SANDRA GRUBER,

Grievant,

v. **Docket No. 98-19-410**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent,

and

BETTY DAVIS,

Intervenor.

D E C I S I O N

Grievant, Sandra Gruber, employed by the Jefferson County Board of Education (JCBE) as a teacher, initiated grievance proceedings on or about August 27, 1998, alleging that a less qualified individual had been selected for the position of Academic Dean for Mathematics, Science & Technology. Both parties waived consideration at level one, and the grievance was denied at level two by decision dated October 12, 1998. Grievant waived consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the matter to level four on October 20, 1998. An evidentiary hearing was conducted on December 8, 1998, to supplement the lower-level record. Grievant was represented by Harvey Bane, WVEA Consultant, JCBE was represented by Claudia Bentley, Esq., and Intervenor was represented by William White, WVEA Consultant. The matter became mature for decision with the parties' submission of proposed findings of fact and conclusions of law on January 19, 1999.

The following findings of fact are made based upon the evidence presented at levels two and four.

Findings of Fact

1. Grievant has been employed by JCBE for twenty-five years as a mathematicsteacher assigned to Jefferson High School.

2. Grievant served as Department head for ten years prior to a reorganization which abolished those positions, and created twelve new positions, five Academic Deans and seven Lead Teachers.

3. The position of Academic Dean is a non-teaching, professional position.

4. The Academic Deans are responsible for multiple subject areas, and have substantial curricular responsibilities. These positions are not equivalent to the Department head positions.

5. In July 1998 JCBE posted the vacancy notices for the new positions. The job description for Academic Dean stated the following minimum qualifications:

1) Must be a teacher at Jefferson High School

2) Must have 3 years of successful teaching experience

3) W. Va. certification as required

4) Masters degree preferred

5) Must be a teacher within one of the following departments [Math, Science]

6. Three individuals applied for the position of Academic Dean for Math, Science and Technology, including Grievant and Intervenor.

7. All three applicants were interviewed by Marc Arvon, Principal at JHS, David LeFevre, Assistant Principal, and William Whittaker, Vice President of the JHS Faculty Senate. Because a fourth member of the interview team was unable to participate in all three interviews, her input was not considered in ranking the applicants.

8. Each applicant was posed a series of eleven questions, with each interviewer rating the responses from 1 to 10, one being the lowest rating and ten beingthe highest. The interviews were conducted in the same manner for each applicant.

9. At the completion of the interviews, Mr. Arvon tabulated the ratings. The applicant with the highest number of points, Intervenor, was ranked first by each interviewer, and was subsequently appointed to the position.

10. In addition to her twenty-five years experience teaching and ten years of service as Department Head, Grievant has earned a Bachelor of Arts degree, plus fifteen hours, has attended a number of training sessions offered by the W. Va. Department of Education and others, and has received satisfactory evaluations.

11. Intervenor is also employed by JCBE as a math teacher, and has never held the position of Department Head. The record is silent as to her qualifications.

Discussion

Because non-selection for a position is not a disciplinary matter, Grievant bears the burden of

proving each element of her 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); Mauck v. Berkeley County Bd. of Educ., Docket No. 97-02-231 (Jan. 30, 1998); 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. In these cases, Grievant bears a heavy burden, as the selection process for filling an administrative position is governed by the "first set of factors" set forth in W. Va. Code §18A-4-7a, as follows:

A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. . . . In judging qualifications, consideration shall be given to each of the following:Appropriate certification and/or licensure; amount of experience relevant to the position, or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§18A-2-12] article two of this chapter; and other measures or indicators upon which the relevant qualifications of the applicant may be fairly judged.

While each of these factors must be considered, this Code section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

County boards of education have substantial discretion in matters relating to the hiring of school personnel, so long as the discretion is 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). An action is arbitrary and capricious if the agency making the decision 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 is 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); Watts v. Lincoln County Bd. of Educ. Docket No. 98-22-348 (Nov. 30, 1998); Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may

also be arbitrary and capricious if it is willful and unreasonablewithout consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Grievant argues that she is more qualified than Ms. Davis, and that a simple side by side comparison of their qualifications, as required by W. Va. Code §18A-4-7a, establishes that she was equal to or better qualified than Intervenor in all categories except the last one, “other measures or indicators”. Grievant stated that in addition to her twenty- five years of teaching experience at various grade levels, she graduated from college summa cum laude, holds a Bachelor of Arts degree plus fifteen hours, and has received satisfactory evaluations both as a teacher and Department Head. Grievant asserts that Mr. Arvon acted in an arbitrary and capricious manner by placing “extreme weight” on the interview, to the degree that all other qualifications were essentially overlooked.

Respondent and Intervenor argue that the selection process was fair and reasonable. Respondent notes that the grievance procedure is not be used as a “super interview” of the candidates, and because Grievant has failed to establish an abuse of discretion, the grievance should be denied.

As previously noted, Grievant bears the burden of proving that she was better qualified for the position at issue than the successful applicant. Grievant has failed to meet that burden of proof. While she addressed her own qualifications at the level two and four hearings, she did not offer Intervenor's qualifications for comparative purposes. It appears from the testimony of Messrs. Arvon, LeFevre, and Whittaker, that the selection of Intervenor was based primarily on the interview. However, all three also testified that theyreviewed the resumes and/or portfolios submitted by the applicants. Mr. Arvon freely admits that he perceived Grievant to have a negative approach, and was not the team player he wanted for the position of Academic Dean. While these criteria are subjective in nature, they are properly considered under the seventh factor, “other measures or indicators”. His determination of weight to be applied to this factor appears reasonable, and was not an abuse of discretion.

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. Because non-selection for a position is not a disciplinary matter, Grievant bears the burden of proving each element of her 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); Mauck v. Berkeley County Bd. of Educ., Docket No. 97-02-231 (Jan. 30, 1998); 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. The selection process for filling an administrative position is governed by the "first set of factors" set forth in W. Va. Code §18A-4-7a.

3. While each of the factors must be considered, Code §18A-4-7a permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5,1998).

4. County boards of education have substantial discretion in matters relating to the hiring of school personnel, so long as the discretion is 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).

5. An action is arbitrary and capricious if the agency making the decision 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 is 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); Watts v. Lincoln County Bd. of Educ. Docket No. 98-22-348 (Nov. 30, 1998); Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

6. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the hearing officer may not substitute her judgment for that of the board of education. Stinn v.

Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

7. The grievance procedure is not intended to be a “super interview” for unsuccessful applicants; rather, it allows an analysis of the legal sufficiency of the selectionprocess at the time it occurred. Holmes v. Berkeley County Bd. of Educ., Docket No. 96- 02-070 (Jan. 13, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

8. Grievant failed to prove by a preponderance of the evidence that she was better qualified than the Intervenor to hold the position of Academic Dean, or that the board of education had abused its discretion, or acted in an arbitrary and capricious manner when it did not select her for the position.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: January 28, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE