THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CLINTON HENRY,

Grievant,

v.

Docket No. 07-33-009

MCDOWELL COUNTY BOARD OF EDUCATION

and WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondents.

DECISION

Grievant Clinton Henry filed this grievance June 6, 2006, grieving his non-selection for the position of Principal of the Career and Technology Center. His Statement of Grievance reads as follows:

> I responded to the Notice of Professional Job Openings dated March 20, 2006, and applied for the position of Principal, Career and Technology Center, Posting No. P-82-06. I was interviewed for the position by a team from the Career and Technology Center. I was not informed of the results of the selection until April 11, 2006, when the Superintendent called me to his office and informed me that I was not selected. I requested an informal conference by letter of May 2, 2006, and had a conference with Dr. Manchin on May 4, 2006. I did not hear from Dr. Manchin until May 24, 2006, when, in response to my further inquiry, he informed me, “I am not changing anything as far as having given the principalship to another candidate.”
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> I am filing this grievance because I believe that I both meet the position standards and possess professional qualifications exceeding those of the successful candidate and all other candidates who applied.

> I believe that I am entitled to the relief of instatement into this position. I believe that I have equivalent experience to the "Minimum 3 years experience in secondary administration" required under "Certification" and further that the requirement is pretensively adopted to qualify a pre-selected candidate and to discriminate against my selection.

After denial at the lower levels and an extensive hearing conducted at level two, Grievant appealed to the Grievance Board on November 10, 2006. Day one of a level four hearing was convened before the undersigned in Beckley, West Virginia, on March 17, 2008. (See footnote 1) Subsequent to this hearing, an *Order of Joinder and Notice of Hearing* was entered on May 20, 2008, joining the West Virginia Department of Education as an indispensable party. Day two of the level four hearing was convened in Beckley, West Virginia, on August 5, 2008. Grievant appeared in person and by his counsel, John W. Feuchtenberger, Esq. Respondent McDowell County Board of Education appeared by its counsel, Kathryn Reed Bayless, Esq. Respondent West Virginia Department of Education appeared by its counsel, Heather l. Deskins, Esq. The matter became mature for consideration upon receipt of the parties' fact/law proposals on November 13, 2008.

Synopsis

Grievant contends that he should have been selected over Roger K. Smith for the position of principal of the McDowell County Career and Technology Center ("CTC"). He argues that the selection process was flawed, the statutory criteria were not appropriately evaluated, he was more qualified, and the provisions of § 18A-4-7a providing for the selection of the most qualified applicant should control the analysis. The evidenceestablished that an interview committee was properly appointed, interviews conducted, and a consensus was reached regarding the recommendation of Mr. Smith, based upon his more relevant experience in secondary administration. The statutory criteria were evaluated and considered, the selection of Mr. Smith was based upon relevant considerations, and it did not reflect an abuse of the Board's discretion in such matters. In November 2001, DOE intervened in the operations of the McDowell County Board of Education. The State Superintendent of Schools is under no obligation to comply with § 18A-4-7a in making the final decision in the principal's selection now challenged by Grievant. No showing has been made that the State Superintendent acted arbitrarily or capriciously in filling this position. The grievance is denied.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact:

Findings of Fact

1. Grievant is employed by the McDowell County Board of Education ("BOE") as the director of special education. Grievant has held that position since 1985.

2. Grievant applied for the position of principal of the McDowell County Career and Technology Center ("CTC") in response to a vacancy posted on March 20, 2006. Grievant was not the successful applicant for that position and grieves his non-selection.

3. By way of background, after the West Virginia State Department of Education ("DOE") intervened in the McDowell County school system, it was decided that a reorganization of the central office was needed. (See footnote 2) As a result, the position at the CTC,which had been a director/principal position, was changed to a principal only position when the contract of the former director/principal was terminated. Assistant Superintendent Peggy Freeman then assumed the duties of vocational director.

4. Prior to the time the vacancy at issue was posted, a new and more specific job description for the principal's position was developed. That description was developed by Assistant Superintendent Freeman after she reviewed similar descriptions from several other counties.

5. The changes made to this position, and the job description were approved by the State Superintendent of Schools. The posting of this particular position, including the certification requirement, was approved by the State Superintendent of Schools.

6. The posting for the principal's position at CTC required administrative certification 9-12, a masters degree, and a minimum of three years of successful experience as an administrator at the secondary level. Four persons applied for the position. All applicants were certified for the position.

7. Grievant acknowledges that he has no experience in a secondary school setting as an administrator. Grievant asserts his qualifications substantially satisfy that particular job posting requirement. Grievant is certified in Elementary Principalship, Middle School Principalship, Secondary Principalship, and Supervisor in Special Education as a general supervisor, Vocational Education, the Superintendency, and Social Studies. 8. Grievant further asserts that he had administrative experience from 1985 to the present with K-12 schools by his supervision of the county wide special education program.

9. The only school based administrative experience of Grievant is a 2 ½ year period served as principal at Coalwood Elementary School prior to 1985.

10. The successful applicant, Roger Smith, had served three years as a middle school principal, two years as an assistant high school principal, and two years as a high school principal.

11. A selection committee composed of Dr. Mark A. Manchin, then Superintendent of the McDowell County schools, Peggy Freeman, Assistant Superintendent of the McDowell County schools, and three instructors at the CTC, Francine Kirby, Bob McKinney and Bob Poore, interviewed all applicants for the position.

12. Both Grievant and Mr. Smith were awarded the same number of points for certification, degree level, academic achievement, relevant specialized training and past performance evaluations. Mr. Smith was awarded seventy points for administrative experience relevant to the position, and Grievant scored zero points. The committee members assessed the “other measures and indicators” criterion resulting in Grievant being awarded ten points, and Mr. Smith being awarded thirty points.

13. The completed interview score sheets demonstrated that Grievant's qualifications were fairly considered, and that he ranked third out of four candidates interviewed. 14. Consistent with the facts described in the preceding paragraphs, Dr. Manchin recommended to the State Superintendent of Schools that Grievant not be offered the principal position, and he was not.

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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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). “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).

Grievant's argument against the decision made in this case by the State Superintendent of Schools is based largely on the contention that the Superintendent failed to comply with W. Va. Code § 18A-4-7a. Respondent BOE asserts Grievant has failed to prove, by a preponderance of the evidence, that he was the most qualified applicant for the position. Respondent DOE argues that the applicable standard for review is not “most qualified” under § 18A-4-7a, but whether the action of the State Superintendent of Schools was arbitrary and capricious pursuant to the provisions of W. Va. Code § 18-2E-5. Grievant counters that DOE is estopped from raising this objection. In support of

this argument, Grievant points out that the BOE went through the § 18A-4-7a procedure, and made a recommendation based on those factors. To adopt an “arbitrary and capricious”standard on the State Superintendent's approval of the successful applicant for the position would make a mockery of the selection process. Certainly divergent arguments to what are essentially undisputed facts, however, they are not impossible to reconcile in some meaningful fashion.

At the time in question, the State Department of Education had intervened in the operations of the BOE pursuant to W. Va. Code § 18-2E-5, suspending the operation of W. Va. Code § 18A-4-7a. However, because the Respondent BOE appears to have intended to follow § 18A-4-7a, in its posting and its selection decision, its adherence to those procedures will be analyzed, in order to assess the reasonableness of the recommendation to the State Superintendent.

The State Superintendent has the authority to make selection decisions in intervention counties. The West Virginia Code grants the DOE, and State Superintendent broad powers once it has taken control of a county, including the ability to make hiring decisions with regard to vacant principal and administrator positions. Specifically, W. Va. Code § 18-2E-5(p)(4)(C) provides the following:

> [t]he state board shall intervene in the operation of the school system to cause improvements to be made that will provide assurances that a thorough and efficient system of schools will be provided. This intervention may include, but is not limited to, the following:
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> (v) Taking any direct action necessary to correct the emergency including, but not limited to, the following:
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> (I) Delegating to the state superintendent the authority to replace administrators and principals in low performing schools and to transfer them into alternate professional positions within the county at his or her discretion; and
>
> (II) Delegating to the state superintendent the authority to fill positions of administrators and principals with individuals determined by the statesuperintendent to be the most qualified for the position. Any authority related to intervention in the operation of a county board granted under this paragraph is not subject to the provisions of article four [§§ 18A-4-1 et seq.], chapter eighteen-a of this code;

The Legislature clearly grants the State Superintendent the authority to fill the position to which

Grievant asserts he is entitled to be awarded. Furthermore, the statute indicates this authority is not subject to W. Va. Code §§ 18A-4-1, *et seq*. Therefore, Grievant cannot assert a claim based on this statute, as the above provisions of W. Va. Code § 18-2E-5(p) specifically supersede the provisions of § 18A-4-7a. *Mahone v. Mingo County Bd. of Educ.*, Docket No. 07-29-126 (April 25, 2008); *Hicks v. Mingo County Bd. of Educ.*, Docket No. 07-29-054 (April 23, 2008).

County Superintendents in intervention counties do, as a general rule, recommend employees to the State Superintendent based on an analysis of the appropriate factors set forth in § 18A-4-7a. DOE points out that this exercise prepares the counties to appropriately hire personnel when local control is returned and the county operations are no longer governed by the State Department of Education. Accordingly, a review of the selection process is appropriate on the issue of the most qualified applicant, and whether there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used.

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

(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).

The BOE did not abuse its discretion in determining the scoring to be applied to the various statutory criteria. The experience each applicant had accrued as a secondary administrator was an important factor in the selection process. While Grievant has attempted to equate his experience as a central office administrator in the very narrow field of special education to that of a school-based administrator, his duties, for more than twenty years, have focused upon the county wide administration of the special education program. Grievant's duties are not the same as those expected to be performed by an administrator in charge of over seeing a secondary school.

Grievant has attempted to equate his experience as a principal of an elementary school to the secondary administration qualification. The requirement that a successful applicant have three years of experience as an administrator at the secondary school level is not an unreasonable requirement and is rationally related to the vacancy which was posted. In addition, this requirement was approved by the State Superintendent of Schools. The BOE and the State Superintendent have not abused their discretion in determining that such experience is important nor have they abused their discretion in the scoring weight assigned to this criterion.

Grievant has not shown that it was unreasonable, arbitrary or capricious to require a minimum of three years of successful experience as an administrator at the secondary level as a qualification for the position of Principal at the CTC. The record indicates that the posting at issue was developed after researching job postings from other counties, and each of these counties required experience at the secondary level for the position ofvocational principal. The record further supports this qualification to be appropriate due to the age level of the vocational student, which often includes adults, and due to the significant curriculum, financial, and scheduling requirements that vocational principals must implement and oversee. The inclusion of a minimum of three years of successful experience as an administrator at the secondary level as a qualification for the principal position is reasonably related to the successful performance of the job, and is not so narrowly tailored as to favor a specific applicant. The undersigned concludes that the decision to award the position to Mr. Smith was reasonable by any of the above standards, which is all that is required for it to pass muster under this Board's review.

The following Conclusions of Law support the Decision reached.

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. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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). “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. W. Va. Code § 18-2E-5(p) specifically grants the power to fill the positions of administrators and principals in school systems under State Department of Education intervention to the State Superintendent. 3. 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).

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. Respondent DOE's selection of Roger Smith for the principal position at issue was not arbitrary and capricious, an abuse of 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 McDowell County. Any such appeal must be filed within thirty (30) days of receipt of this decision.

W. Va. Code § 18-29-7 (*See Footnote 1, supra)*. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is aparty 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: December 8, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature in S.B. 442 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 being 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. Any references in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

In November 2001, DOE intervened in the operations of the McDowell County Board of Education, limiting its authority as to the employment of school personnel, bydelegating this authority to the State Superintendent of Schools.