THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TINA MARIE ZAGO,
Grievant,

v. **DOCKET NO. 2010-1299-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Tina Marie Zago, filed a grievance against her employer, the Brooke County Board of Education, on March 29, 2010. The statement of grievance reads:

> I feel the hiring process for the principal position for Hooverson Heights Primary was flawed. I believe I was the most qualified candidate for the position of Principal at Hooverson Heights Primary and that the selection process was flawed, the statutory criteria were not appropriately evaluated. This is a violation of WV code 18A-4-7a.

As relief Grievant sought:

> To be placed in the Principal position at Hooverson Heights Primary and to assure the Brooke County Board of Education develop and establish written policy for the interpretation of statutory criteria and the hiring process, assuring consistent practices for hiring the most qualified candidates for administrative positions in Brooke County Schools.

A hearing was held at level one on April 14, 2010, and a level one decision denying the grievance was issued on April 21, 2010. Grievant appealed to level two on April 27, 2010, and a mediation session was held on June 2, 2010. Grievant appealed to level three on June 14, 2010, and a level three hearing was held on September 21, 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 Chief Assistant Prosecuting Attorney. This matter became mature for decision on November 1, 2010, upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was not selected as the principal of an elementary school by the board of education. The applicants were all highly qualified, but the interview committee did not believe Grievant was the best choice, or even the second best choice for this particular job. Grievant did not demonstrate that the selection process was flawed, or that her qualifications were so superior to those of the successful candidate that the decision was arbitrary and capricious. Respondent's argument that the grievance was not timely filed because placement of the grievance form in the mail does not constitute filing, is rejected.

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)" for 30 years as a classroom teacher. Her most recent assignment was as a second grade teacher at Jefferson Primary School. She taught at Hooverson Heights Primary School for 28 years, and has taught fourth grade and kindergarten.

2. BBOE posted a vacancy for the principal at Hooverson Heights Primary School on January 26, 2010. There were seven applicants for the vacancy, including Grievant. Two of the applicants later withdrew their applications, leaving five applicants.

3. All remaining applicants, including Grievant, Nicole Ennis, and Jennifer Fitzpatrick, were interviewed for the position at issue by Kathy Kidder-Wilkerson, Assistant Superintendent of Schools, Tracy Welch, Chair of the Faculty Senate, Valerie Smith, BBOE's Director of Student Services, and Joyce Rea, BBOE's Director of Special Education, on February 23, 2010. All applicants were asked the same 10 questions.

4. Ms. Kidder-Wilkerson completed a matrix comparing the qualifications of the applicants in the statutory criteria certification, experience relevant to the position, amount of course work/degree level, academic achievement, and performance evaluations. All applicants ranked the same in these categories as all held the proper certification and the same degree level, a Master's Degree plus 18 hours, and all applicants had a 4.0 grade point average and good performance evaluations.

5. None of the applicants had ever been a principal, or served in any capacity as an administrator in any school system. The interview committee only considered prior experience as an elementary principal under the statutory criteria amount of relevant experience, so none of the applicants had any relevant experience.

6. Ms. Kidder-Wilkerson shared the matrix with the interview committee members, and after the interviews she asked them to look over their notes and rank the candidates. Three of the four members of the committee ranked Ms. Ennis first. The fourth member had Ms. Ennis tied with Ms. Fitzpatrick for first place. Two of the other three members of the interview committee ranked Ms. Fitzpatrick second, and the fourth member ranked Grievant second. The interview committee shared their rankings and discussed the candidates. Ms. Ennis was the choice of the interview committee for the

position, and Ms. Fitzpatrick was the second choice of the members of the interview committee. Grievant was the third choice of the interview committee.

7. The Superintendent recommended to BBOE that they hire Ms. Ennis to fill the position, and they did so on March 8, 2010.

8. Grievant is certified to teach first through sixth grade, early childhood birth through kindergarten, and special education K through twelve. She holds an administrative principal and administrative superintendent certification, as well as certification in administration for supervisors general instruction.

9. Ms. Ennis has a B.A. in Elementary Education, with an emphasis in Special Education, and a Masters Degree plus 18 hours. She is certified in elementary education K-6, specific learning disabilities K-adult, mentally impaired, mild and moderate K-adult, and reading specialist PreK-adult. She also holds a principal certificate and a superintendent certificate. She taught at a preschool in Cabell County for two years, and has been employed by BBOE since 2005 as a special education teacher at Brooke High School and then as a seventh grade reading teacher at Wellsburg Middle School. She is a reading specialist, and is very familiar with the various reading tests which are given to elementary students.

10. Hooverson Heights Primary School has an autism and behavioral disorders unit which houses all elementary students in the county who are autistic or have been diagnosed with a behavioral disorder.

11. The interview committee discussed and considered Grievant's much greater teaching experience and specifically her experience teaching at Hooverson Heights Primary School. They reviewed her resume, and also discussed the years of experience

she had in administering after school and summer educational programs which she had listed in the portfolio she had presented before the interview.

12. Ms. Kidder-Wilkerson believed that Ms. Ennis demonstrated in her answers during the interview an in depth knowledge of the matters about which the interview committee members questioned her. Ms. Smith believed that Grievant's answers during the interview were not what the interview committee was looking for.

13. Grievant placed her grievance form in the mail addressed to the Grievance Board and the chief administrator on March 29, 2010. March 29, 2010, is 15 working days from March 8, 2010.

Discussion

Respondent asked that this grievance be dismissed as untimely filed. Because an untimely filed grievance must be dismissed, this issue will be addressed first. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

W. VA. CODE § 6C-2-3(a)(1) states that, "[a]n employee shall file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) provides, in pertinent part:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event

> became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may *file* a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

(Emphasis added.) The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

Respondent argued that with the adoption of W. VA. CODE §§ 6C-2-2, 6C-2-3, and 6C-2-4(a)(1), "the prior decisions of the West Virginia Public Employees Grievance Board and even those of the West Virginia Supreme Court which addressed this matter are no longer valid precedent," and specifically the "mailbox rule," and the rule that untimely filing may be excused, "are no longer the law in West Virginia." The undersigned does not read the statutes to overrule all prior case law on the timely filing of a grievance. The cited statutes neither define the term file, nor do they specifically state that substantial compliance is no longer sufficient, or that a grievant may not put forth an excuse to untimely filing. However, the procedural rules of the Grievance Board do define the term file as follows:

> "File" or "filing" means to *place the grievance form in the United States Postal Service mail*, addressed to: (1) the Board's main office at 1596 Kanawha Boulevard East, Charleston, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimilie transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark. All grievance forms shall be date stamped when received. Grievance forms may not be filed by interdepartmental mail. The key to assessing whether a grievance is

> properly filed is substantial compliance with the statute and rules. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

156 C.S.R. 1 § 2.1.4 (2009)(Emphasis added). This rule adopted the mailbox rule previously set forth in the case law in *McVay v. Wood County Board of Education*, Docket No. 95-54-041 (May 18, 1995). The grievance form in this case was placed in the mail on the fifteenth working day after BBOE made its decision to place Ms. Ennis in the position at issue. This grievance was timely filed.

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).

In this case, Grievant bears a heavy burden, as the selection process for filling an administrative position is governed by the "first set of factors" set forth in W. VA. CODE § 18A-4-7a, which provides:

> 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. . . . In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; 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; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

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. Thus, a county board of education may determine that the factor "other measures or indicators" is the most important factor. *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998).

> All that CODE §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. *See Hyre v. Upshur County Bd. of Educ.,* 186 W. Va. 267, 412 S.E.2d 265 (1991). The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the

undersigned may not substitute her judgment for that of the board of education. *See generally, Harrison v. Ginsberg,* 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. *Harper, supra; Stover v. Kanawha County Bd. of Educ.,* Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985).

Grievant argued that Respondent did not properly apply the criterion amount of experience relevant to the position, because it did not consider her supervisory experience with after school programs to be relevant experience. She also argued that she had the most specialized training because she had received training over a 30 year period. She asserted that the factors were equally weighted, and that because of this, had she been awarded the proper credit, she would have scored the highest on the matrix. Finally, she argued that the interview process was flawed because when she was asked about her professional development activities, she was not asked to describe these activities only for the last three years as were the other candidates. Grievant asserted that this placed her at a disadvantage because she did not know what the focus of the interview committee was.

Grievant did not demonstrate that Respondent erred in considering only experience as a principal when evaluating the criterion experience relevant to the position. While

Grievant asserted that experience as a supervisor for Americorps Vista Volunteers of America, experience as a curriculum director, and her role in the development of the Kids Korner Christian Preschool, including developing a budget and curriculum should have been credited as relevant experience, none of this was experience as the full-time administrator of a school in any county. Respondent was looking for experience as a principal in an elementary school in the evaluation of this criterion, which made it an objective evaluation, as opposed to the subjective evaluation of various experiences Grievant proposes. The undersigned cannot conclude that it was unreasonable or contrary to law for Respondent to look only at a particular, defined type of experience, that as a full-time principal in a county school system, in evaluating this criterion. However, Respondent did not completely disregard Grievant's other experience, and given that Respondent is not required to give equal weight to each criterion, it is of no significance whether Grievant's experience in supervision was specifically credited under this criterion.

Grievant, as noted above, asserted that Ms. Kidder-Wilkerson stated that all the criteria were weighted equally in this case. This misrepresents Ms. Kidder-Wilkerson's testimony. What she said was that the applicants were "all equal. And because everyone was equal in all of these things, it did come down to [the interview]. This category had the more [sic] weight, but it just so happened that they were all equal in everything else, so it did come down to their responses." (Level one transcript at page 125.) However, Ms. Smith stated that Grievant's experience and her resume were certainly considered by the interview committee members, but that Grievant's responses during the interview were not what they were looking for. All of this indicates that the matrix was simply one tool used by the interview committee members in evaluating the applicants, and that none of them

stood out above the others on the matrix. Grievant's many years of experience as a teacher and her activities outside of school were definitely considered, but the committee determined that Ms. Ennis was the best choice for this position based primarily on the interviews.

Grievant also did not demonstrate that she was not asked in the interview about her professional development activities only over the last three years. She did not recall being asked to limit her response to a three year period, but Ms. Kidder-Wilkerson had the questions in front of her, and testified that all questions were read to all interviewees verbatim. Ms. Smith also stated that the interview committee made sure the questions were asked of each candidate exactly as written. Ms. Kidder-Wilkerson acknowledged that questions could have been asked in reverse order from the way they were written, but that when this occurred, the question remained the same. Just because Grievant did not remember being asked about the last three years of professional development does not mean this question was not asked. There is no indication that she was taking notes during the interview, and the undersigned would be surprised to find that anyone could recall exactly what they were asked during an interview even hours after the interview, let alone several months later. Even if she were not asked this one question exactly as the other interviewees were asked the question, it was an interview, and she had ample opportunity to demonstrate to the interview committee that she was indeed the best choice to fill this position.

As to Grievant's 30 years as a teacher, compared to Ms. Ennis' less than 10 years, and her experience as a teacher at Hooverson Heights Primary School, this experience did not in and of itself qualify her or make her the best choice to be a principal. Ms. Kidder-

Wilkerson testified that the candidates were highly qualified, and that any of the first three candidates could have been placed in a principal position. However, the interview committee members all thought that Ms. Ennis was the best candidate for this particular position. Hooverson Heights Primary School has many special education students, and Ms. Ennis has both a reading specialty and special education certification and experience, which was also a consideration. This is not to say that Grievant would not have also been successful in this role, but she was not considered to be the best choice, or even the second best choice for this particular position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative defense by a preponderance of the evidence. *Hale and Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

2. "A party to a grievance is deemed to be in compliance with applicable time lines so long as the grievance-related document is placed in the mail and is postmarked by the due date. *Wadbrook v. Shepherd College*, Docket No. 93-BOD-214 (Aug. 31, 1993). Stated another way, under existing Grievance Board rules, grievants can ensure that a grievance is timely filed and will be received by the Board by placing the grievance

form in the United States mail on or before the due date." *McVay v. Wood County Bd. of Educ.*, Docket No. 95-54-041 (May 18, 1995).

3. "'File' or 'filing' means to *place the grievance form in the United States Postal Service mail*." 156 C.S.R. 1 § 2.1.4 (2008)(Emphasis added).

4. The grievance was timely filed.

5. 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).

6. While each of the factors listed in W. VA. CODE § 18A-4-7a 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. Thus, a county board of education may determine that the factor "other measures or indicators" is the most important factor. *Baker v. Lincoln County Bd. of Educ.,* Docket No. 97-22-482 (Mar. 5, 1998).

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> based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

7. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. *See Hyre v. Upshur County Bd. of Educ.,* 186 W. Va. 267, 412 S.E.2d 265 (1991).

8. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. *See generally, Harrison v. Ginsberg,* 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. *Stover v. Kanawha County Bd. of Educ*., Docket No. 89-20-75 (June 26, 1989); *Harper, supra*. 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)).

9. Grievant did not demonstrate a flaw in the selection process, or that Respondent acted in an arbitrary and capricious manner in making the determination that Ms. Ennis was the best candidate for this particular administrative position.

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: April 18, 2011