LAWRENCE WRIGHT
Grievant,

v. **Docket No. 05-26-139**

MASON COUNTY BOARD OF EDUCATION,
Respondent,
and

CHARLOTTE OSCHEL,
Intervenor.

D E C I S I O N

Grievant, Lawrence Wright, filed this grievance against the Mason County Board of Education ("MCBOE" or "Board") on November 18, 2004, over his non-selection for an administrative position. His Statement of Grievance says:

> Violations of WV Code 18A-4-7a with regard to the Grievant's non-selection for the posted position of assistant principal at Wahama Jr./Sr. High School. Grievant was the most qualified applicant for the posted position.
>
> RELIEF SOUGHT: Relief sought is to be awarded the position and any compensation and benefits due.

This grievance was denied at all lower levels. Grievant appealed to Level IV on May 6, 2005, and a Level IV hearing was held on June 27, 2005, at the Grievance Board's office in Charleston. This case became mature for decision on July 12, 2005, after receipt of Grievant's and Respondent's proposed findings of fact and conclusions of law.[1]

Issues and Arguments

[1]Grievant was represented by Susan Hubbard from the West Virginia Education Association, Intervenor was represented by Gary Archer from the West Virginia Education Association, and CCBOE was represented by Attorney Greg Bailey of Bowles Rice McDavid Graff and Love.

Grievant asserts he was the most qualified candidate for the position at issue because he has administrative experience, and the successful applicant did not, and because he has experience in and ability with community involvement.

Respondent asserts the most qualified applicant was selected for the position, and the mandates of W. Va. Code § 18A-4-7a were followed. Respondent also notes Grievant's year in administration resulted in an Improvement Plan and an unsatisfactory evaluation for that year, and Grievant would have been removed from the position, but he applied for and was selected to fill a teaching position.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. It should be noted that the lower level record is incomplete due to a malfunction of the recording equipment.

Findings of Fact

1. Grievant has been employed by MCBOE for 23 years.

2. On August 26, 2004, MCBOE posted the position of Assistant Principal at Wahama Junior/Senior High School, and five applicants, including Grievant, applied.

3. Then Director of Personnel, Suzanne Dickens[2], developed both written and oral questions for the applicants, and the Interview Committee, appointed by Superintendent Larry Parsons, interviewed the applicants. Ms. Dickens also assessed the candidates in all the factors required by W. Va. Code § 18A-4-7a: appropriate certification, amount of administrative experience, course work/degree, academic achievement, relevant specialized training, evaluations, and other measures or indicators and completed a matrix

[2]Ms. Dickens is now an Assistant Superintendent.

comparing the candidates. Pursuant to the long-standing directions of Superintendent Parsons, the interview portion is weighted at 40% for administrative positions.

4. Grievant received administrative experience credit on this matrix for his unsatisfactory year as a principal.

5. Grievant was aware the interview portion was weighted.

6. The Interview Committee recommended Intervenor Charlotte Oschel for the position.

7. Superintendent Parsons routinely takes the recommendation of the Interview Committee, unless he has personal knowledge that contradicts the committee's opinion. The data he possessed did not contradict the recommendation of the Interview Committee.

8. Superintendent Parsons knew Intervenor Oschel had demonstrated initiative, leadership, and the ability to work independently as Coordinator of the HomeBound program. He had observed Intervenor's work and noted she performed beyond his expectations and the listed duties of her position. He also saw her serve students, parents, and the community skillfully. Additionally, he had not received any complaints about Intervenor from anyone.

9. Superintendent Parsons knew Grievant as well, as he was Superintendent when Grievant was employed as a principal during the 1998 - 1999 school year. He noted Grievant did not demonstrate leadership, was ineffective in the area of discipline, and had difficulty relating to staff, students, and parents. Additionally, Superintendent Parsons had to talk to Grievant privately about multiple complaints of sexual harassment.

10. Superintendent Parson recommended Intervenor to MCBOE, and the Board approved this recommendation.

11. Grievant has 23 years as a teacher, is certified as an administrator, and has one year of administrative experience as a principal. He also worked three months as an assistant principal prior to his year as a principal. He has a Masters + 45, his grade point average is 3.7, and his evaluations for the past two years have been satisfactory. The only relevant training required for the position was evaluation training, and Grievant possessed this qualification. Grievant had not taken any course work or instruction in the areas of leadership or administration other than to renew his evaluation training, since his unsatisfactory year as a principal.

12. Intervenor has eleven years as a teacher, and she is certified as an administrator. Although not paid as an administrator, she has coordinated the countywide HomeBound program effectively for four and one half years. Intervenor has a Masters, but it is unknown if she possesses additional hours. Her grade point average is 3.6, and her past evaluations have been satisfactory. She also had the required evaluation training.

13. Grievant was the Principal at Hannan High School during the 1998 - 1999 school year. He was placed on an Improvement Plan on February 10, 1999, as his performance was unsatisfactory in the areas of: adherence to established policies, rules, and regulations; acceptance of authority and assumption of responsibility; and ineffectiveness in the use of group processes and facilitator skills. Resp. No. 3 at Level II.

14. On March 11, 1999, while Grievant was on the Improvement Plan, he received a written reprimand for insubordination as he had failed to secure the required prior approval before he allowed students to be away from their school. This written

reprimand noted Grievant had been supplied the necessary documents "numerous" times. Resp. No. 1 at Level II.

15. On March 17, 1999, an Improvement Plan meeting was held with Grievant. The written follow-up to this meeting is dated March 29, 1999, and characterizes eleven areas as continuing to be unsatisfactory. These eleven areas included: failure to turn in performance evaluations due February 1, 1999, Course Description Booklet due December 1998, and Attendance Improvement Plan due March 1, 1999. Resp. No. 1 at Level II.

16. On March 30, 1999, the Improvement Plan Committee reported to Dr. Parsons that Grievant had made no progress on his Improvement Plan goals and had not cooperated with the Improvement Plan Committee. This letter noted Grievant continued to experience difficulty with completing the responsibilities of the position and was creating "serious" difficulty for those employees who needed data from him. Hannan High School was in danger of losing its North Central Accreditation because Grievant still had not submitted the required annual report due December 1, 2004. When this problem was mentioned to Grievant, he replied this document was not one of his priorities. This document was not completed until intervention by other Central Office staff and the North Central Accreditation Office. Resp. No. 3 at Level II.

17. A follow-up letter was sent by the Improvement Plan Committee on June 17, 1999. This letter reported there was "no progress" made toward the goals of the Improvement Plan, and this letter and Improvement Plan would be placed in Grievant's personnel file and serve as Grievant's official evaluation for the school year.

18. Grievant did not grieve his evaluation or Improvement Plan.

19. Before the 1998 - 1999 school year ended, Grievant applied for and received a teaching position.

20. When Grievant first started the school year as Principal at Hannan High School, he experienced some problem with allergy medication, and it interfered with his work. He did not tell his supervisor or Superintendent Parsons of these problems. Grievant did not offer an explanation for his failure to perform before and during the Improvement Plan.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); 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. "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 Res., Docket No. 92-HHR-486 (May 17, 1993).

The first issue to address is qualifications. Both candidates were qualified for the position, but the Interview Committee did not recommend Grievant to the Superintendent, because it did not find him to be the most qualified applicant.

W. Va. Code § 18A-4-7a requires the best or most qualified individual be selected. These qualifications are judged by the factors outlined in that Code Section. The pertinent part of this 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. Oldham v. Cabell County Bd. of Educ., Docket No. 03-06-269 (Feb. 27, 2004); 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 the factor of "other measures or indicators" is the

most important factor. Stinn, supra; 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)).[3]

The standard of review for a county board of education's decision is whether it was arbitrary and capricious or an abuse of discretion. "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 Res., 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

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[3]It has already been determined by this Board that an applicant's greater experience in education administration does not necessarily entitle him to an administrative position. March, supra.

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.

Additionally, nothing in the language of W. Va. Code § 18A-4-7a restricts the area of measures or indicators, as long as they are factors "upon which the relative qualifications of the applicant may fairly be judged." Stinn, supra. Indeed, W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the qualifications of the applicants. Stinn, supra. Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993). The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998)(citing Tenny v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990)); See Deadrick v. Marion County Bd. of Educ., Docket No. 90-23-071(Jan. 30, 1991). This statement is especially true in the selection for an administrative position.

One of the key factors Grievant relied on in asserting he was the most qualified applicant was his administrative experience. MCBOE gave Grievant credit for this experience, but, as previously stated in March, supra, an applicant's greater experience in education administration does not necessarily entitle him to an administrative position. Additionally, while a board of education is required to consider an applicant's experience, it is also appropriate for it to consider the quality of that experience. Grievant's administrative experience resulted in an Improvement Plan, during which he made no

improvement, and an unsatisfactory final evaluation for the school year. In essence, this type of incompetent experience may end up being considered unfavorably by a board of education. By comparison, Intervenor had no such negative experience. Grievant has not met his burden of proof and demonstrated he was the most qualified applicant.

In evaluating the actions of MCBOE as whole, its actions are not arbitrary and capricious. As previously stated, W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the qualifications of the applicants, and the selection of candidates for educational positions is not simply a "mechanical or mathematical process." Stinn, supra; Anderson, supra; Hoffman, supra. See Deadrick, supra. Once a review of the matrix factors is completed, the Board may hire any candidate based solely upon the credentials it finds to be the most important. Owen, supra. The choice made by MCBOE in this set of facts cannot be seen as arbitrary and capricious. The undersigned Administrative Law Judge does not find the decision-making process was fatally flawed, or that MCBOE overstepped its broad discretion as described in W. Va. Code § 18A-4-7a.

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 his 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. "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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

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. 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); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). Thus, a county board of education may determine that the factor "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998). Once a review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance, unless this assessment is arbitrary and capricious. 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)).

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 for vacant positions. Harper, supra; 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 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 Res., 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. The actions of MCBOE in selecting Intervenor for the assistant principal position were not arbitrary and capricious as the decision was based on criteria intended to be considered, the Board did not reach a decision contrary to the evidence, and the decision reached that was not so implausible that it could not be ascribed to a difference of opinion. Bedford, supra.

Accordingly, this grievance is **DENIED**.

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

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JANIS I. REYNOLDS
ADMINISTRATIVE LAW JUDGE
Dated: August 10, 2005