THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

FRANCIS GOODWIN,

Grievant,

v v.

Docket No. 06-20-140

Janis I. Reynolds

Senior Administrative Law Judge

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Francis Goodwin, is employed by the Kanawha County Board of Education ("KCBOE" or "Board") as a Coordinator of Services/Secretary 3. She filed this grievance on January 20, 2006, and the Statement of Grievance reads:

> KCS Board approved the job as Supervisor of Maintenance - Custodial Services on 1-19-06 to a person outside the KCS system. I applied for the position having 28 years seniority (18A-4-8B) including 7 years as Head Custodian and passing the Supervisor of Maintenance Test . . . . (See footnote 1)
>
> Relief Sought: To award me the Supervisor of Custodian [position] OR align my salary to the Supervisors pay scale.

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

Level IV on May 2, 2006, and a Level IV hearing was held October 5, 2006. This case became mature for decision on November 15, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, the Board was represented by Attorney James Withrow.

Procedural history

Grievant filed two separate grievances on this position, as it was posted twice and she was not selected twice for different reasons. This grievance concerns the first selection process.

Synopsis

Grievant asserts she should have received the position because she had passed the test for Supervisor of Maintenance, met the stated requirements, and was the most senior.

Respondent asserts it selected the best qualified applicant, and this selection was within its discretion pursuant to Hancock County Board of Education v. Hawken, 209W. Va. 259, 546 S.E.2d 258 (1999)(per curiam (See footnote 2)), which allows boards of education to add other qualifications for a supervisory position beyond the passing of the competency examination.

Grievant has not met her burden of proof and has not demonstrated KCBOE's selection of the successful applicant was arbitrary and capricious.

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

Findings of Fact

1. On November 16, 2005, KCBOE posted the position of Supervisor of Maintenance for Custodial Services.

2. The list of applicants was reviewed by KCBOE's Human Resources staff, and all applicants, including Grievant, who met the minimum qualifications, were interviewed.

3. Because none of the applicants held the classification title, they were given the competency examination.

4. Grievant, the successful applicant, and other applicants passed the competency exam.

5. Grievant has been employed by KCBOE for 28 years. She began her employment as a

custodian, and shortly thereafter became Head Custodian. She served in this supervisory capacity for seven years. She then worked as a clerk, and as asecretary, and now serves as a Coordinator of Services/Secretary 3 in the Special Education Department. Her evaluations have all been satisfactory or above.

6. The successful applicant was Paul Prendergast. He had a Master's of Science Degree in Occupational Health and Safety and had worked as a custodian. He had fourteen years of supervisory experience, including his work at the Capitol Complex as an Assistant Director, where he was responsible for supervising custodial and maintenance employees.

7. The successful applicant had never been employed by KCBOE.

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 (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.

Grievant contends KCBOE's failure to select her for the Supervisor of Maintenance for Custodial Services vacancy violates W. Va. Code § 18A-4-8b. 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.

Grievant asserts she is entitled to the position because she passed the competency examination, possessed 28 years of seniority, and she was a regularly employed service personnel, while the successful applicant was not an employee.

The most recent case on this issue to come before the West Virginia Supreme Court of Appeals is Hawken, supra, which dealt with a Supervisor of Maintenance position. In that case, the grievant asserted he should receive the position because he was the most senior, and he had passed the competency examination. The West Virginia Supreme Court of Appeals agreed with the Circuit Court that "county boards 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 Board of Education, 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."

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. The 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 free schools,' 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.

In Hawken, 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 thatinstance, the Court found hiring a manager with greater experience in administration did not violate any statutes.

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, and the West Virginia Supreme Court of Appeals held a board of education may hire an individual from outside the school system or with less seniority, if the person is more qualified, and this action would not be 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)). " 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 ofeducation. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

A comparison of Grievant's and the successful applicant's qualifications demonstrates the successful applicant had a Master's Degree in Occupational Health and Safety, and recent and extensive supervisory training and experience in the necessary area. Grievant has a high school education and has not worked as either a custodian or a supervisor for many years. Respondent's determination that Mr. Prendergast 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 selection of the successful applicant was not arbitrary and capricious, and it was within the discretion of KCBOE. Blake v. Kanawha County Bd. of Educ., Docket No. 02-20-343 (Mar. 11, 2003).

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 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). 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 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 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 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.

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. Achieving a passing score on the state competency test for a particular classification shall conclusively demonstrate an applicant is qualified to hold that classification title. W. Va. Code § 18A-4-8e.

5. "In light of the importance [placed] upon providing students with 'a thorough and efficient system of free schools," the passing of the competency examination is not "the alpha and the omega" of a board's hiring process. Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999). See Shaffer v. Kanawha Bd. of Educ., Docket No. 00-20-085 (June 12, 2000).

6. 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); Blake v. Kanawha County Bd. of Educ., Docket No. 02-20-343 (Mar. 11, 2003); 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).

7. 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. Hawken, supra; Hopkins, supra.

8. The selection of Mr. Prendergast for the position of Supervisor of Maintenance for Custodial

Services was not arbitrary and capricious nor an abuse of discretion. 9. Grievant has not met her burden of proof and demonstrated Respondent violated rule, regulation, statute, or policy in filling the posted vacancy for the Supervisor of Maintenance for Custodial Services.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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: March 29, 2007

Footnote: 1

The rest of the Statement of Grievance was not attached to the grievance form.

Footnote: 2

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.