision on December 4, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Donald R. Jarvis, Amalgamated Transit Union, and the Board was represented by Brian Abraham, Esq.

SUMMARY OF EVIDENCE

Level Two Grievant's Exhibits

Ex. 1 -

Grievant's resume and certificates

Level Two Board Exhibits (See footnote 2)

Ex. 1 -

Job Description for Coordinator II for Governor's Summer Youth Program.

Ex. 2 -

Posting #530.

Testimony

Grievant testified in his own behalf and presented the testimony of Ray Woolsey, Brenda Skibo, and Walter Watson.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

1. Grievant is employed by the Board as school bus operator. Grievant is AfroAmerican.

2. On or about May 18, 1998, the Board posted a job for a Coordinator II for the Governor's Summer Youth Program. Bd. Ex. 2. The job description for the Coordinator II position listed the following:

a. School secretary preferred,

b. Will assist Coordinator I in performing his/her duties,

c.

Will be responsible for maintaining all records, payroll, typing and submission of reports.

3. The Coordinator II position had been filled the previous 3 or 4 years by Barbara Baxter, the Logan High School secretary. Ms. Baxter did not apply for the job in the Summer of 1998.

4. Grievant bid on the posted position, along with Terri Chafin, an Aide, and Teresa Justice, a Title I Reading and Math Teacher. Bd. Ex. 1.

5. Ms. Skibo, Assistant Superintendent for Personnel, told Grievant he had the most seniority of the applicants, and asked him to submit documentation to prove he met the qualifications of the position. Grievant did so, and Ms. Skibo or her assistant informed him he met the qualifications.

6. However, after learning that Barbara Baxter had not applied for the position, Assistant Superintendent Watson decided that the requirement that the Coordinator II “will assist the Coordinator I in his/her duties” mandated that the successful applicant hold a teaching certificate.

7. The requirements for the Governor's Summer Youth Program had changed over the years, and individuals in that program who would be supervising students were required to hold a teacher's certificate.

8. Based on this information, Mr. Watson informed Ms. Skibo that Teresa Justice should be offered the position because she was the only applicant with a teacher's certificate. 9. Prior to the position being awarded, though, Superintendent Woolsey was made aware that the position was not funded by the Governor's Summer Youth Program, but by local board funds. The Coordinator I position was funded by the Governor's Summer Youth Program.

10. Mr. Woolsey had been an Assistant Superintendent prior to this past year, and did not have any involvement in the Governor's Summer Youth Program.

11. When he found out the position was funded by local board funds, and after discussions with Jack Bailey, the Coordinator I for the Program, Walter Watson, and Brenda Skibo, the Superintendent decided to eliminate this position, due to lack of need.

12. The position was never awarded to any individual, and was never re-posted.

DISCUSSION

Grievant alleges that he has been discriminated against, and that it was arbitrary and capricious for the Board to elect not to fill the Coordinator II position. Specifically, Grievant alleges that the position was eliminated to deprive him of the opportunity to hold it because he is a male and AfroAmerican.

The Board responds that it was within the discretion of the Board to eliminate the position due to lack of need and due to the financial concerns facing the Board. Jack Bailey, the Coordinator I for the Governor's Summer Youth Program, told Superintendent Woolsey and Mr. Walton that he was capable of handling the job without an assistant, and indeed, the Program was successfully completed by Mr. Bailey. Based on Mr. Bailey's assurances, and the fact that the Coordinator II position was not funded by the State, the Superintendent recommended that the Coordinator II position not be filled. 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 interest of the schools, and in a manner which is not arbitrary and capricious. State ex. Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992). There is nothing to prohibit a county board from deciding not to fill a posted position based upon lack of need and financial concerns. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-19-144 (Sept. 28, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require the elimination of some service personnel jobs. See Lucion v. McDowell County Bd. of Educ., 446 S.E.2d 487 (W. Va. 1994). Thus, the Board did not act in an arbitrary and capricious manner when it decided that it was in the school's best interests to eliminate the position of Coordinator II for the Governor's Summer Youth Program.

However, Grievant also contends the decision was made to prohibit him, a male AfroAmerican, from holding the Coordinator II position. Discrimination means “any difference 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.” W. Va. Code § 18-29-2(m). ___Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(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 responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, supra, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

Grievant has failed to make a prima facie case of discrimination regarding the withdrawal of the job posting, because all employees were treated similarly in that no employee was awarded the position. The position was properly withdrawn before theBoard had the opportunity to vote and approve the position. Therefore, Grievant's claim of discrimination must fail.

Further, while it is understandable that, without a clear explanation of what happened at the time, Grievant would be suspicious of the manner in which this situation was handled, the Board has presented ample evidence to explain why the position was withdrawn and not filled. None of these reasons reflects upon Grievant's qualifications or job performance. The determination of the Superintendent to withdraw the position was not an abuse of discretion. Therefore, Grievant's claim that the decision was arbitrary and capricious also fails.

CONCLUSIONS OF LAW

1. 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 interest of the schools, and in a manner which is not arbitrary and capricious. State ex. Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992).

2. There is nothing to prohibit a county board from deciding not to fill a posted position based upon lack of need and financial concerns.

3. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-19-144 (Sept. 28, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987).

4. A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks toreduce employment costs, the board may decide that the schools' best interests require the elimination of some service personnel jobs. See Lucion v. McDowell County Bd. of Educ., 446 S.E.2d 487 (W. Va. 1994).

5. Discrimination means “any difference 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.” W. Va. Code § 18-29-2(m).

6. Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

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of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, supra. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. See Tex. Dept. of Community Affairs, supra; Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365S.E.2d 251 (1986); Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

7. Grievant has failed to make a prima facie case of discrimination.

8. Grievant has failed to prove by a preponderance of the evidence that the Superintendent's withdrawal of the Coordinator II posting was arbitrary or 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 Logan 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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MARY JO SWARTZ

Administrative Law Judge

Dated: January 4, 1999

Footnote: 1

This Grievance Board has no authority to award attorneys fees, and this portion of the grievance is denied.

Footnote: 2

The Board attached these two exhibits to its proposed findings of fact and conclusions of law. They were not admitted during the level two hearing, but were referred to and discussed at some length. In the interests of fairness and to avoid confusion, the undersigned Administrative Law Judge has entered these as exhibits into the record.