THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PATRICIA JANE ENGLISH,
Grievant,

v. **Docket No. 2009-0365-LogED**

LOGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Patricia English is employed by the Logan County Board of Education as a Vice Principal. She filed this grievance on September 18, 2008, concerning her non-selection for the position of Director of Guidance and Testing with the Logan County Board of Education. Her statement of grievance and relief sought reads as follows:

> The Logan County Board of Education and the Superintendent of Logan County schools refused to hire me for the position of Director of Guidance and Testing because I am an African-American female.
>
> My certification and qualifications for the position of Director of Guidance and Testing are better than the person, Harless Cook, put in the position by the Logan County Board of Education on 9-11-08. I am more qualified than Harless Cook.
>
> This not the first time that I have been passed over by the Logan County Board of Education for people with less experience and/or time than I have. My work in all positions that I have held has been more than satisfactory and above.
>
> I understand that there has been only one African-American female principal (Ruth Walker - Stirrat Elementary School) in Logan County schools since integration. Randolph Gilbert (Director of Special Education) was the last African-American administrator in the central office.
>
> In addition, I am a 60 year old female and the individual hired for the position is younger.
>
> I want to be placed in the position of Director of Guidance and Testing

> and given back pay for this position. I want the Logan County Board of Education to reimburse me for all lawyer fees incurred in this matter.

This grievance proceeded directly to level three by agreement of the parties.[1] A level three hearing was conducted before the undersigned Administrative Law Judge on February 25, 2008, at the Grievance Board's Charleston office. Grievant appeared in person and by her counsel, Martin R. Smith, Jr. Respondent appeared by its counsel, Leslie K. Tyree. The matter became mature for consideration upon receipt of Grievant's proposed findings of fact and conclusions of law on April 7, 2009. Respondent opted not to file proposals.

Synopsis

Grievant applied for the posted position of Director of Testing and Guidance and was not chosen for the position. Grievant asserts she is more qualified than the successful applicant, and that she was discriminated against during the selection process. Respondent denies the charge of discrimination in the selection process, and considers the successful applicant as the most qualified for the position. Grievant has failed to meet her burden of proof and demonstrate a flaw in the selection process, or that the selection of the successful applicant was arbitrary and capricious or an abuse of discretion. Respondent is permitted to decide what weight to give the mandated factors in W. VA. CODE § 18A-4-7a when filing administrative positions. In addition, Grievant failed to establish that she was the victim of discrimination. This grievance is denied.

After a detailed review of the limited record of this grievance, the undersigned makes the following Findings of Fact:

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[1]W. VA. CODE § 6C-2-4(a)(4).

Findings of Fact

1. Grievant has been employed by Respondent as a teacher, counselor, and assistant principal for approximately thirty-seven years.

2. A position for Director of Guidance and Testing at the Logan County Board of Education was posted and Grievant applied.

3. Two applicants were considered for the position, Grievant and Harless Cook.

4. The following criteria were used in assessing the qualifications of the applicants:

a. Appropriate certification, licensure or both;

b. Amount of experience relevant to the position;

c. The amount of course work, degree level or both in the relevant field and degree level generally;

d. Academic achievement;

e. Relevant specialized training;

f. Past performance evaluations.

5. Both candidates had the required certification, comparable academic achievement, a Master's Degree in counseling, and good past performance evaluations.

6. While both applicants had a masters level degree and had academic achievement, Grievant did not have the same amount of relevant specialized training as the successful applicant. In short, Mr. Cook was more qualified due to his experience in testing and guidance.

7. The Interview Committee, consisting of three members, formulated twelve questions to ask both candidates which were formulated to take all the first set of factors

in W. VA. CODE § 18A-4-7a into consideration. Each applicant was asked the same questions. The interview was worth a total of 150 points.

8. Interviewer one gave Grievant 99 points and the successful applicant 114 points. Interviewer two gave Grievant 97 points and the successful applicant 112 points. Interviewer three gave Grievant 85 points and the successful applicant 109 points. Out of a total of 450 points, Grievant was given 281 and the successful applicant was given 335.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 the successful applicant were qualified for the position, but the Interview Committee did not recommend Grievant to Superintendent Zigmond, finding she 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 CODE 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 asserts in her proposals that there is no "non-pre-textual basis for hiring Mr. Cook in the place of Ms. English" and "the reasons offered for the hiring of Mr. Cook are found to be without merit and pre-textual." Grievant's Proposed Findings of Fact and Conclusions of Law, numbers 7, and 8. The undersigned disagrees. The record in the matter is clear that the position was offered to Mr. Cook because of his knowledge of student testing. The decision was unanimous among the interview panel.

Here, the Interview Committee selected the higher ranking candidate to recommend to Superintendent Zigmond to fill the position. Mr. Cook was more qualified for the position due to his working knowledge in the area of student testing. While Respondent noted Grievant was a respected and valued employee, and Respondent appreciated her work,

Respondent decided she was not the most qualified candidate for this position. This decision was not arbitrary and capricious.

Grievant also asserts the claim that she was discriminated against. Her argument at level three was that she was being discriminated against based on gender and race. As to Grievant's contention of gender and race discrimination, this Grievance Board has indicated that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. VA. CODE §§ 5-11-1, *et seq*), such as race and gender discrimination. *See Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board's authority to provide relief to employees for discrimination, favoritism, and harassment, as those terms are defined, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over race-based discrimination claims. *See Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995). The selection of a more qualified candidate based on appropriate factors should be a racially neutral determination, and would be upheld based upon the above cited selection law. *Robinson v. Dep't of Transp.*, Docket No. 04-DOH-328 (Feb. 4, 2005).

For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the

employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

After mentioning at the level three hearing that she was the only black employee at the Board of Education Office, Grievant presented no further evidence or information to support a claim of racial discrimination. Race alone, without additional factual evidence, does not in and of itself establish discrimination. In this case, Grievant has not established discrimination because the Respondent has explained legitimate, job-related decisions for its choice, based upon qualifications pertinent to the position, and Grievant has presented no evidence on the issue. The selection of the more qualified candidate was based on the appropriate factors and it was a racially neutral determination. Grievant has failed to prove her allegation of discrimination.

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 her 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. 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).

3. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

4. Grievant failed to establish by a preponderance of the evidence that the selection decision at issue was arbitrary and capricious, clearly wrong, or the result of discrimination.

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 28, 2009

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Ronald L. Reece
Administrative Law Judge