THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROCHELLE HATCHER,
Grievant,

v. **Docket No. 05-41-389R**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Rochelle Hatcher, filed a grievance against her employer, Raleigh County Board of Education, on July 15, 2005. The statement of grievance reads "W. Va. Code 18A-4-7a."

For relief Grievant seeks, "Placement in title I position; backpay [sic], benefits."[1] By letter dated July 15, 2005, the Director of Personnel acknowledged the receipt of this grievance at level one, and denied the same. Grievant then appealed to level two. A level two hearing was held on September 1, 2005, whereby this grievance was once again denied. Respondent waived consideration at level three. Upon appeal to level four, the parties agreed to waive the hearing and submit this case on the level two record. On January 24, 2006, the Grievance Board issued a Decision denying this grievance based on timeliness. This decision was appealed to Kanawha County Circuit Court, and on January 21, 2009, the Honorable Jennifer Bailey Walker entered an Order reversing the case and remanding it back to the Grievance Board for a full hearing on the merits. On May 22, 2009, the remand hearing was held in the Grievance Board's Beckley Office.

---

[1]Grievant's initial requested relief is unavailable, as the school closed at the end of the 2004-2005 school year, and the position is no longer available. Grievant began the hearing by asserting she was seeking to amend the relief sought to include employment in some other position. Respondent objects to Grievant's request to amend the original relief.

Grievant was represented by Ben Barkey, West Virginia Education Association, and Raleigh County Board of Education was represented by Gregory Bailey, Bowles Rice McDavid Graff & Love LLP. This case became mature for decision on June 23, 2009, upon the parties' submission of Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts she was not chosen for the Title I position at the Alternative Education Center. Grievant argues the West Virginia State Department of Education determined the successful candidate ineligible for receiving a permit.[2] Yet, Respondent allowed that individual to remain in the position as a substitute. Grievant avers she should have been placed in the Title I position after the successful candidate was determined not to be permit eligible.

Respondent asserts Grievant did not meet the minimum qualifications for the position, in that she did not hold the required certification. Respondent avers that since Grievant was not minimally qualified for the position, she lacks standing to grieve the selection of another candidate for the position, as she did not show an adverse affect. Lastly, Respondent argues it did not abuse its discretion in filling the contested position.

Grievant did not meet her burden of proof. This grievance is DENIED.

---

[2]West Virginia Board of Education Policy 5202, §7-A-1 states: "A permit is a one-year license issued at the request of the employing superintendent to staff a specific position. The county superintendent verifies that the applicant is the most qualified candidate." This permit can only be requested if no certified applicant applies for the position. Then the county board is required to petition the West Virginia Department of Education.

Findings of Fact

1. Grievant was employed by Respondent as a substitute teacher from January 2000, to November 14, 2005.

2. By posting dated November 15, 2004, Respondent advertised a vacancy for the position of No Child Left Behind Title I teaching position at the Alternative Education Center.

3. The minimum requirement according to the position posting was "Remedial Reading Authorization or Reading Specialist Certification Required." Level II Hearing, Joint Exhibit 2.

4. Four individuals, including Grievant, applied for the Title I position. After the only certified applicant declined the position, and a second applicant accepted another job, only Grievant and Billie Jo Vandall were interviewed for the position. Neither applicant held Reading Specialist Certification.

5. Jeff McClung, then Principal at the school, interviewed both Grievant and Billie Jo Vandall, and evaluated them based on the first set of factors outlined in W. VA. CODE §18A-4-7a. Mr. McClung also included a written interview that outlined the seven factors set forth in the code.

6. Mr. McClung reviewed the personnel files of both Grievant and Ms. Vandall.

7. Grievant has a Bachelor's degree in Education, and a Master's degree in Counseling, with nine graduate hours in Reading.

8. Ms. Vandall was working on completing her Special Education Degree, and was on an Option 4 substitute license.

9. When assessing the candidate's experience, Mr. McClung looked at their experience in Reading, but also their experience in Alternative Education.

10. Ms. Vandall had been serving as a substitute in the vacant position for at least six weeks, and had taught in an alternative setting for a total of twelve weeks.

11. Ms. Vandall had Crisis Prevention Training ("CPI") which is required for all Alternative Education Teachers. Grievant did not have this training.

12. Mr. McClung recommended Ms. Vandall as the successful applicant based on the amount of teaching experience she had acquired with alternative students, and the need for providing continuity of services to such students.

13. Subsequent to Mr. McClung's recommendation, an application for a reading permit was filed with both Marshall University Graduate College and the West Virginia Department of Education. Marshall University did not sign the recommendation for a permit, and the West Virginia Department of Education denied Ms. Vandall the reading permit.

14. In the time while the request for the permit was being reviewed, Ms. Vandall was approved by the Raleigh County Board of Education ("RCBOE") for the Title I Reading position at its January 11, 2005, meeting with an effective date of December 10, 2004.

15. Upon being informed that Ms. Vandall could not obtain the reading permit, the RCBOE voted to remove her from the position at its February 8, 2005, meeting. The effective date of the removal was January 31, 2005.

16. Sometime in January or February 2005, Mr. McClung was definitively informed that the Title I position at the Alternative Education Center would be terminated the following school year.

17. Knowing the position would expire at the end of the school year, Mr. McClung decided to keep Ms. Vandall in the position as a substitute to maintain consistency for the students.

18. At the time of the interview, Grievant had two transcripts on file with the personnel office. Neither of these reflected any course work in Reading. At the time of the job posting, Grievant did not produce any additional transcripts.

19. On February 2, 2005, Grievant's third transcript was forwarded to the Personnel Office. This transcript reflected nine hours of Reading instruction completed during the summer 2004 term, and indicated enrollment in six hours of Reading classes for the spring 2005 term.

20. The Alternative Education Center closed at the end of the 2004-2005 school year.

Discussion

This is not a disciplinary action, and Grievant bears the burden of proving her grievance by a preponderance of the evidence.[3] *Howell v. W. Va. Dep't of Health &*

---

[3]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.

Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). 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 Grievant has not met this burden. *Id*.

Respondent asserts Grievant was not minimally qualified for the position and therefore lacks standing to grieve her non-selection. The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Board of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone

---

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.

of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

This Grievance Board has also repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the selection process. *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994). *See also Weaver v. Mason County Bd. of Educ.*, Docket No. 94-26-028 (Oct. 25, 1994).

The posting for the Title I position required, "Remedial reading authorization or reading specialist certification required." The only qualified candidate declined the position. Neither Ms. Vandall nor Grievant were qualified. Yet, both were interviewed. Ms. Vandall was offered the position, and steps were taken by the Respondent to obtain a permit that would allow Ms. Vandall to be qualified. Because Grievant had earned a Master's Degree and had six hours of reading, she would have been permit eligible, and therefore, could have held the position. For that reason, the undersigned finds Grievant has standing to grieve her non-selection.

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 [§18A-2-12], 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.

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). However, that discretion 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.

Jeff McClung, Assistant Director of Pupil Services and Coordinator of Alternative Programs testified that each of the factors contained in the first set of criteria contained in W. VA. CODE §18A-4-7a was considered in evaluating the qualifications of the applicants. The factor afforded the most weight in this case was the experience Ms. Vandall had with the students in the Alternative Education Center and her demonstrated ability to work with at-risk students.

It was not clear from the transcript or the hearing whether the Grievant is specifically grieving her initial non-selection or her non-selection after Ms. Vandall was denied a permit. Both of these will be addressed.

"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 prove that Respondent's decision to initially offer the position to Ms. Vandall was arbitrary and capricious. Respondent assessed the required factors, giving the most weight to Ms. Vandall's experience with at-risk students and specifically her experience in this particular classroom.

It appears that a decision was reached to eliminate the Title I position around the same time that it was learned that Ms. Vandall was not eligible for a permit. Respondent then made a decision not to fill the position, but to leave Ms. Vandall in as a substitute so as not to cause a disruption for the students. This decision is not arbitrary and capricious. It was made based on the needs of both the students and the school. Grievant has failed to prove by a preponderance of the evidence that the Respondent acted in an arbitrary and capricious manner.

Conclusions of Law

1. This is not a disciplinary action, and Grievant bears the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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 Grievant has not met this burden. *Id*.

2. The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Board of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997).

3. It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990).

4. This Grievance Board has also repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the selection

process. *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994). *See also Weaver v. Mason County Bd. of Educ.*, Docket No. 94-26-028 (Oct. 25, 1994).

5. Because Grievant was permit eligible, she has standing.

6. 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 [§18A-2-12], 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.

7. 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). However, that discretion 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.

8. "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.

9. Grievant has not met her burden of proof that Respondent's decision to initially offer the position to Ms. Vandall was arbitrary and capricious.

10. Grievant has not met her burden of proof that Respondent's decision to leave Ms. Vandall in the Title I position as a substitute was arbitrary and capricious.

Accordingly, this 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 § 18-29-7. (*See Footnote* 3). 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: July 27, 2009

_____

Wendy A. Campbell Elswick
Administrative Law Judge