ROBERT W. POLING,

Grievant,

v. **Docket No. 02-47-053**

TUCKER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Robert Poling ("Grievant") initiated this proceeding on February 6, 2002, claiming he should have been selected as a substitute custodian and substitute maintenance employee. He seeks to be added to Respondent Tucker County Board of Education's ("TCBOE's) substitute lists for those classifications, plus lost wages and benefits. The grievance was denied at levels one and two, and level three consideration was bypassed. Grievant appealed to level four on March 7, 2002. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on June 10, 2002. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Teresa Dumire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 11, 2002.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant was employed by TCBOE as a substitute bus operator at all times pertinent to this grievance.

2. On December 10, 2001, Respondent advertised openings for substituteaides, secretaries, cooks, and custodians.

3. Grievant applied for employment as a substitute custodian, but was not selected.

4. Five applicants were placed on the substitute custodian list, after interviews were conducted. Three of the applicants were not employed by TCBOE at the time of their applications.

5. Madeline Arnold was placed on the substitute custodian list, because she had been most recently employed by McDonald's, performing mostly custodial work.

6. Wanda Knotts was hired as a substitute custodian, because she had previously been employed by TCBOE as a cook, and had been responsible for cleaning the kitchen.

7. Renee Nestor was hired as a substitute custodian and, at the time of her hiring, was already employed as a half-time custodian.

8. Bill Simmons was hired as a substitute custodian, because he had been employed as a regular custodian by TCBOE many years earlier.

9. Chuck White was hired as a substitute custodian, and he had previous custodial experience working for the forest service.

10. On January 7, 2002, Respondent posted the position of Substitute General Maintenance, which listed the job duties as general plumbing, wiring, snow plowing, snowshoveling, general knowledge of coal furnace, and basic maintenance duties.

11. Three applicants, including Grievant, applied for consideration for substitute maintenance. After interviews were conducted, Bill Simmons was selected. Mr. Simmons had previously been employed by Respondent in the maintenance department and was the only applicant who had specific training for the coal-fired furnace.

12. At the time of his application to be a substitute in general maintenance, Mr. Simmons was employed by TCBOE as a substitute bus operator with less seniority than Grievant. (See footnote 1)

13. Grievant had successfully completed the competency tests for custodian and maintenance when he applied for the positions at issue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 contends that the initial hiring of substitutes is governed by the provisions of W. Va. Code § 18A-4-8b, requiring positions be filled on the basis of seniority, qualifications, and

evaluations, with substitutes having hiring preference over new employees. That statute provides, in pertinent part:

> (a) A county board shall make decisions affecting promotions and thefilling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in [18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.
>
> (b) Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;
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> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
>
> (4) Substitute service personnel; and
>
> (5) New service personnel.

Accordingly, Grievant believes he was entitled to placement on the substitute custodian list over the other applicants, at least those who were not employed by Respondent, and over Mr. Simmons for the substitute general maintenance position, because of his superior seniority. Respondent contends that the hiring of personnel for placement on the substitute roster is not governed by the provisions of W. Va. Code § 18A-4-8b, the applicable standard being whether or not the Board abused its substantial discretion in personnel matters.

Substitute service personnel are employed pursuant to the provisions of W. Va. Code § 18A-4-

15, which provides that "[t]he county board shall employ and the countysuperintendent, subject to approval of the county board, shall assign substitute service personnel on the basis of seniority to perform" their duties. The statute then proceeds to describe the situations in which substitutes are to be used to "fill in" for regular and absent employees. There is no mention of the procedure set forth in W. Va. Code § 18A-4-8b when employees are hired as substitutes. Moreover, that statute repeatedly refers to the filling of "vacancies," which a position on the substitute roster does not appear to be; rather, substitutes, once hired, are then used to fill in when positions become vacant for one reason or another.

As stated in W. Va. Code § 18A-4-15, substitutes are "employed" by the board and "assigned" by the superintendent. This is similar to the language used in W. Va. Code § 18A-2-3, which discusses the employment of substitute teachers. As noted by the West Virginia Supreme Court, "[t]his section, which relates to the county superintendent's right to hire substitute teachers, is designed with considerable flexibility[.]" Davenport v. Gatson, 192 W. Va. 117, 451 S.E.2d 57 (1994). The statutory scheme for hiring substitute service personnel is consistent with the provisions of the liberal provisions regarding substitute teachers, who are also employed and assigned without reference to other provisions requiring specific hiring preferences. Therefore, Respondent had no obligation to follow the requirements of W. Va. Code § 18A-4-8b when selecting individuals for the positions at issue.

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). Thearbitrary and capricious standard of review of county board of education decisions 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 board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, a board of education's 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, 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).

No abuse of discretion can be found under the circumstances presented in this case. Respondent provided reasonable explanations of all of the hiring decisions at issue, which were clearly based upon qualifications and previous experience. Accordingly, Grievant has failed to prove by a preponderance of the evidence that he should have been placed on the substitute lists for custodians and general maintenance.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 § 18A-4-8b requires that vacant positions be filled on the basis of seniority, qualifications, and evaluations. 3. W. Va. Code § 18A-4-8b does not apply to the initial hiring of employees for placement on the substitute list.

4. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

5. Respondent's decisions to hire other individuals over Grievant for placement on the substitute and general maintenance substitute lists were not arbitrary and capricious, nor an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Tucker 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. 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.

Date: July 22, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Mr. Simmons apparently had a break in service between his work in maintenance and employment as a substitute bus operator.