THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOSEPH KOMOROWSKI,
Grievant,

v. **Docket No. 2010-0225-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent,
and

COREY MURPHY,
Intervenor.

DECISION

Joseph Komorowski, Grievant, filed this grievance on August 18, 2009, against the Respondent, Marshall County Board of Education, challenging the failure to hire him as the principal of John Marshall High School. Grievant seeks to be awarded the position of principal of John Marshall High School. This grievance proceeded directly to level three by agreement of the parties and in accordance with W. VA. CODE § 6C-2-4(a)(4). A level three hearing was conducted by the undersigned Administrative Law Judge on September 28 and 29, 2010, at the Marshall County Board of Education office, Moundsville, West Virginia.[1] Grievant appeared in person and by his counsel, Gregory A. Gaudino, Petroplus & Gaudino, PLLC. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice McDavid Graff & Love LLP. Mr. Corey appeared as the Intervenor *pro se.* This matter became mature for consideration upon receipt of the Grievant's and Respondent's

---

[1]Prior to the hearing, Respondent moved to dismiss the grievance on the grounds that Grievant retired as an assistant principal effective July 30, 2008, and claimed that the grievance was moot. This motion was denied because Grievant is still an employee of Respondent by virtue of his employment contract with Respondent as National Honor Society Advisor. This contract appears to satisfy the broad definition of "employee" found at W. VA. CODE § 6C-2-2(e)(1).

proposed findings of fact and conclusions of law on December 23, 2010. Mr. Corey did not file proposals.

Synopsis

Grievant claims that Respondent's decision to hire the Intervenor, Corey Murphy, was based upon the recommendation of an interview committee which failed to properly consider the seven hiring criteria that Respondent is required to consider when hiring professional personnel. Grievant contends that had the committee considered the seven criteria required by the applicable statute, he would have been recommended as the most qualified applicant for the position. Grievant has failed to meet his burden of proof and demonstrate he was the most qualified candidate for the position, or that the hiring process was flawed to such a degree as to call into question the outcome of the process.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed by Respondent for forty-three years. He currently serves as the advisor to the National Honor Society at John Marshall High School. Grievant has been employed in various capacities at John Marshall High School since 1968, including as a teacher, assistant principal, athletic director, and adult education coordinator. He has served for twenty-three years as an assistant principal at John Marshall High School.

2. By posting dated July 15, 2009, Respondent advertised the position of Principal at John Marshall High School.

3. Four individuals, including Mr. Murphy and Grievant were interviewed for this position.

4. A committee to review the four applicants for Principal was composed of Respondent's Computer Application Trainer and policy writer Joan Palmer, Director of Pupil Services Dr. Susan Jones, Special Education Director Richard Redd, Director of Career Tech/Adult Education Scott Verner, Director of Curriculum and Instruction Dr. Bonnie Ritz, Attendance Director Ray Dague, Head of the English department at John Marshall High School Michelle Wnek, Faculty Senate President and Social Studies teacher at John Marshall High School Josh Gary, Guidance Counselor at John Marshall High School Linda Fisher, and the Head of the Automotive Technology department at John Marshall High School Mark Coffield.

5. Each candidate was given twenty minutes to type a written response to the same written question, and each candidate gave oral answers to the same set of fourteen questions asked during the interview, and prepared and gave a presentation to the committee on the same topic.

6. The Respondent's Personnel Director, Robyn Fitzsimmons, oversaw the interview process and read the interview questions. Ms. Fitzsimmons did not participate in the scoring process. Each interview committee member was given access to the portfolios submitted by the applicants and an opportunity to review them.

7. The oral interview questions were as follows:

Do you have the appropriate certification and licensure for this position?

What amount of experience do you has [sic] relevant to the position?

What amount of course work/or degree level do you have in the relevant field?

What is your GPA (undergraduate and graduate)?

What relevant specialized training have you had during the past three years?

Have your past performance evaluations been satisfactory?

When conducting a teacher observation, discuss the criteria by which you evaluate an effective lesson.

How will you use the evaluation process to guide staff to improve instruction?

During the 2008-2009 school year, 668 failing grades were transcripted [sic] for JMHS students. What will be your intervention plan to keep these students on course to graduate?

How will you ensure that the instructional staff is focused on common goals, procedures, and effective implementation of research based programs?

Research has shown that a clean and tidy environment promotes good health and positive academic performance. How will you work with the custodial staff to ensure JMHS facilities are maintained at the highest level?

JMHS has assistant principals. How will you utilize this staff for greatest efficiency and benefit of the school?

Situation - The co-teacher regularly does not come to class on time and is not an active partner in the instructional process. How will you handle this situation?

Professional portfolio is well organized and displays professional information about the applicant.[2]

8. The presentation topic was as follows:

This is your first meeting with the John Marshall High School staff prior to the opening of school. You have 12 minutes to conduct this meeting. The interview committee will assume the role of the staff.

9. The written response question was as follows:

Benchmarks and common assessments are essential for determining areas of academic weakness for individual and groups of students. How will you

[2]Respondent's Exhibit No. 1, Tab 2.

establish Professional Learning Communities to enable teachers to effectively use benchmarks and common assessments to intervene early to increase student achievement?

10. At no time during the interview process did any committee member indicate that a candidate should stop speaking or stop providing information. Throughout the interview process Grievant was free to offer any information that he desired.

11. During the interviews, all ten interview committee members used individual tally sheets to record their marks for acceptable responses or best responses to each of the questions. The scores of the ten interview committee members were placed on a master tally sheet.

12. When all the scores were totaled, Grievant ranked last of the four applicants.

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).

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). "The grievance procedure . . . allows for an analysis of 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).

W. VA. CODE § 18A-4-7a requires that professional positions be filled by the most qualified applicant, as determined by the factors outlined in that section. 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 [§ 18A-2-12], article two of this chapter; and

(7) 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. *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 may determine that "other measures or indicators" is the most important factor. *Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97022-482 (Mar. 5, 1998).

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). 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.

Grievant asserts a number of factors flawed the selection process for Principal. First, Grievant challenges the composition of the interview committee. He asserts that the committee contained two members who were listed as references on the Intervenor's application for the position, and those members failed to disclose that they had been asked by the Intervenor to be listed as references. Grievant also asserts that the interview committee included the school faculty senate president who spearheaded the successful effort to remove the former principal, with the intention to have him replaced by the Intervenor. Grievant protested that the consideration of specialized training be limited to the previous three years. Grievant contends that the interview committee failed to consider his forty-one years of experience as an employee of Marshall County Schools. Further, the interview committee failed to consider Grievant's course work and degree level in the field and degree level generally. In addition, the interview committee failed to properly compare the academic achievement of the applicants.

The evidence does not establish that the outcome of the selection process was tainted by the individual members of the interview committee. Although two members of the interview committee were listed as reference for the Intervenor, this information was buried deep in his portfolio and was not the subject of discussion during the interview process. Nothing in the record establishes that the members named as references for the Intervenor exhibited a lack of impartiality. In fact, when questioned by Grievant's counsel, the interview members were unaware that they were named as references in the Intervenor's portfolio. One has to take the assertion in the context of the case. That

context being that the interview committee members that were listed as references worked with the Intervenor during his years as an assistant principal, and as a natural consequence of that relationship were asked to be references.

Grievant next argues that the interview committee included the school faculty senate president who spearheaded the successful effort to remove the former principal, with the intention to have him replaced by the Intervenor. This argument is based on speculation and conjecture at best and not supported by the evidence. Grievant suggests that the Respondent "likely knew that Mr. Komorowski would apply for the principal position . . . [a]mong those assigned to the interview committee was Mr. Gary, who admitted that he and other faculty members wanted Mr. Murphy to become principal . . ."[3] Mr. Gary testified at level three that there were a number of people that he had in mind for the position. Mr. Murphy was one of them. Nevertheless, all applicants, including Grievant, were given equal consideration based upon all the information provided. One notable exception to that consideration favored Grievant in that Ms. Fitzsimmons instructed the committee to give Grievant a check mark in the experience factor. In addition, this undisputed fact effectively negates the basis of Grievant's argument that the interview committee failed to consider Grievant's forty-one years of experience as an employee of Marshall County Schools.

Grievant also complains that the interview committee limited the consideration of specialized training for the position to the previous three years. The record established that this limitation was specified in the posting, and county boards of education are

---

[3]Grievant's fact/law proposals at page 9.

afforded wide latitude in applying reasonable interpretations of their own postings. *James v. Monroe County Bd. of Ed.*, Docket No. 05-31-048 (Sept. 29, 2005). Respondent provided a rationale explanation for this three year limit based on relevance, and the fact that training changes rapidly year from year. Respondent set this cap to focus on specialized training occurring during the past three years so that the committee could better understand that component of the interview, without hearing of training that would no longer be of any use, and to ensure it would be meaningful in helping to perform the duties of the position.

A common theme that runs through a majority of Grievant's arguments questions the manner in which members of the interview committee scored the responses of the applicants. Specifically, Grievant questions whether committee members were instructed that they may only give one check mark to one candidate for a response, or whether multiple check marks could be given to multiple candidates. As Respondent notes, there is no legal requirement that an interview committee use a mathematical system or formula of any kind in evaluating the responses of the candidates for a particular position. The record establishes that the consensus of the interview committee was that Mr. Murphy's answers were more in-depth than Grievant's and reflected a meaningful understanding of the topics.

Clearly, Grievant is unhappy due to his perception that the interview committee failed to consider some factors and/or failed to compare the academic achievement of the applicants. However, the record makes clear that the interview committee properly exercised its statutory discretion to place emphasis on other measures or indicators upon which the relative qualifications of the applicant may fairly be judged. The interview

process was designed by Respondent to elicit from each candidate an appreciation and understanding of the needs of John Marshall High School and its particular challenges. This is unremarkable and permitted by law. In fact, it makes sense in considering an administrative position.

Finally, 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).

Grievant has not shown the selection process, as a whole, to be arbitrary and capricious. Neither did Grievant demonstrate the decision-making process to be fatally flawed, or that Respondent overstepped its broad discretion as described in W. VA. CODE § 18A-4-7a.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

3. W. VA. CODE § 18A-4-7a requires that 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 past performance evaluations and

other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

4. Boards of education may 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).

5. Once a board reviews the criteria required by W. VA. CODE § 18A-4-7a, it may determine that "other measures or indicators" is the most important factor. *Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97022-482 (Mar. 5, 1998).

6. 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).

7. 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).

8. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, or that Respondent acted in an arbitrary and capricious manner, or otherwise overstepped its broad discretion as described in W. VA. CODE § 18A-4-7a.

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: March 18, 2011

_____

Ronald L. Reece
Administrative Law Judge