

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRUCE M. SMITH,
Grievant,

v.

Docket No. 2017-2180-WayED

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Bruce M. Smith, was employed by Respondent, Wayne County Board of Education (“Board”), an Assistant Principal until that position was eliminated in a reduction in force. Mr. Smith filed a Level One grievance form dated, May 17, 2017 alleging violation of W. VA. CODE §§ 18A-4-7a and 18A-2-7 and the Wayne County Administrative Lateral Transfer Policy. Specifically, Grievant alleges that the assistant principal at Ft. Gay Pre-K through 8 position, had been held vacant for months and that he should have been transferred to that position when his position was eliminated. Alternatively, he argues that he was the most qualified applicant for the Ft. Gay position and should have been selected when the job was posted. Finally, he argues that his recall rights were violated. As relief, Grievant seeks “to be placed in the position of Vice Principal at Ft. Gay Pre-K through 8 plus any back pay or related benefit that was lost.”¹

¹ At the Level One hearing Grievant stated that he was no longer interested in the Ft. Gay position and wanted the Board to pay the cost of his relocation to get a new job. At the Level Three hearing, and perhaps at mediation, Grievant amended the remedy he was seeking to that set out above. Respondent did not object to the amendment but sought clarity at Level Three which Grievant provided.

Following a Level One conference, the grievance was denied by decision entered August 14, 2017. Grievant appealed to level two and a mediation was conducted on November 22, 2017. The matter was placed in abeyance by an Order entered the next day. Ultimately an Order of Unsuccessful Mediation was entered January 12, 2018. Grievant's appeal to Level Three was dated January 24, 2018.

A Level Three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on April 19, 2018. Grievant personally appeared and was represented by Ben Barkey, West Virginia Education Association. Respondent was represented by Leslie Tyree, Esquire. This matter became mature for decision on July 5, 2018, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was laid off from his position as an assistant principal because that position was abolished, and he had insufficient seniority to bump any other assistant principal. Grievant argues that he should have been transferred directly to a vacancy which opened to an assistant principal position at another school in the county or in the alternative, based upon his qualifications, he should have been selected for that position when it was posted. Respondent proved that it was required to post the vacant position rather than transfer Grievant directly into it. Respondent also proved that it followed the statutory requirements in filling the vacant position with a different applicant.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Bruce M. Smith, was employed by Respondent, Wayne County Board of Education, as the Assistant Principal at Tolsia High School for three years before that position was eliminated in the Spring of 2017.

2. As a result of Grievant's position being eliminated, Grievant was laid off as part of a reduction of force ("RIF"). His hearing and the Board's vote to approve the RIF took place on April 17, 2017.

3. Grievant had previously taught in Wayne County on two occasions for a roughly seven years. He is certified Physical Education, Grades 5 - 12 and Administration, Grades K – 12.

4. A position for Assistant Principal at Ft. Gay PreK – 8² became vacant on March 10, 2017, and was posted on April 21, 2017. Grievant did not have sufficient seniority to bump the employee holding that position before it became vacant.³ (Grievant Exhibit 2).

5. Grievant Smith, Joshua Sammons and Bruce Justice applied for the vacant assistant principal position. All three applicants held the appropriate administrative certification to qualify for the position.

6. A committee was appointed to select the applicant who would be recommended to the Board to fill the vacant position. The interview committee consisted

² Students are enrolled in the Ft. Gay school from Pre-Kindergarten through Middle school.

³ This position had been vacated prior to the RIF hearings with the promotion of the person holding the position. However, the administration was not sure if the vacant position was going to be eliminated until after the RIFs had been approved.

of four members: Chanda Perry, Director of Human Resources and Certification; Shane Runyan, Director of Institution Leadership; John Waugaman; and Mike Hart.

7. The committee developed a series of questions related to the Ft. Gay position and asked the same questions of each candidate.

8. The committee also prepared a matrix for comparing the candidates based upon the criteria set out in W. VA. CODE § 18A-4-7a which states:

(b) In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

(1) Appropriate certification, licensure or both:

(2) Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;

(6) Specialized training relevant to performing the duties of the job;

(7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter or, in the case of a classroom teacher, past evaluations of the applicants performance in the teaching profession;

(8) Seniority;

(9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged; . . .

(c) When filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications:

Id.

9. The matrix listed the applicants, each criterion, and the points given to each applicant for criterion, and resembled the following:

QUALIFICATION	Smith	Sammons	Justice
Certification	1	1	1
Experience	1	0	0
Course work etc.	1	1	1
Academic Achievement	0	0	0
National Board Certification	-	-	-
Specialized Training	1	1	1
Past evaluations	-	-	-
Seniority	1	0	0
Other measures or indicators	0	2	2
TOTAL	5	5	5

10. For the criterion of "Other Measures and Indicators the interview committee considered the applicants' performance on the interview and discipline Grievant had received from the West Virginia Secondary Schools Athletic Commission (WVSSAC) concerning incidents which took place while he was serving as a basketball coach for Tolsia High School.

11. Grievant received a lower score because he did not do as well on the interview and because he had received discipline by the WVSSAC and a reprimand for his performance as the basketball coach at Tolsia High School.

12. The successful applicant was Bruce Justice. He scored higher on the interview because he brought a portfolio which outlined what he believed to be problem areas in the school related to discipline and achievement and ideas for solutions. He compiled data regarding the school to support these issues. The Committee found this to be particularly impressive because Ft. Gay has been identified as an underperforming school for some time and the committee was looking for an applicant who could help turn that culture around. Applicant Sammons also brought a portfolio, but his was not as detailed and supported by school specific data as Mr. Justice's. No applicant was required to provide a portfolio and Grievant did not.

13. Near the end of the 2015-2016 basketball season Grievant was ejected from a game by the official. Grievant was charged a two-game suspension for the beginning of the 2016-2017 basketball season. Grievant served the two-game suspension and was ejected from his next game back from serving his suspension. Grievant was supposed to serve a second two-game suspension for the second ejection but he did not. Not serving the second suspension resulted in the Secondary School Activities Commission suspending Grievant for an additional four games to be served on top of the two-game suspension he failed to serve. Grievant had no negative evaluations,

no performance improvement plans, and no written reprimands related to his performance as an assistant principal.⁴

14. None of the applicants answered the uniform questions poorly. The committee felt that Grievant's answers were more general while Mr. Justice's answers were more detailed and focused specifically on the Ft. Gay school.

15. The Board has not adopted a tie-breaker for deciding on the successful applicant when the candidates are tied on the matrix scores. In this case the committee decided to break the tie by giving more weight to the "Other Measures and Indicators" criterion which included the interview and prior discipline.

16. Based upon the interviews every member of the committee filled in a form listing their "1st choice," "2nd choice," and "3rd choice." Every committee member selected Bruce Justice as the 1st choice, Josh Sammons as the 2nd choice and Grievant Smith as the 3rd choice. (Grievant Exhibit 4).

17. The committee recommended Bruce Justice to the superintendent and he made the recommendation to the Board. The Board approved the recommendation at their meeting on May 15, 2017. Accordingly, Mr. Justice was placed in the position of Assistant Principal for Ft. Gay PreK - 8 school.

18. Grievant was entitled to be placed on the preferred recall list for vacancies for which he was certified occurring in Wayne County School beginning July 1, 2017.

19. Grievant applied for and received a professional educator position in Gallia County, Ohio, starting the beginning of the 2017-2018 school year. Grievant did not miss

⁴ Director Runyan testified that Grievant had received verbal reprimands as an assistant principal. However, this belief was based upon overheard conversations and rumors, and cannot be given any evidentiary weight.

any work due to the RIF from his Tolsia High School position. He was paid roughly four thousand dollars more for his work in Ohio than he was paid working for Wayne County Schools.

20. After July 1, 2017, and before the beginning of the 2017-2018 school year, two positions were posted for assistant principals in Wayne County Schools; one at Spring Valley High School, and one at Buffalo Elementary School. Grievant holds the appropriate certification for those positions. No effort was made by the Board's agents to notify Grievant of those vacancies.

21. Grievant had moved to Gallia County, Ohio, and had not provided the Board with his new address. Grievant had all mail sent to his Wayne County address forwarded to his new home and received forwarded mail sent to the Wayne County address.

