SANDRA KAY MILAM, et al.,

Grievants,

v. **Docket No. 03-20-194**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Sandra Kay Milam, Toni Withrow, Priscilla Mobley, and Rosemary Light ("Grievants") are employed by the Kanawha County Board of Education ("KCBE") and hold the classification title of Clerk II. Grievant Milam filed a level one grievance on May 15, 2003, in which she alleged that she had been transferred to a position which had not been posted. She requested the transfer be rescinded, and that all non-posted positions be posted. Grievants Withrow, Mobley and Light filed a joint grievance on May 15, 2003, in which they alleged certain vacancies were not posted in violation of W. Va. Code §§ 18A-4- 5b and 18A-4-15. Grievants request that all Clerk positions which were filled without posting, be posted. The grievances were denied at levels one and two, and were appealed to level four on July 1, 2003. Grievants' representative, Rosemary Jenkins, of the American Federation of Teachers, and KCBE counsel James Withrow, agreed that the matters could be consolidated, and a level four decision be rendered on the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law received on August 20, 2003. (See footnote 1)

The following facts are undisputed.

Findings of Fact

1. Grievants Light, Withrow, and Mobley are employed by KCBE as Clerks II, and were employed under 200-day contracts during the 2002-2003 school term.

2. Grievant Milam is employed by KCBE as a Clerk II, and was contracted for a 220-day employment period during 2002-2003.

3. In Spring 2003, KCBE determined that 21 clerk positions would be recommended for elimination during a reduction in force. The positions to be eliminated included personnel assigned to

high schools, the central office and the special education program.

4. KCBE implemented the reduction in force by compiling lists of the positions to be reduced. The positions were categorized by employment terms, 261, 220, and 200 day contracts. The most senior 261-day clerk whose position was being eliminated was recommended for transfer to the position of the least senior 261-day employee. The least senior 261 day clerk was then assigned to a 220-day position held by a less senior employee, and so on, until a number of clerks with low seniority were terminated, and their positions posted.

5. Grievant Milam was transferred to a 220-day position at Stonewall Middle School for the 2003-2004 school year. The position was not posted during the reduction in force process.

6. Grievants Light, Withrow and Mobley were placed on the transfer and subsequent assignment list.

Discussion

In a non-disciplinary grievance, the grievants have the burden of proving their grievance 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.

Grievants argue that W. Va. Code § 18A-4-8b requires that job vacancies be posted and filled based upon seniority, qualifications, and evaluation of past service. Grievants further note that the reduction in force portion of that statute does not create bumping rights for displaced employees, nor does it mandate seniority-based transfers. Grievants assert that KBOE must post all the Clerk positions allowing them the opportunity to apply for assignments they choose. KCBE denies that it acted in an arbitrary and capricious manner, but rather simply preserved, so far as possible, the status of the affected employees.

W. Va. Code § 18A-4-8b provides in pertinent part:

A county board shall make decisions affecting promotions and the filling 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 section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

* * *

If a county board is required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, That if there is no job vacancy for employment within the classification or grades of classification, he or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

Grievants' reliance on the posting and filling provisions of this section is misplaced because there are no vacancies created during a reduction in force. On the contrary, the very reason for the action is that there are too many employees for the remaining positions. The transfer procedure used by KCBE is commonly used, and meets the requirement that the employees with the least seniority be released from employment with as little disruption to the system as possible.

"Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . ." Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995). 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." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). "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 a board of education." Trimboli, supra; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). Grievants failed to provide evidence that KCBE acted in an arbitrary and capricious manner.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In a non-disciplinary grievance, the grievants have the burden of proving their grievance 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. Grievants failed to prove that KCBE is required to post and fill positions held by employees whose employment was terminated during a reduction in force, in compliance with the provisions of W. Va. Code § 18A-4-8b.

3. 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." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

4. The transfer of employees into positions previously held by employees whose seniority was insufficient to retain employment during a reduction in force was not arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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 alsoprovide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: SEPTEMBER 15, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The grievances were appealed separately to level four, and Grievants Light, Withrow and Mobley were assigned Docket No. 03-20-184.