JEFFERY B. WINE,

Grievant,

v. **Docket No. 98-21-248**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jeffery B. Wine, professionally employed by the Lewis County Board of Education (LCBE), alleges that selection practices were not followed, and his tenure was not considered for the hiring and assignment of extracurricular work. The grievance was not resolved at levels one and two, and Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c). At level four, the parties agreed to submit the matter for decision based upon the lower-level record, and the grievance became mature for decision with the submission of additional documents by the parties on or before August 12, 1998. (See footnote 1)

The following findings of fact are derived from the record, including testimony contained in the level two transcript, and documents submitted at levels two and four.

Findings of Fact

1. Grievant has been employed by LCBE for approximately eight years, and was assigned as a regular, full-time special education teacher at Robert L. Bland Middle School at all times pertinent to this decision.

2. By posting dated February 19, 1998, LCBE advertised the vacancy for an extracurricular position of Homebound Instructor. The term of the position was stated tobe the remainder of the 1997-98 school year only, and the salary was listed as $12.50 per hour.

3. Grievant and Connie Lang were the only two applicants for the position. Ms. Lang was not an employee of LCBE at that time.

4. LCBE employed both applicants for the extracurricular work. Grievant's contract provided that his duties were to “provide homebound instruction when our full-time Homebound Instructor cannot cover”, at a location “wherever assigned”.

5. Grievant was assigned to provide an alternative education program, after school hours, to a

student who had been expelled from school. Grievant worked nineteen hours under his extracurricular contract.

6. LCBE serves students at the Sharpe Hospital through its Homebound Instructor. Ms. Lang was assigned to provide services at the Hospital, and worked a total of 8.2 hours under her extracurricular contract.

7. Grievant had previously worked at the Hospital as part of a full-time employment contract.

8. Ms. Lang was assigned to work at the Hospital during regular school hours based upon a determination that the students performed better during the day, and because the social worker who coordinated the educational program with LCBE works during the day.

9. Grievant filed a level one complaint on March 16, 1998.

10. Denton King, Director of Special Services, denied the level one grievance on March 27, 1998, and advised Grievant that he would advance the grievance for further processing. Grievant did not file an appeal to level two, and Assistant SuperintendentGabriel Devono advised him by letter dated April 20, 1998, that his grievance had been terminated.

11. Grievant refiled the same grievance on April 24, 1998, with Steve Casto, Vice Principal of Robert L. Bland Middle School.

12. On April 30, 1998, Mr. Devono denied the second grievance as an untimely appeal of Mr. King's level one response, and on the basis of res judicata.

13. On May 11, 1998, Grievant filed a level four grievance stating that LCBE had refused to grant him a level two hearing.

14. The parties subsequently agreed to schedule a level two hearing. By Order dated May 21, 1998, the greivance was remanded to level two for hearing held on June 8, 1998. The present matter is an appeal of the decision issued pursuant to that hearing.

Discussion

LCBE argues that the grievance was not appealed to level two, and that Grievant, who has participated in the grievance process previously, could not rely upon an administrator to advance the claim in his behalf. Absent any evidence of a deliberate act with intent to cause Grievant to delay in filing an appeal, LCBE argues that Mr. King's statement did not relieve Grievant of his responsibility to appeal his own grievance. LCBE further asserts that it was unreasonable for Grievant to delay four weeks before seeking to proceed with the grievance, even had he believed the appeal had been filed

on his behalf. Finally, LCBE argues that to consider the April 24, 1998, grievance a “new” claim would violate the doctrine of res judicata, in that a final decision had already been rendered in this matter.

In response to the allegation the grievance was not timely filed, Grievant asserts thatat the conclusion of his informal conference, Mr. King said he was “going to send it on and I told him that was fine.” (L. II Trans. p.13.) Grievant notes that Mr. King confirmed that understanding in his letter of March 27, 1998, in which he stated, “[a] resolution to this issue is accordingly denied at this level and I am, therefore, sending your grievance on to the next level for further processing.” Grievant, also testified that after receiving Mr. Devono's letter advising him that the grievance was terminated, he filed the same grievance “to try to keep the grievance process going . . . .” (L. II Trans. p. 16.) This action was taken, according to Grievant, after he concluded that LCBE had also violated the timelines when it failed to issue a level one decision within five days.

When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Hawthorne v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD-252 (Nov. 5, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); and Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996).

Although Respondent established that Grievant did not file a level two appeal after receiving the level one decision, Grievant offered a reasonable explanation for the failure to timely file an appeal. In the ordinary course of events, administrators do not advance appeals on behalf of grievants; however, in this instance Mr. King undeniably stated that he would advance the processing of the grievance, and Grievant's reliance upon that representation was reasonable. Respondent's subsequent scheduling of a level twohearing appears to be a concession on this issue. In consideration of the foregoing, Respondent's affirmative defense that the grievance was not timely filed at level two is denied.

Addressing the merits of the case, Grievant argues that it was arbitrary and capricious for LCBE to hire two individuals for a single job posting, and that as the only regularly-employed applicant, he was entitled to all the extracurricular Homebound Instructor hours. Grievant also argues that it was

arbitrary and capricious to maintain service at the Hospital during regular school hours when the posting had not listed any requirements as to when the duties were to be performed, and because extracurricular work by definition may be performed outside the school day. Finally, Grievant argues that it was arbitrary and capricious for LCBE to ignore his previous experience as an instructor at the Hospital when making this selection/assignment decision.

In response, LCBE asserts that it acted within its discretion in hiring both applicants for the extracurricular work. By hiring both applicants, LCBE notes that it could assign the homebound work in an efficient and prompt manner. LCBE further argues that it acted properly when it assigned the Hospital work to an individual who could serve the students during regular school hours. It concludes that there was no requirement that Grievant be given all the homebound assignments.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code§18-29-6. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp., 769 F.2d 238 (4th Cir.1984). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." Id., Trimboli v. W. Va. Dept. of Health and Human

Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Mr. Devono testified at level two that it had been the practice of LCBE to hire all qualified applicants for the overflow Home Bound assignments, although there was no guarantee as to the amount of work they would receive. Mr. King confirmed that a number of individuals from various schools had been hired for the extracurricular work in pastyears, and that Ms. Lang had been assigned the Hospital students during regular hours to facilitate coordination between LCBE and the Hospital. These explanations are reasonable and establish that the decision to hire multiple individuals was not arbitrary and capricious. Grievant has failed to provide any authority for his argument that he was entitled to all of the work based upon his seniority.

In addition to the foregoing findings of fact and discussion it is appropriate to make the following conclusions of law.

Conclusions of Law

1. When the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Hawthorne v. Bd. of Directors/Bluefield State College, Docket No. 97-BOD-252 (Nov. 5, 1997); Buck v. Wood County Bd. of Educ., Docket No. 96-54-325 (Feb. 28, 1997); and Parsley, et al. v. Mingo County Bd. of Educ., Docket No. 95-29-473 (Apr. 30, 1996).

2. Although Respondent established that Grievant did not file a complaint at level two, Grievant reasonably relied upon the representation of the level one evaluator that he would advance the grievance for processing. Therefore, Respondent's claim regarding timeliness is denied.

3. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1§4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

4. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in

a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillion v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. Grievant failed to prove that Respondent acted in violation of any statute or policy, or in an arbitrary and capricious manner when it hired two individuals for extracurricular academic work, or when it provided services to students in a state hospital during regular school hours.

6. Grievant failed to prove that he was entitled by seniority, or otherwise, to the extracurricular work assigned to another individual.

Accordingly the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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.

Date: September 15, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Jennifer Shope of the West Virginia Federation of Teachers, and LCBE was represented by Sophie Zdatny, Esq.