THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DR. BEN GUIDO,
Grievant,

v. **Docket No. 2009-0456-CONS**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent,

and

LINDY L. BENNETT,
Intervenor.

DECISION

Grievant, Dr. Ben Guido, filed his initial grievance against his employer, Harrison County Board of Education, on September 15, 2008. The initial statement of grievance reads as follows:

> Harrison County Schools has failed to fill a posted position for an Assistant Superintendent of Schools within the prescribed time frame mandated in WV Code §18A-4-7a. Furthermore, the Superintendent has ignored requests regarding the status of said position from Dr. Guido, who properly bid on and is highly qualified for the position. In light of the fact that the county has failed to act in accordance with the law in regard to the job posting, Dr. Guido has been denied a fair and equitable opportunity to be considered for this position with a full and fair review of his qualifications being taken into account in accordance with WV Code §18A-4-7a. The Superintendent has also engaged in retaliatory behavior against him for inquiring into this matter. Specifically, Ms. Susan Collins, Superintendent, added to Dr. Guido's job responsibilities immediately following his inquiry into this matter. This was done by directing him to supervise an additional educational program which (1) is not located at his work site; (2) is not delineated in his job description; (3) was not his responsibility in previous years; and (4) with no additional compensation to be provided to him.

His relief sought states:

> Dr. Guido respectfully requests that Harrison County Schools be directed to comply with WV Code §18A-4-7a in regard to filling employment vacancies. Dr. Guido also requests to be placed in the Assistant Superintendent's

> position with all benefits and wages due him, including 10% interest, retroactive to the legally mandated time frame the position should have been filled. Should this remedy be construed by the Administrative Law Judge to not be permissible, Dr. Guido requests that he be afforded a fair and equitable opportunity to be considered for the Assistant Superintendent's position with a full and fair review of his qualifications being taken into account in accordance with WV Code §18A-4-7a. He further requests to be compensated retroactively, including 10% interest, for the additional job responsibilities that were directed of him by the Superintendent following his inquiry into the status of the Assistant Superintendent's position. Finally, Dr. Guido requests that there be no further acts of retaliation against him by Superintendent Collins or any other administrator of Harrison County Schools' for his questioning the status of the position or for the filing of this grievance in compliance with WV Code § 6C-2-3.

The level one hearing was scheduled for September 30, 2008, but was postponed until October 20 at the request of Grievant. On October 3, 2008, Grievant filed a second grievance and requested it be consolidated with the first. The subsequent statement of grievance reads as follows:

> At a special meeting of the Harrison County Board of Education on September 22, 2008, and following interviews of candidates for the position of Assistant Superintendent on the same day, the Superintendent requested and was granted "permission to appoint" an Assistant Superintendent of Schools. This occurred following a proper job posting which knowingly extended beyond the mandatory time frame for filling vacancies prescribed in WV Code §18A-4-7a. The timing and the specific meeting of the Board of Education where this appointment occurred was highly irregular and out of compliance with clearly established hiring practices. Furthermore, by failing to award Dr. Guido this position, the Superintendent has engaged in additional retaliatory behavior against him, in violation of WV Code § 6C-2-3, for filing a previous grievance on September 15, 2008, in regard to this matter. It was only following Dr. Guido's filing of the September 15, 2008 grievance that the Superintendent and the Board of Education took this action. Dr. Guido is the best suited and most highly qualified candidate for the Assistant Superintendent's position. Additionally, the Superintendent had predetermined the successful candidate for the position of Assistant Superintendent prior to holding interviews or requesting "permission to appoint" from the Board of Education which prevented Dr. Guido from a full and fair interview and from being the successful candidate in accordance with WV Code §18A-4-7a.

His relief sought reads:

> Dr. Guido respectfully requests that Harrison County Schools be directed to comply with WV Code §18A-4-7a in regard to filling employment vacancies. Dr. Guido also requests he be awarded the Assistant Superintendent's position with all benefits and wages due him, including 10% interest, retroactive to the legally mandated time frame the position should have been filled. Dr. Guido also requests that there be no additional acts of retaliation against him by the Superintendent or any other administrator of Harrison County Schools' for the filing of this grievance and the grievance dated September 15, 2008.

This grievance was denied at level one by Decision of the Superintendent's Designee dated January 13, 2009. Upon appeal to level two, a mediation session was conducted at the Grievance Board's Westover office on March 26, 2009. Grievant appealed to level three on March 30, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge at the Grievance Board's Westover office on June 12, 2009. Grievant appeared in person and by Katherine L. Dooley, Esquire, and by Susan Lattimer Adkins, West Virginia Professional Educators Association. Respondent appeared by Howard Seufer, Esquire, Bowles Rice McDavid Graff & Love LLP. Intervenor Lindy L. Bennett appeared pro se. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on July 14, 2009.

Synopsis

Grievant asserts he was the most qualified candidate for the position of Assistant Superintendent of Schools for Harrison County because he possesses a Doctorate Degree, a superintendent certification, and has vast experience in educational programs. Intervenor does not have a doctorate degree. There was no requirement that the Assistant Superintendent possess a doctorate degree. In addition, Respondent determined Central Office administrative experience was important, given the duties of the position.

Respondent's decision to hire the Intervenor was not arbitrary and capricious. In addition, Grievant failed to demonstrate that he was the victim of reprisal.

The following findings of fact are based on the record developed at level one and level three:

Findings of Fact

1. Grievant is employed by the Harrison County Board of Education and works as the Principal at Norwood Elementary School in Stonewood, West Virginia.

2. On July 22, 2008, Harrison County Schools posted the position of Assistant Superintendent, the posting period was July 22, 2008 through July 28, 2008. The associated job description listed, as minimum qualifications, a Master's Degree and a minimum of five years of successful teaching or administrative experience.

3. Grievant and Intervenor Lindy L. Bennett bid on the position of Assistant Superintendent. In all, there were four applicants for the position. In addition to Intervenor and Grievant, a high school principal who withdrew from consideration following the interview, plus a candidate who was not interviewed because his or her relative qualifications were viewed as inferior to those of the other applicants.

4. The posted Assistant Superintendent position is the only Assistant Superintendent position in the school district. The duties of the position, as listed in the job description, were broad and wide-ranging in assisting the superintendent in general administrative operation.

5. At the time of his application, Intervenor Bennett worked in the Board of Education's Central Office as its Administrative Assistant for High Schools and Middle Schools, a position he had held for two years. Prior to that, Mr. Bennett had served for

21 years as Principal of Bridgeport High School, and 3 years as a junior high school Industrial Arts Teacher/Coach. Mr. Bennett held the certification necessary to be an Assistant Superintendent of Schools, plus other certificates that authorized him to serve as Superintendent, Supervisor, Principal at grade levels k-12, Vocational Administrator, and teacher of Industrial Arts and Health and Physical Education in grades 7-12. Mr. Bennet had attained a Master's Degree plus 45 hours in educational administration when he applied for the posted vacancy.

6. At the time of his application, Grievant was the Principal of Norwood Elementary School, a position he had held for five years. Prior to that he served as Principal of Wyatt Elementary School, Assistant Principal of Norwood Elementary School, and classroom teacher. Grievant had never held a position in the Board's Central Office, nor a school district position above that of elementary school principal. Grievant's tenure with Harrison County Schools was interrupted for six years when he resigned to take a job as a visiting faculty member at Fairmont State College. A year later he became an assistant professor at Alderson-Broaddus College, where he worked for five years before resuming employment with the Board. Grievant held the certification necessary to be an Assistant Superintendent of Schools, and other certificates authorizing him to serve as Superintendent, Supervisor, Principal at all grade levels, Vocational Administrator, and teacher of Social Studies and Elementary Education. Grievant had achieved a Doctorate Degree in educational administration at the time he applied for the posted vacancy.

7. Superintendent Collins was unsure whether the Harrison County Board of Education was going to fill the posted assistant superintendent position or reorganize the Central Office staff. The Board had asked her to see if she could get by without an

assistant superintendent. Superintendent Collins was also trying to take care of other matters after the expiration of the assistant superintendent posting, as she was preoccupied with other personnel issues and preparing for the opening of school. Ultimately Superintendent Collins came to the realization that she needed an assistant superintendent. She also discovered that if nobody was in the assistant superintendent position in time for the second month report, the school district would lose some financial aid.

8. At the time Superintendent Collins was made aware of possibly losing state aid, she was not aware of a statutory requirement to fill professional vacancies within 30 working days of the end of the posting period. Jeffrey Moss, the Board's Administrative Liaison Officer in charge of personnel, was concerned about the timely filling of the vacancy, but never calculated or advised the Superintendent of the deadline date.

