ALLEN KAPLAN

Grievant,

v. **Docket No. 05-06-078**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Allen Kaplan, filed this grievance against the Cabell County Board of Education ("CCBOE" or "Board") on September 13, 2004, over his non-selection for an administrative position. His Statement of Grievance says:

> Violation of WV Code 18A-4-7a with regard to the posted position of Assistant Principal at Cabell Midland High School. Grievant contends that he was the most qualified applicant for the posted position.
>
> RELIEF SOUGHT: Relief sought is to be granted the position and any compensation and benefits due.

This grievance was denied at all lower levels. Grievant appealed to Level IV on March 7, 2005, and a Level IV hearing was held on May 24, 2005, at the Grievance Board's office in Charleston. This case became mature for decision on June 22, 2005, after receipt of Grievant's and Respondent's proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts he was the most qualified candidate for the position at issue, as he

was the most senior applicant, and he has many years of teaching experience at thehigh school level, satisfactory evaluations, and ten unpaid days of administrative experience, plus 300 volunteer administrative hours. He also maintains he was the only minority applicant for the position as he is of the Jewish faith. Grievant also asserts the successful applicant's administrative experience at the State Board of Education should not have been counted, and the successful applicant's junior high school and middle school experience should not have been counted as secondary experience.

Respondent asserts the most qualified applicant was selected for the position, seniority is not one of the factors considered when filling an administrative position under W. Va. Code § 18A-4-7a, and Grievant presented no evidence that he was the only minority applicant or that his faith had any bearing on the selection.

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

Findings of Fact

1. Grievant has been employed by CCBOE for 32 years as a history and business teacher. At the time of the selection, he was teaching history at Huntington High School. On December 7, 2004, Grievant was recommended and approved as the Assistant Principal at Barboursville Middle School. Grievant has applied and been interviewed for numerous administrative positions over the years.

2. On July 22, 2004, CCBOE posted the position of Assistant Principal at Cabell Midland High School, and ten applicants, including Grievant, applied.

3. The Superintendent appointed an Interview Committee made up of Central Office administrators. The Interview Committee's duties were to interview the applicants,review the candidates' personnel files, Executive Summaries, (See footnote 2) and written exercises, and recommend two names without ranking them. The Interview Committee 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. Not all of the members of the Interview Committee attended these specific interviews for all the candidates, but these Interview Committee members had attended interviews of these applicants in the recent past, they reviewed the notes of others from this interview, and candidates are informed at their interviews that an interview may be used again, when they apply for other positions.

4. The Interview Committee gave more weight to three factors: prior administrative experience, relevant specialized training, and other measures or indicators. The other measures and indicators assessment was gleaned from the interview, written and oral communication, and the Executive Summaries. The Interview Committee also counted the successful applicant's junior high school and middle school experience as secondary experience. (See footnote 3)

5. After meeting and discussing the identified factors, the Interview Committee unanimously recommended Doug Cross and Brenda Scott for the position of AssistantPrincipal of Cabell Midland High School to the Superintendent. These recommendations were accompanied by a written rationale for their endorsements. The Interview Committee noted the two recommended applicants had prior administrative experience, and this was a key issue in its consideration. Additionally, the Interview Committee stated these applicants were familiar with the high school curriculum and were computer literate and proficient in the use of WVEIS. The Interview Committee also noted Mr. Cross had extensive technology training, was knowledgeable about course objectives and testing, and the No Child Left Behind ("NCLB") legislation and its requirements. Both recommended candidates had "excellent written and oral communication skills." The Interview Committee also found six of the remaining applicants were minimally qualified for the position, including Grievant. Resp. No. 4 at Level II.

6. Grievant has 32 years as a teacher at the high school level, and is certified as an administrator, but has no paid administrative experience. He did volunteer sporadically for ten unpaid days as an assistant principal and also volunteered for approximately 300 hours to assist the assistant principals at his school. He has a Masters + 60 (See footnote 4), but it is unclear from the record when he completed various portions of his education, as there are no dates on his résumé or Executive Summary. His grade point average for his Masters was 3.79, and his past evaluations have been satisfactory. According to his Executive Summary and résumé, Grievant is computer literate and hasattended educational training relevant to the position such as administrative and leadership programs.

7. Even though Grievant volunteered in the assistant principal position, the duties he usually dealt with were limited to some disciplinary activities and attendance issues.

8. Mr. Cross taught seven and one half years in junior high and middle schools, is certified as an administrator, and worked as an administrator for the West Virginia State Board of Education for a year and one half. He has also served as an adjunct professor at Marshall University in computers and data processing. He has no in-building administrative experience. He had a Masters + 30, at the time of his application, but was scheduled to earn a Masters + 45 in August 2004 and an Educational Specialist degree in December 2004. His grade point average for his Masters was 4.0 and his current grade point average for his Educational Specialist is also 4.0. His past evaluations have been satisfactory. While employed at the State Board of Education, Mr. Cross completed evaluations of other staff, managed budgets, conducted staff workshops, developed portions of the WESTEST, worked on performance descriptors and worked with the NCLB legislation. He has completed numerous educational and training sessions and worked in a variety of situations, including writing and receiving grants and serving on statewide committees.

