PATRICIA BLANCO,

Grievant,

v. Docket No. 05-05-026

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Patricia Blanco ("Grievant"), employed by the Brooke County Board of Education ("BCBE") as a teacher, filed a level one grievance on August 26, 2004, after she was not selected to serve as yearbook advisor for the 2004-2005 school year. For relief, Grievant seeks reinstatement as advisor, and back pay. The grievance was denied at levels one and two. Appeal to level four was made on February 1, 2005, at which time Grievant's representative, Rosemary Jenkins of the American Federation of Teachers, and BCBE counsel David F. Cross, Assistant Prosecuting Attorney, agreed to submit the grievance for decision based upon the record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before March 11, 2005.

The following facts have been derived from a preponderance of the evidence made a part of the level two record.

Findings of Fact

1. Grievant has been employed by BCBE as a teacher at Follansbee Middle School ("FMS") at all times pertinent to this grievance.

2. In addition to her teaching assignment, Grievant has served as facultyyearbook advisor at FMS from 1999 to 2004. The faculty member serving in this position is given an extracurricular contract providing compensation of $600.00 per year, and is relieved of some teaching duties.

3. Grievant was not employed by BCBE as yearbook advisor for the 2004-2005 school year.

4. Grievant was not available to serve as yearbook advisor during the 2004- 2005 school

year due to a curriculum change designed to improve the reading skills of students at FMS. Because she holds a Masters degree in Reading, Grievant was assigned to work with students to improve their reading skills during the time period she had previously been allocated to serve as yearbook advisor.

Discussion

Grievant argues that BCBE's failure to employ her as yearbook advisor was arbitrary and capricious, and without proper notice and due process. BCBE asserts that Grievant's one-year extracurricular contract expired by its own terms, and that the decision to assign Grievant to a reading improvement class, given her educational background in that area, was properly made within the discretion of the school principal.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 (2004); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't ofHealth & Human Res., Docket No. 92-HHR-486 (May 17, 1993). County boards of education have broad discretion in personnel matters, including making job assignments and transfers, 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.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 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).

In this case, the administrator made a reasoned decision to assign a highly qualified teacher to an area most in need of instructors. Unfortunately, this change caused Grievant to be unavailable to pursue the position of yearbook advisor. Clearly, Grievant wished to continue with the yearbook assignment; however, extracurricular contracts must be made by the mutual agreement of the parties which did not exist in this instance.

Neither was Grievant deprived of any due process. The terms of the extracurricularcontract she entered stated that the assignment was for the 2003-2004 school year. At the conclusion of the term, the contract expired. BCBE was not required to provide her with notice or any other due process at that time.

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. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 (2004); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). 2. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, 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).

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 amanner 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).

4. BCBE's decision to assign Grievant to a reading program, rendering her unavailable to apply for an extracurricular assignment was not arbitrary or capricious.

5. Because the extracurricular contract last held by Grievant expired by its own terms, BCBE was not required to provide her any notice or due process prior to awarding the position to another teacher.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 Judgesis 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: MARCH 25, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE