VIRGINIA L. BROWN,

Grievant,

v. **Docket No. 00-52-402**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Virginia L. Brown, employed by the Wetzel County Board of Education (WVBOE) as a supervisory aide, filed a level one grievance on November 13, 2000, in which she alleged a violation of W. Va. Code §18-2-6b when a coaching position for which she had applied was reposted. (See footnote 1) By letter dated December 4, 2000, Grievant's WVEA representative amended the complaint to assert violations of W. Va. Code §§18A-4-8b, 18A-4-16, and 18-29-2(m). After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and appeal was made to level four on December 21, 2000. An evidentiary hearing was conducted at the Grievance Board's Wheeling office on February 16, 2001, at which time Grievant was represented by Owens Brown of WVEA, and WCBOE was represented by Larry W. Blalock, Esq. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by both parties on or before March 12, 2001.

The facts of this matter are undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by WCBOE as a supervisory teacher's aide forseven and one-half years. Grievant is a non-certified employee, holding no valid teaching certificate in West Virginia.

2. During the 1999-2000 school year, Grievant was additionally employed by WCBOE as coach of the eighth grade girls' basketball team at Short Line School. This was an extracurricular assignment for which Grievant had no tenure or other entitlement to continued employment.

3. On October 13, 2000, WCBOE posted the seventh grade girls' basketball coaching position at Short Line School.

4. Grievant was the sole applicant for the coaching position.

5. By letter dated October 26, 2000, Assistant Superintendent Paul E. Barcus, notified Grievant that absent any fully certified applicants, the position would be reposted, and that she would need to rebid if she was still interested in the assignment.

6. The position of girls' basketball coach was reposted on or about October 30, 2000.

7. In response to the second posting, Grievant and Kelly Jo Ring, a professionally-employed, certified teacher, submitted applications. Ms. Ring was awarded the position.

8. On or about September 15, 2000, WCBOE posted a vacancy for the seventh grade boys' basketball coaching position at Short Line School. Allen Miller, also a non- certified employee, bid on and received the position. This position was not reposted even though no certified employee bid on it.

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 §4.21 (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. Dept. of Health and 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.

Grievant argues that she met all the qualifications listed on the posting, and that WCBOE reposted the position contrary to their previous practice and Policy GCAPC-R, which provides that "[i]n the event that no certified applicants are recommended for a particular extracurricular position, non-certified applicants shall be considered." Grievant further asserts that the reposting of the girls' position, but not the boys' position, was discriminatory.

WCBOE argues that the applicable standard of review for filling a coaching position is whether there was an abuse of discretion. There was no abuse or discrimination, Respondent asserts, because the reposting was done in accordance with a long standing policy to employ certified coaches for all extracurricular activities. Further, reposting was a reasonable measure to act in compliance with W. Va. Code §18A-3-2a(4) which requires county boards of education to employ

currently employed professional educators overother applicants. Finally, WCBOE denies any discrimination occurred when it did not repost the boys' coaching position, because Short Line School Principal Janie Beckett had not had a negative experience with Mr. Miller, as she had with Grievant.

Although W. Va. Code §18A-3-2a establishes a preference for certified professional educators to hold coaching positions, it also permits noncertified employees such as Grievant to serve in this capacity in cases where no certified professional educator has applied. It is undisputed that while there were no professional applicants for either the girls' or boys' basketball teams, only the girls' position was reposted. 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.” An employee seeking to establish discrimination must first establish a prima facie case by demonstrating the following:

(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, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. ofCommunity Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant has established a prima facie case of discrimination by showing that she was similarly situated to Mr. Miller, was treated differently to her detriment, and that the differences were unrelated to the actual job responsibilities and were not agreed to by Grievant. WCBOE asserts that the difference in treatment was based on a legitimate, non- discriminatory reason. Specifically, Ms. Beckett testified that while she had evaluated Grievant's 1999-2000 performance as “meets standards,” she was not satisfied with her work. Ms. Beckett noted that Grievant questioned the

authority of teachers and the principal, did not follow the practice schedule, had told the principal it was none of her business when she had questioned an incident of student behavior, and had demonstrated a lack of knowledge of the Secondary Schools Athletic Commission rules. By comparison, Ms. Beckett stated that Mr. Miller had worked well with the school and the students.

While it is not clear why Ms. Beckett rated Grievant as “meets standards” when she was not pleased with Grievant, she has provided a legitimate reason for requesting that the position be reposted. While Grievant stated that she was not aware of any problems with the practice schedule, that she was familiar with the SSAC rules, and was not attempting to contravert them, the testimony of both individuals support a finding that their views were very different, and likely not compatible. The evidence does not support a finding that Ms. Beckett's reason for requesting a reposting was a pretext for discrimination.

With regard to Grievant's argument that the Board violated statutory law by re-posting the position, this Grievance Board has found that no statutory or case lawprohibits a county board from reposting a position vacancy, and thus, Grievant has failed to prove a violation of W. Va. Code §18A-4-8b. See Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-009 (Mar. 24, 1998); Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd. of Educ., Docket No. 94-30-616 (Mar. 30, 1995).

W. Va. Code § 18A-4-16 is the statutory provision governing extracurricular contracts. While the subject position clearly falls within the definition of an extracurricular contract, Grievant has proven no violation of this provision. There was no extracurricular contract executed between Grievant and the Board, and thus, there can be no violation of that statute.

The Grievance Board has previously held that the standard of review for filling coaching positions is whether the Board abused its discretion in the selection or acted in an arbitrary or capricious manner. Elkins v. Boone County Bd. of Educ., Docket No. 00-03- 209 (Sept. 7, 2000); Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986); Butta v. Wood County Bd. of Educ., Docket No. 99-54-466 (Dec. 23, 1999); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgement for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276

(1982). Generally, an action is arbitrary and capricious if the body taking the action did not rely on factors that were intended to be considered, explained its decision in a manner contrary to the evidence before it, orreached 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). Because the decision was based upon Ms. Beckett's determination that Grievant did not function in a positive manner with the students or faculty, the reposting was not arbitrary and capricious.

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

Conclusions of Law

1. 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 §4.21 (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.

2. An employee seeking to establish discrimination must first establish a prima facie case by demonstrating the following:

(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). 3. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986);

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

4. Grievant established a prima facie case of discrimination; however, WCBOE offered a legitimate, non-discriminatory reason for the reposting, and Grievant did not assert that the reason was pretextual.

5. There is no statutory or case law which prohibits a county board from reposting a vacancy. W. Va. Code § 18A-4-8b, See Toney v. Lincoln County Bd. of Educ., Docket No. 98-22-009 (Mar. 24, 1998);Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd. of Educ., Docket No. 94-30-616 (Mar. 30, 1995).

6. Grievant did not have an extracurricular contract for the subject position, and thus has proven no violation of W. Va. Code § 18A-4-16.

7. Grievant failed to prove that WCBOE's decision to repost the coaching position was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

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

Date: March 29, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

W. Va. Code §18-2-6b was repealed by the West Virginia Legislature in 1990.