

REBECCA HAUN,

Grievant,

v v.

DOCKET NO. 00-30-274

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

ANN HUNTOON,

Intervenor.

DECISION

Rebecca Haun (Grievant) alleges that the Monongalia County Board of Education (MCBE) improperly failed to post a teaching position. No proceedings at Level I took place. A Level II hearing was held on July 27, 2000. Grievant was represented at this hearing by Don Craft of the West Virginia Education Association, and MCBE was represented by Harry M. Rubenstein, Esq. The grievance was denied at Level II by Hearing Examiner Dr. Louis Hlad on August 10, 2000. There is no record of any proceedings at Level III.

The parties agreed that this grievance could be submitted at Level IV based on the record developed at the lower levels. [\(See footnote 1\)](#) The parties were given until September 29, 2000, to submit proposed findings of fact and conclusions of law, both parties did so, and this matter became mature for decision on that date.

The following Findings of Fact have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by MCBE as an Itinerant Gifted Teacher.
2. Prior to the 2000 - 2001 school year, MCBE Special Education Director DeEdra Lundeen determined that four and one-half Itinerant Gifted Teacher positions were required for the 2000 - 2001 school year.
3. MCBE had three incumbent Gifted Teachers under contract available to fill two and one-half of its Itinerant Gifted Teacher positions.
4. One of the three incumbent Gifted Teachers was Intervenor Ann Huntoon (Intervenor).
5. MCBE assigned Intervenor to the Itinerant Gifted Teacher position at Cheat Lake Elementary and Middle Schools (Cheat Lake) without posting the position.
6. MCBE assigned the other two incumbent Gifted Teachers to fill the remaining one and one-half Itinerant Gifted Teacher positions without posting the positions.
7. MCBE assigned its three incumbent Gifted Teachers based upon their seniority, certification, and professional preferences.
8. MCBE posted the remaining two Itinerant Gifted Teacher positions. Grievant applied for and received one of these positions.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. Dep't of Health & Human Resources, 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.

Grievant alleges that MCBE improperly failed to post the position of Itinerant Gifted Teacher at Cheat Lake. Grievant seeks the posting of the position, so that she can apply for it. MCBE responds

that no vacancy existed at Cheat Lake, because it had assigned Intervenor to that position.

It is clear that teaching position vacancies must be posted. W. Va. Code § 18A-4- 7(a) states: “[b]oards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days.”

However, boards of education also have the authority to “[a]ssign, transfer, suspend or promote teachers and other school employees. . .” W. Va. Code § 18-4-10(3). It seems to the undersigned that, when MCBE filled its two and one-half existing Gifted Teacher positions, which had existed the previous year, with its three incumbent Gifted Teachers, it was making the sort of “assignment” contemplated by W. Va. Code § 18-4-10(3); and that it properly posted the two newly-created positions, for which it had no incumbent Gifted Teachers, pursuant to W. Va. Code § 18A-4-7(a). See Butcher v. Logan County Bd. Of Educ., Docket No. 95-23-015 (July 27, 1995); Napier v. Logan County Bd. Of Educ., Docket No. 94-23-541 (April 25, 1995). It appears that the transfer of duties among the incumbent Gifted Teachers did not create new positions within the meaning of W. Va. Code § 18A-4-7(a).

“County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as the discretion is exercised reasonably, in the best interests of 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).

In applying the “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, *supra* at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997).

The credible evidence of record in this grievance shows that MCBE annually conducts a reasoned assessment of its need for Itinerant Gifted Teachers for the upcoming school year, and assigned its three incumbent Gifted Teachers based upon their seniority, certification, and professional preferences. Under these circumstances, the undersigned concludes that relevant factors were

considered by MCBE in reaching its decision, and can not conclude that there has been a clear error of judgment. Bowman, supra.

Accordingly, Grievant failed to prove, by a preponderance of the evidence, that MCBE erred in failing to post the position of Itinerant Gifted Teacher at Cheat Lake. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievant has the burden of proving her 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.

2. W. Va. Code § 18A-4-7(a) states: “[b]oards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days.”

3. Boards of education have the authority to “[a]ssign, transfer, suspend or promote teachers and other school employees. . .” W. Va. Code § 18-4-10(3).

4. When MCBE placed its three incumbent Gifted Teachers into its two and one-half existing Gifted Teacher positions, which had existed the previous year, it was making the sort of “assignment” contemplated by W. Va. Code § 18-4-10(3); and it properly posted the two newly-created positions, for which it had no incumbent Gifted Teachers, pursuant to W. Va. Code § 18A-4-7(a). See Butcher v. Logan County Bd. Of Educ., Docket No. 95- 23-015 (July 27, 1995); Napier v. Logan County Bd. Of Educ., Docket No. 94-23-541 (April 25, 1995).

5. In applying the “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997).

6. Relevant factors were considered by MCBE in reaching its decision, and there was no clear error of judgment. Bowman, supra.

7. Grievant failed to prove, by a preponderance of the evidence, that MCBE erred in failing to post the position of Itinerant Gifted Teacher at Cheat Lake.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER
ADMINISTRATIVE LAW JUDGE

Dated October 16, 2000

[Footnote: 1](#)

This grievance was assigned, for administrative purposes, to the undersigned administrative law judge on September 18, 2000.