ELEANOR BUSSEY,

Grievant,

v. Docket No. 03-19-359

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent,

and

ARTHENA ROPER,

Intervenor.

DECISION

Eleanor Bussey ("Grievant") initiated this proceeding on October 23, 2003, alleging she should have been selected to fill the position of Cultural Diversity Coordinator for the Jefferson County Board of Education ("JCBOE"). She seeks placement in the position, with back pay and benefits. The grievance was denied at level one on October 27, 2003, and at level two on November 19, 2003. Grievant appealed to level four on November 20, 2003, and a hearing was conducted in Westover, West Virginia, on July 6, 2004. Arthena Roper ("Intervenor"), the successful applicant for the position at issue, was joined as a party at level four. Grievant was represented by Harvey Bane, WVEA representative; Respondent was represented by counsel, David Camilletti; and Intervenor was represented by Mary Snelson of WVEA. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 7, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

___1. Grievant is employed by Respondent as an elementary school teacher.

2. In August of 2003, JCBOE posted the new position of Cultural Diversity Facilitator. Under

the heading of "qualifications," the posting stated "See Attached Job Description." The attached job description contained an extensive list of the duties and expectations of the position. In addition, the posting stated that a masters degree and experience dealing with cultural diversity issues were preferred.

3. Grievant and several other candidates were interviewed for the position on September 4, 2003, by an interview panel consisting of Dr. John Prohaska, Director of Human Resources, Debra Corbett, a JCBOE principal, and James Tolbert, a private citizen. (See footnote 1)

4. Each applicant was asked a series of ten questions by the committee members and were scored in the areas of "content and substance of response," "effectiveness of response," "communication skills," "knowledge," and "overall impression of response." The applicants were also given a written essay to complete regarding achieving goals of the diversity program.

5. After review of their score sheets and a discussion of their impressions of the applicants, the interview committee recommended two individuals for interview by the superintendent: Meredith Napper and Susan Sowers. Grievant was the committee's third choice for the position, but she was not recommended. 6. Dr. Prohaska called Grievant a few days after the interviews and informed her that, despite his own recommendation, the committee had voted not to recommend her for an interview with the superintendent.

7. A few days after Dr. Prohaska's call, Grievant called Dr. Prohaska and requested a meeting with him to discuss the committee's decision. After the meeting was scheduled, Dr. Prohaska called Grievant to inform her that he had arranged for her to be interviewed by the superintendent instead.

8. At Dr. Prohaska's urging, Superintendent Steven Nichols decided to also interview Grievant "as a courtesy." Also, because Dr. Prohaska stated that Grievant was an impressive applicant, the superintendent wanted to make sure that the committee "hadn't missed anything" regarding her qualifications.

9. Following interviews of Grievant, Ms. Sowers, and Ms. Napper, Superintendent Nichols determined that none of the applicants had sufficient qualifications for selection as Cultural Diversity Coordinator. Because the State Office of Performance Audits had raised concerns concerning cultural diversity and staff development issues, the superintendent was looking for an individual who had worked extensively with minority populations, had an educational background, and also had experience developing and implementing a program. He did not believe that any one candidate had

all the qualifications necessary to accomplish the goals of the position. 10. The position was posted in October of 2003 with the added qualification of an administrative certificate--preferred. (See footnote 2) The posting also stated that all original applicants would be considered.

11. After additional interviews were conducted, Intervenor was selected to fill the position, beginning January 5, 2004.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

W. Va. Code §18A-4-7a sets forth the criteria to be used in assessing the qualifications of applicants. In employing administrative personnel the first set of factors is applied. The pertinent portion of the statute provides:

> 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 past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

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). As previously stated, when selecting an administrator, the first set of factors listed in W. Va. Code § 18A-4-7a is utilized. 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. Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009

(July 31, 1992). Once a board reviews the criteria required by W. Va. Code § 18A-4-7a, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). 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 when a decision concerning the hiring [for an administrative position] is made 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.

Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993)).

In the instant case, Grievant is not asserting any failing in Respondent's evaluation of the seven statutory criteria. Rather, she contends that, because she was a qualified applicant who applied during the posting period, Respondent was legally obligated to place her in the position. Grievant points to Code § 18A-4-7a ()(3), which states that “[i]f one or more applicants meets the qualifications listed in the job posting, the successful applicant . . . shall be selected . . . within thirty working days of the end of the posting period.” However, it has been held by this Grievance Board that:

> The language of the statute is clear that only when at least one of the applicants meets the standards set forth in the job posting are the seven criteria required to be utilized in the selection process. When a situation arises that is not specifically governed by the school personnel laws, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 156, 406 S.E.2d 687 (1991); See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-003 (Apr. 25, 1997). See, Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-265 (October 15, 2002).

Accordingly, the undersigned must determine whether the superintendent's determination that none of the applicants were qualified was arbitrary and capricious under the circumstances presented. "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, 198 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)).

The arbitrary and capricious standard of review of a county board's decision 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, 286 S.E.2d 276 (W. Va. 1982). An administrative law judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Harper, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

As stated above, boards of education have broad discretion in filling administrative positions. The superintendent's decision that none of the applicants had all of the desired qualifications was justified and cannot be found to be an abuse of that discretion. This was a newly-created position, and Superintendent Nichols was concerned about employing an individual who had both cultural diversity experience and experience in program development and implementation. In view of those concerns, he believed that no single candidate satisfied all the applicable criteria. Moreover, even if the undersigned were to find that Respondent should have made a selection from the original applicants, the evidence is clear that Grievant was the third choice of the committee, and she has failed to demonstrate that the committee's findings were erroneous in that regard. Grievant has not challenged the qualifications of the committee's first and second choices, so she would not be entitled to placement in the position, even if she had proven her claims; neither has she challenged the qualifications of Intervenor.

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, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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.

2. 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 schools 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. Once a board reviews the W. Va. Code § 18A-4-7a criteria it must consider, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994).

4. When one or more permanently employed instructional personnel apply for a position, but do not meet the standards set forth in the posting:

The language of the statute is clear that only when at least one of the applicants meets the standards set forth in the job posting are the seven criteria required to be utilized in the selection process. When a situation arises that is not specifically governed by the school personnel laws, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 156, 406 S.E.2d 687 (1991); See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-003 (Apr. 25, 1997). See Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-265 (October 15, 2002).

5. 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, 286 S.E.2d 276 (W. Va. 1982). An administrative law judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates. Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

6. "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 amanner 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

7. Grievant did not meet her burden of proof and demonstrate she was more qualified than the successful applicant, that Respondent acted in an arbitrary and capricious manner, or that the Board abused its broad discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jefferson 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 byW. 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.

Date: July 21, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Mr. Tolbert was also an officer in the NAACP, giving him some expertise with cultural diversity issues.

Footnote: 2

An administrative certificate did not end up being a factor in the final decision, and the successful applicant did not have one.