WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

REBECCA MARTIN, ET AL.,
Grievants,

v. **Docket No. 2010-0275-CONS**

JACKSON COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Seven grievances were filed in August 2009 by Elizabeth Galloway, Beverly Hudson, Tamela Hunter, Aimee Kibble, Robin King, Rebecca Martin, and Kathryn Owens. All were employed by Respondent. The essence of the grievances were that the Respondent posted a position for a Special Education Paraprofessional/Aide and listed that the successful applicant be male. Grievants contend that was improper and Respondent should be required to hire based on seniority. Because these grievances are on the same issue, they were consolidated. For relief, Grievants request Respondent returns to the policy of hiring based on seniority.

A level one hearing was held September 16, 2009, and the grievances were denied. A level two mediation was held on February 10, 2010. After a timely appeal to level three, a hearing was held in Charleston at the Grievance Board's office. Grievants were represented by John Roush, Esq., West Virginia School Service Personnel Association, and Respondent was represented by Howard Seufer, Bowles Rice McDavid Graff & Love LLP. This case became mature on June 28, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievants assert gender discrimination. Respondent argues that gender is a bona fide occupational qualification ("BFOQ"). Respondent further argues that several Grievants lack standing, as they either did not apply for the position or did not hold the appropriate classification.

Grievants did not meet their burden in this matter. This grievance is denied.

Findings of Fact

1. On or about August 3, 2009, Respondent posted a vacancy for a Paraprofessional/Aide at Ripley Middle School with gender being a BFOQ for the position.

2. At the time of filing this grievance, Rebecca Martin was classified as a Cook, though having previously been employed as a Paraprofessional/Aide. Prior to the level one hearing, Ms. Martin transferred back to the Paraprofessional/Aide classification. Ms. Martin testified she would not accept the position if it were offered to her.

3. Grievant Elizabeth Galloway is currently a regular status Cook, but has seniority as an Aide. She applied for and does desire the position in question.

4. Grievant Beverly Hudson is currently employed as a regular status Paraprofessional/Aide. Ms. Hudson did not apply for and is not currently interested in the position in question.

5. Grievant Tamela Hunter is currently employed as a Paraprofessional/Aide. Ms. Hunter did not apply for the position because of the gender qualification, but desires the position.

6. Grievant Aimee Kibble is currently employed as a regular status Cook, but has seniority as an Aide. Ms. Kibble applied for and still wishes to fill the position.

7. Grievant Robin King is a substitute Paraprofessional/Aide. She applied and desires the position.

8. Grievant Kathryn Owens is a substitute Paraprofessional/Aide. She did not apply for the position due to the gender qualification. She is interested in the position.

9. Grievants King, Hunter, and Owens have greater substitute seniority than Christopher Stout, the only male applicant and successful applicant for the posting. Mr. Stout was a substitute Paraprofessional/Aide.

10. The posting for the Paraprofessional/Aide position is to assist a male student entering middle school who is diagnosed with Duchenne muscular dystrophy, which is a lifelong chronic condition that leaves the student unable to walk unassisted. It is a progressive muscle disorder and he is wheelchair bound for most of the day.

11. The student has difficulty going to the restroom on his own and requires an aide be in the bathroom to assist him in transferring from the wheelchair to the toilet. The student also needs assistance with his clothes.

12. The student's parents requested that a male aide be assigned to him, as the student is maturing and becoming an adolescent.

13. The student's doctor requested a male aide be assigned to assist him.

14. During the previous school year, the student's personal needs were provided by a substitute male aide and male teachers.

15. A male aide can assist the student in the restroom while other male students are in there. Whereas, with a female aide, the student would require the need of a special restroom located in an entirely different area of the building.

16. The student's restroom needs are not predictable, nor can they be scheduled. They are also more frequent than in the case of most other students.

17. Going to middle school requires the student to change classes. He does not have one primary classroom teacher. The student may or may not have a male teacher who could help him.

18. The student's disability is progressive, meaning that he now needs greater assistance than the year before, and his need for assistance will continue to become greater.

Discussion

This grievance does not challenge a disciplinary action, so 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 C.S.R. 1 § 3. "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 Res.,* 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.*

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *See Hyre v. Upshur County Bd.*

of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

"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 Res.,* 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* (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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Grievants assert it is improper for Respondent to require the successful applicant of this position be male. Grievants argue they have worked with other male students and have not had problems.

First, it should be noted that the West Virginia Supreme Court has ruled that boards of education can add qualifications to posting for aid positions in the limited circumstances in the best interest of the students. *See, Scott v. Randolph County Bd. of Educ.*, 217 W.Va. 128, 617 S.E.2d 478 (2005) (upholding the hiring of a less senior applicant for an aid position because the applicant was an LPN who would be working with two students who were brittle diabetics).

Respondent avers requiring the successful applicant be male is a BFOQ. A BFOQ is a statutory exception to the general rule in W. VA. CODE § 5-11-9 that race, color, creed, sex, national origin, handicap, or age standing alone is no criterion for employment decisions.

The Grievance Board has found that gender can be a legitimate BFOQ under the school laws. *See Keith v. Harrison County Bd. of Educ.*, Docket No. 99-17-242 (Feb. 24, 2000), *aff'd* Circuit Court of Kanawha County, No. 00-AA-52 (Dec. 27, 2001); *Shahan v. Preston County Bd. of Educ.*, Docket No. 92-39-213 (Dec. 29, 1992), *aff'd* Circuit Court of Kanawha County, No. 93-AA-31 (Feb. 8, 1994); *Rogar v. Raleigh County Bd. of Educ.*, Docket No. 97-41-295 (Apr. 14, 1988); *Sall v. Wood County Bd. of Educ.*, Docket No. 54-86-311-3 (Mar. 20, 1987).

