THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FLOYD FRIEND, SR.,
Grievant,

v. **Docket No. 2010-1409-NicED**

NICHOLAS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Floyd Friend, Sr., filed a grievance against Respondent, Nicholas County Board of Education, on May 3, 2010. The grievance statement reads:

> Violation of WV § 18A-4-7a. Most qualified applicant not chosen. Using the RIF/transfer process to remove and replace staff members subverting evaluation process and improvement plan opportunities. Reprisal.

As relief, Grievant sought "placement in or returned to position of Assistant Principal, Richwood High School."

A level one hearing was held on June 23, 2010. The grievance was denied at that level. A level two mediation was held on October 29, 2010. A level three hearing was held on July 8, 2011, at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Ben Barkey, West Virginia Education Association. Respondent was represented by Howard E. Seufer, Jr., Esq., Bowles Rice McDavid Graff & Love, LLP. This matter became mature for decision on August 16, 2011, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent eliminated Grievant's full-time Assistant Principal Position at Richwood High School at the end of the 2009-2010 school year. A full-time Social Studies teacher for grades 9-12 at Richwood High School retired at the end of the 2009-2010 school year. Based on student enrollment and budget concerns, Respondent decided to eliminate the full-time Social Studies position and create a joint position of Half-Day Assistant Principal/Half-Day Social Studies Teacher for the 2010-2011 school year. The vacancy posting required certifications in West Virginia Secondary Principal Certification (9-12) and Secondary Social Studies Certification (9-12). Grievant is certified to teach Social Studies in grades 1-9.

Grievant argues that Respondent should have posted the vacancy with the requirement of certification in grades 7-9 instead of 9-12 so that he would have met the qualifications. Grievant asserts that the elimination of the full-time Assistant Principal position and the requirement for Social Studies certification in grades 9-12 for the vacant joint position were intentional acts of retaliation. Respondent argues that it reasonably exercised its discretion in a manner that was not arbitrary and capricious.

Grievant failed to demonstrate that Respondent's decision to require Social Studies certification in grades 9-12 in the new joint position was unreasonable and in a manner that was arbitrary and capricious. Grievant failed to prove that Respondent's elimination of the full-time Assistant Principal position was arbitrary and capricious. Grievant failed to establish reprisal by Respondent. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant has been employed by Respondent for over 30 years. During the 2009-2010 school year, Grievant held the full-time position of Assistant Principal at Richwood High School.

2. Under Respondent's policy, any high school with an enrollment of 0-500 students shall have one Principal and only one half-day Assistant Principal.[1]

3. During the 2009-2010 school year, student enrollment at Richwood High School was less than 450.[2]

4. Respondent eliminated Richwood High School's full-time Assistant Principal position for the ensuing 2010-2011 school year.

5. A full-time 9-12 Social Studies teacher at Richwood High School retired at the end of the 2009-2010 school year. That full-time position was then eliminated.

6. On March 8, 2010, Respondent posted notice of a vacancy for the joint position of Half-Day Assistant Principal/Half-Day Social Studies Teacher at Richwood High School.

7. The posting listed two professional certifications as required qualifications: West Virginia Secondary Principal Certification (9-12) and Secondary Social Studies Certification (9-12).

8. Grievant is certified as a teacher in Social Studies for grades 1-9.

9. Social Studies is a core subject area. Richwood High School is required to

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[1] *See* Joint Exhibit No. 1 (Policy CFA, Administrative Assignment Schedules).

[2] *See* Joint Exhibit No. 1 (Student Enrollment Reports).

provide Social Studies instruction to students in grades 9, 10, 11 and 12.

10. There were three applicants for the posted vacancy, one of whom was Grievant.

11. Only one of the three applicants, Charles Weber, met the posted qualifications of holding certification both as a Secondary Principal and as a teacher of Social Studies for grades 9-12. Mr. Weber was awarded the posted position.

12. As of the 2010-2011 school year, Grievant was transferred to his current assignment as a Social Studies Teacher at Richwood Middle School.

13. Since Nicholas County Schools Superintendent Beverly Kingery took office approximately three years ago, all high school teaching vacancies have been posted requiring certification in grades 9-12 of the subject matter. Respondent has posted the following vacancies[3]:

- Science teacher with Secondary Science Certification (9-12) on August 4, 2009
- Math teacher with Math Certification (9-12) on September 11, 2009
- English teacher with English Certification (9-12) on January 21, 2009
- Spanish teacher with Spanish Certification (9-12) on June 4, 2010

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is

[3]Joint Exhibit No. 1 (Nicholas County Schools Professional Employee Vacancy Announcement) and level one testimony of Superintendent Kingery.

evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E. 2d 58 (1986). In *Cowen v. Harrison County Board of Education*, 195 W.Va. 377, 465 S.E.2d 648 (1995), the West Virginia Supreme Court held, "[w]e now have no hesitancy in expanding the *Dillon* standard to matters involving curricular programs and the qualification and placement of personnel implementing those programs. *See Pauley v. Bailey*, 174 W.Va. 167, 324 S.E.2d 128 (1984) (holding that the West Virginia Board of Education and the State Superintendent of Schools have a duty to ensure delivery and maintenance of a 'thorough and efficient system of free schools' in West Virginia as embodied in A Master Plan for Public Education)."

Upon review of student enrollment at Richwood High School for the 2009-2010 school year, Respondent made a reduction in force (RIF) by eliminating Grievant's full-time

Assistant Principal position.[4] A reduction in the number of full-time positions in a county is governed by the provisions of WEST VIRGINIA CODE § 18A-4-7a(j). That section provides, in pertinent part:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least seniority shall be properly notified and released from employment pursuant to the provisions of....[18A-2-2} of this chapter...

Grievant does not argue there was a less senior Assistant Principal that he could have "bumped" laterally. Under Respondent's Policy CFA, Administrative Assignment Schedules, any high school with an enrollment of 0-500 students shall have one Principal and only one half-day Assistant Principal. As a result of Richwood High School's student enrollment falling below 500, Respondent decided to RIF the full time position at the end of the 2009-2010 school year. Respondent had recently made a similar reduction at Nicholas County High School (NCHS) the previous school year. Following Respondent's Policy CFA, any high school with enrollment of 501-850 students shall have only one Assistant Principal. Due to student enrollment dropping below 850 students, Respondent decided to make a reduction in force from two Assistant Principal positions to one at NCHS. In the present grievance, Grievant has failed to prove that Respondent's RIF of the full-time Assistant Principal position was arbitrary and capricious.

A full-time Social Studies teacher for grades 9-12 at Richwood High School retired at the end of the 2009-2010 school year. Due to declining student enrollment and budget concerns, Respondent decided that the needs of the high school's students could be met

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[4]When reviewing student enrollment, Respondent considered the amount of students enrolled in October 2009 and June 2010.

with a half-day Social Studies teacher. It has been previously recognized by this Grievance Board that, when a position is vacated, it is within the board's discretion to determine whether or not the position is still needed. *See Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-123 (Sept. 20, 2002); *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997).

The State funds the number of teachers for each county based on enrollment of students. Any teaching positions over that number are paid for by the county's board of education. Respondent believes that teaching positions should not be filled in a manner creating a limited role. Respondent avers that a teacher certified to instruct a subject matter in multiple grade levels is more flexible and versatile than a teacher certified to only instruct one grade level. Since Nicholas County Schools Superintendent Beverly Kingery took office approximately three years ago, all high school teaching vacancies have been posted requiring certification in grades 9-12 of the subject matter.

