WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LONNIE MORRIS
Grievant,

v. **Docket No. 2008-1011-RalED**

RALEIGH COUNTY BOARD OF EDUCATION
Respondent.

D E C I S I O N

Lonnie Morris, Grievant, employed by the Raleigh County Board of Education ("RBOE") as a mechanic, filed a level one grievance on December 28, 2007, alleging violation of W. VA. CODE §§ 18A-4-8 and 18A-4-8b(g), and challenging the job posting of an "Assistant Supervisor of Transportation" position. The grievance statement identifies the event as an "illegal job posting" and seeks as relief, "Re-post Job as it was Previously Posted."[1]

A level one decision issued on February 26, 2008, by Superintendent's designee Emily C. Meadows, Ed.D., denied the grievance at that level following a hearing held on February 6, 2007. Grievant appealed. Level two proceedings were waived. A level three hearing was convened before the undersigned Administrative Law Judge at the Public Employees Grievance Board's Beckley office on May 27, 2008. At the hearing, Grievant

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[1] At the level three hearing Grievant explained this to mean re-posting of the job opening with a classification listed in the [West Virginia School] law book, or one used previously (i.e., foreman, coordinator of services, chief mechanic) and, in accordance with past practices, award the job to an individual who has progressed through the ranks, such as himself. Grievant officially grieves the job posting, but it is readily apparent that Grievant is disturbed by Respondent's selection and the criteria used to fill a job opening [duties] he asserts traditionally was the next progressive step of his career path.

appeared in person and was represented by Phyllis Davis-Pennington, Vice President for West Virginia School Service Personnel Association. Respondent was represented by Gregory W. Bailey, Esquire, of Bowles Rice McDavid Graff & Love LLP. Proposed findings of fact and conclusions of law were submitted by the parties. This case became mature for decision on or about June 23, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Respondent posted and accepted applications in regard to a position identified as "Assistant Supervisor of Transportation." Grievant contends this is improper. While Supervisor of Transportation is a position recognized and defined in W. VA. CODE § 18A-4-8, the specific title Assistant Supervisor of Transportation is not listed therein. Eleven individuals, including Grievant, made application for the position of Assistant Supervisor of Transportation. Grievant, with more than twenty-seven years of service, was not the successful applicant. Grievant contends the position was contrived (not an official classification), and the Respondent invented the position with orchestrated qualifications to favor a specific applicant.

County School Boards have the authority to make decisions affecting promotions and the filling of service personnel positions. In exercising its substantial discretion in matters relating to school personnel, Respondent must be reasonable, execute duties in the best interests of the schools, and in a manner which is not arbitrary or capricious. Grievant failed to establish by a preponderance of the evidence that Respondent violated any section of WEST VIRGINIA CODE or acted in an arbitrary or capricious manner. Accordingly, this Grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact based upon a preponderance of the evidence presented;

Findings of Fact

1. Grievant is currently employed as a mechanic in the Transportation Department of the Respondent RBOE. Grievant has approximately twenty-seven years of service and has previously held the position of Chief Mechanic.

2. The position of Supervisor of Transportation is a title recognized and defined in W. VA. CODE § 18A-4-8. The specific title Assistant Supervisor of Transportation is not listed therein.

3. On September 17, 2007, Respondent advertised the position of Supervisor of Transportation, Pay Grade H2, with $975 monthly supplement. The immediate supervisor is listed as "Director of Transportation." "Supervisor of Transportation" means a "qualified person employed to direct school transportation activities properly and safely, and to supervise the maintenance and repair of vehicles, buses and other mechanical and mobile equipment used by the county school system." See W. VA. CODE § 18A-4-8 (80). Both Grievant and Respondent provided job descriptions for the position of Supervisor of Transportation. Resp. Ex. 3 and Gr. Ex. 1.[2]

4. Eddie Severt was the successful applicant for the position of Supervisor of Transportation. When Mr. Severt assumed the responsibilities of the position, he left the shop/garage location and physically moved to the transportation office. This created

[2] The job description of a Supervisor of Transportation provided by Grievant's exhibit specifically cited W. VA. CODE § 18A-4-8 to describe the duties of the position.

somewhat of a void in the supervisory personnel physically located in the shop/garage location.

5. On October 29, 2007, Respondent advertised the position of Assistant Supervisor of Transportation, Pay Grade H2. The "Supervisor of Transportation" was identified as the immediate supervisor for the position. A statutory definition of the job title, "Assistant Supervisor of Transportation," is not listed. The definition of a "Supervisor of Transportation" is listed citing W. VA. CODE § 18A-4-8. Resp. Ex. 1.

6. Among other qualification standards, the position of Assistant Supervisor of Transportation required qualification in three recognized job classifications: 1) Supervisor of Transportation; 2) Mechanic; and 3) Bus Operator.

7. Eleven individuals, who were employees of Raleigh County Schools, made application for the posted position of Assistant Supervisor of Transportation.

8. Three applicants qualified at the time of their applications for the position by either holding prerequisite classification or taking the appropriate qualifying test.[3] The most senior applicant and one other applicant withdrew prior to the administration of any of the qualifying tests. The remaining six applicants were offered in-service training and tested for the classification for which each lacked.

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[3] The requirements for competency testing by county boards of education are set forth in W. VA. CODE § 18A-4-8e, which defines the purpose of the tests as "to provide county boards of education a uniform means of determining whether . . . employees who do not hold a classification title in a particular category of employment meet the definition of the classification title." None of the applicants had held the position of Supervisor of Transportation.

9. Both the Grievant and the successful applicant met the minimum qualifications for the Assistant Supervisor of Transportation position as a result of classifications held at the time of the posting and competency test results.

10. After administration of the competency tests, the applications were evaluated as follows: The most senior remaining applicant failed the mechanic test and was no longer considered for the position; the second most senior remaining applicant qualified for all three classifications, but there is no indication in the evidence presented that he declined the position; the third most senior remaining applicant, Gary Watson, qualified for all three classification titles and was the successful applicant.

11. Gary Watson, the successful applicant held more overall seniority than Grievant with the County School system. Resp. Ex. 2. Gary Watson's seniority date is January 23, 1980 (1/23/80). Grievant's seniority date is June 16, 1980 (6/16/80).

12. Grievant was the fourth most senior remaining applicant and the third applicant to be considered after the qualifying tests.

Discussion

Grievant challenges the legality of the posted position of Assistant Supervisor of Transportation. Grievant argues that a County Board of Education must post jobs using WEST VIRGINIA CODE classifications. However, Raleigh County Schools posted a job title not contained in W. VA. CODE § 18A-4-8. In dispute is Respondent's ability to assign identified, non-disputed duties, to a job title other than a classification listed in W. VA. CODE § 18A-4-8. In that this is not a disciplinary case, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rule of the W. Va. Public

Employees Grievance Board, 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*.

Grievant asserts that historically the duties now being identified as that of an Assistant Supervisor of Transportation were performed by other legitimate classifications (i.e., foreman, coordinator of services, chief mechanic). Grievant alleges violation of W. VA. CODE § 18A-4-8b(g) contending the deviation from the classifications outlined in West Virginia Code is intended to favor specific individuals Respondent preselects for the positions.[4] W. VA. CODE § 18A-4-8b(g) in relevant part provides:

> Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant.

It is well-established that county boards of education have substantial discretion in matters relating to the hiring, transfer, and assignment of school personnel, provided that discretion is not exercised arbitrarily or capriciously and is exercised in the best interests of the schools. *Dillon v. Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986). Such discretion extends to the employment of service personnel. WEST VIRGINIA CODE § 18A-2-5 provides in part:

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[4] Specifically Grievant writes, "Raleigh County Schools has become liberal with writing classifications to suit the employees that someone wants in a specific area; giving no regard to West Virginia law."

> The board is authorized to employ such service personnel, including substitutes, as is deemed necessary for meeting the needs of the county school system.

Respondent's stated position with regard to this grievance is that the job title "Assistant Supervisor of Transportation" falls within the code classification category of "Supervisor of Transportation." Further, it is not unusual for county boards of education to establish job titles that are more descriptive than the general classification categories provided within W. VA. CODE § 18A-4-8.[5] Respondent's point of distinction is received favorably by the undersigned and is not without precedence. See *Newcome v. Kanawha County Bd. of Educ.,* Docket No. 98-20-080 (June 25, 1998). *See also Wellman v. Mercer County Bd. of Educ.,* Docket No. 95-27-327/300 (November 30, 1995).

It is true that the West Virginia State Supreme Court has explained that "[o]ur Legislature has devoted great attention to the regulation of school service personnel, and has established an exhaustive list of class titles [or positions or jobs] describing the general duties of any person working as a school service employee." *Board of Educ. of County of Randolph v. Scott*, 217 W.Va. 128, 617 S.E.2d 478 (2005) *citing Hancock County Bd. of Educ. v. Hawken*, 209 W.Va. 259, 262, 546 S.E.2d 258, 261 (1999) (footnote omitted). However, county boards of education may expand upon the W. VA. CODE § 18A-4-8 classification definitions in a manner which is consistent with those definitions. *Brewer v. Mercer Co. Bd. of Educ.*, Docket No. 91-27-002 (March 30, 1992); *Pope and Stanley v.*

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[5] This distinction may not be readily apparent to individuals not familiar with school law. Generally, classification means a category of class titles requiring similar responsibilities. For example, the classification category may be "Cook" but the class title could be "Cook I" or "Cafeteria Manager." See W. VA. CODE 18A-4-8e (a)(1). "Class title" means the name of the position or job held by a service person. See W. VA. CODE § 18A-4-8.

Mingo County Bd. of Educ., Docket No. 91-29-068 (July 31, 1992); *Beahm and Himes v. Randolph County Bd. of Educ.*, Docket No. 98-42-241 (Jan. 7, 1999). The proper focus is whether the duties and responsibilities identified in a class title are consistent with the duties actually required, regardless of the label a county board of education places on a position.

A county board of education has a duty to properly classify its school service personnel positions. That is, it must ensure that the duties of a particular position conform to the W. VA. CODE § 18A-4-8 classifications to which the position is assigned. Simply stated, Respondent is required to call the position what it is.

The employees holding the positions of "Supervisor of Transportation" and "Assistant Supervisor of Transportation" perform duties within the statutory definition of the classification of "Supervisor of Transportation." Grievant's exhibit one, Respondent's exhibit two and Respondent's exhibit three specifically cited to W. VA. CODE § 18A-4-8's definition of duties in describing the positions. Grievant made no showing that the duties of the "Assistant Supervisor of Transportation" position were inconsistent with the "Supervisor of Transportation" classification. Grievant asserted the duties *could* be performed by other classifications. This secondary issue, if true, would still be a discretionary matter within Respondents purview (Grievant is without authority to mandate the determination).

A county board of education must make decisions affecting the hiring of service personnel on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE § 18A-4-8b. Grievant did not establish that a county board of education is barred from identifying a position as an "assistant." Respondent did not violate an identified West

Virginia statute in posting a position titled Assistant Supervisor of Transportation in that the duties of the position are within a defined statutory classification.

It is readily apparent that Grievant is disturbed by Respondent's decision to fill the identified duties, now recognized as that of an Assistant Supervisor of Transportation position, with an individual other than himself. While Grievant officially grieves the job posting, this matter for all practical purposes is a non-selection grievance with a colorful (artful) legal theory.[6] Grievant believes this position by any other name is rightfully his. This is unfortunate in that Grievant has not established a violation of an identified West Virginia statute.

Grievant's representative referenced a deviation from classifications outlined in WEST VIRGINIA CODE being akin to "writ[ing] one's own ticket" and Grievant alleges violation of W. VA. CODE § 18A-4-8b(g). However, other than Grievant's testimony attesting to his good faith belief regarding manipulation of the system, Grievant offers no direct evidence to substantiate such allegations *with regard to the facts of this case*. Grievant did not establish by a preponderance of the evidence, that there was a flaw in the process (posting or selection) sufficient to suggest that the outcome may be reasonably different. Grievant seeks to compel Respondent to re-post the duties under an alternative classification. Yet, Grievant offered no evidence demonstrating that the duties of the contested job title were inconsistent with the Supervisor of Transportation classification. An agency's execution of discretion is given deference unless shown to be arbitrary and capricious. The relief requested simply is not warranted by the facts of this case.

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[6] Grievant contends that traditionally, the job duties in discussion were assigned to an individual who has progressed through the ranks.

County boards of education have substantial discretion with regard to matters related to the management of school operations. The discretion must be reasonably exercised in the best interests of the schools and not arbitrarily and capriciously. (Citations omitted). 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 are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "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 (W. Va. 1982); *Trimboli, supra*. "[T]he grievance procedure is not intended as a 'super interview,' but merely an analysis of the legal sufficiency of the selection process at the time it occurred. *Stover v. Kanawha County Bd. of Educ*., Docket No. 89- 20-75 (June 26, 1989); *Sparks v. Mingo County Bd. of Educ*., Docket No. 96-29-447 (Feb. 18, 1997). A grievant may obtain relief by proving, by a preponderance of the evidence, a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. *Hopkins v. Monroe County Bd. of Educ*., Docket No. 95-31-477 (Feb. 21, 1996).

In this grievance, there is no indication that a significant flaw occurred in the selection process that would have reasonably altered the outcome. Both Grievant and the successful applicant met the minimum qualifications for the position as a result of classifications held at the time of the posting and competency test results. Initially, there were eleven applicants for the position. Grievant failed to present any evidence that Respondent engineered the selection of Gary Watson as the successful candidate. The successful candidate was awarded the position based upon qualifications and his greater county seniority. Grievant did not establish that Respondent abused its authority or discretion in awarding the position of Assistant Supervisor of Transportation.

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 Rule 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id*.

2. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The discretion must be reasonably exercised in the best interests of the schools and not arbitrarily and capriciously. *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).

3. County boards of education may expand upon the W. VA. CODE § 18A-4-8 classification definitions in a manner which is consistent with those definitions. *Brewer v. Mercer Co. Bd. of Educ.*, Docket No. 91-27-002 (March 30, 1992); *Pope and Stanley v. Mingo County Bd. of Educ.*, Docket No. 91-29-068 (July 31, 1992); Beahm and Himes v. Randolph County Bd. of Educ., Docket No. 98-42-241 (Jan. 7, 1999).

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 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). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

5. "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 his judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*. "[T]he grievance procedure is not intended as a 'super interview,' but merely an

analysis of the legal sufficiency of the selection process at the time it occurred. *Stover v. Kanawha County Bd. of Educ*., Docket No. 89- 20-75 (June 26, 1989)." *Sparks v. Mingo County Bd. of Educ*., Docket No. 96-29-447 (Feb. 18, 1997).

6. Grievant has failed to establish by a preponderance of the evidence that Respondent violated any statute, rule or policy, abused its discretion, or acted in an arbitrary and capricious manner.

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 WEST VIRGINIA 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: January 13, 2009

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Landon R. Brown
Administrative Law Judge