SUSAN CUSTER,

Grievant,

v. **Docket No. 05-05-210**

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Susan Custer ("Grievant"), employed by the Brooke County Board of Education ("BCBE") as a custodian, filed a grievance directly to level four on June 23, 2005, after her probationary employment contract was not renewed. A level four hearing was held in the Grievance Board's Wheeling office on January 26, 2006. (See footnote 1) Grievant was represented by Ronald W. Kasserman, Esq., of Seibert & Kasserman, L.C., and BCBE was represented by David F. Cross, Esq., Assistant Prosecuting Attorney of Brooke County. The grievance became mature for decision on February 16, the due date for filing responses to proposed findings of fact and conclusions of law. (See footnote 2)

The following facts have been derived from a preponderance of the credible evidence made part of the record at level four and at a preliminary hearing held before BCBE.

Findings of Fact

1. Grievant was first employed by BCBE as a substitute custodian in November 1998, and was hired as a full-time Custodian III at Brooke High School ("BHS") for the 2004-2005 school year. 2. Following observations of Grievant's work on May 11, 2004, and June 8, 2004, BHS Assistant Principal Manuel Markos notified Grievant that several sections of her assigned area were not cleaned. Observations on October 7 and 8, 2004, again revealed that Grievant had not cleaned the girls' locker room.

3. On October 29, 2004, Mr. Markos completed an evaluation for Grievant in which he determined her performance was unsatisfactory. The categories Grievant was rated as "Does Not Meet Standards," were the quantity of work and quality of work. Mr. Markos commented on the evaluation that Grievant had failed to clean her assigned area at least three times.

4. Grievant was subsequently placed on a plan of improvement, effective November 28, 2004, through April 1, 2005.

5. Pursuant to the plan of improvement, observations of Grievant's work were conducted on December 7 and 15, 2004, January 5, 12, 19, and 26, February 2, 9, and 16, 2005.

6. On April 1, 2005, Mr. Markos completed an evaluation of Grievant's work, again finding that she did not meet performance standards in the areas of quality and quantity of work. Additionally, Grievant was rated unsatisfactory in the category of “Initiative” at this time. Mr. Markos noted that while Grievant had not always completed the work in her area, because some improvement had been demonstrated, the plan of improvement would be extended to April 25, 2005. Grievant was advised to do her best work.

7. Grievant did not successfully complete her assignment on April 1, 18, and 19, 2005. By letter dated April 25, 2005, Mr. Markos notified Grievant that she had notsuccessfully completed the plan of improvement, and that she would not be recommended for rehiring.

8. By letter of April 29, 2005, BCS Superintendent Charles F. Baker notified Grievant that he had not recommended that she be rehired for the 2005-06 school year. (See footnote 3) 9. At Grievant's request, BCBE conducted a hearing on June 8, 2005, prior to upholding Superintendent Baker's decision not to renew her probationary contract. 10. Grievant is a female over the age of forty.

Discussion

The non-renewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002); 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). Initially, it is noted that when a board of education elects to not renew a probationary employee's contract, it need only follow the provisions of W. Va. Code § 18A-2-8a, which provides:

The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for

the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last-known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.

Grievant does not allege a violation of her due process rights set forth in this provision, but asserts that her non-retention was based on age and gender discrimination. BCBE argues that Grievant's contract was not renewed because of unsatisfactory performance.

"Ordinarily, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Because W. Va. Code § 18A-2-8a gives broad discretion tothe county board when determining whether or not to rehire a probationary employee, Grievant must establish that BCBE's decision in this instance was arbitrary and capricious. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). Grievant may also claim that the action was taken in violation of some substantial public policy . . . . See, e.g., Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978)."

As previously noted, Grievant alleges that the decision not to renew her employment contract was due to age and gender discrimination. For purposes of this grievance procedure, discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code §

18-29-2(m). In discussing discrimination claims under the grievance statutes, the Supreme Court of Appeals has noted that “[t]he crux of such claims is that the complainant was treated differently than **similarly situated** employees[.]” Bd. of Educ. v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004)(emphasis added). Grievant failed to prove that she was treated differently from any other custodian who was not completing his/her assignment. To the contrary, the evidence establishes that Grievant was treated exactly the same as all other custodians, over and under forty years of age, male and female.

Neither was the decision arbitrary and capricious. "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 differenceof 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)." Trimboli v. Dep't of Health and 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. BCBE provided a substantive record establishing an on-going lack of diligence by Grievant to complete the duties of custodian in a satisfactory manner. Her deficiencies were brought to her attention, and she was given the opportunity to improve. Even with an extension of the plan of improvement, satisfactory performance was not demonstrated. BCBE met all the procedural requirements, and established a substantive reason for not continuing Grievant's employment.

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. The non-renewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the

evidence. Loundman-Clay v. Higher Educ. Policy Comm'n, DocketNo. 02-HEPC-013 (Aug. 29, 2002). See Rogers v. Logan County Bd. of Educ., Docket Nos. 99-23-196/246 (Nov. 16, 2002).

2. Because W. Va. Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, Grievant must establish that BCBE's decision in this instance was arbitrary and capricious. See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991). Grievant may also claim that the action was taken in violation of some substantial public policy. . .. See, e.g., Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978)."

3. W. Va. Code § 18-29-2(m) defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

4. Grievant failed to prove that the non-renewal of her employment contract was the result of discrimination.

5. "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).

6. Grievant failed to prove that BCBE acted in an arbitrary and capricious manner when it did not renew her employment.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Brooke 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 16, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.The unusually lengthy delay was the result of a change in Grievant's counsel after which an agreement to submit the grievance for a decision based on the record was rescinded.

Footnote: 2 Grievant elected not to file post-hearing proposals.

Footnote: 3

[3]The record actually has two letters from Superintendent Baker notifying Grievant that she was not recommended for rehiring. A letter dated April 27, 2005, was attached to the grievance form. This letter bears the same certified mail number as the April 29 letter, admitted as Joint Exhibit 1, but they are clearly different. Insofar as the relevant content is consistent, this fact has no bearing on the outcome of the case.