THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DAN BREWER,

Grievant,

v v.

Docket No. 07-27-010

Janis I. Reynolds

Senior Administrative Law Judge

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dan Brewer, is employed by Mercer County Board of Education ("MCBOE" or "Board") as a bus operator. He filed this grievance on September 12, 2007, about his non-selection for the Supervisor of Transportation and Safety position. The Relief Sought is placement into the position.

This grievance was denied at all lower levels. Grievant appealed to Level IV on January 17, 2005, and the parties decided to submit this case on the record developed below. This case became mature for decision on March 23, 2007, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Ben Barkey, from the West Virginia Education Association, and the Board was represented by Attorney John Shott.

Synopsis

Grievant maintains W. Va. Code § 18A-4-8b was violated, as he was the most senior applicant

who met the minimum qualifications for the position, and the selectedapplicant was not a regular employee of MCBOE. Grievant also asserts he was the best qualified applicant for this service personnel position.

Respondent asserts it selected the best qualified applicant, and this selection was within its discretion pursuant to Ohio County Board of Education v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995), and its progeny, which allows boards of education to add other qualifications to a supervisory position beyond the passing of the competency examination. Respondent also avers the standard of review is whether the selection was arbitrary and capricious or an abuse of discretion.

Grievant has failed to meet his burden of proof and demonstrate a flaw in the selection process, or that the selection of the successful applicant was arbitrary and capricious or an abuse of discretion.

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

Findings of Fact

1. Grievant is employed as a bus operator and became a full-time employee in October 1979. Although the Grievant did not testify as to his qualifications for the position, the record revealed Grievant had supervised a maximum of ten employees several years ago, had run his own small business and scheduled his service vans, had a Bachelor's Degree, and had little experience in purchasing, bidding, and budgeting.

2. After the 2005 - 2006 school year, William Hopkins, who had been the Supervisor of Transportation and Safety decided to retire.

3. The position of Supervisor of Transportation and Safety was posted on June 8, 2006, and Grievant and twelve other people applied. One applicant withdrew his name. 4. Twelve applicants who met the minimum qualifications were interviewed by Superintendent Debra Akers, Assistant Superintendent Dan White, Rick Ball, Coordinator for Pupil Services, and Roger Daniels, Administrative Assistant/Director of Human Resources, using previously prepared questions related to the duties listed in the job description. All applicants were asked the same questions. The personnel files of all the applicants were reviewed.

5. After scoring the applicants, Mr. Michael Weeks was considered the most qualified

candidate for the position. Mr. Weeks' score was 68 out of approximately 97 possible points. Grievant was ranked eighth out of twelve applicants, with a score of 39.

6. Superintendent Akers recommended Mr. Weeks for the position, and this recommendation was accepted by MCBOE. The Interview Committee did not use seniority as a factor in selecting the successful applicant.

7. Prior to the selection, Mr. Weeks had been employed by MCBOE in an extracurricular assignment as an assistant coach.

8. Mr. Weeks had been a company commander in the military with responsibility for 400 men and had experience in supervising people in his own business. He had a Master's Degree, had done traffic routing for the government in New York and Washington, D.C., worked with FEMA to design traffic patterns to mobilize emergency vehicles, served as a training manager for several companies, oversaw a $9,000,000 budget, had an in- depth knowledge of safety procedures, and had experience in bidding and inventories. During the interview process, Mr. Weeks answered the questions in a thoughtful manner and demonstrated the ability to communicate in a clear and authoritative manner. Test. White and Daniels, Level II & III Hearings.

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).

Grievant's main contention is that since he was the most senior candidate he should receive the position. Additionally, he asserts he was more qualified for the position than the successful applicant. The standard of review in cases brought by unsuccessful candidates generally entails an inquiry into whether the qualifications were accurately assessed for each candidate, whether the qualifications were necessary for the performance of the positions, whether favoritism and/or discrimination played a role in the selection process; and whether flaws in the process were so significant that the outcome

might reasonably have been different. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). See Mills v. Wayne County Bd. of Educ., Docket No. 99-50-016 (Feb. 22, 1999). Ultimately, it must be decided whether the Board abused its considerable discretion in personnel matters, or if its decision was arbitrary and capricious. See Dillon v. Wyoming County Bd. of Educ., Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986); Blake v. Kanawha County Bd. of Educ., Docket No. 02-20-434 (Mar. 11, 2003); Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-85 (Aug. 28, 1998); Elkins v. Boone County Bd.of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995).

"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)). " 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 law judge 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 (W. Va. 1982)." Trimboli, supra.

W. Va. Code § 18A-4-8b controls hiring of school service personnel, and includes the following provisions pertinent to this grievance:

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.
>
> (b) Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted

or employed in the position for which he or she applies. Applicants shall be considered in the following order:

(1) Regularly employed service personnel;

(2) Service personnel whose employment has been discontinued in accordance with this section;

(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

The selection process for filling supervisory service personnel positions has been examined by the West Virginia Supreme Court of Appeals several times. The most recent case on this issue to come before the West Virginia Supreme Court of Appeals is, Hancock County Board of Education v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999) (per curiam), (See footnote 1) which dealt with a Superintendent of Maintenance position. In that case, the grievant made the same assertion that Grievant has made here: he should receive the position because he was the most senior and had passed the competency examination. The West Virginia Supreme Court of Appeals agreed with the Circuit Court that "countyboards of education have the right to expand the required qualifications for a given position beyond the statutory definition of its classification title."

The Hawken Court also noted "a county school board has great latitude in running the affairs of its school system[,] . . . ha[s] substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel" and "this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." See Dillon v. Wyoming County Bd. of Educ., Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986). The Court clarified

that the phrase "best interests of the schools" meant "what is in the best interest of the children of this State." The West Virginia Supreme Court of Appeals also cited Hyre v. Upshur County Board of Education, 186 W. Va. 267, 412 S.E.2d 265 (1991), and spoke to its similar determination in a case dealing with a Supervisor of Transportation. In that instance, the Court found hiring a manager with greater experience in administration did not violate any statutes.

Additionally, in Hawken, the grievant asserted W. Va. Code § 18A-4-8e supported his argument because it stated: "'[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title' . . . meant that the passing of the test is both the beginning and the end of a board's inquiry into the qualifications of an applicant for a given position." 209 at 261. Grievant further argued "the Legislature intended a passing grade on the test to serve as a replacement for any review of qualifications; once two candidates have passed the test, both are equally qualified, and the job must go to the applicant with the most seniority." 209 at 261 - 262. The West Virginia Supreme Court of Appeals did not agree, and held "[i]n light of the importance we place upon providing students with 'a thorough and efficient system of freeschools,' we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process." 209 at 262.

Additionally, the cases of Ohio County Board of Education v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995) and Cox v. Board of Education of the County of Hampshire, 177 W. Va. 576, 355 S.E.2d 365 (1987)(per curiam), are directly on point. In both cases, a newly-hired person was employed to fill an administrative service personnel position. The West Virginia Supreme Court of Appeals in Hopkins cited Cox, and said "we emphasized that the management of a county school transportation system is for the welfare of the children . . . ," and noted it was within the county board of education's discretion to place the responsibility for its transportation system with an applicant "more acquainted with the administrative and managerial skills necessary to the operation of an efficient transportation system." Additionally, a county board of education has an implicit obligation "to supervise the system in a responsible and efficient manner" and to choose the candidate who, by virtue of experience, is more acquainted with "the administrative and managerial skills necessary to the operation of an efficient transportation system." Cox at 370. See Hopkins, supra. The Hopkins Court noted the transportation of school children has a "special degree of responsibility," and it was within the parameters of the board of education's discretion to look outside the statutory definition to

assess the qualifications, and the decision should not be based on seniority alone.

A comparison of Grievant's and the successful applicant's qualifications demonstrates the successful applicant was the more qualified choice, as he had greater experience in a variety of areas applicable to the position. His knowledge about the duties of the position was demonstrated by his score on the interview questions. Respondent'sdetermination that Mr. Weeks had the skills, training, and experience necessary to perform the duties of the position was not arbitrary and capricious, nor was this assessment an abuse of discretion.

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 & 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 so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. "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 implausiblethat 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)). " 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 law judge 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 (W. Va. 1982)." Trimboli, supra.

4. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications, and evaluation of past service. W. Va. Code § 18A-4-8b.

5. A board may expand the qualifications for a position found in W. Va. Code § 18-4-8, so long as this expansion is consistent with the statutory definition. Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-101(May 29, 1998); aff'd Kanawha County Cir. Ct., Civil Action No. 98-AA-99, ref'd West Virginia Supreme Court of Appeals, No. 001293 (Sept. 7, 2000); Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Brewer v. Mercer County Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988). 6. A county board is not precluded from considering other job-related qualifications in determining which applicant is the most qualified to fill a posted vacancy. Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999)(per curiam); Hopkins, supra.

7. The selection of Mr. Weeks for the position of Superintendent of Transportation and Safety was not arbitrary and capricious nor an abuse of discretion.

8. Grievant has not met his burden of proof and demonstrated Respondent violated any rule, regulation, statute, or policy in making this selection.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

Janis I. Reynolds

Senior Administrative Law Judge

Dated: April 30, 2007

Footnote: 1

The full cite is Docket No. 95-15-577 (Apr. 29, 1996), rev'd Hancock County Cir. Ct. Civil Action No. 96-P-17W (May 13, 1996). The action by the West Virginia Supreme Court of Appeals affirmed the action of the circuit court.