9. While the information about Ms. Scott was limited, it was clear she had high

school administrative experience. 10. No evidence was introduced concerning Grievant's religion and any effect it had on the outcome of the Interview Committee's recommendation, the Superintendent's recommendation, or CCBOE's approval of the Superintendent's recommendation.

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).

I. Qualifications

The first issue to address is qualifications. The Interview Committee found Grievant to be minimally qualified for the position, but the Interview Committee recommended Mr. Cross and Ms. Scott to the Superintendent, because they judged them to be more qualified than Grievant.

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 thecase 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 action 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 "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 areview 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)).

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 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 is

especially true in the selection for an administrative position.

Contrary to Grievant's assertions, it was not arbitrary and capricious for CCBOE to count the successful applicant's administrative experience at the State Board of Education. As revealed by the evidence, Mr. Cross's experience in that setting included the supervision and evaluation of professional employees, budgetary matters, curriculum issues, and responsibility for standardized testing. These are areas in which an assistant principal could reasonably be expected to be involved.

Additionally, Grievant has not demonstrated it was arbitrary and capricious for the Interview Committee to give greater weight to prior administrative experience, relevant specialized training, and other measures or indicators as established by the interview, written and oral communication, and the Executive Summaries. These factors are ones "upon which the relative qualifications of the applicant may fairly be judged," as these elements are ones needed in an administrative position Stinn, supra. Further, the fact that one member was not present for Grievant's interview also does not require this selection to be overturned. This Interview Committee member had attended a recent interview involving Grievant, and he remembered the content of that interview, reviewed the interview notes of other Interview Committee members, reviewed the answer to the written question and Grievant's Executive Summary, and applicants are told that their interviews will/may be used when they apply for another position. The undersigned Administrative Law Judge finds no significant flaw in this procedure. (See footnote 5)

In reevaluating the actions of CCBOE as whole, these actions are not seen as 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 upon

the credentials it finds important to the position. Owen, supra. The choice made by CCBOE 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 CCBOE overstepped its broad discretion as described in W. Va. Code § 18A-4-7a.

II. Discrimination Next, Grievant asserts he has been discriminated against and was not recommended for the position because he is of the Jewish faith. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

Notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 6)

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

First, Grievant did not prove that he was the subject of discrimination. The record is bereft of any evidence that established his non-selection was related to his faith. Further, Grievant did not demonstrate any of the member of the Interview Committee,

the Superintendent, or the CCBOE knew he was Jewish, that they were aware of any other applicant's religion, or even thought about it for a moment. Second, although Grievant asserted he was the only minority applicant, he also stated he did not know all the other applicants. There was no information submitted by Grievant stating the religious affiliation of the other applicants, nor any other information which would demonstrate he was the only minority applicant, and the other nine applicants were not members of a minority. Grievant, who had the burden of proof, did not submit any information on the religion, race, sex, national origin, age, or physical condition of the other applicants, he did not even establish he was the only Jewish applicant. In this instance, Grievant has not demonstrated he was treated differently because of his religion.

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 (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). 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 "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 ofreview 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. CCBOE's decision to focus on prior administrative experience, relevant specialized training, and other measures or indicators as established by the interview, written and oral communication, and the Executive Summaries was not arbitrary and capricious. 8. The action of CCBOE in selecting Mr. Cross 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 was not so implausible that it could not be ascribed to a difference of opinion. Bedford, supra.

9. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

10. To prove discrimination a grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

11. Grievant did not prove he was subjected to discrimination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Cabell 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 Educationand 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: August 10, 2005

Footnote: 1

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and CCBOE was represented by Attorney Howard Seufer of Bowles Rice McDavid Graff and Love.

Footnote: 2

The Executive Summary is one of the major tools used to assess applicants for administrative positions. A candidate

is asked to state his or her knowledge of the duties and responsibilities required for the position, list educational proficiencies, and enumerate relevant specialized training related to the position.

Footnote: 3

The undersigned Administrative Law Judge takes administrative notice that experience is frequently divided into two areas, elementary and secondary.

Footnote: 4

The Executive Summary states Grievant has a Masters + 45, but this document does not have a place to mark Masters + 60. Grievant's résumé states he has a Masters + 60, and the undersigned Administrative Law Judge used that information.

Footnote: 5

It should be noted that even if that individual did not participate in the recommendation procedure, the endorsement of the Interview Committee would still have been unanimous.

Footnote: 6

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).