In *Keith*, the Grievance Board reasoned:

> It is well established that gender can be an appropriate BFOQ. A requirement that certain prison guards be male has been held to be a BFOQ. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In a more factually analogous case, a gender-based BFOQ was found to exist when female mental health workers were laid off differently than male mental health workers within the same classification. "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Local 567 American Fed'n of*

State, County and Mun. Employees v. Michigan Council 25, 635 F. Supp. 1010 (E.D. Mich. 1986), (quoting *York v. Story*, 324 F.2d 450 (9th Cir. 1963), cert. Denied, 376 U.S. 939 (1964)).

The West Virginia Supreme Court has approved the limitation of applicants for the position of child care worker to males when the job entailed close, intrusive supervision, including supervision of undressing and showering of male adolescents housed in the boys' cottage of a school for delinquent children. *St. John's Home for Children v. W. Va. Human Rights Comm'n.*, 180 W. Va. 137, 375 S.E.2d 769 (1988). The Court also found that a gender-based BFOQ existed where less senior male health service workers were retained in a reduction-in-force action, displacing more senior female health service workers, because the male employees supervised male patients during their dressing, bathing, and toileting. *Gibson v. W. Va. Dept. of Health and Human Resources*, 192 W. Va. 372, 452 S.E.2d 463 (1994).

The Grievance Board has determined that gender can be a BFOQ in a number of instances. In *Sall v. Wood County Bd. of Educ.*, Docket No. 54-86-311-3 (Mar. 20, 1987), a case bearing a remarkable factual similarity to the present matter, the board posted a position for a male aide who would be assigned as caretaker of a fifteen year old quadriplegic male student. The successful applicant was to be responsible for the student's toileting, feeding, and personal hygiene. It was determined that the wishes of the parent, the advice of members of the Placement Advisory Committee, and the recommendation of several psychologists, that a male aide was deemed necessary to care for the boy's intimate and sensitive needs while at school created a BFOQ that the position be filled with a male.

Gender has also been determined to be an acceptable BFOQ in the retention of a less senior male aide during a reduction in force in *Higginbotham v. Putnam County Bd. of Education*, Docket No. 40-88-069 (Feb. 27, 1989), and *Shahan v. Preston County Board of Education*, Docket No. 92-39-213 (Dec. 29, 1992). In both cases, a male aide was assigned to work with handicapped boys, and it was determined in *Higginbotham* that it would have been "highly inappropriate and even psychologically damaging to the boys to have their toileting done by a female aide." Despite Grievants' assertion in *Shahan* that they were capable of providing the personal care needs of the students, this factor was determined not to negate gender as a BFOQ. Again, in both cases, the wishes of the parents were considered. More recently, it was held that a board's determination to hire a less senior female applicant to provide adequate supervision in the female locker room constituted a valid BFOQ, and Grievant, a male, was not subject to gender discrimination. *Rogar v. Raleigh County Bd. of Educ.*, Docket No. 97-41-295 (Apr. 14, 1998).

As is evidenced from this lengthy quote, gender has routinely been held as a valid BFOQ in cases very similar to this particular fact pattern.

In the case at hand, the male student is entering adolescence, and as such is going through the normal physical changes and challenges that face all young men and women. While all the Grievants indicated that they could perform the position and the undersigned has no doubt, the issue really is not about the comfort level of the Grievants, but instead about the comfort level of the young man who requires assistance in the restroom which is a sensitive and intimate act.

Not only did Respondent look at the student's comfort level, but it looked at the logistics of having a female aide. A female aide would have to take the student to a private bathroom in a different section of the school. This is impractical and unfair to the student, given that his bathroom needs are frequent and unpredictable.

Gender is a valid BFOQ given the facts of this case. Grievants have not met their burden of proof.

Respondent raised the issue of standing, as some Grievants did not apply for the position and some Grievants did not hold the classification of Aide/Paraprofessional. Because gender is a BFOQ for this position, those issues need not be addressed.

This grievance is denied.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so 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 C.S.R. 1 § 3. "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 Res.,* 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. It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *See Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. "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 Res.,* 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* (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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

4. A BFOQ is a statutory exception to the general rule in W. VA. CODE § 5-11-9 that race, color, creed, sex, national origin, handicap, or age standing alone is no criterion for employment decisions.

5. The Grievance Board has found that gender can be a legitimate BFOQ under the school laws. *See Keith v. Harrison County Bd. of Educ.*, Docket No. 99-17-242 (Feb. 24, 2000), *aff'd* Circuit Court of Kanawha County, No. 00-AA-52 (Dec. 27, 2001); *Shahan v. Preston County Bd. of Educ.*, Docket No. 92-39-213 (Dec. 29, 1992), *aff'd* Circuit Court of Kanawha County, No. 93-AA-31 (Feb. 8, 1994); *Rogar v. Raleigh County Bd. of Educ.*, Docket No. 97-41-295 (Apr. 14, 1988); *Sall v. Wood County Bd. of Educ.*, Docket No. 54-86-311-3 (Mar. 20, 1987).

6. Given the facts of this case, gender is a legitimate BFOQ.

7. Grievants did not meet their burden of proof in this matter.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: December 2, 2010

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Wendy A. Elswick

Administrative Law Judge