

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEFFREY MENNILLO,
Grievant,

v.

Docket No. 2022-0748-WooED

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Jeffrey Mennillo, Grievant, filed this grievance against his employer Wood County Board of Education ("WCBE"), Respondent, contesting the approval and hiring process for the Director of Wood County CTE.¹ The original grievance was filed on April 27, 2022, and the grievance statement provides:

This grievance relates to the application, approval and hiring process of the Director of Wood County CTE in 2022.

Superintendent Hosaflook shared information with Board Members, and/or the hiring committee and/or other school administration that was discriminatory, defamatory, false, and harmful to Jeff Mennillo's reputation and application for Director of Wood County CTE.

Board Member Ron Tice went to the CTE to speak to employees regarding Jeff Mennillo, candidate for Director of Wood County CTE dispersing discriminatory, defamatory, and false information originating from Superintendent Hosaflook.

Jeff Mennillo did not receive any evaluations as Assistant Director of Wood County CTE, despite his request to have required evaluations.²

¹ The contested position is referred to variously by the parties and in the exhibits as "Director of Wood County CTE," "Director of Vocational Education," "WCTC Director," and "Director," among others. All these titles are referring to the same job. See generally, Director of Vocational Education (Job Description). Respondent's Exhibit No. 1

² Grievant last worked at the Caperton Center in 2019. Any complaint about not being evaluated when he worked at the Caperton Center is at least four years too late to be considered by the Grievance Board. See W. Va. Code §6C-2-4. The prospective "lack of evaluation" issue

Jeff Mennillo was discriminated against for using sick and vacation days while Assistant Director of Wood County CTE. Superintendent Hosaflook further discriminated and retaliated against Jeff Mennillo for using said sick and vacation days when Jeff Mennillo applied for the position of Director of Wood County CTE.

The posting procedures for the position of Director of the Wood County CTE were violated.

The meeting procedures for the board meetings related to the position of Director of Wood County CTE were violated.

The above were violations of discrimination, favoritism, and defamation in the Board of Education's hiring decision for the position of Director of Wood County CTE; all the provisions related to grievance procedures for employee; West Virginia Code §6C-2-2(d); §6C-2-3(h); West Virginia Code §18, §18A-2-1 et. al.; West Virginia Code §18A-2-1a; and West Virginia Code §18A-2-11 and any other provisions in the law and procedure related to board meetings, committee meetings and hiring decisions for the position of Director of Wood County CTE of the Wood County Board of Education and Superintendent Hosaflook in March and April of 2022.

As a remedy, Grievant seeks the following:

To be placed in the Position of Director of the Wood County CTE and receive back pay and benefits, future pay, and benefits; and reimbursement of attorney's fees and costs.³

A conference was held at level one on May 19, 2022, and the grievance was denied at that level on June 30, 2022. Grievant appealed to level two on July 13, 2022, and a mediation session was held on October 12, 2022. Grievant appealed to level three on October 20, 2022. A level three hearing was held before the undersigned Administrative Law Judge on February 1, 2023, and May 19, 2023, at the Grievance

will not be addressed in this decision.

³ WEST VIRGINIA CODE § 6C-2-6 is entitled, Allocation of expenses and attorney's fees. It specifically states: (a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expense. It is well established that the Grievance Board does not award attorney fees. Further this Grievance Board does not award tort-like or punitive damages.

Board's Charleston office. Grievant appeared in person and was represented by legal counsel Ginny Conley, Esquire Conley Law Office, PLLC. Respondent appeared by current Wood County Superintendent C. Willis and by legal counsel Richard S. Boothby, Esq, Bowles Rice LLP. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. A request was received and granted extending the submission date for the Proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals and this matter became mature for decision on July 21, 2023, on receipt of the last of these proposals.

Synopsis

This grievance involves the selection of the Director of the Wood County Technical Center in 2022. Grievant contends he should be placed in the position. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Respondent does not dispute Grievant's qualifications but chose an alternate individual. It is not established that Respondent exceeded its recognized degree of discretion or authority in choosing the successful candidate. It is not established by a preponderance of the evidence that Respondent violated duly applicable rule, regulation and/or law in awarding the Director of Wood County CTE position. Accordingly, this grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by Respondent for more than 20 years. He served as an assistant principal at Parkersburg High School for 15 years, an administrator at the Caperton Center for three years and as an assistant principal at Williamstown Middle/High School for 4 years. Grievant holds a Bachelor of Arts, a Master's in Administration, and a Certificate in Career Technical Education (hereinafter "CTE"). Grievant is a secondary schools administrator whose applicable experience includes curriculum, scheduling, attendance, discipline, and relationships with partner WVU Parkersburg and various other community contacts. Grievant's testimony

2. Respondent's vocational and technical education programs are located on two campuses. The Wood County Technical Center (WCTC) is located next to Parkersburg South High School. The Caperton Center is about 4 miles from the WCTC. *Id.* See also generally, <https://www.woodcountyschoolswv.com/o/wctc>. The official titles for these schools are the "Wood County Technical Center and the Caperton Center for Applied Technology." *Id.*

3. The contested position was first posted on February 23, 2022. See R Ex. 2. This posting was not placed on the West Virginia Department of Education's statewide job bank. Level three (L3) Testimony

4. Grievant along with four other candidates applied for the position. All five candidates met the minimum qualifications. All five candidates who applied were interviewed.

5. One of the qualifications for the Director of Vocational Education position was a valid Career and Technical Education administrator authorization or a willingness to obtain a valid Career and Technical Education administrator authorization. R Ex. 1.⁴

6. Keith Palmer, Kenneth Cook, and Michael Fling, administrators in the Respondent's central office, were the members of the interview committee. R Exs. 15-17. The interview committee members were selected by Superintendent Hosaflook.⁵

7. Several applicants, including Grievant, were interviewed for the position on March 8, 2022. R Exs. 12-14.

8. Both Grievant and Kaleb Lawrence favorably impressed the interview committee with their responses to the committee's questions. L3 Testimony of Judy Johnson, Mike Fling, and William Hosaflook.

9. Interview committee member, Mike Fling recommended both Grievant and Kaleb Lawrence to Superintendent Hosaflook. Fling L3 testimony. It is not clear which applicant was "formally" recommended to Superintendent Hosaflook by the interview committee. L3 Testimony of Judy Johnson, Christie Willis, and William Hosaflook.

10. "Approval of _____ as WCTC Director" was placed on the March 22, 2022, Board Meeting Agenda as a personnel action item. R Exs. 2 & 3.

⁴ Recently, the West Virginia State Board of Education started requiring the completion of certain coursework to obtain this CTE administrative authorization. However, at the time that requirement was enacted, anyone who held a West Virginia school administrator's certificate was "grandfathered in" and did not have to complete the coursework. L3 Testimony Dr. Hughes, the successful applicant, has completed the coursework. Hughes L3 testimony.

⁵ When the contested position was filled in 2022, William Hosaflook was the superintendent of Wood County Schools. He is now the superintendent of Jackson County Schools.

11. Prior to the March 22, 2022, board meeting, then-Superintendent Hosaflook sent his weekly confidential memo to the board members. See Board Member Rick Olcott L3 testimony . Among other things, the memo stated that Mr. Hosaflook planned to recommend Grievant, for the Director of Vocational Education position.

12. During the March 22, 2022, board meeting, an executive session was held to discuss the position. L3 Testimony of Judy Johnson, Debbie Hendershot, Justin Raber, Rick Olcott, and Ron Tice. The event of the executive session has a variety of perspectives. Superintendent and individual Board Members' L3 testimony.

13. There were multiple conversations happening at once during the March 22, 2022, executive session. Conversation/discussions transpired regarding applicants, information analysis, procedure, and potential options. Not all members were necessarily aware or participated in every conversation.

14. Nevertheless, it is factually accurate that during the executive session, discussion and conversation transpired between, among and with various Board members:

- Unorchestrated conversation transpired. Not all members were necessarily aware or participated in every conversation.
- Board member Rick Olcott entering into conversation with then Superintendent Hosaflook, "Do you have memory loss?" Mr. Olcott explained that this rhetorical question was related to a complaint Hosaflook had raised with him a few years earlier when Grievant was working at the Caperton Center. Olcott L3 testimony.
- Board member Ron Tice spoke to some of the other board members regarding the negative information he received about Grievant.
- Grievant's attendance and alleged reliability at Caperton Center was noted. (e.g., Board member, Judy Johnson recalled that during the March 22, 2022,

executive session, Olcott said something about he and Mr. Hosaflook going to the Caperton Center and not being able to find Grievant at work.) Johnson L3 testimony; see also Olcott L3 testimony.

- Board member Johnson had questions concerning whether or not the position had been posted on the statewide job bank website.
- When it came to discussions during executive session on March 22, 2022, Hosaflook's defense of Grievant is ambiguous and confusing. L3 Testimony
- There was discussion toward the recommendation of another qualified candidate, Caleb Lawrence. It is debatable whether Superintendent Hosaflook did or did not formally recommend Grievant for the position.
- No vote was taken during the executive session to determine the Board's choice for Director of Wood County CTE.

15. While Superintendent Hosaflook may have planned to recommend Grievant for the Director of Vocational Education position, he readily became aware of the discord among the board members. It is not established that the Superintendent formally recommended Grievant for the position.

16. Ultimately, at the March 22, 2022 meeting, the Board came out of executive session and voted to table the decision to choose the Director until April 12, 2022.⁶ R Ex 4. Further, the Board choose to re-post the position on a statewide job bank website.

17. None of the Board members saw any application information, interview notes or decision matrixes for any of the Director candidates prior to March 22, 2022.

18. During the March 22, 2022 executive session, Board Member Judy Johnson asked Superintendent Hosaflook whether the position had been posted on the statewide job bank. Superintendent Hosaflook responded that it had not. L3 Testimony of Rick

⁶ The school board voted unanimously to remove the contested position from the agenda.

Olcott, Judy Johnson, Justin Raber, Ron Tice, Deborah Hendershot, and William Hosaflook.

19. Board Member Judy Johnson had repeatedly encouraged Superintendent Hosaflook in the past to post professional administrative positions on the statewide job bank to access a larger pool of qualified applicants. Johnson L3 testimony.

20. During the March 22, 2022, executive session, Board Member Tice shared with some of the board members regarding negative information he perceived and/or was aware of (received) about Grievant.⁷

21. At some time before the March 22, 2022 board meeting, Ron Tice went to the Wood County Technical Center (located by Parkersburg South High School). Board Member Tice spoke to carpentry instructor Michael Kimble. The school secretary voiced some complaints about Grievant. While in the wood shop, Mr. Kimble provided that he “had some problems” with Grievant. Further, Board Member Tice met with one female instructor who had numerous concerns about Grievant being Director. Tice L3 testimony.

22. Grievant had missed 80.5 days during his last year as assistant director due to a medical condition, his wife’s medical condition, and the birth of a grandchild. Grievant L3 testimony.

23. After the March 22, 2022 board meeting concluded, Superintendent Hosaflook sent an email to the board members at 11:19 p.m. that evening. R Ex. 5. In

⁷ Board Member Ron Tice was a teacher for 20 years in Cabell County and 10 years in Wood County. He retired from Wood County Schools. He taught mechanical drawing, reading blueprints, and similar vocational/technical courses. The tech courses were part of Parkersburg South High School’s programs when he in Wood County. Board members have numerous contacts within school systems.

the email, Superintendent Hosaflook explained that there was still time to repost and fill the Director of Vocational Education position within the time limits required by West Virginia law. *Id.*

24. On March 23, Superintendent Hosaflook forwarded his March 22, 2022, 11:19 p.m. email to Stephanie Cunningham, the board's administrative assistant for teacher certification. R Ex 6.

25. Ms. Cunningham works in Respondent's human resources department. Among other things, she is involved in posting professional positions for the respondent. Cunningham *L3 testimony*.

26. On March 23, 2022, Ms. Cunningham sent an email to Brad Mills, a West Virginia State Department of Education employee who oversees the technical aspects of the statewide job bank. R Ex. 21.

27. Mr. Mills provided Ms. Cunningham with the necessary log-in and password information to post a job on the statewide job bank. As far as Ms. Cunningham knows, Respondent had never used the statewide job bank prior to March 23, 2022. R Ex 6; see also Cunningham L3 testimony. Neither she nor her predecessor had ever posted a job on the statewide job bank. *Id.*

28. On the afternoon of March 23, 2022, the contested position was reposted in Wood County and on the statewide job bank. R Exs. 7, 21, 22. See also Cunningham L-3 Testimony.

29. Dr. Jason Hughes saw the Director of Vocational Education job posting on the statewide job bank. Dr. Hughes applied for the position and was interviewed on April 4, 2022. R Exs. 11 and 14.

30. Dr. Hughes's qualifications for the CTE director's position are provided in the record. R Ex. 8, 11. He has an extensive record of expertise in vocational education as a CTE classroom teacher in West Virginia for 13 years, as a CTE administrator at the West Virginia Department of Education for 13 years, and as an instructor at Kansas State University, where he earned his doctorate. Further he has been recognized as West Virginia Agriscience teacher of the year twice (1995, 1996), West Virginia secondary conservation teacher of the year twice (1996, 2001), and West Virginia teacher of the year (2005).

31. Dr. Jason Hughes, ultimately the successful candidate, was interviewed by the same interview committee as the other applicants .

32. After Dr. Hughes's interview, the members of the interview committee unanimously recommended him to Superintendent Hosaflook for the position. R Ex. 8. See also L3 testimony

33. Grievant contacted Board Member Olcott by phone at some point after the March 22, 2022, board meeting but before the April 12, 2022, meeting to discuss the Director position. Grievant questioning why the Board Members would not want him in the Director position began talking to each Board Member. Grievant L3 testimony.

34. Grievant became aware that board members may have been misled and/or unaware of relevant facts pertaining to his potentially alleged absenteeism issue three years prior while he worked at Caperton.

35. Grievant met with Board Member Olcott in person at a McDonald's to discuss Grievant's concerns about the Director position not being awarded to him. *Id.*

36. At some point before April 12, 2022, Grievant called and/or met with every member of the board of education about the position. L3 Testimony of Rick Olcott, Judy Johnson, Justin Raber, Ron Tice, and Deborah Hendershot.

37. Superintendent presented his recommendation of Dr Hughes to Respondent, Wood County Board of Education, at its April 12, 2022 Board meeting.

38. At its meeting on April 12, 2022, Respondent voted to hire Dr. Jason Hughes as the Director of Vocational Education. R Exs. 9,10. Dr. Hughes received approval of the board with a 4-0 vote; Board member Olcott abstained from the vote.

39. All five members of the Wood County Board of Education at the time of the selection of the Director testified at the level three hearing, including Rick Olcott, Justin Raber, Ron Tice, Judy Johnson, and Debbie Hendershot.

Discussion

This grievance does not challenge a disciplinary action, Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

"County 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). In a non-selection case, the grievant bears the burden of proving that he should have been selected for a particular position rather than another applicant by establishing that he was the most 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).

Grievant contests the hiring process and the approval of the Director of Wood County Technical Center in 2022. Grievant via legal counsel contends a substantial flaw

in the selection process. Grievant argues there should not have been a second posting; he is the most qualified candidate and should have been selected by the Board on March 22, 2022. Grievant maintains he is more qualified and suited for the position than the chosen candidate Dr. Jason Hughes. Grievant highlights that Dr. Hughes did not have administrative experience in the secondary school setting.

When selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in W. Va. Code § 18A-4-7a, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. See W. Va. Code § 18A-4-7a(c). See also *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 (Apr. 10, 1992); *Komorowski v. Marshall County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009). At their discretion, school boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. W. Va. Code §18A-4-7a (q)(1). If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within 30 working days of the end of the first posting period. W. Va. Code §18A-4-7a (q)(3). Attracting more qualified applicants is one, if not, the very purpose of reposting professional positions. See generally, W. Va. Code §18A-4-7a (q)(1).

The instant contested position was posted in Wood County on February 23, 2022.⁸ Grievant and four other individuals applied and were interviewed. During the March 22, 2022 board meeting, an executive session was held to discuss the appointment to the position. Multiple conversations transpired during the executive session. See Finding of Facts 12-20, *supra*. It was recommended by at least one board member that the position be reposted on the statewide job bank. Ultimately, the Board came out of executive session and voted to table the decision to choose the Director until April 12, 2022. See R Exs. 3 and 4. See also L3 Testimony of Rick Olcott, Judy Johnson, Justin Raber, Ron Tice, Deborah Hendershot, and William Hosaflook. These actions are within the purview of the Boards authority. W. Va. Code §18A-4-7a. The actions of the Board are lawful.

One of the Grievant's complaints about the hiring process is that "Superintendent Hosaflook shared information with Board Members, and/or the hiring committee and/or other school administration that was discriminatory, defamatory, false, and harmful to Grievant's reputation and application for Director of Wood County CTE." See Level Three Grievance Form. Former board member Rick Olcott's testimony directly contradicts this claim. Mr. Olcott testified that he, not Superintendent Hosaflook, brought up the issue of Grievant's alleged past attendance problems. Mr. Olcott raised that issue with Mr. Hosaflook *because* the Superintendent was "planning" to recommend Grievant for the contested position. There was not a true consensus among the members that Grievant

⁸ See generally, Director of Vocational Education (Job Description). R Ex 1 Referred by the parties and in the exhibits as "Director of Wood County CTE," "Director of Vocational Education," "WCTC Director," and "Director," among others. All these titles are referring to the same job.

was best fitted for the position. During the March 22, 2022 executive session, board members were in a state of discord. Discord is not a consensus; this discord was the result of several, not one, particular factors.

Grievant further alleges that Board Member Ron Tice solicited and promoted dispersing discriminatory, defamatory, and false information to the detriment of Grievant. Select actions of Board Member Tice were outside the recognized process established for the hiring of the position.⁹ An independent investigation initiated *sui sponsee* by a lone Board member is not customary or prudent procedure.¹⁰ Grievant maintains such action, (independent investigation), constitutes an inexcusable flaw in the hiring/confirmation process.¹¹ Grievant is of the position that this conduct nullifies the Board's subsequent action(s). The undersigned is not so convinced. The undersigned is

⁹ Board Member Tice admitted that he conducted an "investigation" into Grievant. He explained his inquiries included walking the halls at the Wood County Tech Center located at Parkersburg South High School looking for teachers to talk to about Grievant. L3 Testimony. He admitted talking to several individuals at the Tech center including, Mr. Kendall, Tony, the secretary, Natalie Ruiz who had negative things to say about Grievant. He also spoke to Mr. Raines, the autobody teacher and the auto mechanic teacher prior to the March 22, 2022, board meeting who had nothing to say about Grievant one way or another. Board member Tice disclosed this "investigation" into Grievant to other members in the executive session at the March 22, 2022, Board Meeting. He did not confirm or do any follow-up on the information from his investigation that he shared with the Board to determine if it was true or not.

¹⁰ W. Va. Code § 18A-2-1 discusses the responsibilities of the superintendent and the board in these situations, providing that the board hires professional personnel "upon nomination and recommendation of the superintendent."

¹¹ Similarly, Grievant alleges that he was discriminated against in considering his usage of sick and vacation days. Grievant credibly testified as to why, for a period, he used such an above average amount of leave. This claim as it pertains to Superintendent Hosaflook, is not supported by established evidence. Quite the opposite. While Mr. Hosaflook may have been annoyed by Grievant's absences from work several years ago, he was unmistakably planning to recommend Grievant for the Director of Wood County CTE position. L3 Testimony Olcott and William Hosaflook.

aware and interested in the degree of ramification but not convinced that in the fact pattern of this case the conduct constituted a substantial flaw.

It is factual that the Board, individually discussed a variety of issues and options but it is collectively that they voted. The Board came out of executive session and voted to table the decision to choose the Director until April 12, 2022. It is not established that the reposting can be attributed solely to discord created by Board Member Tice actions, Board Member Rick Olcott's reservations, or Superintendent Hosaflook's hesitation. **The tabling of the discussion and reposting are lawful actions of Respondent.** It is disturbing that Grievant was never made aware of any questions or issues related to his attendance as principal of the Caperton Center.¹² However, it is also of record that Grievant called and/or met with every member of the board of education about the position. L3 Testimony of Rick Olcott, Judy Johnson, Justin Raber, Ron Tice, and Deborah Hendershot. This too is not recognized procedure. Unusual, not normal and/or indirect influence is not the same as a "substantial flaw."

While Grievant alleges that the "posting procedures for the position of Director of the Wood County CTE" and the "meeting procedures for the board meetings related to the position of Director of Wood County CTE were violated" it is not established by a preponderance of the evidence that the process was influenced by unlawful action(s).

After the March 22, 2022, board meeting concluded, Superintendent Hosaflook sent an email to the board members. In that email, he explained and demonstrated there

¹² There is no evidence of record that Grievant was in violation of any applicable school policies with his attendance while working as a Principal at Caperton Center.

was still time to repost and fill the Director of Vocational Education position within the time frame required by West Virginia law. See W. Va. Code §18A-4-7a (q)(3). The position was reposted locally and on the statewide job bank the next day, March 23, 2022. R Exs. 6-7. See also Stephanie Cunningham L3 Testimony. The instant contested position was timely reposted to attract more qualified applicants by the board within the statutory timeline. R Ex. 5. Respondent maintains that reposting the position resulted in more qualified person(s) applying for the position. Respondent highlights the CTE credentials and experience of the successful applicant greatly exceeded those of prior applicants. R Exs 10 and 11. Attracting more qualified applicants is one if not the very purpose of reposting professional positions. See generally, W. Va. Code §18A-4-7a (q)(1).

The grievance procedure allows for an analysis of legal sufficiency of the selection process at the time it occurred. *Boone v. Cabell County Bd. of Educ.*, Docket No. 2022-0159-CONS (June 3, 2022). Absent proof that he was the most qualified applicant, when a grievant shows that there was such a substantial flaw in the selection process that the outcome may have been different had the proper process been followed, his relief is limited to a reposting of the position so that it may be filled following the proper process. *Blackburn v. Mingo County Bd. of Educ.*, No. 2021-2450-CONS (March 16, 2023); *Mick v. Hancock County Bd. of Educ.*, Docket No. 2022-0038-HanED (March 4, 2022).

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 Resources*, 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). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Based on then-Superintendent Hosaflook's determination that Dr. Hughes was the most qualified applicant, Respondent selected Dr. Jason Hughes for the contested position. Dr. Hughes's qualifications for the CTE director's position are provided in the record. R Ex. 8, 11. He has a record of expertise in vocational education; as a CTE classroom teacher in West Virginia for 13 years, as a CTE administrator at the West Virginia Department of Education for 13 years, and as an instructor at Kansas State University, where he earned his doctorate. Respondent by counsel highlights that Grievant, on the other hand, has never taught a classroom of public-school children, let alone been a West Virginia Agriscience teacher of the year twice (1995, 1996), West Virginia secondary conservation teacher of the year twice (1996, 2001), and West Virginia teacher of the year (2005). R Ex 11. Grievant had prior work experience as a public school CTE administrator (at the Caperton Center) and as an administrator for Wood County Schools for many years. Given Dr. Hughes's CTE-related experience, CTE-related education and award-winning CTE job performance in the past, Respondent's decision to hire Dr. Hughes, as the most qualified applicant, cannot be labeled arbitrary

and capricious. Grievant has not established that, he and he alone is the most qualified applicant.¹³ Please recall, even at the March Board meeting, there was viable discussion toward the recommendation of another qualified candidate, Kaleb Lawrence.¹⁴

