THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DAVID RICHARDSON,

Grievant,

v v.

Docket No. 06-54-445

Janis I. Reynolds

Senior Administrative Law Judge

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Richardson, is employed by the Wood County Board of Education ("WCBOE" or "Board") as an Assistant Principal. He filed this grievance on May 30, 2006, about his non-selection for the Principal's position at Emerson Elementary School. His Statement of Grievance (See footnote 1) states, "The administrative hiring matrix has an unfair bias inscoring." Although not listed on the grievance form, the relief sought was placement into the position.

This grievance was denied at all lower levels. Grievant appealed to Level IV on December 4, 2006, and a Level IV hearing was held February 5, 2007. This case became mature for decision on March 5, 2007, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant represented himself, and the Board was represented by Attorney Dean Furner.

Synopsis

Grievant asserts the matrix was incorrectly completed, and WCBOE was incorrect to place so much emphasis on an applicant's interview performance. He avers points should not be assigned to the mandatory factors, but only checks marks should be counted, and if the scoring had been done in this way he would have been the successful applicant.

Respondent asserts it selected the best qualified applicant, the matrix was correctly completed, and boards of education are permitted to decide what weight to give the mandated factors in W. Va. Code § 18A-4-7a when filling administrative positions. Respondent also notes the standard of review is whether the selection was arbitrary and capricious or an abuse of discretion, and the grievance process is not a "super-interview" where the undersigned Administrative Law Judge is allowed to substitute her judgement for that of the board of education.

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 is currently employed as an Assistant Principal at Hamilton Junior High School and has been for four years. He has a Ph.D. in Education Administration, and five years of administrative experience, one as a Principal in Fayette County and four as an Assistant Principal in Wood County. None of the administrative experience is in an elementary school. His evaluations have been satisfactory. He has applied recently for several administrative positions without success.

2. A position for principal at Emerson Elementary School was posted and Grievant applied. Three other elementary principal positions were posted at the same time, and many of the applicants applied for all three positions.

3. The Interview Committee for the three positions was composed of Ralph Paugh, past Director of Elementary Education, Karen Brunicardi, new Director of Elementary Education, and Mike Boyd, Director of Secondary Education. They composed the interview questions from discussions with the LSIC's (Local School Improvement Council) of the schools and standard questions WCBOE typically asks of administrative applicants.

4. The front of WCBOE matrix scores W. Va. Code § 18A-4-7a's required factors in the

following manner: 1) certification = 2 points; 2) relevant experience = 3 points; 3) course work and/or degree level in the relevant field = 2 points; 4) Academic achievement = 2 points; 5) Relevant specialized training = 4 points; 6) past performance evaluations = 2 points; and 7) other measures or indicators upon which the relativequalifications of the applicant may fairly be judged = 10 points. This final category is divided into two sections by WCBOE with seniority equaling 2 points and the interview equaling 8 points. If all candidates meet the requirement, or are equal in the area, this category receives a check in the box on the matrix, but when the points are totaled in the end, the applicant receives the points in this category. (See footnote 2) In other categories, only one or a couple of the applicants, received the points. For example, only Grievant received the points in degree level because he was the only applicant with a Ph.D. If there had been two applicants with Ph.D.'s both would have received the points.

5. Grievant received the following points: 1) certification = 2 points; 2) relevant experience = 0 points; 3) course work and/or degree level in the relevant field = 2 points; 4) Academic achievement = 2 points; 5) past performance evaluations = 2 points; and 6) other measures or indicators = 0 points, for a total of eight points. The category of relevant specialized training was not scored as no specialized training was required in the posting. The successful applicant received seventeen points, including eight points in the other measures category.

6. The directions on the back of the matrix form state,"[e]ach column shall have a winner or winners (check) in that column," "[i]f all applicants are equal they all receive a mark (check) in that column," and "[t]he total score will be an accumulation of checks from each criteria." As previously stated, WCBOE does use check marks, but the check is converted to the identified point total in the final column.

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 and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Both Grievant and the successful applicant were qualified for the position, but the Interview Committee did not recommend Grievant to the Superintendent, finding him to not be the most qualified when compared to the successful applicant. The statute requires the best or most qualified individual be selected. W. Va. Code § 18A-4-7a requires the best or most qualified individual be selected. These qualifications are judged by the following factors outlined in that Code Section:

> (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.

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). As previously stated, when selecting an administrator the first set of factors listed in W. Va. Code § 18A-4-7a is utilized. While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling

an administrative position, so long as this does not result in an abuse of discretion. Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). Once a board reviews the criteria required by W. Va. Code § 18A-4-7a, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). Thus, a county board of education may determine, as it did here, that "other measures or indicators" is the most important factor. Stinn, supra; Baker v. Lincoln County Bd. of Educ., Docket No. 97- 22-482 (Mar. 5, 1998).

> All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight itdeems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993)).

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.

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, academictraining, 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)); See Deadrick v. Marion County Bd. of Educ., Docket No. 90-23-071(Jan. 30, 1991). This is especially true in the selection for an administrative position.

Further, consistent with this standard of review, the grievance process is not intended as a "super interview," but merely an analysis of the 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). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997).

In order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover, supra. The choice made by WCBOE, to give the interview greater weight based on responses to questions specifically written to match an applicant to the needs of Emerson Elementary, cannot be seen as arbitrary and capricious. The undersigned Administrative Law Judge does not find the decision-making process was fatally flawed, or that WCBOE overstepped its broad discretion as described in W. Va. Code § 18A-4-7a. Additionally, Grievant has failed to establish WCBOE's decision was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such professional, administrative determinations. 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 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 (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. "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 employer has not met its burden. Id.

2. County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the schools and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va 145, 351 S.E.2d 58 (1986).

3. Once a board reviews the W. Va. Code § 18A-4-7a criteria it must consider, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994).

4. While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Elkinsv. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). 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). Once a review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance, unless this assessment is arbitrary and capricious. Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993)).

5. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). An administrative law judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Harper, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

6. "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 ofHealth 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.

7. The actions of WCBOE in selecting the successful applicant for the principal position were not arbitrary and capricious as the decision was based on criteria intended to be considered, the Board did not reach a decision contrary to the evidence, and the decision reached that was not so implausible that it could not be ascribed to a difference of opinion. Bedford, supra.

Accordingly, this grievance is **DENIED**.

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.

Janis I. Reynolds

Senior Administrative Law Judge

Dated: April 30, 2007

Footnote: 1

At Level IV, Grievant attempted to amend his grievance and add age discrimination and Respondent objected. The question of whether a grievant can raise a new grievance at Level IV over the objection of a respondent has been answered in the negative by prior Grievance Board decisions, with directions from the West Virginia Supreme Court of Appeals. As stated in Whitt v. Lincoln County Board of Education, Docket No. 97-22- 342 (Feb. 3, 1998), a complaint

raised by a grievant at Level IV for the first time and not consented to by the respondent cannot be addressed. See Smith v. Mingo County Bd. of Educ., Docket No. 96-29-492 (May 29, 1997); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995). See generally W. Va. Dep't of Health & Human Res. v. Hess, 189 W. Va. 357, 432 S.E.2d 775 (1993).

Additionally, Grievant asserted certain administrators were against him and were unfairly keeping him from receiving a higher administrative position. As this issue was not included in his Statement of Grievance, and the evidence presented on this issue basically consisted of his belief that this was occurring, this issue was seen to be without merit and will not be considered further. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998).

Footnote: 2

For example, all the applicants for the Emerson Elementary position had the proper certification and received a check mark in the column, but when the points were totaled they all received these two points.