THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

GINA HICKS,

Grievant,

Docket No. 07-29-054

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Gina Hicks, employed as a special education teacher at Kermit Area School (K - 8) by the Mingo County Board of Education ("Respondent"), grieves her non-selection for the posted position of Assistant Principal at Burch High School. Her statement of grievance was: "The Grievant was granted an Assistant Principal position and then removed. She claims violations of 18A-4-7a and arbitrary and capricious action." As relief, she sought "reinstatement to Assistant Principal position and all benefits including salary."

At the time of these events, Respondent was under the control of the State Department of Education ("DOE"), as explained below in greater detail. The non-selection decision which she grieves was made by the State Superintendent of Schools.

The Grievant filed at Level One on November 20, 2006. On that same date, the principal of the Grievant's school met with her. The principal denied the grievance in a letter dated

November 27, 2006, on the basis that she lacked authority to grant the relief requested. On November 28, 2006, the Grievant filed at Level Two. By agreement, a Level Two hearing was conducted on January 12, 2007. A Level Two decision denying the grievance was mailed to the parties on February 12, 2007. On February 14, 2007, the Grievant appealed to this Board at Level Four. (See footnote 1) Former Acting Chief Administrative Law Judge Reynolds conducted a Level Four hearing at the Board's offices in Charleston on October 18, 2007. The Grievant appeared in person and by her representative, Sidney Fragale, Staff Representative, AFT-West Virginia. Respondent Mingo County Board of Education was represented by its attorney, Harry M. Rubenstein. The West Virginia Department of Education also appeared at the Level Four hearing, by its attorney, Assistant Attorney General Anthony D. Eates II. (See footnote 2) The parties and DOE agreed to submit proposed findings of fact and conclusions of law by November 12, 2007, and they did so. They also agreed that they could choose to submit responses to the proposals due on November 12 by November 16, 2007. The case became mature for decision on November 17, 2007, by which date no party had elected to submit responsive proposals.

On March 13, 2008, the case was reassigned to the undersigned for decision, due to the retirement of Acting Chief Judge Reynolds.

Summary

In this case, the Grievant, an assistant high school principal candidate, challenges her non-selection by the State Superintendent of Schools during a period when the State Superintendent was acting under what is known colloquially as the "takeover" authority of the West Virginia Board of Education. Grievant maintains that the county school authorities awarded her the position, but that state officials subsequently withdrew the offer; that the state officials' decision was arbitrary and capricious; and that the state officials failed to comply with selection statutes applicable to county boards of education.

As a matter of law, county school authorities lacked the power to award Grievant the position. At the time in question, their authority had been lawfully preempted by the State Department of Education. The decision of the State Department of Education officials not to place Grievant in the assistant principal position was not arbitrary and capricious. Grievance

denied.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. The February 15, 2005, minutes of the West Virginia Board of Education, http://wvde.state.wv.us/boe-minutes/2005/wvbeminutes021505.html , reflect its adoption of a resolution which:

_ describes the State Board's earlier declaration of a state of emergency in the Mingo County School System; and

_ "delegate[s] to the State Superintendent the authority to fill positions of administrators and principals with individuals determined by the State Superintendent to be the most qualified for the positions." *Id*., ¶¶ 7, 11.

2 2. The February 15, 2005, resolution remained in effect at all times relevant tothe facts involved in this grievance.

3 3. On September 13, 2006, while employed by Respondent as a special education teacher at Kermit Area School (K - 8) in Mingo County, the Grievant applied (among other jobs) for the posted position of Assistant Principal at Burch High School in Mingo County.

4 4. Following interviews, Jada Hunter, the principal at Burch, recommended Grievant for the position, describing her as the most qualified applicant; Ms. Hunter's recommendation was made to Nell Hatfield, Mingo County Schools Personnel Coordinator. **(See footnote 3)**

5 5. The Grievant was disciplined in 2002 for an incident involving a boyfriend or former boyfriend, which occurred at Respondent's offices. Following a grievance decision, the Grievant was suspended for twenty days in connection with that incident. The details are set forth in the Grievance Board's decision in *Hicks v. Mingo County Bd. of Educ*., Docket No. 02-29-216/257 (June 24, 2003).

6 6. During the State Department of Education's hiring process, the existence of prior disciplinary action caused the Grievant's application to be flagged.

7 7. Deputy State Superintendent of Schools Dr. Jack McClanahan reviewed the Grievant's application.

8 8. Dr. McClanahan ultimately decided that the Grievant's prior discipline, and the incident which gave rise to it, should eliminate her from consideration for the position, at least at the time her application was reviewed, some four years after the incident, and threeyears after her punishment was finalized through the grievance process.

9 9. Dr. McClanahan's decision to recommend that Grievant not be offered the position was based, among other things, on the fact that assistant principals have significant disciplinary responsibilities and must be role models for the students whom they might have occasion to discipline. Dr. McClanahan also concluded, based on his experience in the state school system, which included experience hiring several principals and assistant principals, that a 20-day suspension was a relatively severe and unusual punishment.

10 10. Consistent with the facts described in the preceding paragraphs, Dr. McClanahan recommended to the State Superintendent of Schools that Grievant not be offered the assistant principal position, and she was not.

Discussion

Burden of Proof

Because this is not a disciplinary case, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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); recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion).

Failure to Comply with County Board of Education Hiring Statutes

The Grievant's argument against the decision made in this case by the StateSuperintendent of Schools is based largely (See footnote 4) **on the contention that he failed to comply with W. Va. Code § 18A-4-7a (2005).** (See footnote 5) **That section is captioned "Employment, promotion and transfer of professional personnel; seniority." It governs hiring**

decisions by county boards of education in ordinary circumstances. However, § 18A-4-7a was pre-empted by the West Virginia Board of Education resolution described in the Findings of Fact, above, which was adopted pursuant to the authority of W. Va. Code § 18-2E-5 (2005). (See footnote 6) Subsection (n)(4)(C) of that section provides, in pertinent part:

> **(C) Whenever nonapproval status is given to a school system, the state board shall declare a state of emergency . . . . If progress in correcting the emergency, as determined by the state board, is not made within six months . . . , the state board shall intervene in the operation of the school system . . . . 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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> *** * ***
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> **(II) Delegating to the state superintendent the authority to fill positions of administrators and principals with individuals determined by the state superintendent to be the most qualified for the positions. Any authority related to intervention in the operation of a county board granted under this paragraph is not subject to the provisions of [§§ 18A-4-1 to 18A-4-20] . . . .**

Section 18-2E-5 and the W. Va. Board of Education resolution quoted above in the Findings of Fact, taken together, mean that the State Superintendent was under no obligation to comply with § 18A-4-7a _ nor, for that matter, with any other section of Article 4 of Chapter 18A. (See footnote 7) As a result, there is no need to examine whether the Superintendent complied with section 7a. To the extent this grievance is based on the State Superintendent's failure to comply with W. Va. Code § 18A-4-7a (2005), the grievance is untenable.

Whether the Grievant was told by county school officials that she had been selected for the position is irrelevant because those officials lacked authority to make the selection. (It is difficult to believe that in 2006 anyone in the Mingo County school system could have thought that they did. The takeover of the Mingo County schools was not just well publicized in Mingo County. It was big news throughout West Virginia.) More important, the record contains no evidence that the Grievant was the victim of misrepresentation, nor that she relied in some detrimental way on a conviction that she had been given the job.

Claim that Non-selection was Arbitrary and Capricious

In the absence of controlling authority and for purposes of this decision, the undersigned assumes that the State Superintendent's exercise of powers which preempted W. Va. Code § 18A-4-7a did not free him to make a hiring decision in an arbitrary and capricious fashion. Government action may be found arbitrary and capricious when the decision-maker misapplies the law; entirely fails to consider an important aspect of theproblem; offers an explanation that runs counter to the evidence; or offers an explanation so implausible that it cannot be attributed to a difference of opinion, or to the exercise of the decision-maker's expertise. *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996); s*ee generally Martin v. Randolph County Bd. of Educ*., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). *See 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). While a searching inquiry into the facts is required to determine whether an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the decision maker whose action is challenged. *See Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

In this case the West Virginia Deputy Superintendent and Superintendent of Schools eliminated the Grievant from consideration for an assistant principal's position, in a county whose school system had been declared in a state of emergency. Their decision was made primarily because of her relatively recent 20-day suspension for involvement in a fight of a domestic nature in the County School Board's offices, during working hours, and with other employees present. Such a decision does not step over the line of the arbitrary and capricious standard. That standard, as articulated by the Supreme Court of Appeals in *In re: Queen, supra,* says _ among other formulations _ that if the action in question is attributable to "a difference in view or the product of [the official's] expertise," then it is not arbitrary and capricious.

The decision in question here is precisely one about which people can disagree _ asthe Grievant does, for perfectly understandable reasons. The decision at issue also involved the State Department of Education officials' application of their expertise. They did exactly what

they are paid to do; they made a judgment call. As it happens, their decision was made using the extraordinary powers the Legislature has granted to state officials for use in specifically-defined emergency circumstances. The extraordinary nature of the administration of the Mingo County school system at the time in question would counsel _ if anything _ greater reluctance than usual to second-guess a high school assistant principal personnel decision such as the one involved here. In any event, the undersigned concludes that the decision was rational and reasonable by any standard, which is all that is required for it to pass muster under this Board's review.

Conclusions of Law

1 1. When the W. Va. Board of Education intervenes in a county school system under W. Va. Code § 18-2E-5 (2005), subsection (n)(4)(C)(v)(II) of that section preempts Article 4, Chapter 18A of the Code, which ordinarily governs hiring decisions by county boards of education. In such circumstances, the State Superintendent is under no obligation to comply with W. Va. Code § 18A-4-7a (2005) in making selection decisions such as the one challenged here.

2 2. As a result of he decision of the State Board of Education to intervene in the administration of the Mingo County school system, under the authority of W. Va. Code § 18-2E-5 (2005), local officials had no authority to make the selection decision in this case.

3 3. Government action may be found arbitrary and capricious when the decision-maker misapplies the law; entirely fails to consider an important aspect of the problem; offers an explanation that runs counter to the evidence; or offers an explanation soimplausible that it cannot be attributed to a difference of opinion, or to the exercise of the decision-maker's expertise. *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996); s*ee generally Martin v. Randolph County Bd. of Educ*., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). *See 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). While a searching inquiry into the facts is required to determine whether an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the decision maker whose action is challenged. *See*

***Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The State Schools Superintendent's decision not to offer the assistant principal position to the Grievant in this case was rational and reasonable by any standard, and was not arbitrary and capricious under the standard set forth above.**

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (2006) (repealed, *see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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.

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Thomas J. Gillooly

Administrative Law Judge

Date: April 23, 2008

Footnote: 1

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: 2

The West Virginia Department of Education was effectively treated as a party to the grievance at both the Level Two and Level Four hearings, appearing, participating, and submitting proposed findings and conclusions, at both levels. (At Level Two, it was represented by its General Counsel, Heather L. Deskins.) However, it appears

that the Department of Education was never formally joined as a party to the grievance. The reason for this is not apparent from the record.

Footnote: 3

The undersigned assumes, without finding, that Ms. Hatfield told the Grievant she had been selected for the position, as the Grievant contends. Whether the Grievant was told this is not material to the legal issue presented by the grievance, as explained below in the Discussion section of this Decision.

Footnote: 4

There is a single statement in Grievant's proposed findings of fact and conclusions of law which suggests that the Grievant was the object of disparate treatment. Nothing in the record supports this legal theory, and it is fair to say that the single reference to it in Grievant's submission amounts to abandonment of the issue. The statement of grievance made no such claim in any event, nor does it appear to have been pursued at the lower levels.

Footnote: 5

At the time of the events in question, the version of the West Virginia Code in effect in 2005 controlled, although as of the date of this Decision, there have been no subsequent amendments to § 18A-4-7a.

Footnote: 6

See the immediately preceding footnote. W. Va. Code § 18-2E-5 has since been amended. The language discussed in this Decision remains intact, however; only the numbering of the subsections has changed.

Footnote: 7

Cline v. Mingo County Bd. of Educ., Docket No. 05-29-193 (Oct. 21, 2005) does not hold to the contrary, nor does it offer any principles of law germane to the issues raised by this grievance.