THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAN BREWER,
Grievant,

v. **Docket No. 2008-1822-MerED**

MERCER COUNTY
BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Dan Brewer filed a grievance against his employer, Mercer County Board of Education, on June 12, 2008. The statement of grievance reads, "WV. [sic] §18A-4-8b non hire [sic] Director of Maintenance." For relief Grievant seeks, "Placement in position – back pay and related benefits."

A level 3 hearing was held at the Grievance Board's Beckley office on August 7, 2009. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by John Shott, Esq. This case became mature on October 13, 2009, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant asserts he should have been chosen for the position of Supervisor of Maintenance, as he has his plumbers, contractors and fire protection equipment installers licenses. Grievant argues these licenses were not properly considered, and Respondent put too much emphasis on the pesticide license.

Respondent avers it followed procedure and chose the most qualified candidate.

Grievant has failed to meet his burden in this matter. Therefore, this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as a bus operator.

2. Grievant has been a full-time employee since 1979.

3. Respondent posted the position of Supervisor of Maintenance on March 21, 2008. The qualifications for the position were stated:

> Successful applicant must possess a valid electrician's license; CDL; certified Public Application License for pesticides; experience in the scheduling and oversight of maintenance work; HVAC; welding; plumbing; carpentry; blueprint reading; boiler and cooling towers. Successful applicant will review the general upkeep of all physical properties; assures that all school properties meet full and complete compliance with any and all proper and published requirements made by any of the Regulatory Agencies, federal and state; plans and schedules all work in accordance with a priority system; issues instructions to subordinates relating to the cleaning, repairing and maintenance of all structures, mechanical and electrical; schedules maintenance staff to perform maintenance and upkeep of facilities in the most efficient and effective manner; provides for the employee evaluation process for all department employees; performs other duties as assigned by immediate supervisor. Job Description #65 is hereby incorporated as part of this posting.

4. Respondent established an interview committee consisting of Superintendent Deborah Akers, Assistant Superintendent Don White, Administrative Assistant/Director of Human Resources Roger Daniels and the retiring Supervisor of Maintenance Jim Hill.

5. Six people applied and were interviewed. All six applicants were asked the same questions by the committee.

6. A score was assigned to each interview question, and each person on the interview committee scored the applicants on their leadership and management skills.

7. Points were also given for each required license. CDL and electrician licenses were worth 5 points each. The pesticide license was given 10 points.

8. Grievant received 10 points for his certification, as he had both CDL and electrician's licenses.

9. Melvin Gregg, the successful applicant, received 15 points for his electrician and pesticide licenses.

10. Mr. Gregg had approximately 32 years of seniority in the Maintenance Department.

11. When the interviews were completed, the committee members met to discuss the applicants' scores. Grievant received a combined score of 31.25, and Mr. Gregg received the highest combined score of 56.75.

12. Grievant ranked 3rd out of the applicants.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id*.

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351, S.E. 2d 58 (1986).

"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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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 "Supervisor of Maintenance" position is defined in W.Va. Code §18A-4-8. However, Respondent added additional qualifications in the posting for this position. In this specific instance, adding qualifications to this position is not arbitrary and capricious. *Hancock County Board of Education v. Hawken*, 546 S.E.2d 258, 209 W.Va. 259 (1999); *Board of Education of Randolph v. Scott*, 617 S.E.2d 478, 217 W.Va. 128 (2005).[1]

W.Va. Code § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service."

Mr. Gregg was the successful applicant. Not only did he receive the highest combined score, but he also had the most seniority, having been in the Maintenance Department since 1977. Mr. Gregg also had been a foreman and had supervised the

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[1]This issue was not raised by either party but needed to be addressed.

asbestos crew. For sometime prior to Mr. Hill's retirement, Mr. Gregg had served as the backup Maintenance Supervisor in Mr. Hill's absence. Based on this experience and his interview, Mr. Gregg was selected.

Grievant asserts he had supervisory experience that was not considered. However, all of his supervisory experience comes from positions outside the school system and was not as obvious from looking at Grievant's resume as Mr. Gregg's.

Grievant also asserts his other licenses were not taken into account. Respondent looked for the licenses set out in the posting, and provided each with a point value. The CDL and electrician licenses were given fewer points because, at the time of the interview, Respondent believed a year long internship was required to successfully obtain the pesticide license. Grievant rebuked this notion. The undersigned cannot discern from the evidence presented whether a year long internship is currently required, but finds that immaterial, as Respondent's decision to weigh the pesticide license more heavily than the others is not arbitrary and capricious.

Lastly, Grievant was ranked 3rd in the scoring. He did not compare himself to the individual who was ranked before him. Assuming Grievant had prevailed in this grievance, he could not have been awarded the position, as he did not compare himself to the person ranked 2nd.

However, the undersigned need not address that. Grievant has not proven any flaw in the selection system. Mr. Gregg had the most seniority and experience in the Maintenance Department, as well as demonstrated leadership abilities. Therefore, Respondent's choice was not arbitrary and capricious. This grievance must be DENIED.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id*.

2. It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351, S.E. 2d 58 (1986).

3. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

4. West Virginia Code § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions... on the basis of seniority, qualifications and evaluation of past service."

5. Grievant did not meet his burden of proving that Respondent's selection 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: February 10, 2010

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Wendy A. Elswick
Administrative Law Judge