WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

TONI PAESANO SHUTE,

Grievant,

v. **Docket No. 07-05-402**

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

___Toni Paesano Shute ("Grievant") initiated this grievance on August 11, 2006, alleging she should have been the successful applicant for the posted position of Principal of Brooke High School ("BHS"). Although Grievant was ultimately placed in that position, pursuant to a second posting and bidding process, on October 9, 2006, she seeks back pay with associated seniority and benefits to July 3, 2006, when Joyce Rea was selected to fill the position. After denials at the lower levels and an extensive hearing conducted at level two, Grievant appealed to the Grievance Board on October 23, 2007. A level four hearing was convened before the undersigned in Westover, West Virginia, on June 27, 2008. Grievant was represented by counsel, Brent Wolfingbarger, and Respondent was represented by counsel, David F. Cross. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 15, 2008.

Synopsis

Grievant contends that she should have been selected over Joyce Rea for the position of Principal at Brooke High School. She argues that the selection process was flawed, the statutory

criteria were not appropriately evaluated, she was more qualified, andthe Board erred by not conducting its own investigation of the applicants' qualifications. Evidence established that an interview committee was properly appointed, interviews conducted, and a consensus was reached regarding the recommendation of Ms. Rea, based upon her more relevant experience at the high school level, and particularly because she was already a Brooke High School administrator. The statutory criteria were evaluated and considered, the selection of Ms. Rea was based upon relevant considerations, and it did not reflect an abuse of the Board's ample discretion in such matters. Moreover, pursuant to statute and established case law, it is the superintendent's job to assess the applicants' qualifications, not the board of education's. The grievance is denied.

Findings of Fact

1. Grievant has been employed by Respondent Brooke County Board of Education ("the BOE") for more than 30 years. She has spent almost her entire career at Wellsburg Middle School as a teacher, Assistant Principal, and Principal. She became the Principal of that school in November of 2005, and served in that position until she became Principal of BHS.

2. On June 22, 2006, the BOE posted a vacancy for the position of Head Principal at BHS.

3. The only current BOE employees who applied for the position were Grievant and Joyce Rea, who was serving as Assistant Principal at BHS.

4. At the time the BHS position was posted, Kary K. DeGarmo was Assistant Superintendent. She assembled an interview committee, which consisted of the Directorof Student Services, the Maintenance Technology and Attendance Director, the Director of Special Education, and the outgoing principal of BHS.

5. Grievant and Ms. Rea were interviewed by the committee and were asked identical questions, which were formulated to take all of the first set of factors in W. Va. Code § 18A-4-7a into consideration. Each applicant also submitted a portfolio of information regarding her background, education, training and experience.

6. Because Grievant was under the impression that an emergency BOE meeting was going to be convened in order to hire Ms. Rea at the conclusion of the posting period, without interviews, she visited each of the BOE members at home and provided them with her portfolio. (See footnote 1)

7. Grievant has an M.A. degree in Educational Leadership, along with B.A.s in Language Arts,

Social Studies and Mental Retardation. She is certified in Social Studies 7-12, Mental Retardation K-12, Language Arts 7-9, Developmental Reading, and Principalship PK-Adult.

8. Joyce Rea has a Masters of Education degree in Learning Disabilities, along with a B.A. in Elementary Education. She also completed programs offered by Salem International University to receive certifications in Educational Leadership, Principal, Supervisor of Instruction and Superintendent. 9. Ms. Rea has been employed by the BOE for approximately 35 years. She had worked as a teacher at the middle school level, had taught Learning Disabilities at the high school and middle school levels, and had been employed as the county's Special Education Transition Coordinator for over 20 years. At the time the position in question was posted, she had been the Assistant Principal at BHS since 2004.

10. On July 1, 2006, Ms. DeGarmo became Superintendent for Brooke County. 11. After the interviews, the committee and Ms. DeGarmo discussed the applicants, coming to a consensus that, while both were extremely qualified, Ms. Rea was the preferred candidate. Because she had already been working at BHS as an administrator, her familiarity with the school, staff and students was considered extremely important. She was also considered to be more qualified because she had over 20 years' experience at the high school level, along with knowledge of high school programs, college preparatory requirements and vocational offerings.

12. Superintendent DeGarmo reviewed the applicants' information and considered them to be fairly equal in the statutory categories of certification, experience, degree level, academic achievement and past performance evaluations. She did not give any particular consideration to specialized training, because this information had not been requested in the posting.

13. At a BOE meeting on July 3, 2006, Superintendent DeGarmo recommended Ms. Rea for the position, based upon the interviews and assessment of the qualifications of the applicants, which was approved by a 3-2 vote. 14. Ms. Rea subsequently vacated her position as Principal at BHS to take a central office position. The Principal position was again posted, and Grievant was the successful applicant, being placed in the position on October 9, 2006.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. (See footnote 2) "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). Where the evidence equally supports both sides, the employee has not met her burden. *Id*.

When filling administrative positions, W. Va. Code § 18A-4-7a requires the best or most qualified individual be selected. These qualifications are judged by the following factors, referred to as the "first set of factors," outlined in that statute:

> (1) Appropriate certification, licensure or both;
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> (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;
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> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
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> (4) Academic achievement;
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> (5) Relevant specialized training;
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> (6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and
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> (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). 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 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. *Stoverv. 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).

Grievant contends that she was more qualified than Ms. Rea for the principal position, and the focus of most of her evidence was upon her allegation that the BOE members failed to perform their own independent evaluation of the applicants' credentials, “blindly” accepting the Superintendent's

recommendation. All five of the Board members were called to testify at the level two hearing in this matter regarding their approval of the Superintendent's recommendation without performing any additional, independent inquiry. (See footnote 3)

As discussed by the Grievance Board in *Switzer v. Kanawha County Board of Education*, Docket No. 03-20-013 (Apr. 11, 2003), “it is the responsibility of the superintendent, not the board of education, to evaluate the candidates, review the statutory criteria, and make a recommendation to the board of education.” The provisions of W. Va. Code § 18A-2-1 discuss the responsibilities of the superintendent and the board in these situations, providing that the board hires professional personnel “upon nomination and recommendation of the superintendent.” In the event that a superintendent's recommendation is rejected, the superintendent must then nominate a different candidate. The following additional discussion from *Switzer, supra*, is informative:

> “Clearly, the nomination of persons qualified to fill vacancies is a statutory duty of the superintendent and not a responsibility which arises by virtue of his or her employment with the county board.” *Gore v. Monroe County Bd. of Educ.*, Docket No. 93-31-532 (Apr. 26, 1994). In the case of professional personnel, the superintendent's duty to nominate necessarily entails the dutyto adhere to the provisions of W. Va. Code §18A-4-7a, which set forth the criteria to be used in assessing the qualifications of the applicants. In employing administrative personnel the first set of factors is applied. It appears well-settled that the chief executive officer of a county school system may not delegate the duties of the post to others. *Gore, supra*; *See*, 78 C.J.S. *Schools and School Districts* §171 (1952). It follows that others may not take actions which have the effect of impeding or usurping the exercise of those duties. '"W.Va Code §18A-2-1 prohibits a county board from participating in the evaluation process by which the superintendent reaches a decision to nominate a particular candidate not through the use of specific language[,] but by explicitly establishing a bifurcated appointment procedure.“ *Gore*, *supra*.

Accordingly, Grievant's proposition that the Board members were obligated to perform their own independent evaluation of the applicants, instead of accepting a recommendation which was the result of an appropriately conducted interview and selection process, is both illegal and improper.

Contrary to Grievant's assertion that the statutory factors were not properly evaluated in this selection case, the undersigned concludes that Respondent fulfilled its responsibilities appropriately. Although Grievant believes that she was “more qualified” in certain areas, such as the types of degrees and certifications she holds, Respondent was not obligated to grant either applicant any particular “credit” in each of the categories assessed, so long as each statutory area was, in fact, examined. As discussed above, it is within the Board's discretion how much weight to give to each of the factors, barring an abuse of discretion or a decision which is arbitrary and capricious.

Clearly, both candidates were highly qualified, each having over 30 years of experience with the school system as teachers and administrators. However, it was not an abuse of Respondent's ample discretion in such matters to select Ms. Rea because of her more relevant experience in the high school arena. There is no dispute that all ofGrievant's experience was at the middle school level, and Ms. Rea's familiarity with BHS and its students, staff and curriculum were appropriate considerations upon which her selection was based. The undersigned cannot find that this decision was arbitrary and capricious or an abuse of discretion.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *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. 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).

3. 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).

4. "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).

5. It is the responsibility of the superintendent, not the board of education, to evaluate the candidates, review the statutory criteria, and make a recommendation to the board of education. A board of education is not required to independently rank the applicants and compare their qualifications based upon the statutory criteria when the superintendent has already done such a comparison prior to making his recommendation. *Switzer v. Kanawha County Board of Education*, Docket No. 03-20-013 (Apr. 11, 2003), *citing Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998).

6. Respondent's selection of Joyce Rea for the principal position at issue was not arbitrary and capricious, an abuse of the Board's discretion in such matters, or otherwise legally improper.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Brooke County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 2, supra)*. 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. 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: September 26, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although not really addressed by Respondent, Grievant testified that she was informed when she submitted her application the final posting day that an emergency meeting was going to be convened the following day. She visited each BOE member that evening, in an effort to make sure her qualifications were considered. The following day, Grievant was notified of the date and time of her interview.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

However, it should be noted that two BOE members did, in fact, vote against the recommendation to hire Ms. Rea; one BOE member was new to the process and felt uncomfortable not having more information, and the other simply believed that Ms. Shute was more qualified.