HOWARD BLAKE, et al.,

Grievants,

v v.

Docket No. 02-20-343

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Howard Blake, Richard Baldwin, James Wiley, and Michael Haynes are employed by the Kanawha County Board of Education ("KCBOE" or "Board"). They filed separate grievances which were consolidated by the Grievance Board at Level IV. (See footnote 1) Each Grievant asserts he should have been selected to fill the position of Supervisor of Maintenance.

These grievances were denied at Levels I and II and waived at Level III. Grievants appealed to Level IV, and a Level IV hearing was held December 5, 2002. This case became mature for decision on January 22, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievants assert the selection should have been made on the basis of seniority, and once an applicant met the minimum qualifications, the most senior applicant should have been selected for the position. Grievant Wiley also asserts the selection process tooklonger than allowed by statute. (See footnote 3) Grievants Baldwin, Wiley, and Haynes assert they were more qualified than the successful applicant. Grievant Blake asserts it was unfair for the Interview Committee to consider recommendations, because he has worked for KCBOE for many years and does not have other employers from which to obtain these recommendations.

Respondent asserts it selected the best qualified applicant, and this selection was within its discretion pursuant to Hancock County Board of Education v. Hawken, 209 W. Va. 259, 546 S.E.2d

258 (1999)(per curiam) (See footnote 4) , which allows boards of education to add other qualifications for a supervisory position beyond the passing of the competency examination.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant Blake is employed as an Electronics Technician II, has thirty years of seniority, satisfactory evaluations for the past two years, and no Electrician license. He completed a two year Electronics Technician program at Garnett Adult Education in 1974. 2. Grievant Baldwin is employed as a Heating and Air Conditioning Mechanic II, has twenty-four years of seniority, satisfactory evaluations for the past two years, and has a Journeyman Electrician's license.

3. Grievant Wiley is employed as an Electrician II, has seventeen years of seniority, satisfactory evaluations for the past two years, and has a Journeyman's Electrician license. (See footnote 5) He received an Associate Degree from West Virginia Institute of Technology in 1974 in "Mechanical Engineering Technology, Mining Option."

4. Grievant Haynes is employed as an Electrician II, has twenty-eight years of seniority, satisfactory evaluations for the past two years, and has a Master Electrician's license.

5. All Grievants have limited supervisory experience.

6. On April 23, 2002, KCBOE posted the position of Supervisor of Maintenance. The posting stated a Master Electrician's License was "required," and the Job Description was available in the Human Resources Office. (See footnote 6) This position would oversee the Electricians, the Electronics Technicians, and a portion of the Heating and Air Conditioning Mechanics.

7. Grievants went to the Human Resources Office to pick up this Job Description, but were told it was not yet available. 8. Grievants still applied for the position.

9. The Job Description was not revised prior to the selection for this position, and it states Master Electrician's License is "preferred," and five years of supervisory or lead experience is required.

10. Because none of the applicants held the classification title, they were given the competency examination, and all of the Grievants and the successful applicant, Daryl Smith, passed.

11. KCBOE viewed all Grievants and the successful applicant as meeting the minimum

qualifications for the position.

12. The applicants were then interviewed by an Interview Committee composed of Melanie Vickers, Assistant Superintendent of Systems Support; Jeff Allred, Director of Maintenance and Energy; Chuck Wilson, Administrative Assistant for Facilities; and Rick Neal, Coordinator/Architect. All applicants were asked the same six questions, which were designed to assess their abilities to perform the essential duties of the position. A focus for this position was supervisory experience and capability.

13. The Interview Committee unanimously selected the successful applicant.

14. At the time of the selection, Mr. Smith was employed as an Electrician II, had six years of seniority, satisfactory evaluations for the past two years, and a Master Electrician's license. He also had served in the military and Air National Guard, and in these positions had extensive supervisory experience and training. Mr. Smith also presented well at the interview and had compiled a resume and exhibits which outlined histraining, certificates (including refrigerant transition and recovery, fiber optics installation, and electronic ignition theory), and glowing letters of recommendation. (See footnote 7)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.

I. Seniority

Grievants contend KCBOE's failure to select them for the Supervisor of Maintenance vacancy violates W. Va. Code §§ 18A-4-8b, 18A-4-8g, (See footnote 8) and 18A-4-8e. (See footnote 9) W. Va. Code § 18A-4-8b controls hiring of school service personnel, and includes the following provisions pertinent to this grievance:

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:

(1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section;

(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

None of the applicants for the Supervisor of Maintenance vacancy held the classification at the time they applied. In such circumstances, county boards employ competency testing to determine qualification for employment in a particular classification in accordance with the provisions in W. Va. Code § 18A-4-8e. This was done, and all Grievants passed the competency examination and were interviewed.

Each Grievant asserts that because he passed the exam, and he was more senior than the successful applicant, he is entitled to the position. Clearly, there is a conflict among the Grievants on this issue, as Grievant Blake is the most senior.

The most recent case on this issue to come before the West Virginia Supreme Court of Appeals is Hawken, supra, which dealt with a Superintendent of Maintenance position. In that case, the grievant asserted he should receive the position because he was the mostsenior, and he had passed the

competency examination. The West Virginia Supreme Court of Appeals agreed with the Circuit Court that "county boards of education have the right to expand the required qualifications for a given position beyond the statutory definition of its classification title."

The Hawken Court also noted "a county school board has great latitude in running the affairs of its school system[,] . . . ha[s] substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel" and "this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." See Dillon v. Wyoming County Board of Education, Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986). The Court clarified that the phrase "best interests of the schools" meant "what is in the best interest of the children of this State."

In Hawken, the grievant asserted W. Va. Code § 18A-4-8e supported his argument because it stated: "'[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title' . . . meant that the passing of the test is both the beginning and the end of a board's inquiry into the qualifications of an applicant for a given position." 209 at 261. Grievant further argued "the Legislature intended a passing grade on the test to serve as a replacement for any review of qualifications; once two candidates have passed the test, both are equally qualified, and the job must go to the applicant with the most seniority." 209 at 261 - 262. The West Virginia Supreme Court of Appeals did not agree, and held "[i]n light of the importance we place upon providing students with 'a thorough and efficient system of free schools,' we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process." 209 at 262. In Hawken, The West Virginia Supreme Court of Appeals also cited Hyre v. Upshur County Board of Education, 186 W. Va. 267, 412 S.E.2d 265 (1991), and spoke to its similar determination in a case dealing with a Supervisor of Transportation. In that instance, the Court found hiring a manager with greater experience in administration did not violate any statutes.

Additionally, the cases of Ohio County Board of Education v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995) and Cox v. Board of Education of the County of Hampshire, 177 W. Va. 576, 355 S.E.2d 365 (1987)(per curiam), are directly on point. In both cases a newly-hired person was employed to fill an administrative service personnel position. The West Virginia Supreme Court of Appeals in Hopkins cited Cox, and said "we emphasized that the management of a county school transportation system is for the welfare of the children . . . ," and that it was within the county board of

education's discretion to place the responsibility for its transportation system with an applicant "more acquainted with the administrative and managerial skills necessary to the operation of an efficient transportation system." Additionally, a county board of education has an implicit obligation "to supervise the system in a responsible and efficient manner" and to choose the candidate who, by virtue of experience, is more acquainted with "the administrative and managerial skills necessary to the operation of an efficient transportation system." Cox at 370. See Hopkins, supra. The Hopkins Court noted the transportation of school children has a "special degree of responsibility," and it was within the parameters of the board of education's discretion to look outside the statutory definition to assess the qualifications, and the decision should not be based on seniority alone. A board of education may hire an individual from outside the school system or with less seniority if the person is morequalified, and this action would not be an abuse of discretion. (See footnote 10) Accordingly, if an assessment of the successful applicant's qualifications demonstrates he was more qualified, for the position, then hiring him would not violate any Code Section and would be in the best interest of the school system.

II. QUALIFICATIONS

Grievants' next contention is they were more qualified for the position than the successful applicant. The standard of review in cases brought by unsuccessful candidates generally entails an inquiry into whether the qualifications were accurately assessed for each candidate, whether the qualifications were necessary for the performance of the positions, whether favoritism and/or discrimination played a role in the selection process; and whether flaws in the process were so significant that the outcome might reasonably have been different. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). See Mills v. Wayne County Bd. of Educ., Docket No. 99-50-016 (Feb. 22, 1999). Ultimately, it must be decided whether the Board abused its considerable discretion in personnel matters, or if its decision was arbitrary and capricious. See Dillon, supra; Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-85 (Aug. 28, 1998); Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995).

"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 mannercontrary 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 Resources, 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 (W. Va. 1982)." Trimboli, supra.

A comparison of Grievants' and the successful applicant's qualifications demonstrates the successful applicant had a Master Electrician's License, a preferred qualification, other appropriate training, and had extensive supervisory training and experience, a required qualification. Only Grievant Haynes possessed a Master Electrician's License, and his supervisory experience was limited. Respondent's determination that Mr. Smith had the skills, training, and experience necessary to perform the duties of the position was not arbitrary and capricious, nor was this assessment anabuse of discretion. (See footnote 11) The selection of the successful applicant was not arbitrary and capricious, and it was within the discretion of KCBOE.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 Resources, 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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a mannerwhich is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 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 Resources, 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 (W. Va. 1982)." Trimboli, supra.

4. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications and evaluation of past service. W. Va. Code § 18A-4-8b. Achieving a passing score on the state competency test for a particular classification shall conclusively demonstrate an applicant is qualified to hold that classification title. W. Va. Code § 18A-4-8e.

5. "In light of the importance [placed] upon providing students with 'a thorough and efficient system of free schools," the passing of the competency examination is not "the alpha and the omega" of a board's hiring process. Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999). See Shaffer v. Kanawha Bd. of Educ., Docket No. 00-20-085 (June 12, 2000).

6. A board may expand the qualifications for a position found in W. Va. Code § 18-4-8, so long as this expansion is consistent with the statutory definition. Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-

101(May 29, 1998); aff'd Kanawha County Cir. Ct., Civil Action No. 98-AA-99, ref'd West Virginia Supreme Court of Appeals, No. 001293 (Sept. 7, 2000); Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Brewer v. Mercer County Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988).

7. A county board is not precluded from considering other job-related qualifications in determining which applicant is the most qualified to fill a posted vacancy. Hawken, supra; Hopkins, supra.

8. The selection of Mr. Smith for the position of Superintendent of Maintenance was not arbitrary and capricious nor an abuse of discretion.

9. Grievants have not met their burden of proof and demonstrated Respondent violated W. Va. Code §§ 18A-4-8g, 18A-4-8e, & 18A-4-8b in filling the posted vacancy for the Superintendent of Maintenance.

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. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 11, 2003

Footnote: 1

Grievant Blake filed July 30, 2002, Grievants Haynes and Wiley filed August 1, 2002, and Grievant Baldwin filed August 8, 2002. Grievant Blake's Level II decision was dated October 16, 2002, Grievants Wiley's and Haynes' Level II decisions were dated October 24, 2002, and Grievant Baldwin's Level II decision was dated September 5, 2002.

Footnote: 2

Grievant Blake was represented by Attorney John Roush from the West Virginia School Service Personnel Association, the other Grievants represented themselves, and the Board was represented by Attorney James Withrow.

Footnote: 3

Since the increase in time period did not affect the outcome of the selection, and indeed appeared necessary so the competency examination and interviews could be conducted, this increase in the time period is seen as harmless error.

Footnote: 4

The full cite is Docket No. 95-15-577 (Apr. 29, 1996), rev'd Hancock County Cir. Ct. Civil Action No. 96-P-17W (May 13, 1996). The action by the West Virginia Supreme Court of Appeals affirmed the action of the circuit court.

Footnote: 5

Grievant Wiley indicated for the first time at Level IV that he should have received special consideration because he has a fifty percent disability from the military. He had not informed KCBOE of this disability until the Level IV hearing, and he cited no legal authority for his proposition. Accordingly, no further action will be taken on this argument.

Footnote: 6

KCBOE admits this statement was in error. This alleged requirement was not followed, as applicants without a Master Electrician's License were interviewed and considered for the position.

Footnote: 7

Included in these letters was one from the former Supervisor of Maintenance, Charles Rucker. He had written this letter when recommending Mr. Smith for a vocational position, but the letter detailed Mr. Smith's abilities in a positive manner.

Footnote: 8

This Code Section, which deals with service personnel seniority, was not discussed further.

Footnote: 9

The only issue raised about the competency examination was whether passing the exam entitled Grievants to the position, as they were more senior than the successful applicant.

Footnote: 10

Grievant Blake cites to Dalton v. Mercer County Board of Education, 887 F.2d 490 (4th Cir. 1989) as support for his seniority argument. This federal case dealt with the issue of age discrimination, positively cited Cox, supra, and was issued before Hopkins and Hawken, supra.

Footnote: 11

Grievant Blake also asserted it was unfair of KCBOE to consider recommendations, as long-term KCBOE employees would not have outside recommendations. It was not explained why a KCBOE employee could not obtain recommendations from other supervisors or other employees such as principals, etc., for whom they had completed work. The undersigned Administrative Law Judge notes these types of recommendations have been submitted by other

employees.