SHERRY SHUMAKER,

Grievant,

v. **DOCKET NO. 06-06-032**

CABELL COUNTY BOARD OF EDUCATION,

Respondent,

and

DEBORAH SMITH,

Intervenor.

DECISION

Grievant Sherry Shumaker filed this grievance against her employer, the Cabell County Board of Education, on October 5, 2005, alleging she should have been selected for a Curriculum Supervisor position. Intervenor Deborah Smith was chosen by the Board for that position.

A level four hearing was held in the Grievance Board's Charleston office on April 13, 2006. Grievant was represented by West Virginia Education Association Representative Susan Hubbard, Intervenor appeared *pro se*, and Respondent was represented by counsel, Howard E. Seufer, Jr. of Bowles Rice McDavid Graff & Love LLP. The matter became mature for decision May 5, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as Assistant Principal at Milton Middle School. Intervenor, prior to being placed in the position at issue, was employed by Respondent as Principal at Salt Rock Elementary School.

2. In August 2005, Respondent posted a position opening for Curriculum Supervisor, a central office administrative position. The posting stated, “Applicants who have one or both areas of language arts and/or reading certification will be given preference.”

3. During the selection process for the posting, Grievant, Intervenor, and Robin Harmon were the only candidates interviewed. The interview committee, tasked with providing two unranked names to the Superintendent, recommended Grievant and Ms. Harmon. The committee requested permission to provide three names, intending to include Grievant on its list, but the Superintendent elected to stay with his standard procedure and directed them to provide two. Ms. Harmon was hired for the job, but only stayed in the position a few weeks. The job was then reposted in September, 2005.

4. Grievant and Intervenor again applied for the job, and the second time, they were the only candidates interviewed. Grievant has the reading and language arts certification, but Intervenor does not. 5. After the interviews, the Interview Committee again provided the Superintendent with two unranked recommendations. Since there were only two qualified applicants, Grievant and Intervenor, they were both recommended.

6. Superintendent William Smith recommended to the Board that Intervenor be hired, and the Board accepted his recommendation, voting to place her in the position at a meeting held October 4, 2005, to be effective November 7, 2005.

7. The decision to recommend Intervenor over Grievant was made solely by Superintendent Smith. He reviewed the candidates' applications, executive summaries, personnel files, the report of the Interview Committee and notes of the interviewers. He also considered the job description as written in the posting, and the needs of the school system.

8. Superintendent Smith found both candidates to be highly qualified and closely matched, but with different strengths. While Grievant had experience and certification and greater experience teaching reading and language arts, Intervenor had, in addition to her classroom teaching experience, extensive administrative experience and demonstrated leadership skills. Both had performed well in their interviews, and had favorable past evaluations. Although Grievant possessed the preferred teaching certification and Intervenor did not, Intervenor had several years of administrative experience while Grievant had none (at the time of the selection).

9. Superintendent Smith, after much deliberation, recommended Intervenor on the basis of her administrative experience implementing and monitoring guided reading, mathematics and other curriculum initiatives. The Curriculum Supervisorposition does not include a classroom teaching component as part of its assigned duties. He found Intervenor's skill set more closely matched the

staff development role he envisioned for the position.

Discussion

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. (See footnote 1) It is Grievant's burden to prove, by a preponderance of the evidence, that Respondent abused that discretion in hiring Intervenor for the Curriculum Supervisor position. (See footnote 2)

Grievant asserts the posting listed a preference for candidates who were credentialed in reading and language arts. As the only candidate with those credentials, she should have been preferred. Respondent takes the position that both candidates were well-qualified, and that Grievant's certifications were given extra weight, but more weight was given to Intervenor's overall administrative experience. Grievant also points to the fact that, under the first posting for the job, she was selected for recommendation by the interview committee over Intervenor. The undersigned finds that process largely irrelevant, given the interviewer's expressions that they would have also recommended intervenor had they been permitted to pass on three recommendations, and also given that Grievant was the only candidate with the preferred certifications the first time, and Superintendent Smith was consistentin his decision to give greater weight to administrative experience. The Board followed his recommendation, so it can be inferred it agreed with his evaluation of the candidates based on the required factors.

A county board of education must make decisions affecting the hiring of professional administrative personnel on the basis of the applicant with the highest qualifications. In judging qualifications, consideration must be given to each of the seven factors described in West Virginia Code § 18A-4-7a. “Because the . . . factors are not prioritized, and the statute does not 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.” *(See footnote 3)*

In this case, there is no evidence, and Grievant does not assert, that Grievant so far exceeds Intervenor in qualifications that Superintendent Smith's decision could be deemed arbitrary or an abuse of discretion. Instead, Grievant relies on the language of the posting , which stated an express preference for a candidate with her certifications. However, there is no basis for concluding that the preference was an absolute indicator of choice, or was a deciding factor in all cases. Further, the

posting language is not a contract: it does not confer any special status beyond setting the minimum qualifications. Both candidates were qualified, and the Superintendent and the Board were within their discretion in weighting Intervenor's relevant administrative experience as a deciding factor.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 party bearing the burden has not met its burden. *Id.*

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Cowen, et al. v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 456 S.E.2d 648 (1995).

3. 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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative lawjudge may not simply substitute her judgment for that of a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. Because the . . . factors [described in West Virginia Code § 18A-4-7a] are not prioritized,

and the statute does not 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).

5. Respondent did not abuse its discretion in selecting Intervenor over Grievant for the curriculum supervisor position.

For the foregoing reasons, this grievance is hereby **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 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 theGrievance 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.

May 19, 2006

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

Footnote: 2

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 3

Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996).