22. Respondent's Policy 1540 – *Termination of Administrative Contracts* contains the following provision:

Employment as a high school assistant principal or vocational, technical or adult school assistant principal **shall be deemed an area of lateral employment to middle/junior high school and high school, vocational, technical or adult school assistant principals.** In the event of a reduction in the number of high school, vocational, technical or adult school assistant principals, the assistant principal subject to release may displace a middle/junior high school assistant principal with less administrative seniority, in inverse order of seniority. (Emphasis added).

Grievant Exhibit 1.

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 R §156-1-3. *Burden of Proof*. "The preponderance standard

generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichter v. W. Va. Dep't of Health & 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.*

Grievant makes two main arguments relating to his entitlement to be placed in the position of assistant principal at Ft. Gay school. First, Grievant argues that he should have been placed in the Ft. Gay vacancy rather than be laid off in the RIF. Second, Grievant argues that the selection process for choosing the successful applicant was fatally flawed and he was the most qualified applicant for the position.

The procedures for a county board of education to reduce its professional educator workforce are set out in W.VA. CODE § 18A-4-7a which states:

(k) Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter. The provisions of this subsection are subject to the following:

. . .

(2) Notwithstanding any provision of this code to the contrary, for any vacancy in an established, existing or newly created position that, on or before March 1, is known to exist for the ensuing school year, upon recommendation of the superintendent, the board shall appoint the successful applicant from among all qualified applicants. All employees subject to release shall be considered applicants for the positions for which they are qualified and shall be considered before posting such vacancies for application by nonemployees;

(3) An employee subject to release shall be employed in any other professional position where the employee is certified and was previously employed or to any lateral area for which the employee is certified, licensed or both, if the employees

seniority is greater than the seniority of any other employee in that area of certification, licensure or both;

(4) If an employee subject to release holds certification, licensure or both in more than one lateral area and if the employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification, licensure or both, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification, licensure or both;

(m) All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification, licensure or both, the employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept the position.

(n) Before position openings that are known or expected to extend for twenty consecutive employment days or longer for professional personnel may be filled by the board, the board shall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause the employee to forfeit any right to recall. The notice shall be sent by certified mail to the last known address of the employee, and it shall be the duty of each professional personnel to notify the board of continued availability annually, of any change in address or of any change in certification, licensure or both.

Pursuant to W.VA. CODE § 18A-4-7a (l), the Board adopted as part of its Policy 1540 which specifies that high school assistant principal positions are lateral to all other assistant principal positions for purposes of a reduction of force. Grievant argues that because the Ft. Gay position was lateral to his assistant principal position at Tolsia High School, he should have been transferred directly into that position instead of being laid

off. He relies upon the W.VA. CODE § 18A-4-7a provision which states that employees who are being released in a RIF shall be employed in “any lateral area for which the employee is certified, licensed or both, if the employee’s seniority is greater than the seniority of any other employee in that area of certification, licensure or both.”

The problem with this argument is that the Ft. Gay assistant principal position was not held by a less senior professional employee but was vacant. Had the position been held by an employee with less seniority than Grievant he would clearly have been entitled to bump that employee and not be laid off. However, the position was vacant and regarding vacancies W.VA. CODE § 18A-4-7a(o)(1) requires, “[b]oards shall be required to post and date notices of each opening at least once.”⁵ The Board was required to post the Ft. Gay vacancy.

Since Grievant was laid off he was entitled to be recalled to any position for which he was certified on the basis of seniority “if no regular, full-time professional personnel, . . . are qualified, apply for and accept the position.” W.VA. CODE § 18A-4-7a(m). In his case both Mr. Justice and Mr. Sammons were regular, full-time professional personnel and they were qualified for the Ft. Gay position because they held the proper certification. Once they applied for the position Grievant was no entitled to be automatically recalled to the position, but he was entitled to apply for the position which he did. At that point, the successful applicant was required to be selected pursuant to the factors and process set out in W.VA. CODE § 18A-4-7a(b) and (c) and reflected in the matrix utilized by

⁵ The Board also argues that it was required to post the position by the mandatory provisions of W.VA. CODE § 18A-4-7a(k)(2) *supra*. That provision is not applicable to this case because it only applies to position which become vacant on or before March 1. The testimony at Level three was that the Ft. Gay position did not become vacant until March 10, 2017.

