WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARTHA STRICKLAND,
Grievant,

v. **Docket No. 2018-1391-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Martha Strickland, Grievant, filed this grievance against her employer the Kanawha County Board of Education ("KCBE"), Respondent, protesting her non-selection for a posted position. The original grievance was filed on June 18, 2018. The grievance statement provides, "Violation of WV §18A-4-8b. Most qualified applicant not selected. Clendenin Elementary. Approved June 4. Grievant was more senior qualified applicant and should have been selected for the position." The relief that Grievant seeks is placement in the position of Cook II at Clendenin Elementary.

A conference was held at level one on August 2, 2018, and the grievance was denied at that level by a written decision dated August 3, 2018. Grievant appealed to level two on August 13, 2018, and a mediation session was held on October 25, 2018. Grievant appealed to level three on October 30, 2018. A level three hearing was held before the undersigned Administrative Law Judge on February 11, 2019, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Ben Barkey, West Virginia Education Association. Respondent appeared by James Robert Calhoun, Assistant Superintendent, and was represented by Lindsey McIntosh, General Counsel. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact

and Conclusions of Law, and this matter became mature for decision on or about March 8, 2019, on receipt of the last of these fact/law proposals.

Synopsis

Grievant was not selected for a Cook II position at Clendenin Elementary School. Grievant was qualified and the most senior applicant for the position. County boards of education in West Virginia must fill school service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W. VA. CODE § 18A-4-8b(a) The dispute tends to be whether Respondent has lawfully denied Grievant the Cook II position.

Respondent maintains proper justification exists in the record for it to lawfully select another applicant for the position in discussion. Grievant persuasively establishes, that one or more of Respondent's motivating concern(s) for not selecting her, for the Cook II position, included factors not reflected in Respondent's official justification. All of Grievant's work history with Respondent was relevant with regard to Respondent's analysis and selection. Respondent had concerns with regard to Grievant's past service, which includes but is not limited to her attendance, reliability and effect on the work place. Evaluation of past service is more than the chronological measurement of time. Grievant did not meet her burden and establish that Respondent's action was unlawful and/or resulted in a violation of W. VA. CODE § 18A-4-8b.

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

Findings of Fact

1. Grievant is currently employed as a Cook II at Herbert Hoover High School; she has been working there since approximately May 2017.

2. Grievant applied for a Cook II position at Clendenin Elementary School. Clendenin is thought to be closer to Grievant's residence, it is for one reason or another a preferred location by Grievant.

3. Vanessa Brown is the Principal at Clendenin Elementary and the person charged with making a recommendation of employment for a cook position that was posted on or about May 16, 2018 and is the subject of this grievance.

4. Grievant had been an employee at Clendenin Elementary as a Cook in the Fall of 2015. While Grievant was at Clendenin Elementary, Vanessa Brown was the Principal (*defacto* Grievant's supervisor).

5. On December 8, 2015, Grievant was advised by letter that due to her not showing up to work since November 18, 2015, there would be an employee disciplinary hearing on January 7, 2016. R Ex 7

6. Grievant resigned her position at Clendenin Elementary before the January 7, 2016 hearing took place.

7. Due to the brevity of her employment Grievant was not provided a written evaluation while at Clendenin Elementary.

8. In 2016, Grievant was hired at Point Harmony Elementary as a Custodian.

9. Jennifer Cochran is the Principal at Point Harmony Elementary.

10. On or about June 3, 2016, Grievant was evaluated as unsatisfactory in her position as a Custodian at Point Harmony Elementary School by Principal Cochran.

11. Principal Cochran, provided a copy of the June 3, 2016 unsatisfactory evaluation to Grievant by letter dated June 9, 2016, stating, "On Friday, June 3, 2016, you were scheduled to meet with me regarding your evaluation, however, you failed to show up at the appointed date and time to discuss your evaluation and performance. Enclosed is a copy of your performance evaluation… ." G Ex 3

12. Grievant responded to the June 3, 2016 unsatisfactory evaluation in writing, but she did not grieve the evaluation. G Ex 4

13. As a result of the June 3, 2016 unsatisfactory evaluation, Grievant was placed on a Performance Improvement Plan. The Plan included in the statement of deficiency "Observance of work hours; Attendance; Compliance with Rules; Safety Practices; Meeting Schedules; Appearance of Work Area; Quality of Work; and Follows Instruction."

14. On September 29, 2016, after successfully completing the Plan of Improvement, Grievant was given a satisfactory evaluation, which she signed.

15. Grievant is currently employed as a Cook II at Herbert Hoover High School. In May 2018, Grievant applied for a Cook II position at Clendenin Elementary School. Grievant was the most senior applicant for the position.

16. Grievant is qualified for the position of Cook II at Clendenin Elementary.

17. Vanessa Brown, who was still Principal at Clendenin Elementary in 2018, inquired as to Grievant's performance evaluations on record with Human Resources and

was told about the unsatisfactory evaluation at Point Harmony Elementary.

18. Principal Brown had a conversation with Principal Jennifer Cochran of Point Harmony Elementary regarding Grievant and her job performance at Point Harmony Elementary.

19. It was noted by Principal Cochran that Grievant was not properly working her designated 3.5 hours. Specifically, Grievant had been informed, [Grievant] "must report to work and/or report her absence(s) appropriately, she must report to work during her specified schedule and she must fulfill all duties of her job." R Ex 2

20. Principal Brown was Grievant's supervisor in late 2015 when Grievant stopped coming to work at Clendenin Elementary and resigned her employment prior to a scheduled disciplinary hearing. Principal Brown is aware of Grievant's past service.

21. Grievant's past service includes her deeds and the environment of her resignation. Principal Brown became aware of a number of work place activities of Grievant's around the time of her departure in 2015. Grievant's work place attendance record was allegedly being unduly influenced by marital strife.

22. Principal Brown was unaware that Grievant had been hired for another school service position after returning from her self-imposed sabbatical. Grievant readily acknowledges the time away from this area was a needed break. Grievant needed to get away for a while (emotional stress).[1]

23. Grievant was not selected for the Cook II position at Clendenin Elementary.

[1] The undersigned ALJ in drafting this decision struggles with providing enough facts to deliver understanding but not embarrass or jeopardize Grievant's current circumstances, thus the use of terms like "emotional stress," "domestic turmoil," and potentially harmful activities.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

County boards of education in West Virginia must fill school service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W. VA. CODE § 18A-4-8b.[2] There is no dispute that Grievant was the most senior applicant, and was qualified, for the Cook II position at Clendenin Elementary. The dispute tends to be whether Respondent has lawfully denied Grievant the position. Respondent maintains their determination to not select Grievant for the position in discussion was due to Grievant's past performance and evaluation. Grievant argues Respondent's

[2] WEST VIRGINIA CODE § 18A-4-8b(a) specifically provides:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

communicated rationale for not selecting her for the cook position is pretextual. Grievant contends Respondent has unlawfully denied her the position. Respondent asserts that it complied with the provisions of West Virginia Code § 18A-4-8b(a).

"County 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*, 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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Respondent underscores that seniority in and of itself is not the sole determining factor in selecting an applicant to fill a posted vacancy. Respondent highlights that evaluation of past service is proper and in the circumstances of this matter not arbitrary information. "In the exercise of their discretion, school boards may consider job-related factors in addition to the specific statutory qualifications in selecting an applicant to fill a

posted vacancy." *Randolph County Bd. of Educ. v. Scott,* 217 W. Va. 128, 617 S.E.2d 478 (2005). Further, "[t]he West Virginia Supreme Court of Appeals has repeatedly upheld service personnel hiring decisions in which seniority was not the determinative factor. *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999); *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995).

Six applicants applied for the Cook II position at Clendenin Elementary. The presiding Principal Vanessa Brown, who has prior work history with Grievant, was a quintessential individual in making a recommendation with regard to the selection of the individual for the position in discussion. Respondent and Grievant differ on the totality of Grievant's past service with Kanawha County Schools. Grievant is of the belief Respondent cannot consider factors not documented on a formal evaluation form.

An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. It is perceived

prudent to review the plausibility of the testimony of one or more of the witnesses who testified in this matter.

The level one conference regarding this grievance spent a substantial portion of time on the issue(s) of Grievant's domestic condition. This issue was not documented in the level one decision.[3] Grievant by representative, strongly infers this oversight was intentional and evidence of disingenuous, and/or deceptive actions by Respondent.[4]

Grievant testified at the level three hearing. Her testimony is a hodgepodge of information. Grievant's demeanor is fine, but her capacity to provide relevant and coherent information is dubious, at best. Grievant had ample opportunity to communicate her rendition of information. Grievant has the burden of proof. Yet, the existence, nonexistence, or due weight of definitive information is just as convoluted after Grievant's testimony as before.[5] Minor points of contention were out of proportion with disputed deeds and rationale. Grievant tends to hold others to a higher standard than she does herself. Overall, Grievant's perception is not always in line with that of a trained legal scholar. Grievant is quick to point out technicalities for Respondent's actions (eg., signed or unsigned notices of a deficiency) but seems to expect her past conduct to be viewed with clemency. There are issues with Grievant's past service performance.

[3] Grievant's concern as to what weight was attributed to the issue of her husband and any potential threat, he allegedly represented to the school environment is a rational concern, in the circumstances of this matter. Ultimately, it is not Grievant's domestic situation at issue but Grievant's work place conduct.

[4] It is also possible that given the precarious nature of the issue in discussion, domestic turmoil with violent overtones, Respondent opted to omit on the side of caution. The undersigned in drafting this decision struggles with providing enough facts to deliver understanding but not compromise Grievant's well-being.

[5] The level of ambiguity tends to work against Grievant because she has the burden of proof. Grievant provides selective facts with noticeable gaps of prior acknowledged information. Eg., information provided to the head cook at Clendenin Elementary in 2015.

Neither Grievant nor Respondent provided any information or qualification regarding the selected applicant.

Grievant is a mature woman, who has no doubt experienced many traumatic events, nevertheless, her explanation of facts and events was a double-edged sword regarding the issue(s) in discussion. Grievant's testimony provided more credibility to Respondent's case, than Grievant tends to understand. Grievant's testimony did not persuade the undersigned that Respondent unlawfully denied her a position. Grievant's testimony confirmed several of Respondent's unspoken but communicated fears. Grievant's domestic turmoil effected the kitchen work force at Clendenin Elementary in 2015. Principal Brown was aware of this when making her recommendation regarding the selected applicant for the cook position in discussion.

The Principal at Clendenin Elementary School, Vanessa Brown, testified at the level three hearing. Characterization of her testimony is multifaceted. The information garnished is perplexing. Much of the information communicated is layered hearsay and third-party interpretation of alleged behavior and speculated motivation(s).[6] Select

[6] An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. *Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (Mar. 11, 2010); *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008)*; Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). This Grievance Board has applied the following factors in assessing hearsay testimony: 1) the availability of persons with firsthand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *Gunnells v. Logan County Bd. of Educ.*, Docket No. 97-23-055 (1997); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't*, Docket No. 90-8-115 (June 8, 1990).

information is verifiable while other stories potentially just school house rumor. The accuracy of the information may or may not be as relevant, as whether certain parties believed the information and/or acted upon such belief. Principal Brown is of the opinion that Grievant was experiencing domestic turmoil in 2015. (Confirmed by Grievant's testimony) Further, this unrest had the potential of being hostile and causing harm to Grievant and/or others. Principal Brown was led to believe that Grievant's husband represented a potential threat. Whether Grievant's husband does in deed represent a potential threat to the school is not established as fact. Yet, Grievant's own testimony makes it more likely than not, that the past rumors of potential harmful behavior are or were accurate.

Evaluation of past service is proper and in accordance with W. VA. CODE § 18A-4-8b(a). Principal Brown did not complete a formal evaluation process of Grievant during her tenure at Clendenin Elementary in 2015, but Principal Brown became aware of several elements of Grievant's work performance.[7] Principal Brown's testimony has value. This Principal has concerns regarding Grievant's reliability and effect on the school setting. It is not unlawful for Principal Brown to request information regarding Grievant's recent work performance. Principal Brown is aware of past Grievant conduct whether it be on a formal evaluation form, or not, in that she was the Principal at the school, when Grievant abruptly left the state. Grievant's domestic situation is not the issue, it is Grievant's work place conduct. Grievant's attendance has historically been

[7] A school kitchen is a small community, Grievant's co-workers were concerned for Grievant's well-being. Principal Brown was provided information regarding Grievant and her erratic behavior after her abandonment of her job in 2015.

influenced by one or more outside forces. Grievant's testimony tended to legitimize the concern Principal Brown had regarding Grievant's service. Whether Grievant's past situation(s) were current, or future, concerns for the kitchen workforce at Clendenin Elementary was a source of anxiety for Principal Brown. Principal Brown's testimony is deemed credible. There are recognizable reasons for Respondent to want to be aware of Grievant's recent work performance and attendance record.

Jennifer Cochran is the principal at Point Harmony Elementary School. Principal Cochran prepared an evaluation for Grievant regarding her performance at Point Harmony Elementary. This June 3, 2016 evaluation found Grievant's performance to be unsatisfactory. Grievant was employed as a 3.5 hour part-time custodian. Among other concerns, Principle Cochran documented her observation that Grievant was not working her designated hours. Grievant for one reason or another was leaving early or working a self-adjusted schedule. This behavior was reminiscent of past conduct. Principal Brown had a conversation with Principal Cochran regarding Grievant and her job performance at Point Harmony Elementary. This is not improper.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interest of the schools, and in a manner that is not arbitrary and capricious. *Dillon v. Wyoming County Bd. of Educ*, Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986). Evaluation of past service is more than the chronological measurement of time. Further, seniority alone should never be the sole justification for job selection.

Respondent looked at the total body of work of the instant Grievant. In the fact pattern of this matter, it is more likely than not that "evaluation of past service" translates into more than a formal evaluation form filed regarding Grievant's service. Grievant was considered for the position and her past service record included more than the one negative evaluation filed in 2016. With regard to Grievant, Principal Brown's evaluation of past service included information contained in Grievant's formal evaluation and most likely past experience, which includes erratic attendance, dubious explanations for unscheduled departures, and concerns of work place confrontations.[8] Respondent is not without sympathy for Grievant, but it reserves the ability to express lawful discretion with position selection. The instant Grievant has documented and undocumented work place performance issues. Respondent had concerns regarding Grievant's past service, which includes but is not limited to her attendance, reliability and effect on the work place.

Grievant has failed to prove by a preponderance of the evidence that it was arbitrary and capricious for Respondent to consider the totality of her past service with Kanawha County Schools in deciding whether to offer her the position at issue. Respondent specified valid cause why Grievant, a service person, with acknowledged seniority was not employed in the position for which she applied. Grievant has failed to prove Respondent's action was unlawful and resulted in a violation of W. VA. CODE § 18A-4-8b.

The following conclusions of law are appropriate in this matter:

[8] The undersigned ALJ is hesitant to provide hearsay details. But it is factually accurate that Grievant is back with the individual, which was a focal point for some of the workplace turmoil concern.

Conclusions of Law

1. Because the subject of this grievance is not a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. County boards of education in West Virginia must fill school service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W. VA. CODE § 18A-4-8b(a).

3. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interest of the schools, and in a manner that is not arbitrary and capricious. *Dillon v. Wyoming County Bd. of Educ*, Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. Evaluation of past service is more than the chronological measurement of time. Evaluation of past service of a service personnel in consideration for a position of employment is proper and in accordance with W. VA. CODE § 18A-4-8b(a).

5. Grievant has failed to prove by a preponderance of the evidence that Respondent was arbitrary and capricious in its refusal to select her for a posted position.

6. Grievant has failed to prove Respondent's actions were unlawful and resulted in a violation of W. VA. CODE § 18A-4-8b.

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 (2018).

Date: April 18, 2019

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Landon R. Brown
Deputy Chief Administrative Law Judge