PAUL E. COOL, JR.,

Grievant,

v. **Docket No. 02-51-426**

WEBSTER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Paul E. Cool, Jr., ("Grievant") initiated this proceeding on June 11, 2002, alleging that the principal of Hacker Valley School acted arbitrarily and capriciously in the employment of substitute teachers between January and June of 2002, depriving Grievant of employment opportunities. He seeks compensation for days he should have been selected to substitute at that school. The grievance was denied at level one on June 11, 2002. A level two hearing was held on November 4, 2002, and the grievance was denied in a written decision dated November 13, 2002. On December 2, 2002, Respondent waived consideration of the grievance at level three. Grievant appealed to level four on December 19, 2002. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on March 12, 2003. Grievant represented himself, and Respondent was represented by counsel, Basil R. Legg, Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 14, 2003.

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

Findings of Fact

1. Grievant is employed by Respondent as a substitute classroom teacher. He has possessed a permanent professional teaching certificate since 1970, with endorsements in English 7-9, Social Studies 7-9, and Elementary Education 1-8.

2. Edward Skidmore is also employed by Respondent as a substitute classroom teacher. He possesses a long term substitute permit dated February 1, 2000, with an endorsement in Social Studies 5-12.

3. Hacker Valley School ("HVS") is a small school with approximately 75 students, and most classes consist of two grades combined.

4. Patricia Moncey became principal of HVS in January of 2002.

5. Grievant substituted at HVS on April 15 and April 26, 2002. The last day prior to that time that he had worked at the school was November 29, 2001.

6. Mr. Skidmore was called to substitute at HVS on at least twelve occasions between January and April of 2002.

7. Other substitute teachers, including Renee Anderson, Jason Rashka, and Alfred Clay, were used at HVS on numerous occasions between January and April of 2002.

8. After complaints had been made by parents, Ms. Moncey did not call Grievant to substitute for the third grade class after she came to HVS.

9. Anita Pugh, a seventh and eighth grade social studies teacher at HVS, had a planned surgery in April of 2002, and she was absent from work from April 30 through June 7, 2002.

10. Mr. Skidmore substituted for Ms. Pugh for the duration of her extended absence, at Ms. Moncey's request. 11. Respondent adopted a policy ("GBRJ"), effective July 25, 1988, regarding arrangements for substitute teachers, which provides in pertinent part:

> The Principal is authorized to call substitutes for teachers in his/her school who will be absent from work. However, after the fifth consecutive day of absence, the principal must ensure that the best qualified person available on the basis of licensure held and endorsement(s) is substituting in the assignment in question.

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 Principal Moncey favored Mr. Skidmore over other substitutes, specifically himself, once she came to HVS in January of 2002. Further, he argues that Respondent violated its own policy regarding long-term substitute positions when it hired Mr. Skidmore over him for Mrs.

Pugh's position.

Respondent points to W. Va. Code § 18A-2-3, which provides a county superintendent with the authority to employ and assign substitute teachers to fill temporary absences of teachers. As Respondent has correctly noted, there is no statutory requirement that any particular substitute be placed in a particular position, which is left to the discretion of the superintendent. Indeed, as has been noted by the Supreme Court of Appeals, "W. Va. Code § 18A-2-3 . . . which relates to the county superintendent's right to hire substitute teachers, is designed with considerable flexibility and is not circumscribedby any work day quota for substitute teachers." Davenport v. Gatson, 192 W. Va. 117, 118, 451 S.E.2d 57, 58 (1994).

It is well established that county boards of education have broad discretion in personnel matters, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). 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.2d1017 (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 is 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, 169 W. Va. 162, 286 S.E.2d 276 (1982).

With regard to the various substitute assignments at HVS from January through the end of April, 2002, Grievant has failed to prove by a preponderance of the evidence that Respondent abused its discretion. There is no evidence regarding who was called and unavailable for any of these assignments, so it is unknown whether Grievant may have been called. In addition, Mrs. Moncey testified that the only class which she specifically designated that Grievant not be called to substitute for was the third grade, and theevidence does not indicate which classes the substitutes taught. In light of the broad discretion a board of education has regarding the assignment of substitute teachers,

Grievant has not met his burden of proof regarding these assignments.

However, with regard to Ms. Pugh's long-term absence from the seventh and eighth grade social studies class, Respondent was obligated to follow its policy regarding substitute arrangements. It is well settled that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Respondent's policy specifically requires that, after the fifth day, the most qualified teacher be placed in the substitute position, based upon licensure and endorsement. Although both Grievant and Mr. Skidmore have the appropriate endorsement for seventh and eighth grade social studies, there can be no dispute that Grievant's permanent teaching certificate is a superior license to Mr. Skidmore's long term substitute permit. Pursuant to the provisions of West Virginia Board of Education Policy 5202,a long term substitute permit is issued to an individual who has verified eighteen hours of training in classroom management, state and local policies, school law, and instructional goals and objectives, along with twelve semester hours of course work in the specialization contained on the permit. These permits are also issued to applicants who hold an expired professional certificate with the applicable endorsement.

By contrast, teachers such as Grievant have been subjected to much more stringent requirements to obtain a teaching certificate, including college degree completion in a state board approved program and state board examinations. In order to obtain a permanent certificate, an applicant must hold a professional teaching certificate for at least five years and hold a masters degree or have renewed their five-year certificate at least twice basedupon specific course work or obtaining the age of sixty. Accordingly, for purposes of Respondent's policy, the holder of a permanent teaching certificate is a more qualified teacher than one holding a substitute permit.

Grievant has proven by a preponderance of the evidence that Respondent violated its policy with regard to placement of a teacher in a substitute position which lasted longer than five days, because he was more qualified by virtue of his permanent teaching certificate. Accordingly, Grievant is entitled to back pay, seniority, and any associated benefits for the period that Mr. Skidmore substituted at HVS, excluding the initial five days of that assignment.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, 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. Pursuant to W. Va. Code § 18A-2-3, a county superintendent has the authority to employ and assign substitute teachers to fill temporary absences of teachers.

3. County boards of education have broad discretion in personnel matters, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd.of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

4. Grievant has failed to prove by a preponderance of the evidence that Respondent abused its discretion regarding the assignment of substitutes to short-term absences at Hacker Valley School between January and April of 2002.

5. “An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

6. Respondent's Policy GBRJ requires that, after the fifth consecutive day of absence, a principal must ensure that the best qualified person available, based upon licensure held and endorsements, is substituting for an absent teacher.

7. Grievant has proven that, pursuant to Respondent's substitute policy, he was the best qualified substitute for the long-term absence of Ms. Pugh at Hacker Valley School from April 30 through June 7, 2002.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is directed to compensate Grievant with all back pay, seniority and associated benefits for the substitute position from April 30, 2002, through June 7, 2002, excluding the initial five days of that assignment.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Webster 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 andState 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: May 14, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge