WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANGELA HARLESS,
Grievant,

v. **Docket No. 2009-1705-KanED**

KANAWHA COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Angela Harless filed a grievance against her employer, Kanawha County Board of Education, on June 30, 2009. Her statement of grievance reads, "KCS did not approve principal's recommendation to hire Harless for summer facilitator position."

For relief, Grievant seeks, "Back pay/missed wages/attorney fees[1] for Level III hearings and appeals/immediate hire for position."

A level 1 decision denying this grievance was issued on August 27, 2009, at which time Grievant appealed to level two. Mediation was then held on November 3, 2009. Grievant then timely appealed to level three, and a hearing was held at the Grievance Board's Charleston office on February 19, 2010. Grievant appeared *pro se*[2], and Respondent was represented by Jim Withrow, Esq. This case became mature for decision on March 19, 2010, upon the parties' submissions of findings of fact and conclusions of law.

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[1]It is well established that the Grievance Board does not have the authority to award attorney fees. *Brown-Stobbe/Riggs v. Dep't of Health and Human Resources*, Docket No. 06-HHR-313 (Nov. 30, 2006); *Chafin v. Boone County Health Dep't*, Docket No. 95-BCHD-362R (June 21, 1996). West Virginia Code § 6C-2-6 specifically states: "(a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense."

[2]Grievant is a graduate of West Virginia University College of Law and a member of the West Virginia State Bar.

Synopsis

Grievant asserts Respondent was arbitrary and capricious when it did not hire her to the position of Credit Recovery Facilitator. Grievant argues that the more senior full-time employee had been offered the position and declined. Grievant further avers that prior to accepting the position, she had assured the Principal at Herbert Hoover High School that she would be able to continue in the position throughout the school year. The successful applicant did not retain the position throughout the school year, as he resigned due to another commitment that conflicted with the Credit Recovery Facilitator position.

Respondent asserts the successful applicant was a more senior full-time employee who wanted the position. Respondent argues it could not ensure Grievant would be able to continue in the position throughout the school year, and that was a relevant aspect of the inquiry.

Grievant has proven her case by a preponderance of the evidence. Therefore, this grievance is GRANTED.

Findings of Fact

1. For the 2008-2009 school year, Grievant was employed as a classroom teacher at Herbert Hoover High School. Grievant was considered to be hired as a Temporary Itinerant Regular Employee (TIRE).

2. On or about March 4, 2009, Grievant was provided notice that it had been proposed that her employment contract be terminated at the end of the 2008-2009 school year. The reason for the recommendation was the "lack of a sufficient number of

vacancies to accommodate the total number of employees who have been recommended for transfer."

3. On April 7, 2009, Grievant was notified that Respondent had, in fact, voted to terminate her contract at the end of the current school year.

4. On or about April 20, 2009, Respondent posted vacancies for 2 Credit Recovery Facilitator positions at each high school throughout the county.

5. The Credit Recovery Facilitator positions were for the 2009 summer, beginning on June 16, 2009, and continuing "during the 2009-2010 school year during the day and/or during 5th block after school." The posting reiterated the intent that the successful applicant remain in the position during the fall by listing under "Terms of Employment" "20 days during the summer months at daily rate of pay, including 2 days of pre or post days employment as identified by the school administrator and facilitation during the regular school term."

6. Grievant, Mark Mullens, and Stephen Stoffel, Jr. applied for the positions at Herbert Hoover High School.

7. The Principal was supplied with a list of the individuals who had applied for the position and was directed to contact the applicants in order of seniority to determine if the applicants were available to take the position for both the summer and the ensuing school year.

8. Seniority for the applicants at that school were in the following order, starting with most senior: Stephen Stoffel, Jr., Mark Mullins, and Angela Harless.

9. Roy Jones, Principal, met with all of the applicants.

10. Principal Jones met with Mr. Stoffel, a teacher at the school. Mr. Stoffel did not agree to fill the Credit Recovery Facilitator position during the school year due to a commitment with the football team.

11. Principal Jones asked Mr. Stoffel to accept or decline the position within 48 hours of the meeting.

12. Mr. Stoffel withdrew from consideration for the position because he did not respond to Principal Jones.

13. When Principal Jones met with Grievant, she assured him that she would be available to perform the Credit Recovery Facilitator position during the fall.

14. There was discussion Grievant would be recommended for a position at Elk View Middle School. Principal Jones spoke with the principal at the middle school to ensure Grievant would be able to complete the 5th block portion of the position.

15. Principal Jones then recommended Mark Mullins and Grievant for the positions available at Herbert Hoover High School.

16. Grievant and Mr. Mullins were sent to training. During training Grievant was called out and told there had been a complaint made by an outside party regarding her hiring as a Credit Recovery Facilitator due to her TIRE status. There apparently was concern over her being able to remain in the Credit Recovery Facilitator position during the school year.