Grievant's dissatisfaction with Respondent's actions is understandable. However, Respondent's actions are not unlawful. Board members talk, each member brings his or her experiences and opinions regarding various issues. Based on the evidence of what happened before, during and after the executive session on March 22, 2022, the reposting of the Director position statewide is the collective thought process of the Board, not the action of one individual member, be that Board Member Tice, Board Member Olcott and/or Superintendent Hosaflook. The executed plan of repositing is within the discretion authority of the Board. There are some unusual occurrences in the fact pattern of this matter (politicking on both sides), but no facts established that there was conduct which constitutes a substantial flaw in the selection and/or approval process.

All of the official actions of the board were within the purview of the Boards authority. W. Va. Code §18A-4-7a. Grievant understandably is disappointed and truly believes he was cheated out of a life altering opportunity. However, it is not established by a preponderance of the evidence that Respondent violated any law or policy in hiring

¹³ When asked about his qualifications for the contested position, Grievant testified almost exclusively about his connections with other Wood County Schools administrators and employees, his relationships with employers in Wood County and others in the community, his relationships at WVUP (the local community college located next to the Caperton Center), and his familiarity with the vocational school and its staff. See West Virginia Code § 18A-4-7a.

¹⁴ Both Grievant and Kaleb Lawrence favorably impressed the interview committee. L3 Testimony of interview committee members Johnson, Fling, and Superintendent Hosaflook. Interview committee, member Fling recommended both Grievant and Lawrence to Superintendent Hosaflook.

the successful applicant for the contested position.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, Grievant bears the burden of proof. Grievant has the burden of proving his grievance by a preponderance of the evidence. See *W. Va. Code R* §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. "County 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. When selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in *W. Va. Code* § 18A-4-7a, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. See *W. Va. Code* § 18A-4-7a(c). See also *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 (Apr. 10, 1992); *Komorowski v. Marshall County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009).

4. In a non-selection case, the grievant bears the burden of proving that he should have been selected for a particular position rather than another applicant by establishing that he was the most 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. *Baisden v. Cabell County Bd. of Educ.*, Docket No. 06-06-077 (Oct. 22, 2007); *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30-495 (June 26, 2003).

5. The grievance procedure allows for an analysis of legal sufficiency of the selection process at the time it occurred. *Boone v. Cabell County Bd. of Educ.*, Docket No. 2022-0159-CONS (June 3, 2022).

6. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. W. Va. Code §18A-4-7a (q)(1). If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within 30 working days of the end of the first posting period. W. Va. Code §18A-4-7a (q)(3).

7. The instant contested position was timely reposted.

8. “An agency’s decision by ‘appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or

capricious or clearly wrong.” *Wingrove v. W. Va. Univ.*, Docket No. 04-HE-230 (Sep. 30, 2004); *Reynolds v. Higher Educ. Policy Comm’n/W. Va. Univ. Institute of Tech.*, Docket No. 03-HEPC-294 (Jan. 16, 2004); *Burchell v. Higher Educ. Policy Comm’n/Marshall Univ.*, Docket No. 02- HEPC-139 (Sept. 30, 2002); *Rumer v. Bd. of Trustees/Marshall Univ.*, Docket No. 95-BOT- 064 (May 31, 1995).

9. 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 Resources*, 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). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

10. Respondent’s selection decision is not established to be arbitrary, capricious and/or an unreasonable determination.

11. Grievant failed to prove by a preponderance of the evidence that Respondent violated any applicable statute, policy, rule or regulation in hiring the successful applicant for the contested position.

12. Grievant failed to establish that he is the most qualified applicant for the contested position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.¹⁵ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: September 6, 2023

Landon R. Brown
Administrative Law Judge

¹⁵ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.