

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MYCAH AUVILLE,

Grievant,

v.

Docket No. 2023-0115-WooED

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Dr. Mycah Elizabeth Auville, Ed D., is employed by Respondent, the Wood County Board of Education, as a multi-categorical special education teacher. On August 12, 2022, Grievant filed a lengthy statement of grievance, which is incorporated in full by reference. In summary, Grievant contends that had the Respondent considered the “matrix” (nine hiring factors) under W. Va. Code § 18A-4-7a she would have been recommended as the most qualified applicant for the Principal position of Blennerhassett elementary school. Grievant alleges Respondent’s selection decision was arbitrarily and capriciously done and was an abuse of discretion. As relief, Grievant seeks placement in the position of Principal at Blennerhassett elementary school, to be made whole in every appropriate way including, but not limited to, back-pay with interest and all appropriate benefits including retirement, leave and counsel and preparation costs.

On August 22, 2022, level one hearing was scheduled to occur¹. The level one administrator dismissed the grievance by order dated September 7, 2022. Grievant appealed to level two on September 20, 2022. Following unsuccessful mediation,

¹ Grievant and her representative failed to participate in the level one hearing. Grievant instead merely dropped off documents and left before a hearing could occur. The Respondent made a motion to dismiss the grievance for abandonment which the level one administrator granted.

Grievant appealed to level three of the grievance process on November 18, 2022. A level three hearing was held on September 21, 22 and 25, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by her husband, Benjamin Auville. Respondent appeared by Wood County Board of Education Superintendent, Christie Willis, and was represented by counsel, Richard S. Boothby of Bowles Rice LLP. This matter became mature for decision on November 3, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleged she should have been selected over the successful applicant for the position of Principal of Bennerhassett elementary school because she was the most qualified for the position. The record demonstrated the highest criteria for consideration was applicants with past administrative experience as principals or assistant principals, which the Grievant lacked. Grievant failed to demonstrate how her experience as a director of a private school or being an online professor equates to actual administrative experience as preferred for the position. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the position was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a multi-categorical special education teacher at Parkersburg South High School.

2. On July 20, 2022, the principal's position at Blennerhassett Elementary School was posted. (*See Respondent's Exhibit Nos. 3 and 4*).

3. Fourteen people applied for the principal position, including Grievant. Each applicant answered the same set of questions on the application.

4. Justin Hartshorn, then Director of Elementary Education, oversaw the applicant interview process.

5. Mr. Hartshorn asked Kenneth Cook, Director of Secondary Education, and Melanie Cutright, Early Learning Coordinator, to serve on the interview committee.

6. The interview committee determined only applicants with administrative experience in an elementary school would be chosen to be interviewed. (*See Level Three Testimony of Mr. Hartshorn. See also Respondent's Exhibit No. 5*).

7. Of the fourteen applicants for the position, seven² applicants were selected to be interviewed by the interview committee. (*See Respondent's Exhibit No. 5*). Grievant was not chosen to be interviewed.

8. All applicants that were chosen to be interviewed had administration experience of either being an elementary school Principal or Assistant Principal.

9. All interviewed applicants were asked the same set of questions. (*See Respondent's Exhibit No. 5*).

² One applicant withdrew from consideration.

10. On August 2, 2022, the Board of Education voted to approve the superintendent's recommendation that Kristin Garretson be hired as the principal of Blennerhassett Elementary School. (*Respondent's Exhibit No. 25*). Kristen Garretson was an assistant principal at Franklin Elementary Center and held a master's degree of arts in teaching with a 4.00 G.P.A. from West Virginia University. (*See Respondent's Exhibit No. 12*).

11. At the level three hearing, Wood County Board of Education members, Ron Tice, Judy Johnson, and Justin Raber, all affirmed they trusted in the process by which Wood County Superintendent would recommend applicants to the Board, and understood they had the ability to reject the Superintendent's recommendation.

12. Grievant's prior experience in education includes eleven years of teaching experience. Grievant also teaches online courses for Trident University International in the Master of Education program where she teaches an Early Childhood Education course and the Elementary/Secondary Leadership and Administration concentration courses.

13. Grievant obtained a bachelor's degree in early childhood education, master's in early childhood education and special education, and a doctorate in educational leadership.

14. Grievant does not have experience as a principal in a West Virginia public school. Grievant was employed as a director of a private school in Illinois for three years for grades pre-K, kindergarten, and first grade. In Grievant's application, she asserted her director position was the equivalent of a principal endorsement. (*See Respondent's Exhibit 15*).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she 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).

Grievant has two arguments. First, Grievant argues that the selection process was flawed because the Respondent was required to interview her for the position. Grievant’s second argument is that had she been interviewed, the scoring “matrix”³ of W. VA. CODE

³ Grievant continuously referred to W. VA. CODE § 18A-4-7a (b) (nine hiring factors) as a hiring “matrix” in a way to suggest all nine factors must be equally scored. W. VA. CODE

§ 18A-4-7a would have demonstrated that she was the most qualified candidate for the Principal position. Grievant based her allegations by individually scoring each of the nine hiring factors with a single point where she awarded herself with the most points.⁴ Grievant claims the failure to use the hiring “matrix” demonstrated favoritism, blacklisting, discrimination and established the hiring selection was arbitrary and capricious, and an abuse of discretion. Respondent argues West Virginia school boards are not required to interview all minimally qualified applicants for posted professional positions. Respondent further claims it acted reasonably and within its lawful discretion by adding preference to applicant’s experience and granting interviews only to applicants who had actual experience working as elementary school administrators.

W. VA. CODE § 18A-4-7a(b) 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 required certification area;
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;

§ 18A-4-7a (b) does not reveal the word “matrix” anywhere in the language of W. VA. CODE § 18A-4-7a (b) and the word “matrix” was only used by the Grievant.

⁴ At the level three hearing, Grievant concluded that she was the most qualified candidate by looking at W. VA. CODE § 18A-4-7a (b)’s nine hiring factors and subjectively scoring herself as with seven points while she only scoring the successful candidate, Mrs. Garretson, with five points. (See *Testimony of Grievant*).

(5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;

(6) Specialized training relevant to performing the duties of the job;

(7) Past performance evaluations conducted pursuant to §18A-2-12 and §18A-3C-2 of this code or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;

(8) Seniority;

(9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

W. VA. CODE § 18A-4-7a (b) (2022).

County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. See *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievant failed to meet her burden to establish that the Respondent was required to interview her. Nothing in W. Va. Code § 18A-4-7a(b) or any case law says that all applicants must be interviewed. More importantly, Grievant failed to meet her burden to establish that she was the most qualified applicant. As such, the Grievant failed to meet her burden to establish that she would have been the most qualified applicant for the position and the successful applicant was arbitrarily and capriciously selected.

Nothing in W. VA. CODE § 18A-4-7a(b) or any case law says that all applicants must be interviewed nor is there a set “matrix” of equally weighted hiring factors. The law is clear that while each of the factors listed in W. VA. CODE § 18A-4-7a(b) must be

considered, the statute permits county boards to determine the weight to be applied to each separate factor when filling an administrative position, so long as this does not result in an abuse of discretion. *See Switzer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-013 (April 11, 2003).

The record was clear that the criteria that the interview committee gave the factor under W. VA. CODE § 18A-4-7a(b) the most weight was each applicant's prior administrative experience in elementary school education. Only applicants who possessed prior administrative experience as either an elementary school Principal or Assistant Vice Principal were referred to be interviewed for the position. Grievant did not contest she lacked prior experience in administration in a W.Va. public elementary school. Further, Mr. Harthorn did not consider Grievant's prior experience as a director of an Illinois private school as comparable to actual administrative experience as preferred for the position. It is reasonable that a county school board would choose actual administrative experience in elementary school education to be in the best interest of Blennerhasset elementary school. Therefore, Grievant lacked the single heaviest weighted factor for consideration for the position and was not arbitrarily or capriciously denied an interview when all other applicants had prior administrative experience.

Grievant also failed to establish any evidence demonstrating favoritism, blacklisting, or discrimination against her. "Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly

situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

All applicants were asked the same questions and only applicants selected to be interviewed possessed the preferred criteria of administrative experience. Grievant did not contest she lacked administrative experience that the interview committee desired. Grievant failed to introduce evidence showing her background should be treated similarly as having administrative experience. Instead, Grievant made conclusory statements that her prior director experience of an out-of-state private school is equivalent to administrative experience as an elementary school Principal. Grievant introduced a copious amount of evidence at the level three hearing. However, none of the evidence demonstrated her director experience was equivalent to administrative experience. Mr. Hartshorn did not consider Grievant’s experience being the director of a private out-of-state preschool equivalent to administrative experience. If her director’s experience was comparable to administrative experience, Grievant could have introduced evidence or in the very least give examples of her director duties. Instead, Grievant merely made conclusory statements without any supporting evidence.

Grievant also failed to explain how her experience as a professor of an online collegiate course should be considered equal to actual administrative experience. Again, Grievant merely made conclusory statements that her background should be treated as having the equivalent to having administrative experience without any supporting evidence. Grievant did not introduce any evidence demonstrating that she was blacklisted from consideration. As such, Respondent demonstrated it acted reasonably when deciding it determined prior administrative experience was the chief criteria to be

considered for the position and only chose to interview those applicants who possessed such criteria. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the position was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation. As such, this grievance is DENIED.

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. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she 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. "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).

4. W. VA. CODE § 18A-4-7a(b) 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 required certification area;
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;
- (5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to performing the duties of the job;
- (7) Past performance evaluations conducted pursuant to §18A-2-12 and §18A-3C-2 of this code or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

W. VA. CODE § 18A-4-7a (b) (2023).

5. While each of the factors listed in W. VA. CODE § 18A-4-7a must be considered, the statute permits county boards 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. *Switzer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-013 (April 11, 2003).

6. County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. See *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

8. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*,

196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*).

9. “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

10. “‘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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

11. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

12. “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

13. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the position was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation. Respondent was proper to only interview applicants who obtained the desired criteria for the position which the Grievant lacked.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.⁵ 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: December 21, 2023.

Wes H. White
Administrative Law Judge

⁵ 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.