THOMAS HOFFMAN,

Grievant,

v. **Docket No. 05-29-219**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

NONNIE HENSLEY,

Intervenor.

D E C I S I O N

Grievant, Thomas Hoffman, filed this grievance against the Mingo County Board of Education ("MCBOE" or "Board") on May 6, 2005, over his non-selection for an administrative position and asserted:

> I believe that I was the most experienced and qualified candidate for the assistant principal position at Tug Valley High School.

Relief sought: To be awarded the position and pay.

This grievance was denied at Levels I and II, and Level III was by-passed. Grievant appealed to Level IV on June 23, 2005, and a Level IV hearing was held on October 25, 2005, at the Grievance Board's office in Charleston. At Level II, Nonnie Hensley, the successful applicant, asked to intervene, and this request was granted. This case became mature for decision on November 10, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant asserts he should have received the position as he has twelve years of paid administrative experience, and Intervenor has none.

Respondent avers Grievant did not demonstrate the required statutory qualifications were inaccurately assessed for either the successful applicant or Grievant and offered no comparative evidence establishing he was more qualified than the successful applicant. Additionally, Grievant did not demonstrate a flaw in the selection process.

Intervenor asserts she was the most qualified person for the position based on her extensive unpaid administrative experience, other credentials, and her excellent relationship with the faculty, staff, parents, and community in the Tug Valley High School area.

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 MCBOE since 1986 as a teacher and administrator. He has served in administrative positions for twelve years, six years of this time was as a principal. He is currently an assistant principal at Burch Elementary. Grievant has a Masters degree + 45. Grievant was a science teacher from 1986 to 1989, a principal from 1989 to 1996, a science teacher from 1996 to 1999, an assistant principal from 1999 to 2002, a substitute principal from 2002 to 2003, and an assistant principal from 2003 to 2005. (See footnote 2) Grievant worked at Tug Valley High School during the 1997 - 1999school years as a Science teacher. He has taken the required evaluation training for administrators. Grievant listed other training on his resume, but did not explain their significance to the position, nor explain when these classes were taken.

2. Intervenor, the successful applicant, has been a math teacher at Tug Valley High School for thirty-three years and has a Masters degree + 45. She received her

provisional professional administrative certificate in July 2003. (See footnote 3) Her past evaluations have been excellent, and she has a grade point average of 3.6. Intervenor has no paid administrative experience, but has worked extensively in administrative areas while at Tug Valley High School, specifically in the areas of scheduling, WVEIS, and graduation. Intervenor frequently substituted for the principal and assistant principal in their absence, using her planning periods and after-school time to complete these duties. Intervenor has taken the required evaluation training for administrators, and serves as the Chair of the Faculty Senate. The faculty supports Intervenor's placement into the position.

3. Both candidates have course work in administrative areas.

4. Grievant knew the assistant principal position at Tug Valley High School would be posted. He expressed interest to Tug Valley Principal Tom Newsome during an interview for another position, and was informed the faculty wanted Intervenor in the assistant principal position.

5. Interviews were conducted and candidates were requested to answer verbal and written questions. There was no specialized training required for the position. Principal Newsome recommended Intervenor to Superintendent Brenda Skibo, and the recommendation was accepted by MCBOE. (See footnote 4)

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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

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.

(Emphasis added).

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 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 hasthe 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.

In the typical case, because the grievant has the burden of proof, the unsuccessful applicant compares himself to the successful applicant using all the factors identified in W. Va. Code § 18A-4-7a to demonstrate his qualifications are higher, and the selection decision was in error.

As previously stated, the areas that must be considered are appropriate certification and/or licensure; amount of experience relevant to the position, the amount of course work and/or degree level in the relevant field and past performance evaluations; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged. The interview process and written questions are generally viewed as other measures or indicators.

Here, Grievant only compared himself to the successful applicant in one area, administrative experience. While this area is certainly an important factor, it is not the only one to be considered. In the selection process for administrative positions, the key factor is frequently the applicant's ability to demonstrate, during the interview process, that they have the capacity to perform the duties and responsibilities of the position. See

James v.Monroe County Bd. of Educ., Docket No. 05-31-048 (Sept. 29, 2005). Grievant did not address any of the other areas, and he has not met his burden of proof with the limited amount of data/evidence he presented.

The other argument frequently made in a selection process is the assertion of a flaw in this process that resulted in an incorrect decision, such as a mistake in the qualifications. Grievant has not asserted this type of flaw occurred in the selection process, but did allege at Level II that the selection was discriminatory. This assertion was not addressed at Level IV, nor was it addressed in Grievant's post-hearing proposals. Thus, this issue will not be addressed further here.

Grievant has not shown MCBOE's actions, as a whole, to be arbitrary and capricious. Grievant also did not demonstrate MCBOE's 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 & 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. Given this set of facts, Grievant has not met his burden of proof.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 31, 2006

Footnote: 1

Grievant was represented by Gary Archer, from the West Virginia Education Association, Intervenor was represented by Susan Hubbard from the West Virginia Education Association, and MBCOE was represented by Howard Seufer, Esq. of Bowles Rice McDavid Graff and Love.

Footnote: 2

Although this information was gleaned from Grievant's résumé, this information did not exactly match his testimony. Apparently, Grievant was only assistant principal at Burch High School for one semester rather than one year. Test. Grievant, Level II Hearing at 3.

Footnote: 3

This certificate does not become permanent until the educator serves in an administrative position. Test. Keathley, Level IV Hearing.

Footnote: 4

It is unclear from the record whether the State Department of Education had assumed control of MCBOE at the time of this selection, but the was no assertion that the approval did not go through the proper channels.