On March 8, 2010, Respondent posted a vacancy for the joint position of Half-Day Assistant Principal/Half-Day Social Studies Teacher at Richwood High School. The posting listed two professional certifications as required qualifications: West Virginia Secondary Principal Certification (9-12) and Secondary Social Studies Certification (9-12).[5] Grievant argues that Respondent's certification requirement for Social Studies 9-12 was

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[5]Out of three applicants for the joint position, only one, Charles Weber, met the posted qualifications of holding certification both as a Secondary Principal and as a teacher of Social Studies for grades 9-12. All three applicants were interviewed for the position. Each applicant was asked the same interview questions by the same four member interview committee. The interview committee unanimously decided to award the position to Mr. Weber. Grievant did not qualify for the position because he does not possess the required certification to teach Social Studies in grades 9-12.

intended to specifically disqualify him as an applicant for the position. Grievant asserts that Respondent should have posted the vacancy for a Social Studies teacher at Richwood High School with the requirement of certification in grades 7-9 instead of 9-12 so that he would have met the qualifications. Respondent argues that to serve the best interests of the school and to continue with the recent past practice of requiring certification to teach grades 9-12 of a subject matter, it reasonably exercised its discretion in a manner that was not arbitrary and capricious.

W.VA. CODE § 18A-4-7a(o)(1)(E) expressly prohibits county boards of education from creating job postings "with the intent to favor a specific applicant." Respondent clearly could not have posted the vacancy requiring only a Social Studies grade 9 certification just to accommodate Grievant's eligibility. Grievant failed to demonstrate that it was unreasonable for Respondent to require Social Studies certification in grades 9-12 in the new joint position. It is within the Board of Education's authority to determine what certifications are necessary to best serve the needs of the students. Respondent's decision to require certification in Social Studies 9-12 was not arbitrary and capricious.

Grievant argues that Respondent's actions of performing a RIF of the full-time Assistant Principal position and requiring certification in Social Studies 9-12 for the newly created joint position, constitute retaliation. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

(1) That he engaged in protected activity (i.e., filing a grievance);

> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). *See also Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

It is unclear what protected activity Grievant is asserting he participated in that allegedly resulted in Respondent retaliating against him. Grievant briefly alludes to a previous grievance filed by Grievant against Respondent. Grievant did not present specific evidence or testimony to support his charge. Respondent's posted vacancy for a Half-Day Assistant Principal/Half-Day Social Studies Teacher was based on the two needs at Richwood High School. As discussed above, it was not unreasonable for Respondent to RIF the full-time Assistant Principal position or to require Social Studies certification in grades 9-12 in the new joint position. Subsequently, Grievant has failed to establish reprisal by Respondent.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W.Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E. 2d 58 (1986).

3. In *Cowen v. Harrison County Board of Education*, 195 W.Va. 377, 465 S.E.2d 648 (1995), the West Virginia Supreme Court held, "[w]e now have no hesitancy in expanding the *Dillon* standard to matters involving curricular programs and the qualification and placement of personnel implementing those programs. *See Pauley v. Bailey*, 174 W.Va. 167, 324 S.E.2d 128 (1984) (holding that the West Virginia Board of Education and the State Superintendent of Schools have a duty to ensure delivery and maintenance of a 'thorough and efficient system of free schools' in West Virginia as embodied in A Master Plan for Public Education)."

4. A reduction in the number of full-time positions in a county are governed by the provisions of WEST VIRGINIA CODE § 18A-4-7a(j). That section provides, in pertinent part:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least seniority shall be properly notified and released from employment pursuant to the provisions of....[18A-2-2} of this chapter...

5. Grievant has failed to prove that Respondent's RIF of the full-time Assistant Principal position was arbitrary and capricious.

6. W.VA. CODE § 18A-4-7a(o)(1)(E) expressly prohibits county boards of education from creating job postings "with the intent to favor a specific applicant."

7. It has been previously recognized by this Grievance Board that, when a position is vacated, it is within the board's discretion to determine whether or not the position is still needed. *See Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-123 (Sept. 20, 2002); *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997).

8. Grievant failed to demonstrate that Respondent's decision to require Social Studies certification in grades 9-12 in the new joint position was unreasonable and in a manner that was arbitrary and capricious.

9. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity (i.e., filing a grievance);
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> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

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10. Grievant failed to establish reprisal by Respondent.

Accordingly, this grievance is **DENIED**.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: Sept 6 , 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge