DEANA DEFAZIO,

Grievant,

v. **DOCKET NO. 01-17-054**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed on September 5, 2000, (See footnote 1) by Deana DeFazio, Grievant, against her employer, the Harrison County Board of Education ("HBOE"), alleging a violation of W. Va. Code § 18A-4-7a occurred when she was not selected for "a teaching position at one of several schools for which she applied." As relief Grievant seeks,

> a position with the Harrison County Board of Education or at least a new review for one of the positions with the selected applicants who have already received positions removed from the review.

The following Findings of Fact were made based upon the evidence presented at Level II.

Findings of Fact

1. Grievant is employed by HBOE as a substitute teacher. She is certified in multi-subjects K through 8.

2. On August 10, 2000, HBOE posted a teaching position at North View Elementary School. The posting read as follows: "Second Grade Teacher, full time, 200 day employment term, **effective for the 2000-2001 school term only**." (Emphasis in original.)

3. Grievant and 11 other applicants, all substitute teachers, (See footnote 2) applied for the posted position. The position was awarded to Erin Lough.

4. HBOE evaluated the applicants in the following areas: certification and/or licensure, teaching

experience in subject matter, academic achievement - GPA from last degree, amount of course work and/or degree level, relevant specialized training, past evaluations, and other indicators. The principal of North View Elementary School completed a grid sheet which compared the qualifications of the applicants in these areas. 5. HBOE's practice is to award one point to each applicant with a college GPA of 3.5 or higher. The applicant with the most teaching experience gets one point, and the other applicants get no points. Applicants with a Master's Degree get one point, and applicants with a Bachelor's Degree get no points when one of the applicants has a Master's Degree.

6. Each of the applicants received one point in certification.

7. One of the applicants had 13 years of teaching experience. She received the only point awarded in this category. This applicant received three points total, as did Ms. Lough. The grid sheet bears the statement that this applicant was placed in another position. Grievant had seven years of teaching experience, while Ms. Lough had five years. Neither Grievant nor Ms. Lough received a point for teaching experience.

8. Six applicants received one point each in the academic achievement category, because each had a college GPA of 3.5 or higher. Four of the applicants had a 4.0 GPA. Grievant's GPA was 3.0, and Ms. Lough's was 2.6.

9. One applicant held a Master's Degree, and she received one point in the degree level category. She received three points total; however, the grid sheet states she was placed in another position. Neither Grievant nor Ms. Lough received a point for degree level, because neither held a Master's Degree. Both had a Bachelor's Degree.

9. Three applicants received one point each in specialized training, including Ms. Lough. Grievant did not list any specialized training other than her teaching experience on her application for this position, and she did not receive a point in this category.

10. Only Ms. Lough received a point for past evaluations. Grievant was not evaluated the preceding two years.

11. Grievant received only one point, for certification. Ms. Lough received three points, for certification, relevant specialized training, and past evaluations.

Discussion

Grievant bears the burden of proving the elements of her grievance by a preponderance of the

evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). “Grievant must establish that she was the most qualified applicant or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Civil Action No. 90-AA-181 (Circuit Court of Kanawha County March, 1993).” Hall v. Mercer County Bd. of Educ., Docket No.

96-27-175 (April 30, 1997). Grievant argued she should have been selected for the second grade teaching position at North View Elementary School. (See footnote 3) She argued it was arbitrary and capricious to evaluate applicants for the position who had already been placed in other positions; to give a point in academic achievement only to candidates with at least a 3.5 grade point average; to award points for specialized training when none was listed on the posting; and to give Grievant credit for past evaluations and specialized training for other positions for which she applied, but not for the North View Elementary position. Respondent argued it had properly applied the W. Va. Code § 18A-4-7a criteria, and Grievant was not more qualified than the successful applicant.

In evaluating the selection issue, county boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). 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 undersigned may not 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 undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

When no “permanently employed instructional personnel” apply for a teaching vacancy, the “first

set of factors" in W. Va. Code § 18A-4-7a is applicable to the selection process. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998). The applicable provision of W. Va. Code § 18A-4-7a states:

> 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. Further, the county board shall make decisions affecting the hiring of new 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, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

"The foregoing Code provision does not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997)." Fittro supra. 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).

> All that Code §18A-4-7a requires . . . is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

Grievant's first argument was that candidates who had accepted other positions should not have been considered in awarding points. Grievant's position is supported by case law.

> W.Va. Code §18A-4-7a contemplates, and obviously so, that county boards of education should assess only viable candidates for a professional position and that once an applicant has withdrawn his name from consideration, accepted other

> employment or has otherwise become ineligible for the position, his rankings on the various criteria listed in the statute should have no bearing on the scores of the remaining candidates.

Maynard v. Mercer County Bd. of Educ., Docket No. 94-27-047 (Nov. 16, 1994). However, the only evidence that candidates had accepted other positions was the grid sheet, which bore the statement, "[p]laced in another position," beside the names of Sheli Balffey, Kristi Yonero, Jo Anna Reich, and Holly Hawkins. No one testified regarding this statement. This information is insufficient to draw the conclusion that these applicants had withdrawn their names from consideration for this position, or were not available to accept the position. Assuming this statement in fact means that each of these applicants had previously accepted another position, it is entirely possible that, had any one of them been offered this position, she would have resigned the position she previously accepted, and taken this position instead. However, Sheli Balffey and Kristi Yonero were tied in points with Ms. Lough. Either the tie was broken in some way, or Ms. Balffey and Ms. Yonero were no longer applicants. Assuming the latter, Grievant and Ms. Lough would have both received a point in degree level, as Ms. Yonero was the applicant with a Master's Degree, and all other applicants held Bachelor's Degrees. This would not have changed the outcome. Had these four applicants withdrawn their names from consideration, Grievant would have received only one additional point, for teaching experience. As will be discussed below, Grievant demonstrated no other flaw in the selection process, and this additional point, were she entitled to it, would not change the outcome.

Grievant's argument that it is arbitrary and capricious to award points only to those applicants with a 3.5 GPA or higher is rejected. It is not an unreasonable or irrational cut- off point. See Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998). HBOE could award points in this area only to the applicant with the highest GPA. Four applicants had a GPA of 4.0, while Grievant's was 3.0.

Grievant's argument that specialized training could not be considered because it was not listed in the posting has been rejected by this Grievance Board when the first set of factors is applicable. Certainly, her argument would be correct were the second set of factors applicable to the selection. However, the statutory language found in the first set of factors is significantly different from the statutory language used in the second set of factors with regard to consideration of specialized training.

> The second set of factors states that one of the criteria for filling positions shall be "specialized training directly related to the performance of the job as stated in the job description." (Emphasis added.) Conversely, the first set of factors, applicable here, says that "consideration shall be given" to, among other things, "relevant specialized training." There is no reference to specialized training being placed in the job description, and the statute clearly states that it, along with the other factors, "shall" be considered. Accordingly, the first set of factors does not have any specific requirements regarding how or even if specialized training is to be placed in a job posting.

Younger, supra.

Grievant produced no evidence as to what specialized training was considered, or the specialized training possessed by Ms. Lough. She has not demonstrated any error in the application of this point factor.

Finally, Grievant's argument that she should have received credit for past evaluations and specialized training on the grid for the North View Elementary School position, because she received such credit on the grid for another position, is without merit. No evidence was presented to explain why she received such credit on another grid, and it is quite apparent that she should not have received such credit and the other grid is simply erroneous. Grievant testified she had not received evaluations the past two years. If she did not receive evaluations, she cannot receive credit for them. Grievant further did not produce any evidence of any specialized training she had received. In addition, as noted previously, no testimony was presented as to what training was considered for the North View Elementary position. Grievant was not entitled to any points in these two areas.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). "Grievant must establish that she was the most qualified applicant or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Civil Action No. 90-AA-181 (Circuit Court of Kanawha County March, 1993)." Hall v. Mercer County Bd. of Educ., Docket No. 96-27-175 (April 30, 1997).

2. County boards of education have substantial discretion in matters relating to the assignment of school personnel, so long as they act reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

3. When no “permanently employed instructional personnel” apply for a teaching vacancy, the “first set of factors” in W. Va. Code § 18A-4-7a is applicable to the selection process. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998). In applying this set of factors, “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, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.” W. Va. Code § 18A-4-7a.

4. W. Va. Code § 18A-4-7a's first set of factors does “not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997).” Fittro supra. 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).

5. The first set of factors requires consideration of specialized training, but does require the specialized training to be listed in the job description or posting. Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998).

6. Grievant failed to establish that she was more qualified for the position at issue than the successful applicant, or otherwise demonstrate that Respondent did not comply with the requirements of W. Va. Code § 18A-4-7a.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 7, 2001

Footnote: 1

The record does not reflect what occurred at Level I. A Level II hearing was held on January 12, 2001. The grievance was denied at Level II on February 8, 2001. Grievant waived Level III, appealing to Level IV on February 19, 2001. The parties agreed that this grievance could be submitted for decision based upon the record developed at Level II. Grievant was represented by Sidney Fragale at Level II, and Steve Angel at Level IV, and Respondent was represented by Basil Legg, Esquire, at Level II, and Sharon Brisbin, Supervisor of Personnel, at Level IV. This case became mature for decision on March 20, 2001, upon receipt of Grievant's written argument. Respondent declined to submit written argument.

Footnote: 2

The parties did not make clear in the record whether all applicants were substitutes. This information is derived from the grid sheet prepared by the principal of North View Elementary comparing the qualifications of the applicants, which states at the top that it is applicable to substitute applicants. In addition, the grid sheet does not list seniority as a factor, and there is no indication that this factor was considered, as is required when any applicant is not a substitute; and Grievant did not argue that seniority should have been considered. The undersigned has concluded that it is more likely than not that all applicants were substitutes.

Footnote: 3

At Level II Grievant argued she also was better qualified than the successful applicant for another teaching position. Grievant stated in her Level IV written argument that she was grieving only her non-selection for the North View

Elementary position.