DELLA HOUCK,

Grievant,

v. **DOCKET NO. 00-55-358**

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Della Houck (Grievant) filed this grievance against Wyoming County Board of Education (Respondent)(WBOE), alleging that she was the victim of harassment and reprisal when WBOE did not select her as Assistant Principal of Wyoming East High School (Wyoming East).

This grievance was denied at Level I, on August 22, 2000, by F. Stephen Anderson, and at Level II, on October 25, 2000, by Assistant Superintendent Frank B. Mann. The record does not reflect any proceeding at Level III.

A Level IV hearing was held on January 18, 2001, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Derrick Leffler, Esq., and WBOE was represented by Greg Bailey, Esq. The parties were given until February 22, 2001, to submit proposed findings of fact and conclusions of law, both sides did so, and this grievance became mature for decision on that date. The following Findings of Fact are made based upon a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by WBOE as an Assistant Principal at Oceana High School.

2. On July 11, 2000, WBOE posted the position of Assistant Principal of Wyoming East. The minimum qualifications for the position were a valid Secondary Teaching Certificate and Secondary Administrative Certificate.

3. WBOE's requirement of these secondary certificates reflects its policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators. (See footnote 1)

4. Grievant applied for the position.

5. WBOE Superintendent Frank Blackwell (Blackwell) prepared a matrix, using the first set of factors in W. Va. Code § 18A-4-7(a), to assess the qualifications of the candidates for the position.

6. Blackwell recommended that WBOE select Grievant for the position. 7. Grievant did not have a Secondary Teaching Certificate.

8. WBOE did not accept Blackwell's recommendation of Grievant for the position. At its August 14, 2000, meeting, WBOE voted on a motion by Board member Don Nuckols (Nuckols) to eliminate the position. The motion passed by a four-to-one vote.

9. Nuckols had previously been indicted, after a complaint by Grievant, on a felony charge of unlawfully buying or selling a vote and a misdemeanor charge ofunlawfully promising employment in exchange for political support for allegedly promising Richard Davidson the position of Glen Rogers Grade School Principal in exchange for his support in the May, 1998, school board election. The charges against Mr. Nuckols were dismissed on or about July 15, 2000.

10. Nuckols harbored great ill will toward Grievant because of the substantial expense of his defense against his criminal charges.

11. In the Spring of 2000, WBOE was 39.16 professional positions over the state funding formula, due to declining enrollment.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving it by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 asserts that she was not selected for the position of Assistant Principal of Wyoming East

in retaliation or reprisal for her previous grievances, and that her non- selection constitutes harassment. WBOE responds that Grievant did not meet theminimum qualifications of the position, and that the position was properly eliminated to help redress an excess of professional positions, caused by declining enrollment.

Grievant's qualifications will be discussed first, for if she is not qualified for the position, she has no standing to grieve her non-selection, Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994), and her claims of favoritism and harassment become moot. See Crawford v. Boone County Bd. of Educ., Docket No. 94- 03-1131 (June 30, 1995). As noted in Finding of Fact Two, the position in question requires a valid Secondary Teaching Certificate and Secondary Administrative Certificate. WBOE's requirement of these secondary certificates reflects its policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators. See Houck v. Wyoming County Bd. of Educ., Docket No. 99 - 55-289 (Mar. 1, 2001)(Houck 1); Houck v. Wyoming County Bd. of Educ., Docket No. 99 -55-290 (Mar. 9, 2001)(Houck 2). “A board of education may identify required certification for a position, as long as this decision is not arbitrary and capricious or an abuse of discretion.” Crawford, supra; Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

County boards of education have substantial discretion in matters relating to the selection of school personnel, so long as they act reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious. Syl Pt. 3, Id.; See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

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 reacheda 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).

It is not disputed that Grievant did not have a Secondary Teaching Certificate. Accordingly, this grievance must be denied.

However, in the interest of finality, Grievant's claims of reprisal (See footnote 2) and harassment (See footnote 3) will be briefly addressed. These claims are based upon the credible, if hearsay, (See footnote 4) testimony of Morgan Keith Davis (Davis), a Wyoming County merchant and former mayor

of Mullens with a son who attends Wyoming East. Davis credibly testified without contradiction that WBOE member Nuckols, who had been indicted, after a complaint by Grievant, on a felony charge of unlawfully buying or selling a vote and a misdemeanor charge of unlawfully promising employment in exchange for political support, told him that he would never vote for Grievant, because she had cost him $35,000.00 in legal fees, and that he would never forget it; that he would have voted for another candidate with Grievant's qualifications; and that he advocated eliminating the position of Assistant Principal of Wyoming East because he was afraid that Grievant would file and win a grievance if WBOE selected someone elsefor the position. Davis's testimony is consistent with the pattern of politically motivated decision making shown in Houck 1 and Houck 2.

It thus appears that Nuckols had, at best, mixed motives in voting to eliminate the position in question, a point conceded by WBOE in its proposed findings of fact and conclusions of law. However, WBOE presented the credible testimony of three of its five members, (See footnote 5) Margaret Swimm, Gerald L. Short, and President Arnold W. Harless, that their votes to eliminate the position were not influenced by Nuckols's animosity towards Grievant, but were motivated by WBOE being 39.16 professional positions over the state funding formula, due to declining enrollment. (See footnote 6)

W. Va. Code § 18A-4-7(a) provides: “Nothing provided herein shall prevent the county board of education from eliminating a position due to lack of need.” W. Va. Code § 18-9A-4 provides:

> Every county shall utilize methods other than reductions in force, such as attrition and early retirement, before implementing their reductions in force policy to comply with the limitations of this section. It is the intent of the Legislature that in planning reductions in force to comply with reduced ratios of professional educators to students in adjusted enrollment, county boards shall consider positions for elimination in the following order: (1) Central office administrators, (2) assistant principals, and (3) principals.

Determination of the number of school personnel is a management decision, which should remain with a board of education, Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 446 S.E.2d 487 (1994) and, as noted above, county boards of education havesubstantial discretion in matters relating to the selection of school personnel, so long as they act reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious. Dillon, supra.

Because a majority of WBOE was not motivated by Nuckols's animosity towards Grievant when

they voted to eliminate the position of Assistant Principal of Wyoming East, Grievant's claims of reprisal and harassment must fail. Consistent with the foregoing discussion, the following Conclusions of Law are made.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving it by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

2. "A board of education may identify required certification for a position, as long as this decision is not arbitrary and capricious or an abuse of discretion." Crawford v. Boone County Bd. Of Educ., Docket No. 94-03-1131 (June 30, 1995). 3. 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).

4. WBOE's decision to require a valid Secondary Teaching Certificate and Secondary Administrative Certificate for the position of Assistant Principal of Wyoming East High School was not arbitrary and capricious.

5. WBOE's decision to eliminate the position of Assistant Principal of Wyoming East High School was not arbitrary and capricious.

6. Grievant did not meet the minimum qualifications for the position of Assistant Principal of Wyoming East High School.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming County. Any 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: April 6, 2001

Footnote: 1

The record does not reflect whether Grievant's position at Oceana High School required these secondary certificates.

Footnote: 2

Reprisal means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it. W. Va. Code § 29-6A-2(p).

Footnote: 3 *W. Va. Code §18-29-2(n) defines harassment as the "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."*

Footnote: 4 *Hearsay evidence is generally admissible in grievance proceedings. The issue is one of weight rather than admissibility. This reflects a legislative recognition that the parties in grievance proceedings, particularly grievants and their representatives, are generally not lawyers and are not familiar with the technical rules of evidence or with formal legal proceedings. Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990).*

Footnote: 5 *WBOE member Nuckols did not testify.*

Footnote: 6 *Grievant argued that this overage had existed when previous Assistant Principals at Wyoming East*

were selected. However, Grievant cited no authority, and the undersigned is aware of none, to support the proposition that WBOE could not act when it did to reduce its excess professional positions.