WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MICHAEL PRINCE,
Grievant,

v. **Docket No. 2010-1690-CONS**

BOONE COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Michael Prince filed three separate grievances grieving his non-selection for three permanent Custodian III positions.[1] For relief, Grievant wishes to be placed in the position of Custodian III at Sherman Elementary, as he was more senior than the successful applicant.

Grievant's three grievances have been dealt with together from the first level of the grievance process. Therefore, these grievances are consolidated, even though there has been no formal Consolidation Order entered. A level one decision dated December 7, 2009, denied this grievance. A level two mediation session was held on February 9, 2010. Grievant timely appealed to level three, and a hearing was held at the Grievance Board's Charleston office on July 9, 2010. Grievant was represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent was represented by Timothy R. Conaway, Esq. This case became mature on December 10, 2010, upon the parties' submissions of proposed findings of fact and conclusions of law.[2]

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[1]While there were three positions grieved, only two positions were discussed during the hearing.

[2]An earlier mature date was set in place, but the undersigned took a Motion to Quash under advisement. Upon ruling on that Motion, the mature date needed to be extended to give the parties additional time.

Synopsis

Grievant argues that he was the most senior substitute custodian and should have received the position at Sherman Elementary School. Grievant asserts the negative reports and/or observations were never shared with him. Grievant avers these negative reports are not evaluations because they are not open and honest, and therefore, they should not be considered when filling the full time positions.

Respondent did not share the assessment forms with Grievant, and it does not deny that. Instead, Respondent asserts that W. VA. CODE §18-A-4-8b states selections are to be made on the basis of seniority, qualifications and evaluation of past service. Respondent argues the fact that the Legislature left the word "evaluation" singular indicates an intent to have the evaluation of the totality of past performance of a candidate for a position. Respondent avers that because of a number of problems with Grievant's performance in the past, he was not selected as the successful applicant. Respondent lastly argues that Grievant was aware of his performance deficiencies.

This grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as a substitute custodian.

2. On October 23, 2009, Respondent posted two Custodian III positions. One position was at Sherman Elementary and the other was at Madison Middle.

3. Grievant applied for both positions by completing a BID/DATA SHEET. On that sheet Grievant was asked if his past evaluations have been satisfactory, and Grievant left that question blank.

4. A regular employee was hired to fill the Madison Middle position. A substitute custodian with less seniority than Grievant was hired to fill the Sherman Elementary position.

5. Grievant has a seniority date of November 10, 2004.

6. On May 30, 2008, Roger Barker, Principal of Ramage Elementary School, completed a Service Personnel Substitute Assessment Report concerning Grievant's work. Mr. Barker stated that on two occasions he found Grievant asleep in his vehicle when he was supposed to be working.

7. On September 9, 2008, Roger Toney, Principal of Ashford Rumble Elementary School, completed a Service Personnel Substitute Assessment Report concerning Grievant's work. Mr. Toney stated that rooms were not swept, even though Grievant indicated he had swept all the rooms. Mr. Toney also stated that another employee found Grievant asleep on the floor of the supply room.

8. On October 1, 2008, Karen Vickers, Principal for Brookview Elementary School, sent a letter to Respondent requesting that Grievant not be sent back to her school to fill any substitute positions. Grievant had worked at her school September 26th, and was found in the custodial supply closet asleep. During the lunch period one of the supervising teachers reported to the office that the lunch room floor was covered in spills resulting in an unsafe environment. Grievant was instructed to clean the spills as they occurred.

9. On October 7, 2008, Brenda Viars, Principal at Sherman Elementary School, sent Respondent a letter expressing concern over Grievant. Grievant had worked at her school September 4th, 8th, and 10th. Ms. Viars complained of unsatisfactory performance, stating that Grievant failed to follow the custodian schedule, and as a result many classrooms, bathrooms, and hallways were left unattended.

10. On December 19, 2008, Grievant filed a grievance concerning the rotation of substitute custodians, as he alleged he had not been called out to work since being at Brookview.[3]

11. On January 26, 2009, Grievant and Steven Pauley, who was then Superintendent, entered into an agreement where Grievant was reinstated to substitute custodian and Grievant acknowledged principals had complained about his performance and understood he needed to improve his work performance in the future.

12. On October 20, 2009, Respondent received a letter from a parent volunteer at Madison Elementary School, complaining that Grievant was using tobacco on school property and spitting the tobacco juice into the school waste baskets.

13. Tobacco products are prohibited on school grounds, and Grievant was aware of this.

14. On October 30, 2009, Respondent received a Substitute Custodian Assessment Report from Josh Bacchus, Principal of Madison Middle School, who stated

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[3]Information was never presented at the level three hearing to confirm whether Grievant was taken off the substitute rotation, as the undersigned was only provided with the settlement agreement for the purpose of Respondent's argument that Grievant knew and acknowledged his poor performance.

he would not request Grievant as a substitute again, and stated "Mike [Grievant] doesn't see dirty like everyone else. He has to be guided very closely."

15. Also on October 30, 2009, Respondent received a memo from Ginger Green who noticed Grievant playing basketball in the gym while on duty as a substitute custodian at Madison Elementary School on October 16, 2009.

16. Respondent also received another memo from Pat Conaway, Principal of Madison Elementary who was out of school on October 16, when Grievant was the substitute custodian. Ms. Conaway stated, however, that she returned to complaints by staff members regarding Grievant's performance. The complaints were that Grievant was chewing tobacco and spitting it in school garbage cans and playing basketball in the gym. Several staff members complained because their rooms were not cleaned the day Grievant worked.

18. The specific documents labeled Service Personnel Substitute Assessment Reports and the various memos stated above were not shared with Grievant.

19. The successful applicant for the Sherman Elementary position, Todd Armentrout, had less seniority than Grievant and had satisfactory rating with positive comments on the Service Personnel Substitute Assessment Report.

20. Grievant suffers from a medical condition known as sleep apnea.[4]

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

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[4]Grievant fell asleep during the level three hearing.

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.*

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).

"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)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

Grievant asserts he had the most seniority and should have received the position at Sherman Elementary. He further contends that the Substitute Assessment Reports were never shared with him and therefore, should not be considered as an evaluation.

W.VA. CODE § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service."

Grievant clearly has the seniority and qualifications for the Custodian III position. Respondent's basis for not hiring Grievant for the permanent position is based solely on "evaluation of past service." Respondent contends that since the word "evaluation" is singular, the legislative intent is to have the selection made based only on an evaluation of the totality of past performance of a candidate. That would be done, according to Respondent's argument, by looking at the total body of work of the employee.

W. Va. Code §18A-2-12a(6) states:

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer, or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion...

While both sides cite this statute, their arguments differ greatly concerning its applicability to the issue at hand. Grievant argues the Substitute Assessment Report was not conducted in an open and honest manner so as to be a true evaluation. Respondent

asserts that W. VA. CODE §18A-2-12a(6) cites back to W. VA. CODE §18A-2-12(a) which says, "The state board shall adopt a written system for the evaluation of the employment performance of personnel..." Respondent argues since the state department has not adopted any such system for evaluating school service personnel, Respondent cannot conform with the requirements set forth in W. VA. CODE §18A-2-12a(6).

Basically, the county had a system in place to memorialize a substitute custodian's performance. The Substitute Assessment Report was utilized throughout the county to bring to the administration's attention any issues or concerns. In this case, there were numerous issues with Grievant's work performance. While Respondent did not share the specific forms with Grievant, it is clear Grievant knew there were issues with his work.

Grievant was confronted on two separate occasions by Mr. Barker or Ramage Elementary for sleeping in his vehicle when he was supposed to be working. While working at Ashford-Rumble Elementary, Grievant was awakened by another employee who found him asleep on the floor. When working at Brookview Elementary, Grievant was woke up by an employee. Grievant was also instructed that he needed to mop up spills when they occurred. These instances served as notice to Grievant that his performance was poor.

Couple that with the settlement agreement Grievant signed on January 26, 2009, stating that he acknowledged principals have complained of his performance and understands the necessity of improving his performance in doing future assignments, and it is clear that Grievant was well aware of his performance issues.

In *Hare v. Randolph County Board of Education,* 183 W. Va. 436, 396 S.E.2d 203 (1990), the West Virginia Supreme Court looked at an issue similar to the ones presented

in this case. In *Hare*, Mr. Hare was a full-time bus operator who had a series of automobile accidents while driving the school bus. He was eventually terminated from his employment. The Grievance Board upheld the termination, and Mr. Hare appealed to the circuit court who reversed the Grievance Board and placed Mr. Hare back to work. Upon receipt of the circuit court's decision, Randolph County Board of Education filed an appeal with the West Virginia Supreme Court. Mr. Hare argued to the Supreme Court that the annual evaluation forms did not reflect the specific accidents and the specific information contained in the letters sent to him after each accident which indicated that another accident could result in further disciplinary action. Therefore, Mr. Hare contended that because the wrecks were not part of the formal evaluation, they could not be considered as part of the evaluation process. The Supreme Court refused to adopt Mr. Hare's argument, as Randolph County Board of Education had substantially complied with the evaluation procedures.

This current case varies in significant portion to *Hare*, in that the Grievant is a substitute custodian. The specific assessment forms and complaints should have been shared with Grievant as they were provided to the Respondent. However, Grievant was put on notice that his performance was an issue, and he was given a chance to correct the performance by being placed back on the substitute list. Seniority and qualifications are not the only factors taken into account when hiring. Evaluation of past service is also a factor to be considered. Grievant's past service is fraught with sleeping on the job, leaving the work site to sleep in his car, playing basketball, chewing tobacco, and generally not cleaning as is expected.

Grievant has failed to meet his burden of proof in this matter. Therefore, this grievance is DENIED.

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. 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. "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)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

4. W.VA. CODE § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service."

5. Grievant did not meet his burden of proof.

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 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: February 28, 2011

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Wendy A. Elswick
Administrative Law Judge