THE EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GERALD ROSSER,

Grievant,

v. **Docket No. 06-50-259**

Sue Keller

Senior Administrative Law Judge

WAYNE COUNTY BOARD OF EDUCATION,

Respondent,

and

MARK QUEEN,

Intervenor.

D E C I S I O N

Gerald Rosser ("Grievant"), employed by the Wayne County Board of Education ("WCBE"), filed a level one grievance on May 22, 2006, in which he alleged a violation of *W. Va. Code* § 18A-4-8b when he was not selected for the position of Director of Services in the Transportation Department. For relief, Grievant seeks instatement with back pay and benefits. By agreement of the parties, review at level one was waived. The grievance was denied at level two, and Grievant elected to bypass consideration at level three. Appeal was made to level four on August 1, 2006, and an evidentiary hearing was conducted in the Grievance Board's Charleston office on October 13, 2006. Grievant was represented by Susan Hubbard of the West Virginia Education Association, and WCBE was represented by David Lycan, Esq. Proposed findings of fact and conclusions of law were filed by the parties on November 6, 2006, and the grievance was reassigned to the undersigned on April 12, 2007.

Synopsis

Grievant asserts he has the most seniority, and is qualified for the administrative service personnel position. WCBE asserts it selected the best qualified applicant, and that Grievant did not meet the minimum qualifications for the position. 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 has been employed by WCBE for approximately twelve years and has held the classification of mechanic throughout that time.

2. By posting dated March 28, 2006, WCBE advertised the position of Mechanic/Director of Services/Inspector/School Bus Supervisor. Qualifications for the position are listed on the job description as

CDL drivers license

School Bus Driver experience

Formal training in both diesel and gasoline engines, power plants and drive trains

ASE [Automotive Service Excellence] certification

Department of Motor Vehicles Inspectors license for medium duty vehicles

Experience as mechanic with ability to cut tools and test equipment normally associated with this type of work

3. At the time the position was posted and filled both Grievant and Intervenor were regular employees of WCBE. Because Grievant has been employed by WCBE forapproximately twelve years, and Intervenor has only been employed for approximately six years, Grievant has more seniority.

4. Grievant completed a test given by the Department of Motor Vehicles (“DMV”) in August 2004 to obtain the appropriate endorsement on his CDL license to transport passengers on a school bus. When DMV officials indicated there was a problem placing the endorsement on his license, and

that it would be necessary for Grievant to leave his license until the situation was resolved, he declined.

5. Grievant mentioned the situation with the DMV to his supervisors, but took no further action to insure the endorsement was placed on his CDL license.

6. As a mechanic, Grievant frequently drives an empty school bus. He has never driven a bus with students on board, and has never completed the Department of Education requirements to hold the classification of bus operator.

7. A School Bus Supervisor is required to transport students in cases of emergency. At the time of the level two hearing in June 2006, Intervenor had already transported students on one such occasion.

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 acceptas 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 he was qualified for the position and had more seniority than Intervenor. 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).

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. . . .

It is difficult to understand how Grievant believes that he is qualified for the position. By his own testimony, he did not secure the required endorsements on his CDL license to transport students. Neither has he completed the Department of Education requirements to hold the classification of bus operator. Grievant is simply not legally qualified for the position. Grievant suggests that the

requirements for a bus operator are unnecessary and contrary to the *W. Va. Code* § 18A-4-8b(g) provision that "[j]ob postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant."

W. Va. Code § 18A-4-8 defines School bus supervisor as "qualified personnel employed to assist in selecting school bus operators and routing and scheduling of school buses, operate a bus when needed, relay instructions to bus operators, plan emergency routing of buses and promoting good relationships with parents, pupils, bus operators and other employees." (Emphasis added). Therefore, WCBE did not include an unnecessary requirement for the position. Grievant's assertion that it does not state operate a bus with children, is not persuasive, but even so, "county boards of education have the right to expand the required qualifications for a given position beyond the statutory definition of its classification title." *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999)(*per curiam*).

Therefore, the evidence establishes that Intervenor held all the required certifications and experience, while Grievant did not. WCBE's selection of Intervenor for the position of Mechanic/Director of Services/Inspector/School Bus Supervisor was not arbitrary and capricious, nor was this assessment an abuse of discretion.

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 ofthe 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).

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(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).

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. *Hawken, supra; Hopkins, supra*.

7. The selection of Intervenor for the position of Mechanic/Director of Services/Inspector/School Bus Supervisor was not arbitrary and capricious nor an abuse of discretion.

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

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: APRIL 23, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE