THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

BONITA REDD,

Grievant,

v. **DOCKET NO. 06-33-349**

MCDOWELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Bonita Redd, filed this grievance on June 19, 2006, stating, "Title IX, Title VII Civil Rights Act, Equal Pay Act, 18A-4-3, 18A-4-5a, 18A-4-6, 18A-4-14, 18A-2-1, 18A-2- 9, 18A-4-4." (See footnote 1) Her stated relief sought is "2 years assistant principal pay or equivalent. One of the principal or assistant principal positions interviewed for on June 5, 2006."

A Level IV hearing was held in the Grievance Board's Beckley office on January 4, 2007. Grievant appeared *pro se*, and Respondent was represented by Kathryn Reed Bayless. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

Synopsis

Grievant applied for various administrative positions after acting as Head Teacher at Big Creek High School. She asserts her time spent as Head Teacher is essentially the same as Vice Principal, and therefore she should have received administrative credit whendetermining whether she was qualified for these administrative positions. She also argues she was more qualified for the positions.

Respondent asserts that a Head Teacher is different than a Vice Principal, and being a Head Teacher does not allow an employee to accrue administrative credit. Respondent also avers that the most qualified candidate was selected for each position. Based on a preponderance of the

evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant has been employed as teacher for approximately nineteen an a half years.

2. Grievant applied and was awarded the position of Head Teacher at Big Creek High School in the 2004-2005 school year. She has served in that position since that time. When Grievant accepted the position, she knew there was no additional pay.

3. The position of Head Teacher is different than the position of Assistant Principal. Head Teacher is not considered an administrative position.

4. The Head Teacher position is assigned to a school when the school is not large enough to support two administrators. The Head Teacher assists with clerical tasks and acts as a liaison between the parents and the principal.

5. Grievant refused to answer relevant questions about her duties at the Level II hearing. Before she testified at Level IV, she was cautioned on the record that she would be directed to answer any/all relevant questions. Failure to do so, could adversely affect the outcome of her case.

6. At Level IV, Grievant refused to answer relevant questions concerning her duties.

7. Grievant's duties are that of a Head Teacher.

8. On May 18, 2006, Respondent posted vacancies for the positions of Principal at Fall River Elementary School, Principal at Big Creek High School, and Assistant Principal at Mount View Middle School. 9. Grievant applied for all of these positions.

10. Respondent interviewed the applicants and rated them based on the seven criteria found in *W. Va. Code* § 18A-4-7a.

11. Grievant did not receive any administrative credit when being ranked for each of these positions, as she has never held an administrative position.

12. For the Fall River position, Grievant ranked last among six applicants. For the Big Creek position, Grievant ranked last among five applicants. For the Mount View Middle position, Grievant ranked last among four candidates.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's 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.*

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses. Nevertheless, demeanor is only one of the factors to be considered inaccessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness' information. *See Perdue v. Dep't. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

At both the lower level and the Level IV hearing in this matter, Grievant refused to answer relevant questions concerning her duties. At the Level IV hearing, Grievant began her opening statement by saying she did not intend to answer any questions that may negatively affect her civil suit. She was cautioned before testimony began that refusal to answer relevant questions could negatively impact her case. Grievant asked the undersigned if there was a way she could refuse to answer or take the Fifth Amendment. The undersigned explained the Fifth Amendment did not apply in this proceeding, but Grievant would not be held in contempt for refusal to answer. The ultimate consequence would be the negative impact on her case. Grievant then said, “We can proceed, and if I can refuse to answer, I'll refuse to answer.”

Grievant's answers during cross-examination were vague at best. Her demeanor indicated a great level of frustration with Respondent and Respondent's counsel. The following questioning took place on cross-examination:

Q: What other duties, if any, did you perform as a head teacher, in addition to the ones we've just discussed.

A: The other duties assigned by the Principal.Q: And what were those duties?

A: Well, I'm not going to answer that.

Because Grievant refused at both Level II and Level IV to answer relevant questions pertinant to her claims, the undersigned will not consider any of her testimony. The Legislature intended the grievance procedure to be a fair process. It is not fair for a witness, regardless of who called her to testify, to come in and only testify to questions she feels inclined to answer. It places the opposing party at a disadvantage.

Grievant is claiming she was discriminated against. Her argument at Level IV was that she was being discriminated against based on gender. (See footnote 2) "*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01- 50-056 (Apr. 5, 2001).

In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant offered no evidence that she was treated differently than other similarly situated employees. Grievant is under the mistaken impression that a Head Teacher is in essence an Assistant Principal. However, when looking at the job descriptions, the Head Teacher position varies

somewhat from that of an Assistant Principal. Grievant was aware there would be no additional compensation when she applied for and was awarded the Head Teacher position. Grievant has failed to prove her allegation of discrimination.

With respect to the non-selection portion of her grievance, 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.

Grievant was not given credit for any administrative experience, as she has never served as an administrator, only as Head Teacher. However, neither were the successful applicants for the Assistant Principal at Mount View Middle School and Principal at Fall River Elementary.

Dr. Mark Manchin, Superintendent at the time of these postings and interviews, testified that while the first six requirements listed in *W. Va. Code* § 18A-4-7a, provided Respondent with an indication of the minimum qualifications for each candidate, Respondent gave the greatest weight to “Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.” For Respondent, that involved giving the most weight to the interview.

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 betempered 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.

“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 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.

Grievant has failed to show Respondent's decision to hire the successful applicants was arbitrary and capricious. Respondent weighted the interview most heavily, as is permissible under the law. Out of a possible 70 points for the interview, Grievant only received 10 points for each position, and she was not the only applicant to receive thisscore. Dr. Manchin testified the successful applicants performed better in the interview than Grievant, and that was the general agreement of the interview committees.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's 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. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR- 371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health and Human Resources*, Docket No. 95- HHR-066 (May 12, 1995). The undersigned is charged with assessing the credibility of the witnesses. Nevertheless, demeanor is only one of the factors to be considered in assessing the credibility of a witness. Other factors include the witness' opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of witness'information. *See Perdue v. Dep't. of Health & Human Resources*, Docket No. 93-HHR-050 (Feb. 4, 1994).

3. "*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001).

4. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

5. Grievant failed to prove she was a victim of discrimination.

6. 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).

7. A county board of education must make decisions affecting the hiring of professional administrative personnel on the basis of the applicant with the highestqualifications. 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.

8. 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, thatdiscretion 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.

9. "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997).

10. 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.

11. Grievant failed to show Respondent violated any statute or policy or otherwise abused its discretion in not assigning her to the various positions.

Therefore, this grievance is hereby **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 ofreceipt 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.

DATE: February 27, 2007

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

At the outset of the hearing, the undersigned explained to Grievant the definition of discrimination and the elements she must prove pursuant to Grievance Board law, as discrimination based on a protected class is not a subject that may be addressed by the Grievance Board. The Board of Education of the County of Tyler v. White, 216 W. Va. 242 , 605 S.E.2d 814 (2004).

Footnote: 2

At Level II, Grievant argued she was being discriminated against based on race.