9. After Grievant submitted his application for the vacancy, but before the vacancy was filled, he heard rumors that the assistant superintendent position might not be filled, but rather might be abolished or combined with other existing positions. On September 8, 2008, Grievant posed the question in a letter addressed to the Personnel Director, Jeffrey Moss, with copies to his immediate supervisor, Ron Poole, and the Superintendent.

10. On September 12, 2008, the Personnel Director sent a reply explaining that his office has a limited role in the filling of administrative vacancies. It collects the applications and turns them over to the Superintendent's office, which then handles all other steps of the selection process for administrators. The Personnel Director's letter also advised that the Board had not yet taken action to fill the posted vacancy.

11. On January 7, 2008, and by way of background, Lisa Ray, Coordinator of Pre-K and Kindergarten Programs, sent Grievant an e-mail asking him to supervise the Anmoore Head Start program, and Grievant responded that same day, stating "I will help your program in any way I possibly can." Level One Respondent's Exhibit 1.

12. Grievant and Ms. Ray had further communications in May and September of 2008, regarding the Anmoore Head Start program. On September 8, 2008, Grievant changed his position on supervising the Anmoore Head Start program and told Ms. Ray through e-mail that he was going to decline her request for him to supervise the program and that he was reluctant to begin additional supervisory responsibilities without something formal and in writing.

13. Ms. Ray replied that the other elementary principals considered the supervision of pre-K offsite programs as part of their responsibilities and had not raised objections. With pre-K students already returning to schools for the new year, Grievant's immediate supervisor, Ron Poole, met with the Superintendent to discuss Grievant's insistence upon a written directive concerning supervising the Anmoore program. In a memo dated September 11, 2008, Mr. Poole advised Grievant that he and the Superintendent had discussed whether Grievant would be responsible for supervising the Anmoore Head Start Center during 2008-2009. The memo went on to say that Grievant was expected to perform that duty. Grievant carried out this directive by visiting the location once a week during most weeks.

14. Grievant filed a grievance on September 15, 2008, following the Superintendent's and Board of Education's failure to fill the job vacancy within thirty days from the closing date of the posting for the assistant superintendent's position. The

grievance further alleged that he was the victim of retaliation by the Superintendent for filing a grievance. The retaliatory behavior was the additional supervisory responsibility placed on him immediately following his inquiry into the job vacancy without additional compensation.

15. Interviews were scheduled for the position of assistant superintendent following the filing of this grievance. The Superintendent asked two administrators who were not candidates for the opening, Administrative Assistant Victor Gabriel and Curriculum Coordinator Heidi Griffith, to attend the interviews, as witnesses rather than as interviewers. They were asked by the Superintendent to make certain that each applicant was asked the same questions. After the interviews ended, the Superintendent asked Mr. Gabriel and Ms. Griffith what they thought about the interviews. Mr. Gabriel replied that he felt that Mr. Bennett gave longer responses and seemed to have more administrative experience. Ms. Griffith replied that Mr. Bennett gave a more thorough answer to all the questions. Level One Joint Exhibits 13-15.

16. After considering the candidates' credentials, the Superintendent concluded that Intervenor Bennett was the most qualified. Superintendent Collins based her decision not only on Mr. Bennett's significant Central Office administrative experience (Grievant had none) and more middle and high school experience, but also because he answered interview questions more expansively than Grievant, better addressed concerns at all grade levels, and demonstrated a better understanding of "the big picture of the school system." Level One Transcript 137-139, 153-154.

17. At a noticed special meeting of the Board of Education on September 22, 2008, she nominated Mr. Bennett to fill the assistant superintendent's vacancy. By a vote of four to one, the Board of Education approved the nomination.

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

Both Grievant and Intervenor were qualified for the position, but Superintendent Collins did not nominate Grievant for the assistant superintendent position, finding he was not more qualified when compared to the successful applicant. When filling administrative positions, W. VA. CODE § 18A-4-7a requires the best or most qualified applicant 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;

(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). 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 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. *Stover v. 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).

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." Indeed, W. VA. CODE § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993); *English v. Logan County Bd. of Educ.*, Docket No. 03-23-307 (Feb. 27, 2004).

Grievant's case is fairly straightforward. He asserts the decision of Superintendent Collins to hire Mr. Bennett as the Assistant Superintendent of Schools was arbitrary and capricious, and a violation of the clearly established statutory standards. Grievant goes on to claim that the facts surrounding her decision, which he argues were proven by a preponderance of the evidence, are troubling at best and "self-serving double dealing" at worse. Furthermore, the charge is made that the additional supervisory assignment was in retaliation for Grievant forcing the Superintendent to fill a position that she did not want to fill. Respondent counters that the selection of Intervenor Bennett for the assistant superintendent position at issue was not arbitrary and capricious, an abuse of the Board's discretion in such matters, retaliatory, pre-determined, or otherwise improper. Nor did the delay in filling the vacancy entitle Grievant to the appointment.

Grievant makes the claim that he was the superior candidate for the assistant superintendent position. In support, he cites his thirty-two years as an educator (which includes the time he taught at Fairmont State and Alderson-Broaddus), his Doctorate Degree, and his role in developing an after-school program for at-risk students in his area of the state. Grievant additionally cites his extensive experience in curriculum and instruction, leadership of a school that won a national award, and work for the State Department of Education on the 21st Century leadership program.

Based upon her analysis of the relative qualifications of the candidates, Superintendent Collins concluded that Intervenor Bennett was the most qualified. Superintendent Collins based her decision not only on Mr. Bennett's significant Central Office administrative experience (Grievant had none) and more middle and high school experience, but also because he answered interview questions more expansively than Grievant, better addressed concerns at all grade levels, and demonstrated a better understanding of "the big picture of the school system."

It is the responsibility of the superintendent, not the board of education, to evaluate the candidates, review the statutory criteria, and make a recommendation to the board of education. A board of education is not required to independently rank the applicants and compare their qualifications based upon the statutory criteria when the superintendent has already done such a comparison prior to making a recommendation. *Switzer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-013 (April 11, 2003).

Under W. VA. CODE § 18A-2-1, "[t]he employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent." In order for a person to be appointed to a professional position, the superintendent and the

board, in the exercise of their respective roles, must agree upon the choice of a candidate. In the instant case the Superintendent and the Board of Education approved Intervenor Bennett to fill the vacancy in the position of Assistant Superintendent. Accordingly, as far as the first level of analysis concerning the appointment, nothing appears arbitrary and capricious.

Grievant places emphasis on the undisputed fact that the selection for the position was made after thirty days from the close of the posting. Under W. VA. CODE § 18A-4-7a(o)(3), the selection of one or more qualified applicants who applied during the posting period must be made "within thirty working days of the end of the posting period." This rule of selection was violated in the instant case, as both Mr. Bennett and Grievant met the posted qualification for the vacancy, but the position was not filled until nine working days after the thirty working day period lapsed.

Nevertheless, the Board of Education's failure to choose a new assistant superintendent within the thirty working days following the posting period does not entitle Grievant to the appointment. Grievant provided no authority to the undersigned which would require such a result. To the contrary, even in the instance where a board of education fails to select a candidate within the time required by the statute, an applicant who was not selected must still demonstrate that he or she was more qualified than the candidate whom the board of education ultimately appointed. *Bussey v. Jefferson County Bd. of Educ.*, Docket No. 03-19-359 (July 21, 2004). Here, Grievant has not shown that the Board erred in concluding that Intervenor Bennett was more qualified than he.

Grievant's main assertion at level three was that the decision to hire Mr. Bennett was arbitrary and capricious based on the Superintendent's personal interest in keeping

the assistant superintendent position open or filling it with an individual who would either retire or return to another administrative position in the event the Board of Education decided not to renew her one year contract. The record of this case fails to establish Grievant's claim that the Superintendent in some fashion pre-selected Mr. Bennett for the assistant superintendent's vacancy. The only evidence offered on this assertion at level one was hearsay, the reliability of which Grievant refused to establish by identifying the source of the supposed rumor. At level three, Grievant offered the testimony of Board of Education member Mike Queen, who admittedly opposed the appointment of both Superintendent Collins and Intervenor Bennett, and who supported the candidacy of Grievant. Mr. Queen's testimony supporting the theory of some type of pre-selection was not corroborated by any other witness, including Mr. Moss. The record reflects that Mr. Queen's testimony on the pre-selection issue was directly contradicted by Board President Paul Howe and Superintendent Collins.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1993).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)

reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *See Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

Assessing, under those factors, the testimony of Mr. Queen, on the one side of the scale, and the testimony of Board President Howe, Administrative Liaison Officer Moss, and Superintendent Collins, on the other side of the scale, it cannot reliably be concluded that the Superintendent pre-selected the Intervenor. Board President Howe testified that the Superintendent never raised that issue with the Board of Education. In fact, the only such discussion on that point occurred after Mr. Queen, not the Superintendent, suggested that everyone knew that Mr. Bennett would be appointed. The Superintendent testified that she never made such a statement. Mr. Moss testified that he had never heard the Superintendent suggest that the appointment of Intervenor would preserve a position for her in the event her contract was not renewed.

Grievant introduced into evidence the Superintendent's contract for the 2008-2009 school year. Level Three Grievant's Exhibit 1. Grievant suggested that Section 7-d of the contract substantiated his conspiracy theory that Intervenor was pre-selected for the assistant superintendent position. Section 7-d of the contract addressed the Superintendent's placement as a Board of Education employee in the event her contract was not renewed. It stated that in such an instance Ms. Collins could be placed in either her previous position as assistant superintendent or in a regular full-time supervisor or

director position or principalship, provided that, in the case of a principalship, she was qualified and more senior than any incumbent principal. This contract section also provided that Mr. Collins would have the option of becoming a classroom teacher, and it acknowledged that she would not be precluded from applying for any posted vacancy. This broad range of jobs covered by the contract does not substantiate Grievant's allegation that Mr. Bennett was pre-selected for the vacancy. This is especially true since Mr. Bennett's tenure as Assistant Superintendent is, by statute, limited to the period during which Superintendent Collins remains in office. Hence, Superintendent Collins had no motivation to engage in such "self-serving double dealing."[1]

Finally, the charge is made that the additional supervisory assignment was in retaliation for Grievant forcing the Superintendent to fill a position that she did not want to fill. W. VA. CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

(1) that he engaged in protected activity (i.e., filing a grievance);

(2) that he was subsequently treated in an adverse manner by the Respondent or an agent;

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[1]W. VA. CODE § 18-5-32 mandates that all assistant superintendent contracts automatically end when the term of the superintendent ends. As such, no matter who was appointed to the assistant superintendent position, his or her tenure in that position would, by statute, end with the superintendent's position, thus creating an opening in the position of assistant superintendent for which the outgoing superintendent could possibly apply.

(3) that the Respondent or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ. Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Once a *prima facie* case of reprisal or retaliation is established, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for its actions. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. *Liller*, *supra*. *See Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26- 56 (Sept. 29, 1989).

The requirement that Grievant supervise the Anmoore Head Start Center's pre-K program bore no causal connection to any protected activity by Grievant. The record established that Grievant was responsible for the timing of Mr. Poole's September 11 memo confirming that Grievant was to supervise the pre-K site. Grievant had led Ms. Ray and Mr. Poole to believe that he would gladly and willingly supervise the program. The memo was the result of Grievant's unexpected announcement on September 8 that he had decided not to supervise the Anmoore site, it was not the result of any protected activity. Under the facts of this grievance, Grievant should have expected such a memo from Mr.

Poole since he had previously requested written confirmation of the assignment only a few days earlier. Grievant has failed to prove that he was the victim of retaliation or reprisal.

As stated above, boards of education have broad discretion in filling administrative positions. The Respondent's belated appointment of Mr. Bennett outside the thirty-day requirement did not operate to rescind the requirement of W. VA. CODE § 18A-4-7a that the Board of Education fill the vacancy "on the basis of the applicant with the highest qualifications." Based upon her analysis of the relative qualifications of the candidates, the Superintendent concluded that Mr. Bennett was the most qualified. This conclusion was based on valid rationale, and cannot be said to have been arbitrary and capricious or an abuse of discretion. In addition, Grievant has failed to establish his claim that the Superintendent pre-selected Mr. Bennett for the position. Based on the facts of this case, Grievant failed to establish a *prima facie* showing of reprisal.

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).

2. 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).

3. 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).

4. 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).

5. Grievant did not meet his burden of proof and demonstrate he was more qualified than the successful applicant, that Respondent acted in an arbitrary and capricious manner, or that the Respondent abused its broad discretion. Nor did Grievant demonstrate that the delay in filling the vacancy entitled him to the appointment.

6. Grievant failed to establish that he was the victim of reprisal or retaliation. 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 (eff. July 7, 2008).

Date: December 4, 2009

Ronald L. Reece
Administrative Law Judge