THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

FRANCIS GOODWIN,

Grievant,

v v.

Docket No. 06-20-265

Janis I. Reynolds

Senior Administrative Law Judge

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent,

and

SCOTT BEANE,

Intervenor.

D E C I S I O N

Grievant, Francis Goodwin, is employed by the Kanawha County Board of Education ("KCBOE" or "Board") as a Coordinator of Services/Secretary 3. She filed this grievance on April 20, 2006, and the Statement of Grievance reads:

> Grievant a secretary/coordinator of service, contends that the Respondent erred in employing a less senior employee for the position of Supervisor of Custodian Services. Grievant contends that Respondent's action violated West Virginia Code §§ 18A-4-8b, 18A-4-8g, and was arbitrary and capricious application of the county policy regarding nepotism.

Relief Sought: Grievants (sic) seeks instatement into the position of Supervisor of Custodian Services, compensation for wages lost with interest, benefits and seniority.

This grievance was denied at Level II, and Level III was by-passed. Grievant appealed to Level IV on August 2, 2006, and a Level IV hearing was held October 5, 2006. This case became mature for decision on November 15, 2006, after receipt of the parties'proposed findings of fact and conclusions of law. Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, the Board was represented by Attorney James Withrow, and Intervenor represented himself.

Procedural history

Grievant filed two separate grievances on this position, as it was posted twice and she was not selected twice, for different reasons. See Goodwin v. Kanawha County Bd. of Educ., Docket No. 06-20-140. This grievance concerns the second selection process. The successful applicant on the second occasion was Scott Beane, Intervenor.

Synopsis

Grievant asserted she should have received the position because she passed the test for Supervisor of Maintenance, met the stated requirements, and was the most senior. Respondent stipulated Grievant would have been the successful applicant in the second selection process, but could not receive the position because of its nepotism policy. Grievant would have supervised her husband.

Grievant responds to this assertion by noting her husband has worked at Laidley Field for many years, was supervised by the manager there, and his duties, while listed as General Maintenance/Custodian 3, were primarily those of General Maintenance.

With this specific set of facts, the undersigned Administrative Law Judge finds Grievant should have received the position at issue.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. On November 16, 2005, KCBOE posted the position of Supervisor of Maintenance for Custodial Services.

2. This first posting resulted in the hiring of Paul Prendergast. He only stayed in position for a couple of weeks. See Goodwin I.

3. It is unclear from the record when KCBOE reposted the position, but Grievant and Intervenor applied.

4. Both Grievant and Intervenor are employees of KCBOE. Intervenor is a sixteen-year employee. He had been a bus operator and a truck driver, had worked ingeneral maintenance and most recently was a painter. He has an Associate Degree in Business Management. He worked as a custodian for a few months after an injury, but has never been classified as a custodian. Intervenor supervised employees before he began his employment with KCBOE in 1998, but has not supervised anyone at KCBOE.

5. Grievant has been employed by KCBOE for 28 years. She began her employment as a custodian, and shortly thereafter became Head Custodian. She served in this supervisory capacity for seven years. She then worked as a clerk, a secretary, and now serves as a Coordinator of Services/Secretary 3 in the Special Education Department.

6. KCBOE stipulated Grievant would have received this position if her husband had not been classified as a Custodian.

7. Grievant's husband was hired as a full-time Custodian I in August of 1998 at Dunbar Junior High School. A few months later, in October 1998, a General Maintenance/Custodian III position was posted for Laidley Field. (See footnote 1) Mr. Goodwin applied for and received the position. He had been there ever since, until he applied for and received a maintenance position with KCBOE in October 2006. During his time at Laidley Field, he was supervised only by Lou Ann Lanham Hisson, and vast majority of his work was maintenance.

8. A custodian is routinely supervised and evaluated by the principal of the school in which he works.

9. The Job Description Summary for the Supervisor of Maintenance for Custodial Services position states, this employee is to "supervise [the] custodial programto ensure clean, orderly, and

attractive conditions of buildings and grounds to all Board of Education property." KCS Exh. 2 at Level II.

10. The Supervisor of Maintenance for Custodial Services "[r]eports to [the] Director of Maintenance and is responsible for work activities and coordination of all Custodians in association with school Administrators." KCS Exh. 2 at Level II.

11. The duties of the Supervisor of Maintenance for Custodial Services are:

1. Establishes standards and procedures for work of Custodial staff, and plans work schedules to ensure adequate service.

2. Inspects and evaluates physical condition of School Facilities, and submits to management recommendations for painting, repairs, relocation of equipment, and reallocation of space.

3. Periodically inventories supplies and equipment.

4. Reads trade journals to keep informed of new and improved cleaning methods, products, supplies, and equipment

5. Organizes and directs departmental training programs, resolves personnel problems, recommends new employees, works cooperatively with Principals in evaluating custodians.

6. Maintains records and prepares periodic activity and personnel reports for review by management.

7. Coordinates activities with those of other departments.

8. May evaluate records to forecast department personnel requirements, and to prepare budget.

9. May perform cleaning duties or other duties as assigned in cases of emergency or staff shortage.

10. Works flexible hours to enable interaction with and supervise Custodians on various shifts. Overtime exempt position.

