THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ALVIN CLINE and

GLORIA CLINE,

Grievants,

v. DOCKET NO. 06-33-394

MCDOWELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Alvin Cline, filed his grievance on June 23, 2006. Grievant, Gloria Cline, filed her grievance on June 19, 2006. Both Grievants are grieving their non-selection for the position of Principal at Fall River Elementary School. Their relief sought is to obtain that position. (See footnote 1)

These grievances were consolidated, and a level four hearing was held in the Grievance Board's Beckley office on January 4, 2007. Grievants were represented by Nick Roberson and Ben Barkey, West Virginia Education Association, and Respondent was represented by Kathryn Bayless, Esq. The matter became mature for decision on February 6, 2006, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants assert Respondent's selection for Principal at Fall River Elementary was arbitrary and capricious. Respondent avers it complied with the requirements set forth in *W. Va. Code* § 18A-4-7a.

Grievants failed to prove Respondent's choice of the successful candidate was arbitrary and capricious.

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

Findings of Fact

1. On May 18, 2006, Respondent posted a vacancy for the position of Principal at Fall River Elementary School.

2. Alvin Cline and Gloria Cline submitted their applications for the vacancy.

3. Six individuals, including both Grievants, were interviewed for the position. All candidates were asked the same questions.

4. Sandra Murensky was the successful candidate who was awarded the position.

5. The applicants were rated on the seven statutory criteria found in the first set of factors in *W. Va. Code* § 18A-4-7a: certification, experience, degree level, academic achievement, relevant specialized training, past evaluations, and other measures or indicators. These seven criteria were scored numerically based on an established value.

6. Respondent established a numerical point system by which to evaluate the seven criteria.

7. Grievant Alvin Cline had the appropriate certification, five years administrative experience, a master's degree in Educational Leadership, and 3.83 grade point average. Mr. Cline's numerical score was 130.

8. Mr. Cline did not receive any numerical points for the category referring to past evaluations. Respondent did not award him points because of his evaluation for the 2005-2006 school year. By Respondent's established point system, applicants wouldreceive fifteen points for satisfactory evaluations, meaning they met standards in all categories. Applicants would receive ten points for a less than satisfactory evaluation, meaning overall they met standards, but one or more categories needed improvement.

9. Mr. Cline's evaluation for 2005-2006 was marked as “Satisfactory” overall. However, there were several areas where he was marked as “Unsatisfactory.” He was informed that he would be put on an improvement plan the following year if he remained an administrator. (See footnote 2)

10. Mr. Cline did not receive the 2005-2006 evaluation until after the interviews for the position at Fall River Elementary. (See footnote 3)

11. Mr. Cline was not given any points on this criterion. His score on that section of the criteria was based solely on the 2005-2006 evaluation, which he had not yet received. Mr. Cline was not scored correctly on this section.

12. Grievant Gloria Cline had the appropriate certification, three years of administrative experience, a master's degree in Reading, a master's degree in Leadership, and 3.48 and 3.27 grade point averages. Ms. Cline's numerical score was 127.5. 13. Ms. Cline received the maximum number of points allowed for obtaining her master's degree. Ms. Cline was the only applicant with two master's degrees, but received the same numerical score as the other applicants who had obtained one master's degree.

14. Respondent's point system provides for ten points to be awarded to the candidate if he/she has obtained a master's degree and fifteen points for a doctorate. 15. When Respondent assigned a numerical value to Ms. Cline's grade point average, it averaged her grade point average from the two master's degrees.

16. Ms. Cline received the maximum numerical value concerning her past performance evaluations.

17. The successful applicant, Sandra Murensky, had the appropriate certification, no administrative experience, a master's degree in Reading, and a 3.88 grade point average. Ms. Murensky's numerical score was 145.

18. Ms. Murensky received the maximum numerical points for her past performance evaluations.

19. Respondent placed more weight on the interview, making it worth seventy points.

20. Mr. Cline received ten points on his interview. Mrs. Cline received twenty points, and Ms. Murensky received seventy. Ms. Murensky was the only candidate to score the maximum points.

Discussion

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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.*

Grievants assert the selection of Ms. Murensky to fill the position is arbitrary and capricious.

Generally, an action is considered arbitrary and capricious if the agency didnot 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 Resources*, 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 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01- 20-470 (Oct. 29, 2001).

Grievants have not proven the selection of Ms. Murensky to be arbitrary and capricious. 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). 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 following seven factors:

(1) Appropriate certification, licensure or both; (2) 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;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) Relevant specialized training;

(6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and

(7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code § 18A-4-7a.

Respondent has established the interview was given the greatest weight, as is permissible. 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. *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). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998). 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." *Duncan v. McDowell County Bd. of Educ.*, Docket No. 96-33-231. Testimony established Ms. Murensky's interview was superior to those of the other candidates, hence her perfect score in that category. However, of great concern to the undersigned is the fact Mr. Cline was not given any numerical value on the portion of the criteria that discusses past performance evaluations. Respondent's rationale is that Mr. Cline's evaluation for that year was not satisfactory. However, Mr. Cline had not received the evaluation at the time of the interview.

Also, the 2005-2006 evaluation was overall satisfactory. Therefore, based on Respondent's point system, Mr. Cline should have received ten points, the minimum numerical points for that category. Unfortunately for Mr. Cline, receiving the ten points in that category, still would have him ranked second, with Ms. Murensky being the successful applicant.

With respect to Ms. Cline, the point system allows Respondent to give ten points for a master's degree and fifteen points for a doctorate. There is nothing that allows for additional points for two master's degrees. Grievant asserts she should have received a total of twenty points, ten for each degree. However, the undersigned finds that argument to be without merit. Ms. Cline received the appropriate number of points.

That is not to say the degrees should not have been taken into consideration by Respondent when reviewing credentials. Respondent offered testimony Ms. Cline's two degrees and scholastic history was given the weight Respondent believed appropriate.

In the grade point average section, Respondent averaged out Ms. Cline's grade point average from her two master degrees. Grievant has asserted she was harmed by having the two degrees because she received fewer points based on the average than she would have received if Respondent went with the higher of the two grade point averages. No employee is harmed by continually educating themselves in their field. Respondent handled the grade point average in a way it deemed fair and appropriate.

Grievants have not met their burden of proof that Respondent's choice for Principal at Fall River Elementary was arbitrary and capricious.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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. 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).

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 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 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. 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).

5. 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 following seven factors:

(1) Appropriate certification, licensure or both;

(2) 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;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) Relevant specialized training;

(6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and

(7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code § 18A-4-7a.

6. 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. *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). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998). 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." *Duncan v. McDowell County Bd. of Educ.*, Docket No. 96-33-231.

7. Grievants did not meet their burden of proving Respondent's selection for Principal of Fall River Elementary was arbitrary and capricious.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 the GrievanceBoard. 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: March 28, 2007

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

At the beginning of the Level IV hearing, the undersigned informed Grievants it would be an impossibility to award both of them the position, if they prevailed. At that time, Grievants clarified they were more concerned with the process by which the position was filled.

Footnote: 2

Mr. Cline did not return as an administrator the following year because the school where he worked was closed, and there was a reduction in force. This had nothing to do with his evaluation.

Footnote: 3

The undersigned was not given the date of the interviews.