THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOSEPH KOMOROWSKI,

Grievant,

v. **Docket No. 06-25-464**

Sue Keller

Senior Administrative Law Judge

MARSHALL COUNTY BOARD OF EDUCATION

Respondent.

D E C I S I O N

Joseph Komorowski ("Grievant"), employed by the Marshall County Board of Education ("MCBE") as an Assistant Principal, filed a level one grievance on July 7, 2006, challenging his nonselection as Activities Coordinator. For relief, Grievant seeks instatement with back pay, benefits, and attorney fees. (See footnote 1) Grievant's immediate supervisor lacked authority to grant the relief at level one. The grievance was denied following an evidentiary hearing at level two, and MCBE waived consideration at level three. Appeal to level four was made on December 18, 2006. A hearing to supplement the level two record was conducted on March 2, 2007, in the Grievance Board's Westover office. Grievant was represented by Gregory A. Gaudino, Esq., of Petroplus & Gaudino, PLLC, and MCBE was represented by Richard S. Boothby, Esq., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before April 23, 2007.

Synopsis

Grievant argues that the selection process was flawed in that the statutory criteria were not properly considered, and various other factors. MCBE asserts that greater weight was given to the interview procedure. The evidence does not establish that Grievant was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been

different if the proper process had been used. MCBE did not abuse its substantial discretion when selecting the successful applicant for the position of Activities Coordinator.

The following facts have been derived from a preponderance of the credible evidence made part of the record at levels two and four.

Findings of Fact

1. Grievant has been employed by MCBE for approximately forty years, and has been assigned as Assistant Principal at John Marshall High School ("JMHS") at all times pertinent to this grievance. Grievant's duties have included those of Athletic Director for eleven years prior to sometime early in 2006, when Principal David Takach realigned his duties, deleting those relating to school activities and athletics.

2. By posting dated April 24, 2006, MCBE advertised the full-time position of High School Activities Coordinator at JMHS. The only qualification listed was a teacher's certificate. The duties of the Coordinator were listed as:

Organize and carry out an activity program that will promote team and school pride.

Accept the responsibility for the welfare of the student.

Attempt to integrate the athletic program with the total school program.

Promote positive public relations in regard to the school's athletic program.

Abide by the league, county, state, and federal rules and regulations. Promote cooperation between the jr/sr high and the elementary school programs.

Serve as a liaison between supportive organizations and the school.

Inventory equipment.

Schedule and obtain necessary contracts for all events.

Coordinate administration of all school activities.

Participate in the process of hiring, evaluating and dismissing of coaches.

Schedule non-athletic, extra-curricular activities.

Maintain school activities calendar.

Assist in checking student athletic eligibility.

Attend or be represented at all school activities.

Perform other duties as assigned by the principal.

3. A committee to review the five applicants for Activities Coordinator was composed of MCBE

Personnel Director David Gill, JMHS Principal Takach, JMHS guidance counselor and former coach Marilyn Wehrheim, track coach Jim Hudson, Faculty Senate President Casey Storm, and Assistant Principals Connie Young and Tom Wood.

4. The applicants were posed an identical series of questions for oral response, were asked to complete written responses to two questions, and were asked to make a presentation on “Improving Public Relations.” The applicants were scored on each section of the review, with the oral questions composing 50%, the written questions 30%, and the presentation 20% of the total score.

5. When all the scores were totaled, Grievant ranked fourth of the five applicants, receiving a score of 5.8 of a possible 10 points.

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).

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2004); *Black v. Cabell County Bd. of Educ*., Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ*., Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). "The grievance procedure . . . allows for an analysis of legal sufficiency of the selection process at the time it occurred." *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989).

W. Va. Code § 18A-4-7a requires that professional positions be filled by the most qualified applicant, as determined by the factors outlined in that 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.

While each of these factors must be considered, a board of education may 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). Once a board reviews the criteria required by *W. Va. Code* § 18A-4-7a, it may determine that "other measures or indicators" is the most important factor. *Stinn v. Calhoun County Bd. of Educ*., Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22- 482 (Mar. 5, 1998).

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)). This is especially true in the selection for an administrative position. Grievant asserts a number of factors flawed the selection process for Activities Coordinator. First, Grievant challenges the composition of the review committee. He asserts that Mr. Gill and Mr. Takach were directly involved in removing the duties as Athletic Director from his assignment prior to the posting of the Activities Coordinator position. Further, both had testified at grievance hearings wherein Grievant had contested the removal of those duties from his assignment. (See footnote 2) Grievant also protested the assignment of Mr. Hudson inasmuch as they had been involved in “several disagreements” in the past. Grievant

next argues that had he been selected, the duties of the remaining Assistant Principals would likely have been reconfigured, therefore Ms. Young and Mr. Wood had a direct personal interest in the outcome of the selection process, and should not have been on the committee. Finally, Grievant noted that he had been selected over Mr. Wood twelve years ago for the Athletic Director duties, and that he had encountered unidentified problems with Mr. Storm.

The evidence does not establish that the outcome of selection process was tainted by the individual members of the committee. Although Mr. Takach and Mr. Gill had worked to realign Grievant's duties as Assistant Principal, removing those of Athletic Director, that action was taken in response to an acknowledged need for a full-time employee to meet those needs, and was no reflection on Grievant's ability or performance. Grievant's dispute with Mr. Hudson had consisted of a disagreement regarding the completion of an evaluation which delayed Mr. Hudson receiving his compensation for coaching. The matter was resolved when Mr. Hudson sought resolution from a central office administrator. There is no evidence that Mr. Hudson continues to harbor any ill-will against Grievant regarding the matter. It is speculative as to whether the two Assistant Principals were acting with any personal interest or concern, as there is no evidence to indicate that JMHS would lose an Assistant Principal position if Grievant was selected. There is no evidence that Mr. Wood bears any long term resentment toward Grievant, or that Mr. Storm had any ill feelings toward him.

Grievant next argues that some of questions posed during the interview process were directly prejudicial to him, since all the committee members were aware that he had served as the Athletic Director for the previous eleven years. Specifically, Grievant asserts that the question of how he would correct the three year decline in revenues suggests that he had failed to address the situation, and required him to defend his work as Athletic Director. Grievant also perceived the presentation topic to suggest that as the former Athletic Director he had poor public relations.

Mr. Hudson testified at level four that he knew why the Athletic Department was losing money, and that it was not Grievant's fault. Grievant testified that finances had suffered, but that the department was “back in the black.” Although Grievant may have felt that he had been put in an adverse situation, there is no evidence that the questions were designed to impugn his prior service. Rather, both finances and public relations are ongoing concerns of all athletic departments, and interview committees would legitimately be interested as to how applicants would handle these

matters.

Finally, Grievant argues that the committee members were not specifically told that they had to review and consider the information contained on the bid sheets, which included information relevant to the seven statutory factors that must be considered. Grievant notes that none of the interview questions addressed academic achievement, relevant experience, or past performance evaluations. Therefore, Grievant asserts, none of scores assigned by the committee were directly related to his qualifications, including a master's degree plus 45 hours with a 4.0 grade average, his administrative certificate, his forty years of experience, or the fact that his 2004-2005 evaluation indicated that he accomplished all of his goals for the school year.

MCBE argues that the committee members were given access to all the information submitted by the applicant, including their bid sheets which set forth relevant information corresponding to the first set of factors under *W. Va. Code* § 18A-4-7a. Further, Mr. Gill testified that the job description did not require any “relevant specialized training” for the position. Mr. Gill further testified that the interview process was intended to assist the committee in selecting an individual with excellent communication skills, and that greater emphasis was given to the responses to the oral questions.

Clearly, Grievant is upset that the duties of Athletic Director were removed from his assignment. He has also expressed his view that certain factors should have been given more weight than they were, and his belief that he was put in a defensive position during the interview process. However, the fact that the committee placed greater emphasis on the interview, which was determinative of which applicant was selected for the position, does not render the procedure fundamentally unfair, or flawed to such a degree as to call into question the outcome of the process. 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 relativequalifications of the applicant may fairly be judged. The interview process and written questions are generally viewed as other measures or indicators.

Finally, 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.

Grievant has not shown selection process, as a whole, to be arbitrary and capricious. Neither did Grievant demonstrate the decision-making process to be fatally flawed, or that MCBE overstepped its broad discretion as described in *W. Va. Code* § 18A-4-7a.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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.

2. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2004); *Black v. Cabell County Bd. of Educ*., Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ*., Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

3. *W. Va. Code* § 18A-4-7 requires that 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 and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged. 4. A board of education may 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).

5. Once a board reviews the criteria required by *W. Va. Code* § 18A-4-7a, it may determine that "other measures or indicators" is the most important factor. *Stinn v. Calhoun County Bd. of Educ*., Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22- 482 (Mar. 5, 1998).

6. 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).

7. 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). 8. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, or that MCBOE acted in an arbitrary and capricious manner, or otherwise overstepped its broad discretion as described in *W. Va. Code* § 18A-4-7a.

Accordingly, this grievance is **DENIED**.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. 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.

DATE: MAY 14, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Because the salary for Activities Coordinator is less than Grievant earns as an Assistant Principal, there would be no back pay awarded. Further, the Grievance Board has consistently held that it lacks authority to grant attorney fees at this level.

Footnote: 2

[2]Komorowski v. Marshall County Board of Education, Docket No. 06-25-319 (Nov. 27, 2006), was dismissed at level four based on a finding that it was untimely filed.