11. Other duties as assigned by Superiors.

KCS Exh. 2 at Level II. 12. The position also "[r]eceives written or verbal instructions from the Director of Maintenance. Directly assigns work responsibilities for subordinates in association with school administrators." KCS Exh. 2 at Level II.

13. KCBOE's Nepotism Policy identifies a spouse as "immediate family," and states, "[n]o person, either by new hire transfer, reassignment, or assignment as a substitute, shall be placed in any position in which he or she is supervised by or supervises an immediate family member." KCS Exh. 1 at Level II.

14. KCBOE's Nepotism Policy also states, "If a marriage results in the supervision of an immediate family member, the subordinate employee shall be reassigned to an existing vacancy or to the next available vacancy for which the subordinate employee is qualified." KCS Exh. 1 at Level II.

15. KCBOE's Nepotism Policy also states, "In the event the Superintendent recommends the employment or promotion of a member of the immediate family of any administrator at or above the rank of principal or equivalent supervisory position, the Superintendent shall report to the Board the existence of such a relationship in connection with the recommendation." KCS Exh. 1 at Level II.

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 wouldaccept 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).

Anti-nepotism policies, in general, are a reasonable exercise of a county board of education's discretion, and it has been held that "[a] board of education policy that prohibits one spouse from supervising the other spouse within a county school system is a reasonable exercise of the board's supervisory authority to prevent favoritism, conflicts of interest or the appearance of either." Townshend v. Bd. of Educ., 183 W. Va. 418, 396 S.E.2d 185 (1990); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990).

The evidence of record demonstrates Mr. Goodwin's position at Laidley Field was not the normal position at a school. Mr. Goodwin was solely supervised by Ms. Hisson, his duties were mainly maintenance, his hours were extremely varied, including many nights and evenings, and the custodial duties at Laidley Field were performed by a substitute custodian.

While undersigned Administrative Law Judge understands the need for a careful enforcement of the Nepotism Policy, here, the result appears to favor form over substance. This exacting enforcement of the policy prevents a qualified employee with 28 years of seniority from receiving a position that KCBOE stipulates she would have received, but for the employment title of her husband. As noted by the West Virginia Supreme Court of Appeals, "School personnel regulations and laws are to be strictly construed in favor of the employee." Syl. pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). See also Syl. Pt. 1, Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990); State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176; 475 S.E.2d 176, (1996). Respondent cites to Miller v. Kanawha County Board of Education, Docket No. 05- 20-052, (Sept. 28, 2005), as support for its position. In Miller, the grievant worked as a Mechanic/Bus Operator at the Elkview terminal, and his mother-in-law was the terminal supervisor. The administrative law judge found the terminal supervisor was "directly responsible for the supervision of the employees assigned to his/her terminal," and as such the grievant's mother-in-law would be able to assign and directly supervise him.

These facts are not on point with this case. First, if Mr. Goodwin were returned to his original assignment from 1998, the principal of his school would be his supervisor. This person would be the evaluator of Mr. Goodwin, and Grievant would not be his direct supervisor. Second, Mr. Goodwin's work was not that of a custodian, but rather of a general maintenance worker. (See footnote 2)

It is conceivable that if Mr. Goodwin were derelict in the small portion of his duties considered to

be custodial, the person who was his principal might ask for the assistance of the Supervisor of Maintenance for Custodial Services in improving his performance. However, this slim possibility does not appear sufficient to prevent a qualified, 28 year employee from receiving a position KCBOE admits she would have gotten. If there is a fear this potential problem might occur, KCBOE could certainly use the process outlined in its the Nepotism Policy which states, "If a marriage results in the supervisor of animmediate family member, the subordinate employee shall be reassigned to an existing vacancy or to the next available vacancy for which the subordinate employee is qualified."

A transfer occurred in the Miller case, and the undersigned Administrative Law Judge is at a loss to understand why this process could not be applied to this grievance. Especially, since this alteration would result in a promotion for Grievant. As discussed in Finding of Fact 7, Mr. Goodwin is now employed in maintenance at Crede.

The above discussion will be supplemented by the following 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. "'School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1, Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990); State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176; 475 S.E.2d 176, (1996)

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)." 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.

4. A board of education policy that prohibits one spouse from supervising the other spouse within a county school system is a reasonable exercise of the board's supervisory authority to prevent favoritism, conflicts of interest or the appearance of either." Townshend v. Bd. of Educ., 183 W. Va. 418, 396 S.E.2d 185 (1990); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990).

5. In this case, with this specific set of facts, it is arbitrary and capricious to prevent Grievant from being promoted because of the possibility that she could be consulted by her husband's supervisor about the improvement of a small portion of his duties.

Accordingly, this grievance is **GRANTED**.

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 also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: March 29, 2007

Footnote: 1

Laidley Field is the football field and track facility used by many KCBOE schools, as well as other entities throughout the year.

Footnote: 2

Oddly, the posting for the position Mr. Goodwin applied for and received was for a General Maintenance/Custodian III. Grt. Nos. 3, 5, & 6 at Level IV. This is what is stated in his first contract. However, later contracts do not reflect this status, and no explanation was offered for this change. The undersigned Administrative Law Judge holds Mr. Goodwin was a multi-classified employee, holding both titles as reflected on the position request, posting, and initial contract.