THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

AVERY RAY BAILEY,
Grievant,

v. **Docket No. 2008-0442-McDED**

McDOWELL COUNTY BOARD OF EDUCATION
and WEST VIRGINIA DEPARTMENT OF EDUCATION,
Respondents.

DECISION

Grievant, Avery Ray Bailey, filed a grievance against his employer, McDowell County Board of Education[1], on July 17, 2007. The statement of grievance reads "non selection [sic] for Assistant Superintendent position. Most qualified applicant was not selected. Certification."

For relief Grievant seeks, "Placement in position with all back pay, plus interest and related benefits." A level one hearing was held on September 11, 2007. Grievant was represented by Ben Barkey, West Virginia Education Association, and McDowell County Board of Education was represented by Kathryn Bayless, Esquire.[2] The parties agreed to submit this case to level three on the record developed below. This case became mature for decision on March 3, 2009, upon the parties' submission of Findings of Fact and Conclusions of Law.

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[1]At the time this grievance was filed, West Virginia Department of Education had intervened in the operation of the McDowell County school system. Grievant did not include the Department of Education in his original filling. However, on April 10, 2008, Administrative Law Judge Thomas Gillooly joined the State Department as an indispensable party pursuant to 156 C.S.R. 1 §6.13.

[2]Because the West Virginia Department of Education was not joined until after this hearing, it was not represented. However, after April 10, 2008, the Department of Education was represented by Heather Deskins, Esquire.

Synopsis

Grievant asserts he was most qualified for the position of Assistant Superintendent of Elementary Education and Planning because his teaching license reflects that he is certified in administration, and he holds a current superintendent endorsement. He argues he should have been the successful candidate when looking at his endorsements plus his years of experience.

Respondents aver Grievant was not the most qualified candidate. Respondents also assert there is no legal requirement that the successful applicant must hold a superintendent endorsement. Respondents followed proper procedure in the hiring of the position. This grievance is denied.

Findings of Fact

1. At the time of this grievance, McDowell County Schools were operating under the intervention of the West Virginia Department of Education. Therefore, the final determination as to who was awarded the position was made by the Department of Education.

2. Grievant was employed by Respondent as the Principal of Iaeger Elementary School when he filed this grievance.

3. Grievant worked in McDowell County Schools in various capacities from 1967-1975. He then worked in private industry and returned to the school system as an elementary school principal in 2000.

4. Grievant has never been employed in the central office and has never held any position that involved supervision on a countywide basis.

5. On June 15, 2007, Respondents posted a vacancy for the position of Assistant Superintendent of Elementary Education and Planning. The qualifications for the position were:

A. At least three years of successful teaching and three years as an administrator. District wide experience preferred.
B. A Master's degree.
C. Must hold or be able to obtain a valid WV Administrative certificate.
D. Prior experience in program planning and budgeting.
E. Such alternatives to the above qualifications as the Superintendent may find appropriate and acceptable.

6. There were six candidates who met the minimum qualifications and interviewed for the position with Suzette Cook, who was serving at that time as Superintendent of McDowell Schools.

7. All candidates were asked the same interview questions and were assessed pursuant to the first set of criteria set forth in W. VA. CODE §18A-4-7a, the selection criteria applicable to an administrative position. All the questions asked were relevant to the position and did not give one candidate an advantage over the others.

8. Ms. Cook completed interview sheets on each candidate. These score sheets show Grievant's qualifications were fairly considered. Grievant ranked third out of six.

9. Carolyn Falin ranked first and was the successful applicant for the position. She holds a permanent certification in the areas of General Science, Multi-Subjects and Reading Specialist. Ms. Falin also held a temporary administrative certificate with a Principal endorsement. This temporary certificate expired on June 30, 2008.[3]

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[3]Ms. Falin now has a permanent administrative certificate endorsed for Principal and permanent certification in the areas of Superintendent and Supervisor General Instruction

10. Grievant holds a permanent certification in the areas of Principal Elementary/Junior High School, Supervisor General Instruction, Middle/Junior/Senior High School Principal, Vocational Administration, as well as a current superintendent endorsement.

11. Ms. Falin has district-wide experience; Grievant does not.

12. Ms. Cook recommended Ms. Falin be hired for the position, and the Director at the Department of Education agreed.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See* W. VA. CODE § 18-29-6; 156 C.S.R. 1 § 3. "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 party bearing the burden has not met its burden. *Id.*

At the time in question, the Department of Education had intervened in the operations of the McDowell County Schools pursuant to W. VA. CODE §18-2E-5.[4] Grievant asserts he was the most qualified for the Assistant Superintendent position. When filling

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effective January 10, 2008.

[4]This intervention suspends the operation of W. VA. CODE §18-4-7a. However, McDowell County Board of Education complied with §18-4-7a, in its posting and selection decision. Therefore, its adherence to this procedure will be analyzed.

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:

> (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).

While each factor in W. VA. CODE §18A-4-7a must be considered, this 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)). "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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). 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 v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998). Indeed, W. VA. CODE §18A-4-7a contemplates that county boards may look beyond certificates, academic training, 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 education 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.

Grievant asserted that he was more qualified for this position because he possessed a certificate/license endorsement for superintendent. However, W. VA. CODE §18-5-32(e) states that, "Rules for qualifications of assistant superintendents...shall be fixed by the State Board: Provided, That the qualifications required for any assistant superintendent shall in no event be higher than those required for the county superintendent..." The State Board has not promulgated any rule requiring that assistant superintendents possess a certificate/license endorsed for superintendent.

During testimony, Grievant also asserted that several questions in the interview were unfair.[5] He specifically mentioned a question concerning 21st Century skills. Ms. Cook testified that she felt that topic was relevant for the future, and she was assessing the

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[5]These allegations were raised during Grievant's testimony, and even though they were not mentioned in his statement of grievance, the undersigned would be remiss not to address this issue.

candidates' knowledge on that issue. She went on to explain that information on this topic was available on the state web site. Grievant scored a 0.2 out of 1. Ms. Falin received full credit for this question because she attended a training on the topic. This training was not established by McDowell County Board of Education. It was specifically for state department employees and higher education employees. According to this testimony, this was a valid area of inquiry, and simply because Ms. Falin had been to a training on the topic, did not make the question unfair. Applicants typically have varying backgrounds and skills.

Grievant also testified that in his opinion the questions concerning the math program were unfair. However, Ms. Cook testified, once again, that Grievant, as an elementary school principal, had extensive amounts of training in that area over the last three years. Grievant would have had the same information as any other elementary school principal. Once again, Grievant scored a 0.2 out of 1 in this category, the same as three other applicants.

Grievant also avers that he is more qualified because of his supervisory skills. He testified that he has supervised employees and completed employee evaluations, whereas he asserts Ms. Falin has no experience in those areas.

Ms. Cook testified that she decided district-wide experience was more important than supervisory skills because the majority of the duties associated with the position were not supervisory and evaluative. She explained that it was a position with various responsibilities.

Grievant has failed to establish that his qualifications were superior to those of the successful applicant. It appears as if Grievant believed supervisory experience would

benefit the successful applicant. However, Ms. Cook took a different view and felt that, given the job duties, it would be more beneficial for the successful applicant to have district-wide experience, which Ms. Falin did.

The recommendation to hire Ms. Falin, the applicant with the highest score, cannot be seen as arbitrary and capricious. It was based upon an assessment of statutory criteria. Ultimately, Grievant ranked third out of the six candidates. The undersigned does not find the decision-making process fatally flawed or that McDowell County Board of Education overstepped its broad discretion as described in W. VA. CODE §18A-4-7a.

Grievant has failed to prove by a preponderance of the evidence that the selection process was significantly flawed, legally insufficient, or that the selection of the successful applicant was unlawful, unreasonable or arbitrary and capricious. Accordingly, this grievance must be denied.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See* W. VA. CODE § 18-29-6; 156 C.S.R. 1 § 3. "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 party bearing the burden has not met its burden. *Id.*

2. 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:

> (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.

3. 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).

4. While each factor in W. VA. CODE §18A-4-7a must be considered, this 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).

5. 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)). "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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

6. 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 v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998). Indeed, W. VA. CODE §18A-4-7a contemplates that county boards may look beyond certificates, academic training, 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 education 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).

7. Grievant failed to introduce any evidence to support his argument that the selection of the position was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil

Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: May 12, 2009

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Wendy A. Campbell
Administrative Law Judge