MARY ELLEN CHAPMAN,

Grievant,

v.

DOCKET NO. 98-07-159

CALHOUN COUNTY BOARD OF EDUCATION,

and

MONICA OFFUTT,

Intervenor.

D E C I S I O N

Grievant, Mary Ellen Chapman, filed this grievance against her employer, the Calhoun County Board of Education ("Board") on April 1, 1998, alleging the Board violated W. Va. Code §§ 18A-4-7a, 18A-4-7g, and 18-29-2(m) and (o), by not selecting her for an Art Teacher, 5-8, position at the Board's new middle school, and subsequently reducing her in force. Levels one and two of the grievance procedure were waived, and a level three hearing was held on April 23, 1998, where Monica Offut, the successful candidate, was granted intervenor status pursuant to W. Va. Code § 18-29-4(u). The Board denied the grievance by decision dated May 4, 1998, and Grievant appealed to level four on May 13, 1998. The parties agreed that this matter could be submitted on the record developed below, and this case became mature for decision on August 4, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant is represented by LorenB. Howley, Esq., Howley & Venezia, L.C., the Board is represented by Howard Seufer, Jr., Esq., Bowles, Rice, McDavid, Graff & Love, and Intervenor is represented by Ed Stephenson, West Virginia Education Association.

SUMMARY OF EVIDENCE

Agreed Exhibits

Ex. 1 -

Grievance statement.

Intervenor's Exhibits

Ex. 1 -

Wood County Schools Hiring Procedure for Classroom Teaching Vacancies When One Or More Permanently Employed Instructional Personnel Apply.

Ex. 2 -

March 18, 1997 Memorandum from Delores Ranson, Assistant Superintendent, Jackson County Schools, to Principals.

Ex. 3 -

March 12, 1998 letter from Jerry Jones, Acting Superintendent, Roane County Schools, to Ed Stephenson.

Testimony

Grievant testified in her own behalf and offered the testimony of Ron Blankenship. The Board presented the testimony of Ron Blankenship. Intervenor did not present any testimony.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. In the Spring of 1998, the Board and the Superintendent met to discuss the upcoming consolidation of schools, and the opening of the new middle school, set to open in the 1998-99 school year.

2. The Board decided to post all grades 5-12 positions which would be created because of the

consolidation. 3. The professional employees voted to grant priority or preference to those employees in the system for jobs that were being created in the county as a result of the 5-12 postings, in accordance with W. Va. Code § 18A-4-8f.

4. Grievant's position as art teacher in the elementary school was going to be eliminated as a result of the consolidation. Nevertheless, she was not given priority in filling one of the positions at the new middle school, because it was determined that she primarily taught elementary age students.

5. Intervenor's position of Library/Media Science teacher would not be affected by the consolidation.

6. The Board started down the list of employees from the most senior on down, allowing the employees to choose their preference of teaching positions for those areas in which they held appropriate certification.

7. When all employees on the priority list had chosen, an Art Teacher, 5-8, position remained unclaimed.

8.

The Board posted the Art Teacher, 5-8 position.

9. Grievant and Intervenor were the only two applicants for the Art Teacher, 5-8 position.

10. The Superintendent utilized the second set of criteria set forth in W. Va. Code § 18A-4-7a to evaluate the candidates.

11.

The candidates tied with a score of 5-5.

12. Both candidates possessed appropriate certification, experience in the certification area, appropriate degree level, and satisfactory evaluations. 13. Grievant received a point for total teaching experience, with 29 years to Intervenor's 18 years.

14. Intervenor received a point for in-county seniority, with 18 years to Grievant's 10 years.

15. No specialized training was listed on the posting, and neither candidate received any points for this factor.

16. The Superintendent recommended Grievant to the Board for the Art Teacher, 5-8 position, because she had more years teaching art than Intervenor, i.e., 29 years to 9 years.

17. The Board did not accept the Superintendent's recommendation, and selected Intervenor

because she had the most county seniority.

18. Grievant is a resident of Gilmer County. Intervenor is a resident of Calhoun County.

19. As a result of not being selected for the Art Teacher, 5-8 position, Grievant was reduced in force in the Spring of 1998.

DISCUSSION

Grievant argued that the Board violated the applicable provisions of W. Va. Code §§ 18A-4-7a, 18A-4-8f, and 18-29-2(m) and (o), in selecting Intervenor for the posted position.

W. Va. Code § 18A-4-8f provides, in pertinent part:

> Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers, as defined in section one [§ 18A-1-1], article one of this chapter, who vote to do so, in accordance with procedures established herein, and who are employed by a county board of education, the board shall give priority to classroom teachers in any school or schoolsto be closed as a result of a consolidation or merger when filling positions in the new school created by consolidation or newly created positions in existing schools as a result of the merger. Each year a consolidation or merger is proposed, prior to the implementation of that plan, the superintendent shall cause to be prepared and distributed to all faculty senates a ballot on which teachers may indicate whether or not they desire those affected by school closings to be given priority status in filling new positions. A secret ballot election shall be conducted in each faculty senate and the faculty senate chair shall convey the results of such election to the superintendent. The superintendent shall tabulate and post all results prior to the notice requirements for reduction in force and transfer as outlined in sections two and seven [§§ 18A-2-2 and 18A-2-7], article two of this chapter. The total number of votes shall be tabulated and the provisions of this section shall be implemented only if a majority of the total number of teachers who cast a ballot vote to do so. The teachers in the school or schools to be closed shall have priority in filling new positions in the new or merged schools for which the teachers are certified and meet the standards set forth in the job posting on the basis of seniority within the county: Provided, That a teacher shall only receive priority for filling a position at a school impacted by a merger, or consolidation with the position being created by the influx of students from a consolidated or merged school into the school receiving students from their closed school or grade level. The most senior teacher in the closed school or schools shall be placed first, the second most senior shall be placed next and so on until all the newly created positions are filled, or until all the teachers in the closed school or schools who wish to transfer into the newly created positions are placed: Provided, however, That if there are fewer new positions in the newly created school or merged school than there are classroom teachers in the school or schools to be closed, the teachers who were not placed in the new positions shall retain the same rights as all other teachers with regard to seniority, transfer and reduction in force: Provided further, That nothing herein shall be construed to grant any employee additional rights or protections with regard to reduction in force. (See footnote 1) (Emphasis added).

Grievant contends she should have been given priority over the Intervenor, who was not affected by the school consolidation, for the Art Teacher, 5-8 position. Superintendent Ron Blankenship

explained that, in creating the list of professional employees who would be affected by the school consolidations, the employees agreed that they would beprioritized according to where they taught the majority of the time. Therefore, as Grievant spent more than 50% of her time teaching children up through the 4th grade, she was placed at the primary or elementary teaching level. As a result, Grievant was not eligible for preference when filling teaching positions for the newly created positions in the middle school.

After the list of employees who had priority was exhausted, the Art Teacher, 5-8, position at the new middle school, was still unclaimed. The Board posted that position, and Grievant and Intervenor applied. Although not clear from the record, it appears Grievant is arguing that, once the list got to the level of the Art Teacher position, she should have been given priority under W. Va. Code § 18A-4-8f for that position over Intervenor. Intervenor had been employed in a Library/Media Science teacher position, which position would still be in existence following the consolidation of schools. Thus, Grievant argues, the Board could have kept Intervenor in the Library/Media Science position, and employed her in the Art Teacher position, therefore employing both of them, rather than having to reduce Grievant in force.

The question to be decided is whether the Board erred in not giving Grievant any type of priority in selecting the Art Teacher position at the new middle school, as opposed to posting the position. The Board's method of prioritizing teachers based on the grade levels they taught has been utilized by other county boards of education and upheld by this Grievance Board. In Crawford v. Randolph County Bd. of Educ, Docket No. 93-42-108 (July 27, 1993), a case very similar to the instant case, the grievant was not given priority status in filling newly created positions at the new consolidated high school. The Board determined that, using a “three-class” rule, grievant spent more than fifty percent of histime teaching middle school grade level students, and spent a lesser amount of time teaching ninth grade level students, who were being moved to the high school. Thus, the Board decided grievant was not “affected” by the consolidation under the provisions of Code § 18A-4-8f, and therefore, not eligible for priority in filling one of the new positions at the high school. Relying on two State Superintendent's Opinions, and the reasoning of the Board, the Administrative Law Judge held that the “three-class” rule was not arbitrary or capricious, or in contradiction with the applicable provisions of the Code.

In addition, this Board, in Hoyes v. Tyler County Bd. of Educ., Docket No. 93-48-026 (May 28,

1993), held that "[u]nder Code § 18A-4-8f, when several jobs are available for displaced teachers with like certifications, a board of education must determine whether the students who will create each such teaching slot are from the displaced applicants' former school and current grade level teaching area in its placement decisions." In that case, the Board allowed a displaced middle school teacher to fill a newly created high school position, which resulted in a displaced high school teacher having to take a newly created middle school position. This Board held that was an arbitrary and capricious application of Code § 18A-4-8f, and ordered the county board to place the grievant in the position at the new school which reflected the grade level/students he currently taught, which was the high school level.

In this instance, the Board determined that Grievant spent more than 50% of her time teaching elementary level students, and was not eligible for priority for one of the newly created middle school positions. Thus, Grievant had to bid on and be selected for the vacant Art Teacher position just like any other teacher without priority, by relying on the criteria set forth in W. Va. Code § 18A-4-7a. The Board's decision not to give primarilyelementary school teachers priority in filling positions at the new middle school, even if their positions would be affected by the consolidation, was in accord with this Grievance Board's precedent, and was not an arbitrary or capricious application of Code § 18A-4-7a.

Grievant also alleges the Board violated W. Va. Code § 18A-4-7a, which provides, in pertinent part:

> . . . If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, the county board of education shall make decisions affecting the filling of such positions on the basis of the following criteria: Appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated in the job description; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority. Consideration shall be given to each criterion with each criterion being given equal weight. If the applicant with the most seniority is not selected for the position, upon the request of the applicant a written statement of reasons shall be given to the applicant with suggestions for improving the applicant's qualifications.

The parties agree that the correct criteria were used to select the Art Teacher, 5-8 position, and that Grievant and Intervenor were tied following the Superintendent's evaluation of the applicable criteria. However, Grievant alleges the tie-breaker used by the Board was arbitrary and capricious, and contrary to law, as the Board had no written policy on tie-breakers prior to this posting. The

Board determined that county seniority would be used as the tie-breaker, giving Intervenor the position over Grievant.

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). The arbitrary and capriciousstandard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The burden of proof is on the Grievant to demonstrate a flaw in the selection process, or that the Board's action was arbitrary and capricious.

With regard to hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the "qualifying factors" set forth in W. Va. Code § 18A-4-7a (1992). That Code Section requires that, in applying the second set of criteria, each factor be weighted equally. It does not address how ties are to be broken, however, it does provide "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." Syl. Pt. 4, State of W. Va. ex rel. Monk v. Knight, No. 24366, slip op. (W. Va. Nov. 24, 1997). It is left to the sound discretion of a county board of education to resolve ties between candidates. Id. See also, Jones v.Summers County Bd. of Educ., Docket No. 97-45-147 (Jan. 7, 1998)(not arbitrary or capricious to use experience or seniority as tie-breaker); Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997)(not arbitrary and capricious for the Board to rely on total amount of teaching experience, and teaching experience in the relevant field in breaking the tie between two

candidates.) In addition, this Grievance Board found in Cummings that the tie-breaker was not flawed simply because a tie-breaking mechanism had not been decided upon before the selection process began.

However, this Board has also held in the past that, because Code § 18A-4-7a requires that the second set of factors be weighted equally, seniority cannot be used as a tie-breaker because that would, in effect, give the seniority criterion more weight than the other six factors. See Jamnick v. Kanawha County Bd. of Educ., Docket No. 92-20-172
(Aug. 24, 1992). To the extent the West Virginia Supreme Court's decision in Monk, supra, and this Board's more recent decisions, hold differently, Jamnick is hereby overruled.

Therefore, under the law established by Monk, supra, and this Board's recent decisions in Cummings and Jones, supra, it was not an abuse of discretion, or arbitrary and capricious, for the Board to use county seniority as a tie-breaker in this instance. Finally, Grievant alleges the Board engaged in favoritism and discrimination in selecting Intervenor for the position, because Intervenor was a resident of Calhoun County, while Grievant was a resident of Gilmer County.

W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” “Favoritism” is described in W. Va. Code § 18-29-2(o) as “unfair treatment of an employee asdemonstrated by preferential, exceptional or advantageous treatment of another or other employees.” Favoritism is generally considered the reverse of discrimination, and the test is the same.

In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a)

that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)

that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c)

> that such differences were unrelated to actual job responsibilities of the Grievant and/or the other employee(s) and were not agreed to by the Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Steele, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has made a prima facie case. She is similarly situated to Intervenor, has been treated in an adverse manner, and the difference in treatment is not related to the actual job responsibilities of Grievant. However, other than her opinion that the reason the Board must have selected Intervenor over her is because she does not live in Calhoun County, she has presented no evidence to support that claim. Conversely, the Board presented evidence that the reason it selected Intervenor was because it believed seniority should be the tie-breaker in selection cases. There is nothing to show that this was a merepretext on the Board's part. The evidence showed that this was the first tie-breaker the Board had ever had, and its decision to use seniority cannot be found to be pretextual to some intent to discriminate against Grievant because of her residency.

CONCLUSIONS OF LAW

1. Under W. Va. Code § 18A-4-8f, when several jobs are available for displaced teachers with like certifications, a board of education must determine whether the students who will create each such teaching slots are from the displaced applicants' former school and current grade level teaching area in its placement decisions. Hoyes v. Tyler County Bd. of Educ., Docket No. 93-48-026 (May 28, 1993). See also, Crawford v. Randolph County Bd. of Educ., Docket No. 93-42-108 (July 27, 1993).

2. It was not arbitrary or capricious for the Board to determine that because Grievant spent the majority of her time teaching elementary age students, she was not eligible for priority placement into the newly created middle school positions.

3. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary or capricious. See Hyre v. Uphsur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

4. With regard to hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the "qualifying factors" set forth in W. Va. Code § 18A-4-7a. That Code Section requires that, in applying the second set of criterion, each factor be weighted equally. W. Va. Code § 18A-4-7a.

5. W. Va. Code § 18A-4-7a does not address how ties are to be broken, however, it does provide "the criteria the board of education must take into considerationwhen determining which candidate is the most qualified. The candidate who is most qualified must be chosen to fill the vacancy." Syl. Pt. 4, State of W. Va. ex rel. Monk v. Knight, No. 24366, slip op. (W. Va. Nov. 24, 1997). It is left to the sound discretion of a county board of education to resolve ties between candidates. Id.

6. It is not arbitrary and capricious for a county board to use teaching experience or seniority as a tie-breaker. See Jones v. Summers County Bd. of Educ., Docket No. 97-45-147 (Jan. 7, 1998); Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997).

7. A selection process is not necessarily flawed because a tie-breaking method has not been chosen prior to posting and filling a position. Cummings, supra.

8. Grievant has not proven by a preponderance of the evidence that it was arbitrary or capricious for the Board to use seniority as tie-breaker.

9. W. Va. Code § 18-29-2(m) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

10. "Favoritism" is described in W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Favoritism is generally considered the reverse of discrimination, and the test is the same.

11. Grievant established a prima facie case of discrimination and favoritism, but failed to rebut the Board's legitimate, non-discriminatory reason for selecting Intervenor, i.e., that she possessed more seniority than Grievant.

Accordingly, this grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Calhoun County and such appeal must be filed within thirty (30) days of receipt of this decision.

W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: September 8, 1998

Footnote: 1

There is no dispute that this Code Section governed the consolidations going on in Calhoun County at the time this grievance arose.