17. Grievant was allowed to complete training. However, Mr. Stoffel, Jr. was brought into training, after it had begun.

18. At the conclusion of the training, contracts were completed for the summer Credit Recovery Facilitator position, as it was indicated that some employees who worked

during the summer could not work at the position during the fall.[3] This was in direct conflict with the "Terms of Employment" listed in the posting.

19. The Board approved hiring Mr. Stoffel, Jr. and Mr. Mullins for the Credit Recovery Facilitator position at Herbert Hoover High School. Grievant's name was never submitted to the Board.

20. Mr. Stoffel, Jr. did not remain in the position as the Credit Recovery Facilitator through the fall, due to a prior commitment, and the position of Credit Recovery Facilitator was never posted.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See* W. VA. CODE § 18-29-6; 156 C.S.R. 1 § 3. "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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The position of Credit Recovery Facilitator is an extracurricular assignment. "The assignment of teachers to extracurricular duties is a matter of educational policy and within

[3]It should be noted that the contract Respondent had the applicants complete was different from the posting. No evidence was presented nor was it argued whether Respondent had authority to change to the terms of employment from what was listed in the posting. It is the undersigned's contention that Respondent in no way had this authority.

the sound discretion of the county boards of education." Syl. Pt. 2, *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 908 (1980).

This Grievance Board has previously held that "[t]he provisions of W. VA. CODE § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Hall v. Mingo County Bd. of Educ*. Docket No. 95-29-529 (Mar. 28, 1996); *Foley v. Mineral County Bd. of Educ.*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Bd. of Educ.*, Docket No. 91-23-040 (July 31, 1991)." *Lusher v. Putnam County Bd. of Educ.*, Docket No. 99-40-061 (May 7, 1999). A separate line of cases starting with *Chaffin v. Wayne County Bd. of Educ.*, Docket No. 92-50-398 (July 27, 1993) reaches the same conclusion with respect to extracurricular coaching assignments, but through different reasoning. *Chaffin* regards W. VA. CODE § 18A-4-16, the statute that defines extracurricular assignments, as self-contained.

Thus, "'the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' *McCoy v. Kanawha County Bd. of Educ.*, Docket No. 94-20-141 (Oct. 13, 1994), *Foley*, *supra*; *See Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct.16, 1997)." *Lusher*, *supra*; *Baker v. Lincoln County Bd. of Educ.*, Docket No. 01-22-518 (Mar. 1, 2002).

"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)." *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)). "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. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Principal Jones was supplied with the seniority of the applicants who applied for the Credit Recovery Facilitator position. It is undisputed that, of the three applicants, Mr. Stoffel, Jr. had the most seniority. Principal Jones testified that Mr. Stoffel, Jr. had prior commitments during the school year portion of the position. Nevertheless, Principal Jones offered to recommend Mr. Stoffel, Jr. for the position, and requested that Mr. Stoffel, Jr. either accept or decline within 48 hours.

Meanwhile, Principal Jones met with Grievant and Mr. Mullins. Grievant had the most experience for this position. She assured him that, if selected, she would be able to fulfill the fall requirement.

After 48 hours, Principal Jones had not heard whether Mr. Stoffel, Jr. accepted or declined, so Principal Jones submitted Grievant's name, along with Mr. Mullins. Grievant continually elicited testimony concerning how often the Board does not agree with a principal's recommendation. For that purpose, it is imperative to review the law concerning who has the final say with respect to employment.

It is well settled that representations are not binding on an agency, where the individual does not possess authority to make that determination. *Blevins v. Raleigh County Bd. of Educ.*, Docket No. 97-41-314 (Jan. 29, 1998). The board of education is the final authority on the use of its funds, and "[u]ltra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." *Franz v. Dep't of Health and Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). *See Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Crowder v. Kanawha County Bd. of Educ.*, Docket No. 00-20-178 (Sept. 15, 2000). *See also Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991).

While Principal Jones submitted both Grievant's and Mr. Mullins' names, he did not have the authority to hire either. That authority lies with the Board alone. However, in order for Principal Jones to make an informed and intelligent recommendation, he has to know who is interested and who can fulfill the complete requirements of the position.

At the meeting between Principal Jones and Mr. Stoffel, Jr., Principal Jones was informed that Mr. Stoffel, Jr. had a prior commitment to the football team during the school year. Mr. Stoffel, Jr. was to inform Principal Jones within 48 hours as to whether he had a continued interest in pursuing the Credit Recovery Facilitator. Mr. Stoffel, Jr. never responded. Mr. Stoffel, Jr.'s non-response, along with his prior commitment, led to his withdraw from the pool of applicants.

Principal Jones made a good faith recommendation of Grievant and Mr. Mullins. Principal Jones did not recommend Mr. Stoffel, Jr. because he did not talk to Principal Jones within the 48 time period. Based on this particular set of facts, Mr. Stoffel, Jr. withdrew from consideration for the position.

However, during the first morning of training, a concern was expressed that Grievant, a TIRE employee, was the successful applicant. It was at that point, Mr. Stoffel, Jr. was permitted to attend training. Grievant was also permitted to stay, but was told there was some question given her TIRE status.

During this confusion, Principal Jones explained to the Superintendent that, not only had Mr. Stoffel, Jr. not accepted the position, but had voiced a conflict in filling the position during the school year. Testimony at the level three hearing indicated that the relationship between Mr. Stoffel, Jr. and Principal Jones prior to this incident was strained, at best. The Superintendent did not believe Mr. Stoffel, Jr. had been offered the position in the appropriate manner.

It is at this point that perhaps the most troubling aspect of this case occurs. The position was posted with the "Terms of Employment" being both the summer and the school year. However, the contracts were completed at the end of training, and the

applicants were told to only list the position for the summer.[4] Mr. Mullins testified that at training, the applicants were told not to put the 2009-2010 5th block position on the contract. Dr. Cindy Daniel, Assistant Superintendent for Curriculum, testified that if some of the applicants were concerned about doing the school year portion of the position, they should just complete the contract for the summer.

W.VA. CODE §18A-4-7a(o) requires county boards to post positions. This position was posted, but after applicants were trained, the manner in which the contracts were executed caused a substantial change in the position, by allowing some or all individuals the ability to serve in the position during the summer, but opt out for the school year. It is unknown how many other professional staff would have applied for the position had they known they could fulfill only a portion of the terms of employment listed in the posting.

The process by which this position was filled is arbitrary and capricious. Mr. Stoffel, Jr. withdrew from consideration when he did not speak with Principal Jones within the allotted time frame.

Second, and most troubling, is that Respondent was arbitrary and capricious when, after the second day of training, the contracts were executed by some or possibly all only for the summer portion, and not for both the summer and the school year, as stated in the posting.[5]

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[4]Mr. Mullins' contract was admitted as Respondent's Exhibit 2. In his contract, he lists both the summer and the 2009-2010 school. His testimony was that he made a mistake, and did not erase the school year portion from his contract.

[5]It's also concerning that William Buchanan, Director of Human Resources for Respondent, did not know Mr. Stoffel, Jr. was not serving as Credit Recovery Facilitator throughout the school year, and Mr. Buchanan indicated that position had not been posted.

Grievant has proven Respondent's actions were arbitrary and capricious. Therefore, this grievance is GRANTED.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See* W. VA. CODE § 18-29-6; 156 C.S.R. 1 § 3. "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 and Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. The position of Credit Recovery Facilitator is an extracurricular assignment.

3. "The assignment of teachers to extracurricular duties is a matter of educational policy and within the sound discretion of the county boards of education." Syl. Pt. 2, *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 908 (1980).

4. This Grievance Board has previously held that "[t]he provisions of W. VA. CODE § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Hall v. Mingo County Bd. of Educ*. Docket No. 95-29-529 (Mar. 28, 1996); *Foley v. Mineral County Bd. of Educ.*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Bd. of Educ.*, Docket No. 91-23-040 (July 31, 1991)." *Lusher v. Putnam County Bd. of Educ.*, Docket No. 99-40-061 (May 7, 1999).

5. Thus, "'the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' *McCoy v. Kanawha County Bd. of Educ.*, Docket No. 94-20-141 (Oct. 13, 1994), *Foley*, *supra*; *See Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct.16, 1997)." *Lusher*, *supra*; *Baker v. Lincoln County Bd. of Educ.*, Docket No. 01-22-518 (Mar. 1, 2002).

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

7. 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 a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (1982)." *Trimboli, supra, Blake v.*

Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

8. It is well settled that representations are not binding on an agency, where the individual does not possess authority to make that determination. *Blevins v. Raleigh County Bd. of Educ.*, Docket No. 97-41-314 (Jan. 29, 1998). The board of education is the final authority on the use of its funds, and "[u]ltra vires acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to follow such acts." *Franz v. Dep't of Health and Human Res.*, Docket No. 99-HHR-228 (Nov. 30, 1998). *See Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Crowder v. Kanawha County Bd. of Educ.*, Docket No. 00-20-178 (Sept. 15, 2000). *See also Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991).

9. Grievant has proven Respondent's actions to be arbitrary and capricious.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to provide Grievant with back pay for both the summer and the 2009-2010 school year, along with interest, seniority and any and all benefits to which she is entitled.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: August 13, 2010

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Wendy A. Elswick
Administrative Law Judge