ALBERT E. SMITH,

Grievant,

v.

Docket No. 04-22-331

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

and

DANA SNYDER,

Intervenor.

DECISION

This is a non-selection grievance in which the grievant, Albert E. Smith ("Smith"), alleges that his employer, respondent Lincoln County Board of Education ("BOE"), violated West Virginia Code section 18A-4-7a (See footnote 1) "by failing to hire the most qualified applicant for the position of Director of Vocational/Secondary Education/Safe and Drug Free Schools." The position in question was awarded to the intervenor, Dana Snyder ("Intervenor Snyder"). Smith seeks "[i]nstatement to the disputed position." (See footnote 2)

The grievance was filed at Level I on June 14, 2004. After being denied at Level I, the grievance was appealed to Level II. The Level II hearing was conducted on July 29, 2004. (See footnote 3) A decision denying the grievance at Level II was issued on August 27, 2004. Thereafter, on September 3, 2004, a Level IV appeal was brought to the West Virginia Education and State Employees

Grievance Board ("Grievance Board").

A Level IV hearing was conducted on November 4, 2004, at the Grievance Board's Charleston office. Smith was represented by Gary E. Archer of the West Virginia Education Association. BOE was represented by Gregory W. Bailey, Esquire. Intervenor Snyder was represented by Anita Mitter of the West Virginia Education Association. This case matured for decision on December 6, 2004, after both Smith and BOE submitted their proposed findings of fact and conclusions of law. (See footnote 4)

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Smith has been employed by BOE, in various positions, for over thirty years. He currently serves as the principal of Hamlin High School.

2 2. Prior to receiving the position at issue herein, Intervenor Snyder was employed by BOE as the principal of Duval High School. He has been a BOE employee for approximately fourteen years.

3 3. On April 26, 2004, BOE posted a vacancy for the position of Director of Vocational/Secondary Education/Safe and Drug Free Schools (hereafter sometimes "Vocational Director"). Respondent's Exhibit 1 at Level II.

4 4. Smith's wife is the president of the Lincoln County Board of Education. She actively opposes a plan for the consolidation of schools in Lincoln County.

5 5. The consolidation plan involves the three attendance areas of Guyan Valley, Hamlin, and Duval. Portions of the Harts area may ultimately be involved, as well. Under the proposed plan, the consolidated school would be built in Hamlin.

6 6. The Vocational Director's anticipated role with respect to developing the new, consolidated high school was identified in the job posting. Specifically, the posting indicated that the successful applicant was expected to 1) work with the Superintendent and others in staffing the new high school, 2) work with the vocational and secondary school staffs to implement the Tech Prep Program, and 3) work with the existing high school staff and others in building the new high school curriculum. Respondent's Exhibit 1 at Level II, Tr.11.

7 7. The successful applicant's anticipated role in the school consolidation project was corroborated by the testimony of William Grizzell, Superintendent of the Lincoln County Schools ("Superintendent Grizzell"). According to Superintendent Grizzell, the Vocational Director will be expected to be a major player in bringing the new, consolidated school to fruition. Key responsibilities of the successful applicant are expected to include "scheduling of the new high school, working with the communities and the staff here at the Central Office and with the schools and [sic] staffing that facility and starting the process of bringing the communities together to form a new high school." Tr.11.

8 8. Superintendent Grizzell also noted that, due to the opposition to consolidation in the county, the Vocational Director was going to "have to overcome a number of obstacles in trying to get the four communities together to form a cohesive new high school." Tr.11. Therefore, he opined that "whoever took this job, the perception of their feeling about this new school" was going to be "paramount." Tr.12.

9 9. Superintendent Grizzell acknowledged that he had concerns that, due to "Smith's involvement, either directly or indirectly, with the anti-consolidation group, he is perceived as being against the consolidation and I think that is a tremendous detriment in trying to put all this together." Tr.12.

10 10. Smith and Intervenor Snyder were two of four current BOE employees who applied for the position. There were a total of eight initial applicants. Two people withdrew their applications prior to the interview process.

11 11. Smith's application was not as thorough as it might have been. Respondent's Exhibit 3 at Level II. He did not include his grade point average, his specialized training, or information in a number of other areas that would have helped the Interview Committee develop a matrix to assist in the selection process. Tr.8, 17-19.

12 12. All six of the remaining applicants were interviewed by a three-member committee ("the Interview Committee"). The members of the Interview Committee were Superintendent Grizzell, Dr. Donna Martin, who is Assistant Superintendent of Lincoln County Schools, and Greg Gosnay, who is a vocational education teacher.

13 13. Superintendent Grizzell drafted a list of questions for the Interview Committee to use as a guideline. Tr.14, Respondent's Exhibit 2 at Level II. It was not intended to be an exclusive or

exhaustive list of the questions to be asked during the interviews. Tr.14.

14 14. The members of the Interview Committee compared notes and discussed the applicant at the conclusion of each interview.

15 15. Smith recalled that, at the outset of his interview for the Vocational Director position, Superintendent Grizzell asked him why he wanted the position since his wife wasopposing the new school. (See footnote 5) This question upset Smith. According to his testimony, he felt that “nobody really knows how I stand on this, they just assume that since my wife is against the school that I am automatically.” Tr.5. According to his testimony at Level IV, Smith was not able to concentrate on the rest of the interview.

16 16. The initial question led Smith to believe that he had been “pre-judged” and “did not have a chance[.]”

17 17. Although there is some dispute over the phrasing of the initial question posed to Smith during his interview, Superintendent Grizzell admits that he asked Smith a specific question relating to his ability to do the job in light of Smith's wife's well-known opposition to consolidation. Tr. 15.

18 18. Superintendent Grizzell left Smith's interview for short periods of time to attend to business. One such departure occurred shortly after Smith was asked about his wife's opposition to the consolidation. This was not unique to Smith's interview. Superintendent Grizzell was called out of other interviews, as well. Tr.27.

19 19. Superintendent Grizzell was not concerned about leaving the room during Smith's interview because he had confidence in the other members of the Interview Committee and because he was familiar with Smith and his work, having interviewed him on two or three other occasions.

20 20. During his interview, Smith was afforded an opportunity to explain what role, if any, he had played in his wife's efforts to fight the consolidation plan. As to his role,Smith denied having passed out literature in opposition to consolidation or having engaged in fund-raising for the cause. He explained that he had helped his wife by transporting items for a rummage sale. In addition, he responded to his wife's request to bring more hot dogs to the event.

21 21. All of the local applicants were asked about their views on the consolidation plan. Tr.12.

22 22. There is no evidence that any other applicant was questioned about his or her spouse's views on consolidation or whether those views might impede the applicant's ability to fill the

position successfully.

23 23. There is no evidence that any other applicant was married to a member of the Lincoln County School Board.

24 24. Smith had previously been employed as the principal at Guyan Valley. As noted, he currently serves as the principal of Hamlin High School.

25 25. The Interview Committee's first choice was from outside of the Lincoln County system. John Marra was deemed an excellent choice because he was very experienced and had previously opened a new school of over 1200 students in Virginia. However, he declined the position when he found out what the pay would be. Tr.12.

26 26. The Interview Committee ranked Intervenor Snyder second behind John Marra. After John Marra declined, the position was offered to, and accepted by, Intervenor Snyder. (See footnote 6)

27 27. Intervenor Snyder distinguished himself during the interview process by his enthusiasm for the job, his ideas about the new school, his thoughts on scheduling, his plans for developing the vocational program, and his proposals for working with the communities involved in the consolidation.

28 28. Intervenor Snyder was perceived as being a “neutral” choice in terms of his connections, or lack thereof, to Hamlin. The consolidated school will be located in the Hamlin area. Intervenor Snyder's perceived geographical neutrality was important to Superintendent Grizzell because people in Guyan Valley and Duval were concerned that Hamlin was going to control the consolidated school.

29 29. As principal of Hamlin High School, Smith was not considered to be a geographically neutral candidate.

30 30. During his interview, Smith did not present himself as supportive of consolidation. The Interview Committee members noticed that he prefaced his answers with phrases such as “[i]f the new school is built.” Tr.20, 24, 25. The conditional nature of Smith's answers led at least two members of the Interview Committee (See footnote 7) to question whether he was truly committed to consolidation. Tr. 24, 26.

31 31. At least one member of the Interview Committee found Smith's answers during his interview to be confusing. Tr. 26, 27.

Discussion

This grievance was brought to challenge the action of BOE in failing to select Smith to fill the posted position of Vocational Director. This is not a disciplinary grievance. Therefore, the grievant, Smith, bears the burden of proving his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (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).

"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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001).

Smith argues that BOE violated West Virginia Code section 18A-4-7a by failing to select the most qualified applicant for the Vocational Director position. As provided in West Virginia Code section 18A-4-7a(a), "[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 assessing the qualifications of applicants for a position under the foregoing section, the statute instructs that "consideration shall be given to each of the following:

> (1) Appropriate certification, licensure or both;
>
> (2) 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;
>
> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
>
> (4) Academic achievement;
>
> (5) Relevant specialized training;
>
> (6) Past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and
>
> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged."

W. Va. Code § 18A-4-7a(c). According to Superintendent Grizzell, "[o]ther measures or indicators" was the most important factor utilized by the Interview Committee in the selection process. The "other

measures or indicators" relied upon by the Interview Committee related to each applicant's attitude and abilities with respect to the proposed consolidation.

Smith argues that he did not receive the position because the Interview Committee relied upon extraneous "measures or indicators" that were unrelated to the duties of the position in question. (See footnote 8) Specifically, Smith claims he did not receive the position because his wife was opposed to the consolidation plan. However, Smith never took issue with Superintendent Grizzell's assertions that the successful applicant for the Vocational Director slot was going to be integrally involved in effectuating the consolidation plan and bringing the proposed high school off of the drawing board and into reality.

Superintendent Grizzell took Smith's word for the fact that his wife's opposition to consolidation would not impede Smith's ability to do the job as Vocational Director. However, even without regard to his wife, the Interview Committee did not find Smith to be committed to the concept of consolidation. This perception arose from his own answers and conduct during the interview. For instance, he did not refer to the new school as something that was a certainty. Instead, he gave conditional responses about what he thought would happen "if" the new, consolidated high school were built. In addition to his apparent unwillingness to embrace the consolidation plan, at least one member of the Interview Committee found Smith's answers to questions during his interview to be confusing.

By contrast, Intervenor Snyder was enthusiastic, full of good ideas, and was not considered by the affected communities of Duval and Guyan Valley to be biased in favor of Hamlin. This perception that Intervenor Snyder was a geographically neutral candidate was deemed to be an asset because the successful applicant was going to be called upon to bring the communities and school populations together in support of the consolidated school.

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). An action is recognized as "arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schneider*, 547 F.

Supp. 670 (E.D. Va. 1982)). "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." *Owen v. Wood County Bd. of Educ*., Docket No. 97-54-537 (May 18, 1998)(citing *Harrison v. Ginsberg*, 286 S.E.2d 276 (W. Va. 1982)). The Grievance Board's decisions are replete with cautions that "[a]n administrative law judge cannot perform the role of a 'super-interviewer' in matters relating to the selection of candidates for vacant positions. *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)." *Williamson v. Boone County Bd. of Educ*., Docket No. 04-03-355 (Nov. 19, 2004). It is understood that review in a selection case is limited to an examination of "the legal sufficiency of the selection process, at the time it occurred. *Stover v. Kanawha County Bd. of Educ*., Docket No. 89-20-75 (Jun. 26, 1989)." *Wingrove v. W. Va. Univ*., Docket No. 04- HE-230 (Sept. 30, 2004).

Although all of the factors set forth in West Virginia Code section 18A-4-7a must be considered during the selection process, a board of education is entitled "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)." *English v. Logan County Bd. of Educ*., Docket No. 03-23-307 (Feb. 27, 2004). A "county board of education may determine that 'other measures or indicators' is the mostimportant factor" in selecting the successful applicant for an administrative position." *Bussey v. Jefferson County Bd. of Educ*., Docket No. 03-19-359 (July 21, 2004)(citing *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998)).

In this case, Superintendent Grizzell acknowledged that the "other measures or indicators" portion of the statute was considered to be the most important. This was because of the significance of the consolidation project and the importance of the Vocational Director's proposed role in implementing the consolidation plan.

BOE's action in selecting Intervenor Snyder rather than Smith to fill the contested position cannot be deemed arbitrary and capricious. The Interview Committee relied upon a standard set of questions as a guideline in conducting the interviews. All of the local candidates were invited to give their views

on the proposed consolidation plan because, as the Interview Committee recognized, consolidation was going to be a pivotal issue for the successful applicant. The ability of the various applicants to bridge the differences between the communities affected by consolidation was also taken into account.

The foregoing are important factors that were given due consideration during the selection process. Consideration of these factors indicates that BOE's selection process was not arbitrary and capricious but rather fairly based upon reasonable and appropriate concerns. BOE selected an applicant who was an enthusiastic supporter of the consolidation plan, who came to his interview prepared to discuss his ideas for the new school, and who had already developed ideas for bringing the communities together in support of the new, consolidated high school. In so doing, BOE clearly acted in the best interests of the school system, the affected communities, and the students. It is not necessary to address the question of whether BOE could appropriately consider Smith's wife's open opposition to the planned consolidation in deciding whether Smith was the best candidate for the Vocational Director position. His own conduct was sufficient to give the Interview Committee the impression that Smith was not an enthusiastic proponent of the consolidated high school.

Under similar circumstances, the Supreme Court of Appeals of West Virginia has previously noted that an applicant's views on consolidation may properly be considered during the selection process. In an earlier case,

> Mr. Jones was not hired into a job that he sought because the superintendent believed that his stated position on consolidation would undermine the Board's united front in implementing an admittedly controversial consolidation plan. *Pell v. Board of Educ. of Monroe County*, 188 W.Va. 718, 426 S.E.2d 510 (1992). In general, the higher the governmental position to which a candidate for employment aspires in terms of its policy-making authority, the more legitimate the candidate's positions on public issues become as criteria for employment.

Jones v. Monroe County Bd. of Educ., 190 W. Va. 646, 648, 441 S.E.2d 367, 369 (1994) (footnotes omitted). Smith and the applicant in *Jones* are in the same position. As with Mr. Jones, Smith “was not hired to do a job where his whole-hearted and enthusiastic cooperation in the implementation of a consolidation that had already been decided upon was, at least, arguably, an essential ingredient.” *Jones*, 190 W. Va. at 648, 441 S.E.2d at 369.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1. This is not a disciplinary grievance. Therefore, the grievant, Smith, bears the burden of proving his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (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).

2. "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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001).

3. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. An action is recognized as "arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schneider*, 547 F. Supp. 670 (E.D. Va. 1982)).

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)." *Owen v. Wood County Bd. of Educ*., Docket No. 97-54-537 (May 18, 1998).

6. A "county board of education may determine that 'other measures or indicators' is the most important factor" in selecting the successful applicant for an administrative position." *Bussey v. Jefferson County Bd. of Educ*., Docket No. 03-19-359 (July 21, 2004)(citing *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998)).

7. Each applicant's views on consolidation may properly be considered during the selection

process for an administrative position such as the Director of Vocational/Secondary Education/Safe and Drug Free Schools, who is expected to play a major role in implementing the consolidation plan. *Jones v. Monroe County Bd. of Educ*., 190 W. Va. 646, 648, 441 S.E.2d 367, 369 (1994).

8. It cannot be deemed arbitrary and capricious for BOE to have considered each applicant's attitude and ideas regarding the school consolidation plan in selecting the successful applicant for the position at issue herein. Nor is it arbitrary and capricious for BOE to consider whether an applicant is so clearly associated with one of the affected communities that the other communities involved in the consolidation plan will, justifiably or not, perceive a bias on the part of such applicant. Such concerns on the part of BOE are reasonable in the context of this selection process.

9. The grievant, Smith, has failed to meet his burden of proving that the selection of Intervenor Snyder was arbitrary and capricious or in violation of West Virginia Code section 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 Lincoln 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 West Virginia Code section 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:

February 3, 2005

JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

The Level IV statement of grievance mistakenly refers to West Virginia Code section 18-4-7a. However, it is clear that Smith intends to rely upon West Virginia Code section 18A-4-7a.

Footnote: 2

At Level I, Smith sought "[p]osition &/or al [sic] benefits." At Level IV he did not ask for any relief other than being

placed in the disputed position.

Footnote: 3

References to pages in the transcript of the Level II hearing shall appear as "Tr.__."

Footnote: 4

Intervenor Snyder did not submit proposed findings of fact and conclusions of law.

Footnote: 5

It is clear that this question was posed early in Smith's interview. Therefore, for ease of discussion, the question relating to Smith's wife's opposition to consolidation will be referred to herein as the "initial question."

Footnote: 6

During the time pertinent to this grievance, the State Board had intervened in the operation of the Lincoln County school system. Hiring during this intervention period was subject to approval by the State Board.

Footnote: 7

Dr. Martin did not testify at either Level II or Level IV.

Footnote: 8

In light of the fact that both parties focus their arguments upon "other measures or indicators," the other statutorily-enumerated factors need not be addressed.