THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

KRISTINA BLINN,

Grievant,

v v.

Docket No. 06-06-022

CABELL COUNTY BOARD OF EDUCATION,

Respondent,

and

SUMMER JAMES,

Intervenor.

D E C I S I O N

Grievant, Kristina Blinn, filed this grievance on October 17, 2005, against her employer, the Cabell County Board of Education ("CCBOE"). Her Statement of Grievance reads:

> Violations of WV Code 18A-4-7a with regard to Grievant's non-selection for posted kindergarten positions. Grievant was most qualified for the positions. Grievant had kindergarten experience and related such on posting application.
>
> Relief sought: Relief sought is to be awarded the position for which she was the most qualified and any compensation and benefits due.

This grievance was denied at Levels I and II, and Grievant by-passed Level III. Intervenor

requested to intervene on December 1, 2005. Grievant appealed to Level IV on January 17, 2006, and a Level IV hearing was held in Charleston, West Virginia, on March 13, 2006. This case became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law. Grievant was representedby Susan Hubbard from the West Virginia Education Association, Intervenor was represented by Sidney Fragale from the American Federation of Teachers, and CCBOE was represented by Rebecca Tinder, Esq. of Bowles Rice McDavid Graff and Love.

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 as a substitute teacher for several years. She also worked several years in Wayne County as a substitute teacher.

2. On August 19, 2005, four positions were posted for itinerant kindergarten planning teachers. Grievant, as well as many others, applied. None of the applicants were permanently employed by CCBOE. This was a very busy time of the year, CCBOE was not able to schedule interviews and selected the successful applicants for these four positions through a paper review of their qualifications using the first set of criteria set out in W. Va. Code § 18A-4-7a(c). (See footnote 1) This paper review was conducted by Vickie Adkins, Manager of Professional Personnel.

3. Although all the criteria listed in the first set of factors in W. Va. Code § 18A- 4-7a(c) were considered, the key factors evaluated were relevant specialized training and other measures and indicators. Since all applicants were properly certified with a variety of qualifications, Ms. Adkins looked closely at staff development, additional training, and the willingness of the applicants perform additional work. 4. Ms. Adkins miscalculated Grievant's years of teaching experience as three years instead of four years, and this change would give Grievant one more year of teaching experience than the successful applicants.

5. Grievant was not selected for one of the positions.

6. After her non-selection, Grievant reviewed her personnel file and discovered the information she assumed was in her personnel file was not there. Although Grievant had taught kindergarten several years for the Wayne County Board of Education, the information sent by Wayne County

indicated Grievant had taught math one year at a middle school and did not specify where she taught the other year and/or partial years. The file also did not contain all of Grievant's staff development, as she had not completed the proper form to place this training in her file. (See footnote 2) Additionally, since there was no transcript in Grievant's personnel file, Ms. Adkins did not have Grievant's GPA. Grievant indicated she had a Master's degree on her application, but again there was no transcript to verify this data. Grievant's file also did not contain evaluations from her time with the Wayne County school system, and applicants are encouraged to provide these documents.

7. Grievant had taken part of the key training Ms. Adkins had considered in making the selection, but since this information was not contained in her personnel file or her application, Ms. Adkins noted Grievant's Relevant Specialized Training as "limited," as compared to the other applicants. 8. CCBOE employees' personnel files are open for review at their request, and all employees are encouraged to review their personnel file at least yearly. Grievant did not review her personnel file until after her non-selection.

9. When the information Grievant listed on her application form disagreed with the data in her personnel file, Ms. Adkins relied on the documents in the personnel file.

Discussion

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 (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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.

When, as here, no permanently employed instructional personnel apply for a teaching vacancy, the county board is authorized to apply the more flexible standards in the "first set of factors" set forth in W. Va. Code § 18A-4-7a as follows:

> (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.

(b) The county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications.

(c) In judging qualifications for hiring employees pursuant to subsections (a) and (b) of this section, 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, article two of this chapter; and

(7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

When using the first set of factors, "[t]he foregoing Code provision does not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997)." Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998).

The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of theschools, and are not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Christian v. Logan County Bd. of Educ., Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the

grievance procedure is not intended as a "super interview," but merely an analysis 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 (June 26, 1989). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997).

In order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover, supra. The standard to use in this review is the arbitrary and capricious standard.

"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, 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 does not permit an administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

Grievant has failed to establish CCBOE's decision was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such professional determinations. CCBOE based its decision on the data it had at the time of the selection, and as previously noted by the Grievance Board, it is up to an applicant to inform a board of education of her experience, qualifications, and training. Hoover v. Pendleton County Bd. of Educ., Docket No. 95-36-425 (Oct. 19, 1995). While Ms. Adkins had the responsibility to review the data she received properly, Grievant had a like duty to inform the board of education of any experience or credentials she believed to be pertinent to the position. Vonkallist v. Mercer County Bd. of Educ., Docket No. 94-

27-073 (Aug. 8, 1994). See Stover, supra. See also Worrell v. Mercer County Bd. of Educ., Docket No. 94-27-95 (Feb. 24, 1995). The Grievance Board has held an applicant has a duty to inform the board of education of her experience or credentials pertinent to the position, and the failure of an applicant to do so cannot be considered a flaw in the selection process. See Stover, supra; Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991).

Since Grievant did not inform CCBOE of her credentials and training and provide the required proof, CCBOE's decision, made on the information it had, cannot be seen as arbitrary and capricious. 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 (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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. "When no permanently employed instructional personnel of a county board of education make application for a classroom teaching position, the county board of education must assess and consider the applicants' credentials in the following areas: appropriate certification and/or licensure, the amount of teaching experience in the subject area, the amount of course work and/or degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the relative qualifications of the applicants may be fairly judged. W. Va. Code § 18A-4-7a; Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996)." Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998). 3. In reviewing a county board's exercise of discretion in a hiring decision, the inquiry into the process by which the decision was made must be thorough and searching, but considerable deference must be afforded those conducting it. Jenkinson, supra; Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

4. In order to obtain instatement to a position or a reevaluation of the applicants, a grievant

must not only demonstrate flaws in the process, but must also show that had the process been more accurate and/or fair, the ultimate selection might reasonably have been different. Hopkins, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. The Grievance Board has held an applicant has a duty to inform the board of education of his/her experience or credentials pertinent to the position, and the failure of an applicant to do so cannot be considered a flaw in the selection process. See Hoover v. Pendleton County Bd. of Educ., Docket No. 95-36-425 (Oct. 19, 1995); Worrell v. Mercer County Bd. of Educ., Docket No. 94-27-95 (Feb. 24, 1995); Vonkallist v. Mercer County Bd. of Educ., Docket No. 94-27-073 (Aug. 8, 1994); Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991); Stover, supra.

6. Grievant failed to establish she was more qualified for the positions at issue than any of the successful applicants, demonstrate Respondent did not comply with the requirements of W. Va. Code § 18A-4-7a, and/or prove Respondent abused its 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 Cabell County. Any such appeal must be filed within thirty (30) daysof receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: May 26, 2006

Footnote: 1

Interviews are not required.

Footnote: 2

Apparently this information is in the curriculum office, and the employee is responsible for ensuring its placement in

her/his personnel file.