SUE ELLEN COMPTON,

Grievant,

v. Docket No. 01-06-007

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sue Ellen Compton, employed by Cabell County Board of Education ("CCBOE" or "Board") as a chemistry teacher at Huntington High School, appealed this grievance to Level IV on January 9, 2001. Her Statement of Grievance reads:

> **Violation of WV Code 18-29-2, section "m" discrimination and section "o" favoritism with regard to compensating teachers for maintaining and reorganzing chemistry stockroom at their school.**
>
> **Relief Sought: To be treated the same and compensated for same responsibility[.]**

This grievance was denied at Levels I and II, and waived at Level III. By agreement, a Level IV hearing was held at CCBOE's board offices on May 8, 2001. This grievance became mature for decision on May 24, 2001, the due date for the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a chemistry teacher at Huntington High School. When her department moved into Huntington High School, she organized the chemicalsin the method identified in Flynn's manual to meet safety guidelines, mostly on her own time. (See footnote 2)

These chemicals have remained in the proper order and within the safety guidelines since that time.

2. In April 2000, the State Board of Risk and Insurance Management ("BRIM") engaged a firm to survey CCBOE's facilities to ensure they were in compliance with set standards. The purpose of these periodic reviews is to identify hazardous conditions which could lead to liability claims.

3. The BRIM issued a "Loss Prevention Report" after the survey. This report identifies hazardous conditions, and the necessary steps to cure to the problem. After receiving the "Loss Prevention Report", CCBOE is required to furnish BRIM a "Plan of Action" stating how it will resolve each identified problem.

4. In July 2000, the BRIM sent the "Loss Prevention Report" to CCBOE indicating the chemicals at Cabell Midland High School were not properly stored, as they were in alphabetical order placing non-compatible or reactive chemicals together.

5. When Cabell Midland High School first opened, the chemicals were placed in proper order by one of the chemistry teachers, Hazel Bowen. Some teachers had difficulty finding the chemicals they needed, and she was directed by the Department Chair to place the chemicals in alphabetical order.

6. The Chairperson at Cabell Midland High School was informed of the report from BRIM, and he requested Mr. Jim Boggess, CCBOE's Science Coordinator, to hire acouple of qualified teachers to organize the chemicals properly. Mr. Boggess received permission to do so.

7. CCBOE properly posted this extracurricular assignment from August 9, 2000, to August 15, 2000. (See footnote 3) **The assignment was to be completed by September 23, 2000, and would pay $300.00. The assignment was not to be completed during regular school hours because of safety issues, and was not to be performed during the teachers' regular hours.**

8. During the posting period, Mr. Boggess mentioned the posting to Seth Floyd when he talked to him on another matter. Other than answering questions about the position, Mr. Boggess did not recruit teachers for the position. (See footnote 4)

9. Only two people applied for the position. One of the applicants was Don Jenkins, a science teacher at Cabell Midland High School. The other applicant was Mr. Floyd, who had

taught at Huntington High School during the 1999-2000 school year. Both applicants were qualified for the position, and, as they were the only applicants, they received the positions.

10. If Grievant had applied for one of the positions, it is very likely she would have received it due to her qualifications and years of service. (See footnote 5) Test. Mr. Boggess, Level II Hearing. 11. Grievant was aware to the posting of the positions, and she chose not to apply. (See footnote 6) Grievant called Mr. Boggess, as well as her principals, to complain about the extracurricular position.

12. Since the move to Huntington High School, Grievant has maintained the chemicals at Huntington High School in the proper order as a part of her regular responsibilities.

Issues and Arguments

Grievant argues she has been treated differently because she has not been compensated $300.00 for performing the same task Mr. Jenkins and Mr. Floyd completed. She believes she is similarly situated to these teachers, and, in essence, believes she should receive the additional $300.00 because she maintained the chemicals in the proper order in the first place. (See footnote 7) She was discriminated against because she did her job, and others who did not were rewarded. She asserts she was subject to favoritism because Mr. Boggess called Mr. Floyd and Mr. Jenkins, but did not call her. (See footnote 8) She asserts Mr. Jenkinsand Mr. Floyd received favorable treatment, and she deems she has been treated in a discriminatory manner by CCBOE's actions.

Respondent argues Grievant had the right to apply for the positions just as Mr. Jenkins and Mr. Floyd did, but she chose not to do so. Respondent maintains Grievant does not have standing to contest the filling and compensation for a position for which she did not apply. Respondent also notes CCBOE's decision to post this position as an extracurricular assignment was not arbitrary and capricious, as the safest time to reorganize the chemicals was when students were not in the building.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The issues raised by Grievant will be discussed one at a time.

I. Standing As has been previously stated by this Grievance Board, a party does not have standing to question a hiring decision, if the party did not apply or was not qualified for the position. Phillips v. Div. of Corrections, Docket No. 96-CORR-112 (June 19, 1996). See Farley v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Muncy v. McDowell County Bd. of Educ., Docket No. 96-33-297 (May 19, 1997); Mullins v. Kanawha County Bd. of Educ. Docket No. 94-20-364 (Dec. 29, 1994); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994). Grievant did not apply; thus, she does not have standing to pursue this issue.

II. Posting of the position as extracurricular

Grievant seems to argue CCBOE's decision to hire the chemistry teachers through an extracurricular contract was incorrect. " '[T]he appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' McCoy v. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993). See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999).

"Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be

ascribed to a difference of opinion. See Bedford County Memorial Hosp. v.Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). " While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

CCBOE's decision to fill this extracurricular assignment in the manner described in this decision was not arbitrary and capricious. It is clear the placement of the chemicals in alphabetical order was dangerous and contrary to known standards. CCBOE had a duty to correct this problem in an expeditious and safe manner. The method selected was acceptable.

III. Discrimination and favoritism

Grievant argues CCBOE's actions constitute discrimination and favoritism. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of theemployees or agreed to in writing by the employees." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 9) of discrimination and favoritism under W. Va. Code §§ 18-29-2(m) & (o), must demonstrate the following:

> **(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that she has, to his 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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax& Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant has not met her burden of proof and established a prima facie case of discrimination and/or favoritism. Grievant did not apply for the positions. She was not similarly situated to the applicants who applied and received the positions. The undersigned Administrative Law Judge understands it is clearly very upsetting to Grievant that others were paid additional money to correct a safety hazard; especially one she would never allow to occur at Huntington High School. Grievant feels the successful applicants were rewarded for "bad behavior" while she has been punished for correctly doing her job. This is simply not the case.

It appears Grievant would have received the "reward" if she had chosen to apply for the position, as she is well qualified to complete the extracurricular task. Additionally, Mr. Floyd did not even teach at Cabell Midland High School during the 1999-2000 school year. Further, Mr. Jenkins was not the Chairman of the Science Department at Cabell Midland High School who instructed Ms. Bowen to place the chemicals in alphabetical order. Grievant has not presented evidence of discrimination and/or favoritism.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. KanawhaCounty Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. As Grievant did not apply for the position at issue, she does not have standing to grieve the selection of Mr. Jenkins and Mr. Floyd.

3. CCBOE's decision to post the position as extracurricular assignments was not arbitrary and capricious.

4. Grievant has not met her burden of proof and demonstrated either favoritism or discrimination in the actions of CCBOE.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Cabell 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 31, 2001

Footnote: 1

Grievant was represented by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by attorney Howard Seufer.

Footnote: 2

Grievant organized these materials because she believed it was her responsibility. She did not ask the principal or the assistant principal for any assistance, nor did she inform them it was dangerous for her to complete this work without assistance.

Footnote: 3

The posting did not require the teachers be assigned to Cabell Midland High School.

Footnote: 4

Grievant offered hearsay evidence to the contrary, but Mr. Boggess clearly testified as to what actions he took.

Footnote: 5

Mr. Boggess was one of the people responsible for selecting the successful applicants.

Footnote: 6

Grievant stated she did not want the position, saying, "I would never have applied for that job." Test. Grievant, Level II Hearing at 58.

Footnote: 7

As stated by Respondent, Grievant called both her principals and asked if she could place the chemicals in alphabetical order, and then receive $300.00 for putting them back in the correct order. She reported she said this because she was upset and was trying to make a point.

Footnote: 8

Mr. Boggess testified Grievant did call him, and they played "telephone tag." Eventually, Mr. Boggess spoke to one of Grievant's principals about the position and told the principal that anyone could apply.

During the Level IV hearing, Ms. Bowen complained she had asked Mr. Boggess to call her when the position was posted and he did not. This issue will not be addressed further, as this would only be an issue if Ms. Bowen sought to bring a grievance on the posting and selection for the extracurricular assignment.

Footnote: 9

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence,

would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).