THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ANDREA M. PEPE,
Grievant,

v. **DOCKET NO. 2010-0314-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Andrea M. Pepe, filed a grievance against her employer, the Brooke County Board of Education, on September 10, 2009. The statement of grievance reads:

> It has come to my attention that on August 20, 2009[,] an agenda was distributed prior to the start of the board meeting stating I was the successful candidate recommended for the kindergarten job at Colliers Primary School. Within minutes of the start of the meeting the agenda with my name was collected and a second agenda distributed with a new candidate. According to West Virginia state code 18A-4-7a I am a more qualified candidate based on degree level and specialized training.
>
> I am claiming that the hiring practices used in Brooke County are unfair. I have approached the assistant superintendent with these claims and no reasonable explanation can be given for the agenda change. Therefore, my claim is a violation of the personnel selection and criteria employment process.

As relief Grievant sought "compensation."

A hearing was held at level one on September 21, 2009, and a level one decision denying the grievance was issued on September 24, 2009. Grievant appealed to level two on October 7, 2009, and a mediation session was held on November 23, 2009. Grievant appealed to level three on January 6, 2010, and a level three hearing was held on April 15, 2010, before the undersigned Administrative Law Judge in the Grievance Board's

Westover, West Virginia office. Grievant was represented by Owens Brown, West Virginia Education Association, and Respondent was represented by David F. Cross, Esquire, Brooke County Prosecuting Attorney. This matter became mature for decision on May 21, 2010, upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a substitute employee, who graduated from college with a Masters' Degree in education in the Spring of 2009. She applied for a posted teaching position in August 2009, but was not selected. No permanent employees applied, leaving the Board of Education with some flexibility in evaluating the statutory factors to determine which applicant was the most qualified. The Assistant Superintendent who interviewed the candidates determined that a 2008 graduate, with no Masters' Degree, but with six months of teaching experience in a long-term substitute position, was the better candidate. The interviews for the position were concluded just a little over 12 hours before the Board meeting to fill the position, and the decision as to who should be recommended for the position was made right before the meeting. Through some miscommunication, a recommendation with Grievant's name on it was erroneously distributed to the Board of Education members. This error was corrected before the Board meeting began. Grievant did not demonstrate that this error represented a significant flaw in the selection process, or that she was the best qualified candidate.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Brooke County Board of Education ("BBOE") as a substitute teacher since April 2009. She is certified in elementary education K-6, and early childhood pre-K. Prior to her employment with BBOE she was employed as a substitute teacher for about two months by the Monongalia County Board of Education while she was completing her Masters' Degree at West Virginia University.

2. On August 13, 2009, BBOE posted a position for a kindergarten teacher at Colliers Primary School. Applications were received through August 19, 2009. Grievant applied, along with approximately 42 other individuals.

3. The posting did not list any specialized training required or preferred for the position.

4. The applicants who held the necessary certification were interviewed by John Lyonett, Assistant Superintendent of Schools for BBOE, and JoAnn Goodall, Principal at Colliers Primary School, on August 19, 2009. They began interviewing at 8:00 a.m., and finished after 5:00 p.m. They did not break for lunch or dinner.

5. BBOE met on August 20, 2009, at 8:30 a.m. One of the items on the agenda was filling the kindergarten teacher position at Colliers Primary School, due to the need to fill the position before the start of school.

6. None of the applicants holding the necessary certification were permanent employees of BBOE.

7. After the interviews were concluded, Mr. Lyonett and Ms. Goodall discussed the applicants. Both believed that the top three candidates were Grievant, Jessica Yarter,

and Meredith Hood. Both then eliminated Ms. Hood from consideration because she had no teaching experience.

8. Grievant completed her Masters' Degree in elementary education in the Spring of 2009, with a specialization in Pre-KK. Her graduate grade point average ("GPA") was 4.0.

9. In obtaining her undergraduate degree, Grievant minored in speech pathology and audiology. Her undergraduate GPA was 3.62.

10. Grievant listed as specialized training that she is certified in CPR, AED, and first aid, she attended two day seminars on project Worldwide Water Education and the Elementary Globe Program, and that she has 16 undergraduate credit hours in speech pathology and audiology.

11. Grievant's teaching experience is minimal, having taught speech pathology to kindergarten through second grade and MMI students, and language group for kindergarten through first grade students as a long-term substitute in Brooke County from mid-April through the first week of June of 2009. She has no experience as a classroom teacher.

12. Ms. Yarter was a substitute teacher for BBOE and the Hancock County Board of Education. Ms. Yarter graduated from college in 2008. She worked in a long-term substitute teaching position for the Hancock County Board of Education teaching second grade at Broadview Elementary School, from January through the first week of June 2009.

13. Ms. Yarter does not have a Masters' Degree. Her undergraduate degree was earned in Elementary Education, with a GPA of 3.47.

14. Ms. Yarter listed as specialized training Smart Board, Tech Steps, Power Point, DIBELS, LETERS, Scott Forman Reading Series, Teach 21, and Photo Story.

15. Ms. Goodall believed both Grievant and Ms. Yarter were highly qualified for the position, but preferred Grievant because she had a Masters' Degree, and she had a strong technology background. She felt that Grievant could assist the other teachers in the school with learning how to use the new technology which was being implemented.

16. Ms. Goodall is friends with Grievant's mother, who is a school nurse employed by BBOE, and she is friends with Ms. Yarter's mother-in-law. Grievant's mother works at Colliers Primary School on occasion.

17. Mr. Lyonett contacted an administrator with the Hancock County Board of Education, and he spoke to the principal of the school where Ms. Yarter had taught. The principal told Mr. Lyonett that Ms. Yarter had done an excellent job in all areas, as though she were a veteran teacher. She described Ms. Yarter as one of the best teachers she had seen in 25 years. This caught Mr. Lyonett's attention.

18. As the Assistant Superintendent, it was up to Mr. Lyonett to make a recommendation to the Superintendent. He believed Ms. Yarter was the better candidate because of her five months of classroom teaching experience. He also thought it was a bad idea to have a brand new teacher instruct the veteran teachers in the use of technology, and that it would be asking too much.

19. When Ms. Goodall and Mr. Lyonett went their separate ways on August 19, 2009, both had some contacts they were to attempt to make in order to obtain more information on Ms. Yarter and Grievant. Ms. Goodall was to call Mr. Lyonett the next morning to discuss what they had found out, and to make a final determination as to the

successful applicant. Mr. Lyonett arrived at work around 5:30 a.m. on August 20, 2009. Sometime thereafter he began trying to call Ms. Goodall. Ms. Goodall emailed Mr. Lyonett with her findings and recommendation, but Mr. Lyonett did not check his email. In her emails to Mr. Lyonett, Ms. Goodall explained that she preferred Grievant for the position, but she agreed that "[b]oth candidates are a good fit for CPS," and "both would be outstanding in my building." Mr. Lyonett was finally able to reach Ms. Goodall about 8:15 a.m., right before the Board meeting. She told him she still preferred Grievant, but she would support his decision publicly.

20. Mr. Lyonett had intended to tell his secretary to type up two recommendations, one with Grievant's name and one with Ms. Yarter's name, as he knew he would be recommending one of these two, and that the final determination would be made shortly before the Board meeting. After Mr. Lyonett talked to Ms. Goodall, he decided to recommend to the Superintendent that Ms. Yarter be hired. He discovered, however, that a written recommendation to the Board with Grievant's name on it had already been distributed to the Board members. Mr. Lyonett's secretary had not typed a recommendation with Ms. Yarter's name on it. Mr. Lyonett collected this recommendation with Grievant's name on it from the Board members and replaced it with the recommendation with Ms. Yarter's name on it. Mr. Lyonett told the Superintendent that he was recommending Ms. Yarter, and the Superintendent supported this recommendation, and made the recommendation to the Board. BBOE voted on August 20, 2009, to hire Ms. Yarter for the posted teaching position.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

When, as here, no permanently employed instructional personnel apply for a teaching vacancy, the county board is authorized to apply the more flexible standards in the "first set of factors" set forth in W. VA. CODE § 18A-4-7a as follows:

> (a) A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications.
>
> (b) The county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications.
>
> (c) In judging qualifications for hiring employees pursuant to subsections (a) and (b) of this section, *consideration shall be given* to each of the following:
>
> > (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.

(Emphasis added.)

When using the first set of factors, "[t]he foregoing CODE provision does not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. *Jenkinson v. Greenbrier County Bd. of Educ.,* Docket No. 95-13-503 (Mar. 31, 1996); *Fisher v. Marion County Bd. of Educ.,* Docket No. 93-24-042 (Mar. 11, 1993); *Marsh v. Wyoming County Bd. of Educ.,* Docket No. 94-55-022 (Sept. 1, 1994). *See Saunders v. Cabell County Bd. of Educ.,* Docket No. 97-06-149 (Dec. 29, 1997); *Bell v. Lincoln County Bd. of Educ.,* Docket No. 97-22-013 (July 28, 1997)." *Fittro v. Cabell County Bd. of Educ.,* Docket No. 97-06-556 (May 22, 1998).

The selection of candidates for educational positions is not simply a "mechanical or mathematical process." *Tenney v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.,* Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the 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). *See Sparks v. Mingo County Bd. of Educ.,* Docket No. 96-29-447 (Feb. 18, 1997).

In order to obtain relief, Grievant must establish 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); *Stover, supra*. The standard to use in this review is the arbitrary and capricious standard.

"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,* 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 arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. *Bradley v. Bd. of Directors,* Docket No. 96-BOD-030 (Jan. 28, 1997). *See Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

Grievant did not demonstrate a flaw in the selection process, nor did she demonstrate that she was *more* qualified than Ms. Yarter. Ms. Yarter and Grievant were both recent graduates. Their GPA's were both excellent, as were those of many of the other applicants. Grievant had a more advanced degree than Ms. Yarter, but no classroom teaching experience. Both listed some training on their resumes which they considered to be specialized training related to the position.

The interview team was fortunate to be in the position of having at least two excellent choices for the position. Both members of the team felt that either Grievant or Ms. Yarter would do a good job, and that both would be a good fit in the school. Ms. Goodall preferred Grievant because of her Masters' Degree and technology background, while Mr. Lyonett preferred Ms. Yarter because of her teaching experience and the glowing recommendations she had received. Ultimately it was up to Mr. Lyonett to make a recommendation to the Superintendent, and he recommended Ms. Yarter. While Grievant suggested that Mr. Lyonett disregarded Ms. Goodall's opinion, Ms. Goodall agreed with Mr. Lyonett that both candidates were a "good fit" and either "would be excellent." Mr. Lyonett's choice was well thought out, and based upon relevant factors. It was not an arbitrary and capricious decision.

The fact that the wrong recommendation was distributed to the Board members certainly created some confusion and hard feelings, but this does not constitute a flaw in the selection process. Mr. Lyonett and Ms. Goodall interviewed more than 20 applicants on August 19, 2009, with Mr. Lyonett's secretary setting up more interviews as the day went on, as this was the closing date on the posting. They did not have time to eat lunch or dinner. They began interviewing at 8:00 a.m., and did not finish until after 5:00 p.m. Mr.

Lyonett and Ms. Goodall then reviewed their notes, and both had narrowed the candidates to the same three applicants. They narrowed the candidates to two, because the third applicant had no teaching experience. Clearly then, teaching experience was an important consideration to both Mr. Lyonett and Ms. Goodall. Mr. Lyonett continued to work, trying to contact someone with the Hancock County Board of Education regarding Ms. Yarter's substitute work. He arrived at work the next morning by 5:30 a.m., and tried to contact Ms. Goodall early that morning to get her final recommendation. He was not able to talk to her until right before the Board meeting, and waited until he spoke with her to make his final recommendation.

This entire process was undertaken at the last minute due to the circumstances BBOE was placed in by a late retirement, and the Superintendent's insistence that this position be filled at this Board meeting. It is not surprising that a mistake was made under these circumstances. Regardless of how this occurred, however, the fact remains that both Ms. Goodall and Mr. Lyonett felt that there was very little separating Ms. Yarter and Grievant, and that either would be a good choice for this position. In such a situation how could it be unreasonable for Ms. Yarter to be chosen over Grievant, or vice versa, particularly given the inexperience of both applicants? Whether Mr. Lyonett changed his mind, changed the written recommendation at the last minute, or made misstatements about the reasons for the change in the written recommendation as was suggested by some of the hearsay testimony presented is of no significance. The fact is that it was Ms. Yarter who was recommended by the Superintendent to BBOE, and it was Ms. Yarter whom the Board members voted to place in the position.

There is no doubt that Grievant will have the opportunity to demonstrate that she is an excellent teacher. However, Ms. Yarter's substitute evaluations "showed a complete knowledge and understanding of the goals and objectives of her field and [she] has had a very positive influence on education and has helped prepare our students for the 21st Century." She was described as "professional at all times, dependable and courteous, and personable in her communication." The Principal of Broadview Elementary School, Dawn Petrovich, wrote that Ms. Yarter displayed "a great level of professionalism in the classroom, in parent teacher conferences, and faculty meetings. Ms. Yarter possesses an exceptional ability to connect with elementary children and displays an excellent knowledge of their developmental needs. She has the ability to motivate students to achieve their fullest potential. Jessica is able to present both simple and complex concepts to all levels of learners. Her enthusiasm and love of learning is contagious." Respondent's Level 1 Exhibit 7. It is hard to argue that Ms. Yarter was not an excellent choice for this position.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. When, as here, no permanently employed instructional personnel apply for a teaching vacancy, the county board is authorized to apply the more flexible standards in the "first set of factors" set forth in W. VA. CODE § 18A-4-7a. In determining which of the applicants has the highest qualifications, this CODE Section requires that consideration be given to each of the seven listed factors, as follows: appropriate certification, licensure or both; the amount of teaching experience in the subject area; the amount of course work, degree level or both in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

3. When using the first set of factors, "[t]he foregoing CODE provision does not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. *Jenkinson v. Greenbrier County Bd. of Educ.,* Docket No. 95-13-503 (Mar. 31, 1996); *Fisher v. Marion County Bd. of Educ.,* Docket No. 93-24-042 (Mar. 11, 1993); *Marsh v. Wyoming County Bd. of Educ.,* Docket No. 94-55-022 (Sept. 1, 1994). *See Saunders v. Cabell County Bd. of Educ.,* Docket No. 97-06-149 (Dec. 29, 1997); *Bell v. Lincoln County Bd. of Educ.,* Docket No. 97-22-013 (July 28, 1997)." *Fittro v. Cabell County Bd. of Educ.,* Docket No. 97-06-556 (May 22, 1998).

4. The selection of candidates for educational positions is not simply a "mechanical or mathematical process." *Tenney v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.,* Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the 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). *See Sparks v. Mingo County Bd. of Educ.,* Docket No. 96-29-447 (Feb. 18, 1997).

5. In order to obtain relief, a grievant must establish 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); *Stover, supra*. The standard to use in this review is the arbitrary and capricious standard.

6. "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,* 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 arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. *Bradley v. Bd. of Directors,* Docket No. 96-BOD-030 (Jan. 28, 1997). *See Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

7. Grievant did not demonstrate a substantial flaw in the selection process, or that she was the best qualified applicant.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: September 27, 2010