WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBORAH COMBS,
Grievant,

v. **Docket No. 2011-1844-BerED**

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Deborah Combs is employed as a Secretary for the Respondent, Berkeley County Board of Education ("Board") in its Department of Special Education ("Department"). Ms. Combs filed a level one grievance form dated June 23, 2011, alleging that the Board reclassified one of the Secretary III's in the Department of Special Education as an Executive Secretary, effective July 1, 2011. Grievant believes she should have been reclassification as well as, or instead of, the Secretary III who received the reclassification. As relief, Grievant seeks, "Reclassification to Executive Secretary and compensation for all lost wages and benefits with interest."

A level one hearing was conducted on August 9, 2011, and a decision was entered denying the grievance on September 1, 2011. Grievant appealed to level two by form dated September 13, 2011, and a level two mediation was held on December 1, 2011. An Order entered the following day. Grievant appealed to level three by form dated December 14, 2011. A level three hearing was conducted in the Westover office of the West Virginia Public Employees Grievance Board on July 9, 2012, to supplement the factual record made at the level one hearing. Grievant was present and represented by John E. Roush, Esquire, West Virginia School Service Personnel

Association. Respondent was represented by Gregory W. Bailey, Esquire, Bowles Rice McDavid Graff & Love, LLP. The parties submitted Proposed Findings of Fact and Conclusion of Law which were received at the Grievance Board on August 13, 2012. The grievance became mature for decision on that date.

Synopsis

Respondent promoted the Director of Special Education to the position of Executive Director of Special Education. As an Executive Director he was entitled to an Executive Secretary. The Board followed the Executive Director's recommendation and reclassified one of the Secretary III's in the Department to the classification of Executive Secretary with new duties and responsibilities appropriate to that classification. Grievant argues that she was the Secretary III who was performed most of the secretarial duties for the Director and therefore should have received the reclassification. The Executive Director felt that all of the Secretaries were qualified to for the reclassification and he made his selection based upon the full-time secretary with the most seniority and what he perceived to be the best people skills. Grievant did not prove that selection was contrary to law or arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant is employed by the Board as a Secretary III in the Special Education Department. She has been so employed for approximately seven years.

2. During the Board's 2010-2011 fiscal year[1] there were three full-time, and one half-time, Secretaries III's employed in the Board's Special Education Department. The three full-time secretaries were Grievant Comb, Donna Kline and Frauke Jones. The half-time secretary was Ms. McKnight.[2]

3. The three full-time secretaries were considered equal and all perform similar amounts of work, though their assignments were significantly different.

4 Mr. Jones was responsible for all of the office work related to Medicaid. Grievant Combs handled all financial office work and Mr. Cline was the receptionist, the first person on the telephone and performed other clerical work. Ms. McKnight was assigned almost exclusively to data entry. All of the secretaries were expected to help in all aspects of the Department's assignments when necessary, and worked together well. They all had good performance evaluations.

5. During that fiscal year, Ron Brown, Ed. D., was the Director of Special Education and Nan Bland was the Assistant Director.

6. Grievant's desk was stationed outside of Director Brown's office, and she performed some of his personal clerical duties such as: making his travel arrangements for meetings and conferences; reminding him of appointments; placing telephone calls; and opening his daily mail. Grievant's Exhibit 1. These were certainly not her main duties which entailed, but were not limited to: working in numerous financial databases; coordinating administrative travel database; handling special education teacher requisitions; coordinating computer requests for purchase, repair and maintenance;

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[1] The Board's fiscal year runs from July 1st of one year through June 30th of the next year.

[2] Ms. McKnight's first name was not made a part of the record.

making up all travel sheets; acting as staff development coordinator; general filing; and ordering office supplies and maintenance.[3]

7. In June 2011, the Board decided to promote Dr. Brown to the position of Executive Director of the Department of Special Education and Nan Bland to Director of that Department.

8. Dr. Brown was entitled to an Executive Secretary in this position and was asked to recommend one of the Secretary III's in his Department to be upgraded from the Secretary III classification to the Executive Secretary classification.

9. Dr. Brown recommended Donna Kline for the upgrade to Executive Secretary because she was qualified and the most senior full-time secretary in the Department. Respondent's Exhibit 3. He also selected Ms. Kline because the Executive Secretary would have to be fielding many complaints that come to the Executive Director regarding Special Education. Dr. Brown felt that Ms. Kline had the best people skills of the secretaries in the Department, and would be best at dealing with the disgruntled callers.[4]

10. At its June 21, 2011 meeting, the Board voted to reclassify Dr. Brown as an Executive Director, and reclassify Donna Kline as an Executive Secretary. Both of those reclassifications were to take place on July 1, 2011, the beginning of the 2011-2012 fiscal year.

11. Dr. Brown reorganized the duties for the secretaries in the Department effective July 1, 2011, to effectuate the reclassification of Ms. Kline.[5] He established a

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[3] Grievant's level one testimony
[4] Ron Brown's level one testimony.
[5] Ron Brown's level one testimony.

job description for the Executive Secretary wherein Ms. Kline was assigned the personal matters Grievant had been doing for him, such as his mail and travel bookings. The job description also gave Ms. Kline the responsibility of handling all of the paperwork for complaints sent to the Executive Director, in addition to a wide variety of other duties.

12. No vacancies or new positions were created with the Board's reclassification of Ron Brown and Ms. Cline.

13. The Secretary III classification is defined in statute as follows:

> "Secretary III" means a person assigned to the county board office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities in purchasing and financial control or any person who has served for eight years in a position which meets the definition of "secretary II" or "secretary III."

W. VA. CODE § 18A-4-8(i)(78). This classification is paid at Pay Grade F.

14. The Executive Secretary classification is defined in statute as follows:

> "Executive secretary" means a person employed as secretary to the county school superintendent or as a secretary who is assigned to a position characterized by significant administrative duties.

W. VA. CODE § 18A-4-8(i)(40). This classification is paid at Pay Grade G.

15. The reclassification of Dr. Brown resulted in the Board having four Executive Directors, and a total ten positions that were "characterized by significant administrative duties" which made them eligible for an Executive Secretary.[6] Each of those positions has had one Executive Secretary assigned to it.

[6] In addition to the four Executive Directors, those positions consisted of two Assistant Superintendents, the Treasurer, the Deputy Superintendent, the General Counsel and the Superintendent. *See,* Respondent's Exhibit 1 2011-2012 Central Office Organizational Chart and Ron Brown's level three testimony.

Discussion

This grievance does not involve a disciplinary matter. Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant makes two arguments. First, since she points out that she was performing most of the personal secretarial duties for Dr. Brown in June 2011, when the Board voted to reclassify one of the secretaries in the Department. Grievant notes that the definition of Executive Secretary is "a secretary who is assigned to a position characterized by significant administrative duties." W. VA. CODE § 18A-4-8(i)(40). Grievant believes that since she was the secretary assigned to Dr. Brown when the Board voted to reclassify him, she was entitled to be reclassified as his Executive Secretary.

This argument ignores the fact that none of the Board's reclassification actions took effect until July 1, 2011. Before that date, Dr. Brown remained the Director of Special Education. It was not until July 1, 2011, that he became an Executive Director. On that date, the new Executive Secretary job description went into effect making Donna Kline his personal secretary and entitling her to the Executive Secretary designation, pursuant to W. VA. CODE § 18A-4-8(i)(40), because on that date she was

the secretary assigned to Dr. Brown. Grievant cannot change the effective date of the Board's action merely by filing the grievance before the action took place.

Grievant does contend that the Board could change the duties of the three full-time secretaries. In fact, the Grievance Board has held that Boards may change the duties of service personnel, as long as the duties assigned remain appropriate to the employee's classification. *See generally, Moore v. Mercer County Bd. of Educ.,* Docket No. 01-27-558 (Feb. 20, 2002) (allowing the change of duties within the Aide classification). Additionally, Boards may reorganize their administrative staff, as was done with Dr. Brown, when the personnel involved accept the changes. *Napier v. Logan County Bd. of Educ.,* Docket No. 94-23-541 (Apr. 25, 1995).

In the alternative, Grievant points out that Dr. Brown stated in his memorandum dated June 22, 2011, that he viewed the Secretary III's ". . . as Our 4 secretaries, all with absolutely essential assignments and I might add, each doing a great job." Dr. Brown testified that before the reorganization the three full-time secretaries were performing equal responsibilities even though those responsibilities were very different. Pursuant to Dr. Brown's description, Grievant argues that all she and Ms. Kline were performing "like assignments and duties" in June when the Board voted to make their classifications changes. Grievant avers that the Board is in violation of W. VA. CODE § 18A-4-5b (related to uniformity of pay), and W. VA. CODE § 6C-2-2(d) (related to discrimination) by not upgrading both her and Ms. Kline to Executive Secretary.

W. VA. CODE § 18A-4-5b states in pertinent part:

> [C]ounty [salary] schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall

> apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county . . .

This statute does not apply to this situation. Donna Kline was assigned duties that qualified her to be an Executive Secretary on July 1, 2011. Specifically she was "assigned to a position characterized by significant administrative duties;" the Executive Director of Special Education. All secretaries assigned to Executive Directors by the Board are classified as Executive Secretaries and paid accordingly in compliance with W. VA. CODE § 18A-4-5b. Grievant was not so assigned and therefore was not entitled to be paid in that classification.

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In this case, the reclassifications took place on July, 2011. At that time there was only one secretary in the Department assigned specifically to the new position of Executive Secretary, Donna Kline. Thus, the difference in her classification and pay

grade and Grievant's was specifically related to Donna Kline's actual job responsibilities and there was no discrimination.

Finally, it is well-recognized that "[c]ounty boards of education have substantial discretion in matters relating 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 and capricious." *Syl. Pt. 3, Dillon v. Bd. of Educ*.,177 W. Va. 145, 351 S.E. 2d 58 (1986). Neither party argued that the reclassification of one of the three secretaries to an Executive Secretary, required these duties to be posted. The statutory criteria for filling vacancies set out in W. VA. CODE § 18A-4-8b did not apply. The criteria used by Dr. Brown in choosing the secretary to be reclassified were seniority and qualifications. These are the same criteria he would have been required to use to fill the position of Executive Secretary had the position been posted.[7] While Dr. Brown and the Board may not have been required to utilize these criteria for selecting Donna Kline for the reclassification, it was certainly neither arbitrary nor capricious to follow the public policy established for filing service personnel positions in making their decision. Accordingly, the grievance is DENIED.

Conclusions of Law

1. Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156

[7] W. VA. CODE § 18A-4-8b(a) requires that:

> A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment . . . on the basis of seniority, qualifications and evaluation of past service.

C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "County boards of education have substantial discretion in matters relating 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 and capricious." *Syl. Pt. 3, Dillon v. Bd. of Educ*.,177 W. Va. 145, 351 S.E. 2d 58 (1986).

3. The Board's use of seniority and qualifications to decide which of the three Secretary IIIs would be reclassified as an Executive Secretary, was neither arbitrary nor capricious.

4. W. VA. CODE § 18A-4-5b states in pertinent part:

> [C]ounty [salary] schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county . . .

5. Grievant did not prove that she was performing like assignments and duties as those assigned to Donna Kline on the date the reclassification took effect.

6. In order to establish a discrimination claim asserted under W. VA. CODE § 6C-2-2(d), an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant did not prove that she was the victim of "discrimination" as that term is defined in W. VA. CODE § 6C-2-2(d).

Accordingly, the 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: JANUARY 30, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE