SUSAN BEGUNICH,

Grievant,

v. Docket No. 05-30-007

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

JENNIFER KWIATKOWSKI,

Intervenor.

D E C I S I O N

Susan Begunich ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as a teacher, filed a level one grievance on September 3, 2004, in which she alleged a violation of W. Va. Code § 18A-4-7a when her application for a position was not considered. For relief, Grievant requests that her application be reviewed, and that she be instated to the position if she is determined to be the most qualified applicant. Grievant additionally requests back pay and benefits, if applicable. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following a hearing at level two, and Grievant elected to bypass consideration at level three. Appeal to level four was made on January 11, 2005. Grievant, represented by WVEA Consultant Don Craft, and MCBE counsel Harry M. Rubenstein, of Kay, Casto, & Chaney, agreed to submit the grievance for decision based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law filed on or before February 23, 2005. (See footnote 1)

The following facts have been derived from a preponderance of the evidence made part of the record at levels two and four.

Findings of Fact

1. Grievant has been employed by MCBE as a teacher since 1993, and was assigned as a Special Education teacher at all times pertinent to this grievance. Grievant is additionally certified to teach Physical Education and Heath Education, grades 7-12.

2. On August 13, 2004, MCBE posted a vacancy, effective the 2004-2005 school year, for

a Physical Education and Health Education position at University High School ("UHS"). The deadline date for application was August 20, 2004.

3. MCBE posts paper copies of vacancy announcements in all school buildings, and the central office, and they are announced on the telephone job line. Although not required to do so, MCBE also advertises vacant positions on the State Department of Education ("SDOE") web site. The SDOE web-site is not an official posting, and includes a disclaimer stating, "[t]his information does not replace job application requirements and procedure at the WVDE or County Boards of Education."

4. The position in question was posted on the State Department of Education web-site with a typographical error indicating the closing date to be August 23, 2004.

5. While on vacation, Grievant checked the SDOE web-site and saw the UHS position. Upon her return, Grievant submitted a bid for the position on August 23, 2004. Grievant also sent an e-mail that day to an unidentified individual in the personnel office in which she stated:

I just wanted to let someone know that I have applied for this position. I applied at 7:45 AM this morning. I'm not sure what time the job was posted on the 13th, but I did apply for a couple other jobs on the 13th around 10:00 am and this job was not posted. I'm hoping that my bid will be accepted.

6. Grievant's application was not accepted because it was filed after the deadline. Jennifer Kwiatkowski ("Intervenor"), a substitute employee, was determined to be the most qualified applicant, and was awarded the position.

Discussion

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). Grievant argues that W. Va. Code § 18A-2-7a

requires county boards of education to maintain current information for positions listed on the SDOE site, and because MCBE has made the state-wide posting part of its employment procedure, it is required to honor her application. MCBE denies that it violated W. Va. Code § 18A-4-7a or §18A-2-7(a), and asserts that Grievant's application was simply submitted too late.

Grievant does not explain how she believes W. Va. Code § 18A-4-7a(o) was violated. That provision states:

Openings in established, existing or newly created positions shall be processed as follows:

(1) Boards shall be required to post and date notices which shall be subject to the following:

(A) The notices shall be posted in conspicuous working places for all professional personnel to observe for at least fiveworking days; (B) The notice shall be posted within twenty working days of the position openings and shall include the job description; (C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job; (D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and (E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;

(2) No vacancy shall be filled until after the five-day minimum posting period;

(3) If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the posting period;

(4) A position held by a teacher who is certified, licensed or both, who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years; and

(5) Nothing provided herein shall prevent the county board of education from eliminating a position due to lack of need.

To the contrary, MCBE appears to have acted in compliance with the requirements set forth in this provision regarding posting and filling professional positions.

Neither has Grievant proven a violation of W. Va. Code §18A-2-7a, which establishes a

statewide job bank.

The state board shall establish and maintain a statewide job bank to assist the recruitment and reemployment of experienced professional personnel whose employment with county boards has been terminated because of a reduction in force. The job bank shall consist of two parts for each county: (1) A list of the names, qualifications and contact information of all professional personnel who have been terminatedbecause of a reduction in force, except personnel who have requested in writing that they not be listed in the job bank; and (2) a list of professional positions for which the county is seeking applicants. The job bank shall be accessible electronically to each county and to individuals on a read only basis, except that each county shall have the capability of editing information for the county and shall be responsible for maintaining current information on the county lists.

It is regrettable that the UHS position was posted on the SDOE site with an incorrect application date; however, it appears to be due to a simple mistake, rather than by any misdeeds on the part of MCBE.

There having been no statutory violations proven, the issue is simply whether MCBE acted arbitrarily and capriciously when it did not accept Grievant's late application. “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 & Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 [the employer]." Trimboli, supra; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). In this instance, the closing date for application, August 20, 2004, was on a Friday. Because the first day of the 2004-2005 school year was the following Monday, August

23, 2004, MCBE's need to promptly fill the position is apparent. Further, should the application period have been extended for one day to accommodate Grievant, longer extensions for other employees would likely have to be granted. Based upon these factors, MCBE's decision not to accept the late application was not arbitrary or capricious.

In addition to the foregoing findings of fact and discussion, the following conclusions of law are appropriate.

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.

2. Grievant failed to prove that MCBE violated any provisions of W. Va. Code § 18A-4-7a(o), or § 18A-2-7 when posting the UHS position.

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 & Human Res., Docket No. 93-HHR-322 (June 27, 1997).

4. MCBE's decision not to accept the application filed by Grievant after the posting had closed was not arbitrary and capricious. 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 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: MARCH 9, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Intervenor was represented by WVEA Consultant William White. Mr. White did not file additional proposals at level four.***