WILMON B. CULLEY, II,

Grievant

v. Docket No. 04-15-166

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Wilmon B. Culley, II ("Grievant"), employed by the Hancock County Board of Education ("HCBE") as a Supervisor of Maintenance, filed a level one grievance on April 8, 2004, after his position was eliminated. Grievant requests reinstatement as Supervisor of Maintenance. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following an evidentiary hearing at level two, and HCBE waived consideration at level three. Appeal was made to level four on May 3, 2004, and a hearing to supplement the record was conducted in the Grievance Board's Wheeling office on June 7, 2004. Grievant represented himself, and HCBE was represented by William T. Fahey, Esq. (See footnote 1) **The grievance became mature for decision on July 19, 2004, the due date for submission of proposed findings of fact and conclusions of law.** (See footnote 2)

The following facts have been derived from a preponderance of the evidence submitted at levels two and four.

Findings of Fact

1. Grievant has been employed by HCBE for approximately fifteen years, andhas served as the Supervisor of Maintenance since October 1989.

2. Effective July 1, 2004, HCBE implemented a reduction in force, necessitated by a decline in finances and school consolidations. As part of that reduction, the service personnel position of Supervisor of Maintenance was eliminated, and Grievant was placed on the preferred recall list.

3. The duties of the Supervisor of Maintenance have been reassigned to the Director of Maintenance, a professional position.

Discussion

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); 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 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 alleges that the elimination of the Supervisor position, his reduction-in- force, and the transfer of his service personnel duties to a professional employee was illegal and arbitrary and capricious. HCBE asserts that the decisions were made due to budgetary cutbacks, and that Grievant's termination was not disciplinary but administrative. HCBE denies that it acted illegally or in an arbitrary and capricious manner.

Grievant does not identify any statute, rule, regulation, or policy violated by HCBE relating to the elimination of the Supervisor position, the termination of his employment, or the administrative reorganization. In fact, it appears that HCBE acted in compliance with W. Va. Code § 18A-4-8b, which provides in pertinent part:

If a county board is required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, That if there is no job vacancy for employment within the classification or grades of classification, he or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

As Grievant was the only Supervisor of Maintenance employed by the Board, there was no least senior employee in that classification to "bump." HCBE properly terminated Grievant's employment, and placed him on the preferred recall list.

Grievant also did not prove that HCBE acted in an arbitrary and capricious manner in this instance. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). 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). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

The evidence is undisputed that HCBE employed more service personnel employees than were funded by the state, and that budget cuts required the elimination of a number of positions. The determination to eliminate the Supervisor of Maintenance position, when a Director of Maintenance position was also in place, was neither contrary to the evidence considered, nor was it so implausible that it could not be ascribed to a difference of opinion.

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. 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 § 4.19 (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. "County boards of education have substantial discretion on matters related to the

hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or capricious." Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with Dillon, county boards have discretion to determine the number of positions it will fill and the employment terms of such positions provided that the requirements of W. Va. Code § 18A-4-8 are met. Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 466 S.E.2d 487 (1994).

3. W. Va. Code § 18A-4-8 provides authority for a county board to conduct a reduction in force, specifically providing that the employee with the least amount of seniority within a classification shall be properly released.

4. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., supra; Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

5. 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 implausiblethat it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv. , 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996).

6. Grievant failed to prove that HCBE acted in violation of any statute, rule, regulation or policy, or in an arbitrary or capricious manner when it terminated his employment during a reduction in force.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Hancock 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.

DATE: AUGUST 6, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant had been represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, at level two.

Footnote: 2 ***[2]Neither party elected to file post-hearing submissions.***