Respondent. See FOFs 8 & 9, *supra*. Grievant did not prove by a preponderance of the evidence that he was entitled to be transferred or recalled to the Ft. Gay vacant position.

Grievant's next argument is that he was the most qualified candidate and should have been the successful applicant for the position. Grievant points out that he was the only candidate who had experience as an assistant principal which he believes made him the most qualified. However, he received credit for that on the matrix in the criteria of "experience" and "seniority." See FOF 9 *supra*. Grievant only received one point in each of those criteria, but the statute clearly gives the Board discretion to assign weight to each criterion separately.

Grievant points out that after all the criteria were judged the candidates were tied and the Board had no policy specifying how the tie should be broken. He points out that the committee considered Grievant's prior discipline as a coach in helping to break the tie even though discipline was not an item set out to break a tie prior to the selection process. Grievant also argues that the discipline should not have been considered because it related to Grievant's performance in an extracurricular assignment and not in his regular job as an assistant principal.

Regarding the second argument the West Virginia Supreme Court of Appeals has sanctioned the use of conduct in an extracurricular position in making decisions regarding the regular employment of school employees. In the case of *Kanawha County Board of Education v. Kimble*, the Supreme Court reversed the Grievance Board decision and held that an employee could be dismissed from her school cook position for misconduct in her extracurricular coach position. The Court wrote:

Ms. *Kimble* had no privacy interest in her activities while working as a coach. The board understandably expects that

its employees will refrain from misconduct in all aspects of employment. "The Board is responsible for all aspects of the operation of the educational system in its county. The effective fulfillment of this duty requires the trust, confidence, and respect of parents and students." *Alderman v. Pocahontas Cnty. Bd. of Educ.*, 223 W.Va. 431, 443, 675 S.E.2d 907, 919 (2009).

Kanawha County Bd. of Educ. v. Kimble, Filed No. 13-0810 (W. Va. Supreme Court, May 30, 2014) (Memorandum Opinion).

In this matter, Grievant received eight games of suspension for repeatedly being ejected from basketball games and failing to follow WVSSAC rules related to his punishment for that activity. Pursuant to the ruling in *Kimble*, Respondent was entitled to take that misconduct into consideration when deciding on filing an assistant principal position.

The Supreme Court has also provided some guidance related to breaking ties between candidates under W.Va. Code § 18A-4-7a. *State ex rel. Monk v. Knight*, Justice Maynard wrote:

Where two employees are "tied" in reference to the qualifications under the law for a professional position, a board of education should be allowed to exercise its discretion and choose the candidate of its choice in order to break the "tie" between two applicants;

. . .

W.Va. Code § 18A-4-7a provides the criteria the board of education must take into consideration when determining which candidate is the most qualified. The candidate who is most qualified must be chosen to fill the vacancy.

State ex rel. Monk v Knight, 201 W. Va. 535; 499 S.E.2d 35 (1997).

Pursuant to *Monk* where the Board has no policy related to breaking ties the Board may exercise its discretion to choose the winner as long as it relies on one or more of the

criterion set out in W.Va. Code § 18A-4-7a. In this case the members of the committee testified that they gave extra consideration to the criterion “other measures and indicators.”⁶ The measures the committee considered in that criterion were performance on the interview and Grievant’s prior discipline as a coach. Even if the committee had not considered the discipline the outcome would not have changed because the successful applicant was found to have performed best on the interview. However, it was not an abuse of discretion for the Board to consider the coaching discipline under *Kimble, supra*. Grievant did not prove by preponderance of the evidence that the selection of the successful applicant was flawed or that he was the most qualified applicant for the vacant position.

Two assistant principal positions became available during the summer of 2017 while Grievant was on the preferred recall list. W.VA. CODE § 18A-4-7a(n) specifically requires that:

[T]he board shall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause the employee to forfeit any right to recall. The notice shall be sent by certified mail to the last known address of the employee.

Id.

It is undisputed that Respondent failed to perform this mandatory duty. It does not matter that Grievant had moved to Ohio and had not provided the Board with his new address. Respondent is obligated to send notice to the employee’s “last know address.” Having established that Respondent violated a mandatory duty the issue is what the consequences are for the failure to act. We start by noting that Grievant amended his

⁶ The full name of the criterion is “Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.”

remedy at Level Three but did not seek any remedy at any level related to these two positions. There was no evidence presented regarding whether either position was filled by an outside applicant or whether the positions were filled by full-time employees of the Board. Additionally, no evidence was presented as to the qualifications or seniority of the successful applicants for the position. In short, Grievant provided no evidence demonstrating that he was entitled to any remedy for this statutory violation. Any remedy provided would have to be based upon pure speculation. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 89-20-671 (Jan. 17, 1990); *Braun v. Brooke County Bd. of Educ.*, Docket No. 2011-0674-BroED (Sept. 9, 2011); *Stalnaker v. Div. of Corr.*, Docket No. 2013-084-MAPS (March 26, 2014). There is simply insufficient evidence regarding the consequences of Respondents failure to give notice to grant any remedy. Accordingly, the 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 R §156-1-3. *Burden of Proof*. "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. W.VA. CODE § 18A-4-7a(o)(1) requires, “[b]oards shall be required to post and date notices of each opening at least once.”⁷ The Board was required to post the Ft. Gay vacancy.

3. Since Grievant was laid off, he was entitled to be recalled to any position for which he was certified on the basis of seniority “if no regular, full-time professional personnel, . . . are qualified, apply for and accept the position.” W.VA. CODE § 18A-4-7a(m).

4. Grievant did not prove by a preponderance of the evidence that he was entitled to be transferred or recalled to the Ft. Gay vacant position without that position being posted for regular full-time employees of the Board to apply for and be considered for the position.

5. Professional educator positions with county boards of education must be filled with the most qualified applicant based upon the criteria set out in W. VA. CODE § 18A-4-7a.

6. “Where two employees are “tied” in reference to the qualifications under the law for a professional position, a board of education should be allowed to exercise its discretion and choose the candidate of its choice in order to break the “tie” between two applicants; . . . W.Va. Code § 18A-4-7a provides the criteria the board of education must take into consideration when determining which candidate is the most qualified. The

⁷ The Board also argues that it was required to post the position by the mandatory provisions of W.VA. CODE § 18A-4-7a(k)(2), *supra*. That provision is not applicable to this case because it only applies to position which become vacant on or before March 1. The testimony at Level three was that the Ft. Gay position did not become vacant until March 10, 2017.

candidate who is most qualified must be chosen to fill the vacancy. *State ex rel. Monk v Knight*, 201 W. Va. 535; 499 S.E.2d 35 (1997).”

7. Grievant did not prove by a preponderance of the evidence that Respondent violated W.Va. Code § 18A-4-7a, by using the criterion of “other measures and indicators” to break the tie between the applicants and select another applicant for the vacant position.

8. Grievant did not prove by a preponderance of the evidence that it was an abuse of discretion for the Board to consider the coaching discipline in the decision to select another applicant for the vacant assistant principal position. *Kanawha County Bd. of Educ. v. Kimble*, Filed No. 13-0810 (W. Va. Supreme Court, May 30, 2014) (Memorandum Opinion).

9. W.VA. CODE § 18A-4-7a(n) specifically requires that:

[T]he board shall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause the employee to forfeit any right to recall. The notice shall be sent by certified mail to the last known address of the employee.

10. Grievant proved by a preponderance of the evidence that that Respondent violated W.VA. CODE § 18A-4-7a(n) by not sending a notice of vacancies which occurred in assistant principal positions while Grievant was on the preferred recall list.

11. Grievant did not put on any evidence demonstrating that he would have received either of the positions had they been posted, nor did he ask for any remedy related to these positions. Any granted related to Respondent’s failure to comply with the statutory notice requirements would be based upon speculation.

12. “When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied.” *Lyons v. Wood County Bd. of*

Educ., Docket No. 89-54-601 (Feb. 28, 1990); *Russell v. Kanawha County Bd. of Educ.*, Docket No. 89-20-671 (Jan. 17, 1990); *Braun v. Brooke County Bd. of Educ.*, Docket No. 2011-0674-BroED (Sept. 9, 2011); *Stalnaker v. Div. of Corr.*, Docket No. 2013-084-MAPS (March 26, 2014).

Accordingly, the 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: July 30, 2018.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE