DIANA ANTHONY, et al.,

Grievants,

v. **DOCKET NO. 03-40-009**

PUTNAM COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievants Diana G. Anthony, Beth A. Smith, Donna K. Sergent and Mary Joe Harris filed separate grievances on or about September 25 and 26, 2002, alleging other similarly situated employees receive credit for experience outside the Putnam County School System, but they do not, resulting in a pay disparity. Grievants seek as relief to receive compensation based on their prior secretarial experience.

Having been denied at all lower levels, a level four hearing was held to supplement the foregoing record in the Grievance Board's Charleston office on March 13, 2003. Grievants were represented by John Roush, Esq. of the W. Va. School Service Personnel Association, and Respondent was represented by Gregory Bailey, Esq. This matter became mature for decision upon the filing of the parties' proposed findings of fact and conclusions of law on April 11, 2003.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant Anthony is a secretary/accountant employed by Respondent in its central office, and has been a regular employee since 1997. Ms. Anthony received one year of experience credit for prior work at Ben Franklin Technical Center, a part of the Kanawha County school system.

2. Grievant Harris is a secretary/accountant at Lakeside Middle School, and has been a regular employee since 1997.

3. Grievant Sergent is a secretary/account assigned to the Exceptional Education Department in the central office, and was originally hired in 1997.

4. Grievant Smith is a secretary/accountant at Winfield Elementary School in her fifth year of employment.

5. All of the grievants had prior secretarial and/or accounting experience when they were first employed by Respondent. Grievants do not receive experience credit that increases their classification pay step based on the prior experience with private employers.

6. Respondent has a longstanding practice, but no written policy, of granting employees experience credit for prior work they performed for other local boards of education or the state department of education. Employees receive increased pay based on their total experience credit.

7. Based on their own informal investigation, Grievants mistakenly believed that some secretaries got experience credit for prior work performed for employers other than other local boards of education or the state department of education.

8. Grievants identified four secretaries employed by Respondent, namely Sandra Christy, Lois Brewer, Joyce Garnes and Jeanne Kendall, whose payroll recordsshowed more than a year's difference between their classification pay step and their actual seniority with Putnam County Schools. Their investigation did not reveal what experience these employees were credited with.

9. Ms. Kendall receives experience credit for secretarial work while she was employed by the Painesville, Ohio, Board of Education. Ms. Christy receives credit for about ten years she served as a secretary for the Kanawha County Board of Education. Lois Brewer receives credit for nine years of secretarial experience from her former job with the West Virginia Department of Education. Joyce Garnes receives no experience credit for work with former employers, but does receive experience credit (but not seniority) for work for Respondent in another classification.

10. Some other service personnel, such as maintenance workers and computer technicians, do receive experience credit for similar work performed for private employers.

DISCUSSION

This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156

W. Va. C. S. R. 1 § 4.21. Grievants allege that Respondent has treated them differently than other employees in the same situation, by granting experience credit to other employees and not granting the same credit to them, causing a loss of compensation. Respondent avers Grievants are treated no differently than other, similarly- situated employees.

County boards of education may establish salary schedules in excess of state minimum salaries, provided they are uniform for all salaries, rates of pay, benefits, increments or compensation for all regular employees "performing like assignments and duties within the county." W. Va. Code § 18A-4-5b. Respondent has established a salaryschedule for secretarial employees that in practice grants them experience credit for similar work performed while employed by another local board of education or the state department of education. Employees with more experience receive higher pay. Grievants' claim that other employees receive experience credit for work outside the school system amounts to discrimination or favoritism under W. Va. Code § 18-29-2(m) or (o).

Grievants bear the burden of proving both discrimination or favoritism, by establishing a prima facie case as demonstrated by the factors described in Conclusions of Law No. 5 and 6, below. The common element of these tests is whether Grievants are similarly situated to the employees they are comparing themselves to. In this case, Grievants were unable to prove this point. Grievants were unable to provide any evidence that another secretary or secretary/accountant received experience credit for prior work that was performed for an employer other than a local board of education or the state board of education. Grievants do not have any experience for such employers that they do not get credit for. While other employees in other classifications do get credit for experience with private-sector employers, Grievants are not similarly situated to these maintenance or technical employees. Grievants have therefore failed to establish a *prima facie* claim of discrimination or favoritism.

Similarly, W. Va. Code § 18A-4-5b requires a comparison for pay uniformity purposes between employees "performing like assignments and duties within the county." Grievants provided no evidence that another employee in the county who performs like assignments and duties received experience credit for the same types of employment that they wish to have credited to their experience.

In their level four brief, Grievants also argue that the distinction between private sector employment and employment with other boards of education is arbitrary. Althoughthis issue was not raised in their Statements of Grievance, Respondent did address the issue. The Grievance Board has

invalidated arbitrary and capricious applications of policies or practices. “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. [Citations omitted.]” 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, 196 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.* “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.” Trimboli, *supra*; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant argues that there is essentially no difference between secretarial work performed for a private employer, and secretarial work performed for a board of education, and that the experience Grievants gained in their private employment makes them more valuable employees to Respondent. Grievants point out that other service personnel do receive private-employer experience credit, so Respondent must recognize this fact. Respondent points out that only maintenance workers and computer technicians receive such experience credit, not all service personnel. For professional employees, only vocational teachers receive credit for employment in their field, but that requirement is statutory. However, Bill Duncan, Respondent's Treasurer, testified that the Board enactedthe policy of awarding outside experience credit to those employees as a recruitment tool, in order to attract qualified personnel from the private sector. No such need was apparently seen for secretarial employees. Recruiting difficulties would be a reasonable justification for making that distinction in some cases and not in others. Although Respondent did not introduce evidence of specific recruiting difficulties, it did not have the burden of proving its claim. Grievants presented nothing that would refute Respondent's justification, nor did Grievants present any evidence that, absent a showing of discrimination or favoritism, Respondent would be obligated to consider their prior private- sector experience.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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. County boards of education may establish salary schedules in excess of state minimum salaries, provided they are uniform for all salaries, rates of pay, benefits, increments or compensation for all regular employees "performing like assignments and duties within the county." W. Va. Code § 18A-4-5b.

3. "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 jobresponsibilities of the employees or agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

4. Favoritism is defined by W. Va. Code § 18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." Rice v. Putnam County Bd. of Educ., Docket No. 00-40-011 (May 4, 2000).

5. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. The test to determine whether Grievants have established a *prima facie* case of favoritism requires Grievants to establish by a preponderance of the evidence:

> (a) that they are similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded them; and,
>
> (c) that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). 7. Grievants did not establish a *prima facie* case of discrimination or favoritism by a preponderance of the evidence.

8. 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).

9. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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)).

10. "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 (1982)." Trimboli, *supra*, Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

11. Grievants did not demonstrate by a preponderance of the evidence that Respondent acted

arbitrarily or capriciously in determining not to grant them experience credit for private-sector employment. For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: April 21, 2002 _____

M. Paul Marteney

Administrative Law Judge