WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

FRANK LUCERO,

Grievant,

v. **Docket No. 07-05-030**

Denise M. Spatafore,

Administrative Law Judge

BROOKE COUNTY BOARD OF EDUCATION,

Respondent

and

DALE KEENAN, Intervenor.

DECISION

Frank Lucero ("Grievant") initiated this grievance on October 2, 2006, challenging his non-selection for the extracurricular assignment of Department Chair for Career Technical Education at Brooke High School. After denials at the lower levels of the grievance process, Grievant appealed to level four on January 29, 2007. A hearing was held in the Grievance Board's office in Westover, West Virginia, on April 23, 2007. Grievant was represented by Rosemary Jenkins of the American Federation of Teachers; Respondent was represented by counsel, David Cross; and Intervenor was represented by Owens Brown of the West Virginia Education Association. The parties declined to submit post-hearing proposals, and this matter became mature for consideration at the conclusion of the level four hearing.

Synopsis

Grievant alleges that he should have been selected to fill the extracurricular assignment of department chair. Because of his 31 years of experience in the department and at Brooke High School, compared to the successful applicant's six years of experience teaching, Grievant believed his qualifications were superior. Extracurricular selection decisions are evaluated based upon the abuse of discretion standard, and Grievant failed to meet his burden of proof in this case. The interview committee conducted interviews, scoring the applicants, and selected the applicant with the highest score. Grievant failed to establish any flaws in the process that would have changed the outcome.

Findings of Fact

1. Grievant has been employed by the Brooke County Board of Education ("the BOE") for 31 years as a teacher at Brooke High School. He is certified to teach Industrial Arts K-12 and has a Master's degree in Industrial Arts, +45, including 18 hours in Vocational Administration.

2. Grievant teaches courses in Career Technical Education, including construction systems, communication systems, and foundations of engineering.

3. Brooke High School is a large institution and utilizes department chairs for various subject areas. A department chair is responsible for such things as conducting department meetings with teachers, serving as a liaison between teachers and the principal, assessing needs and acquiring supplies and equipment, determining curriculum, and selecting and assigning teachers. 4. For many years, the department chair for Career Technical Education was not posted, and the assignment was given to the most senior teacher in the department.

5. During the summer of 2006, the Career Technical Education chair position was vacated, and the BOE posted the position.

6. Most teachers in the department believed that Grievant should be placed in the position, because he was the most senior teacher, so they did not apply.

7. Grievant and Dale Keenan applied for the position and were interviewed.

8. The interview committee for this position was comprised of the following individuals:

Joyce Rea _ Principal, Brooke High School

Valerie Smith _ Assistant Principal, Brooke High School

John Leary _ Assistant Principal, Brooke High School

George Brindley _ Assistant Principal, Brooke High School

Kathy Kidder-Wilkerson _ Vocational Director, Brooke High School

9. The two applicants were each asked the same questions, and their answers were scored by each interviewer, on a scale of 0-3, with three being the best score. Scores were given in the following categories:

Seniority

Certification

Current classroom evaluation

Academic achievement

Technology

Classroom walkthroughs

Mentoring other teachers

Developing, mapping and prioritizing the curriculum

Recent trainings or attendance at conferences

Have you reviewed recent instructional strategies and research current to your field? Explain.

Greatest challenges facing the department

Greatest strength as department head

What is your vision for the Career Technical Department? In 25 words or less, please tell us why you would be the best candidate for the job.

How would you initiate or implement creative thinking and problem solving skills into this department?

10. Mr. Keenan has been employed by the BOE for 6 years and teaches Auto Technology. He is currently working on his bachelor's degree and obtained vocational training to become certified to teach Auto Mechanics, 10-Adult. He worked in private industry for 22 years as a technician for Chrysler and General Motors.

11. The interviewers' scores for each applicant were added together, resulting in a total score of 129.0 for Mr. Keenan and a score of 116.5 for Grievant.

12. Mr. Keenan was recommended for the position, due to his higher interview score and his articulation of a vision for improving the department, collaborating with other departments to integrate their education programs, and incorporating community involvement into the department's programs.

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). "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 contends that, due to his numerous years of experience in the department, along with deficiencies in the interview process, he should have been selected as department chair. He contends that he did not have sufficient time to prepare for the interview and that, because many of the interview committee members were newly hired as principals at the school, they did not fairly evaluate his responses.

This Grievance Board has previously held that "[t]he provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Hall v. Mingo County Bd. of Educ.*, Docket No. 95-29-529 (Mar. 28, 1996); *Foley v. Mineral County Bd. of Educ.*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Bd. of Educ.*, Docket No. 91-23-040 (July 31, 1991)." *Lusher v. Putnam County Bd. of Educ.*, Docket No. 99-40-061 (May 7, 1999). A separate line of cases starting with *Chaffin v. Wayne County Bd. of Educ.*, Docket No. 92-50-398 (July 27, 1993) reaches the same conclusion with respect to extracurricular coaching assignments, but through different reasoning. *Chaffin* regards W. Va. Code § 18A-4-16, the statute that defines extracurricular assignments, as self-contained.

Thus, "'the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' *McCoy v. Kanawha County Bd.*

of Educ., Docket No. 94-20-141 (Oct. 13, 1994), *citing Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Foley*, *supra*; *See Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct.16, 1997)." *Lusher*, *supra*; *Baker v. Lincoln County Bd. of Educ*., Docket No. 01-22-518 (Mar. 1, 2002). "County boards of educationhave substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnel implementing those programs. 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)." *Duncan v. McDowell County Bd. of Educ.*, Docket No. 96-33-231 (Sept. 2, 1997).

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. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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 thecase." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Each of the interview committee members testified in this grievance, and all agreed that Mr. Keenan's overall vision for improving the department was superior. As to Grievant's allegations that he was unprepared, he testified that he was informed the day of the interviews that they were taking place. Conversely, Mr. Keenan testified that he "believed" someone called him the day before. Nevertheless, Grievant's contention that he could have improved his score if he had had time to

review his training and evaluations does not appear to be supported by the evidence. Although Grievant did receive somewhat lower scores in the area of training, because Mr. Keenan had attended training that summer, he also received much lower scores in other areas. Mr. Keenan's scores were far greater than Grievant's, by all interviewers, in the areas of vision, dealing with challenges, technology, and greatest strengths. Therefore, it does not appear that Grievant's lack of "preparation" was particularly relevant to the areas where he was rated the lowest.

Viewing the Board's decision in terms of the arbitrary and capricious/abuse of discretion standard, the undersigned cannot find that the selection was not without valid foundation. While it would seem potentially risky, or perhaps ill-advised, to select such an inexperienced teacher to head a department, the committee's concerns for improvement of the department, integration of programs, and community involvement were not an unreasonable basis for selecting Intervenor to fill the position. As discussed above, the undersigned cannot substitute her opinion for that of the BOE. Accordingly, Grievant has failed to meet his burden of proof in this case. The following conclusions of law support this decision.

Conclusions of Law

1. In a non-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).

2. "'[T]he appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' *McCoy v. Kanawha County Bd. of Educ.*, Docket No. 94-20-141 (Oct. 13, 1994), citing *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *[Foley v. Mineral County Bd. of Educ.*, Docket No. 93-28-255 (Oct. 29, 1993)*]*; *See Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct.16, 1997)." *Lusher v. Putnam County Bd. of Educ.*, Docket No. 99-40-061 (May 7, 1999); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 01-22-518 (Mar. 1, 2002). 3. "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnel implementing those programs. 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)." *Duncan v. McDowell County Bd. of Educ.*, Docket No. 96-33-231 (Sept. 2, 1997). 4. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

5. Grievant has failed to establish by a preponderance of the evidence that the selection decision at issue was arbitrary and capricious or an abuse of 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 Brooke County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). 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.

Date: August 17, 2007

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DENISE M. SPATAFORE

Administrative Law Judge