

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**JAMES I. JACKSON,
Grievant,**

v.

Docket No. 2016-0879-KanED

**KANAWHA COUNTY BOARD OF EDUCATION,
Respondent, and**

**BERNARD BALSER,
Intervenor.**

DECISION

Grievant, James Jackson, filed this grievance against Respondent, Kanawha County Board of Education, on November 20, 2015, stating the following:

Grievant applied for the Supervisor of Custodian vacancy. Grievant has 33 years of service & this position was awarded to a less senior candidate. Grievant alleges a violation of W. Va. Code § 18A-4-8b & 18A-4-8g.

Grievant seeks reinstatement into the position, retroactive wages, benefits & seniority. Grievant also seeks an award of interest on all monetary sums.

A Level One evidentiary hearing was conducted on December 20, 2015, by Mary Jo Swartz, designee of the chief administrator. This grievance was denied by Ms. Swartz by decision dated January 19, 2016. Grievant appealed to Level Two on February 2, 2016. A mediation session was conducted on March 23, 2016. Grievant perfected his appeal to Level Three on March 31, 2016. A Level Three evidentiary hearing was conducted on September 28, 2016, at the Grievance Board's Charleston office before Administrative Law Judge Landon R. Brown. This case became mature for consideration on November 3,

2016, after receipt of the parties' fact/law proposals. Respondent appeared by its counsel, James W. Withrow. Grievant appeared in person and by his counsel, John E. Roush, West Virginia School Service Personnel. Intervenor appeared *pro se*. This case was reassigned for administrative reasons to the undersigned on February 22, 2017.

Synopsis

Grievant claims that the Kanawha County Board of Education failed to properly consider his seniority and his past service when it hired a less senior applicant. Respondent argues that Grievant's satisfactory evaluations and lengthy seniority were considered, but those factors could not overcome Grievant's failure to meet the necessary qualifications for the supervisory position. Based upon the record of this case and applicable case law, the undersigned concludes that Grievant failed to demonstrate by a preponderance of the evidence that the selection of Intervenor for the position of Supervisor of Maintenance was arbitrary and capricious or an abuse of discretions.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is currently employed by Respondent as a Carpenter II. He has held that classification category of employment for six years. Grievant has been employed by Respondent for thirty-three years.
2. Respondent posted a service vacancy on July 28, 2015, for Supervisor of Maintenance/Custodial Services.
3. "Supervisor of Maintenance" is defined in WEST VIRGINIA CODE § 18A-4-8(i)(85) as "skilled person who is not a professional person or professional educator as

defined in section one, article one of this chapter. The responsibilities include directing the upkeep of buildings and shops, and issuing instructions to subordinates relating to cleaning, repairs and maintenance of all structures and mechanical and electrical equipment of a county board.”

4. The Kanawha County Schools Job Description for the position included the following minimum requirements:

A minimum of five years significant supervisory experience, or a two-year degree and two years significant experience, or a four year degree. (A minimum of a two year degree preferred). Strong supervisory and communication skills as well as knowledge related to custodian responsibilities. A thorough knowledge of occupational hazards and safety precautions of the trades is required. Previous supervisory experience preferred. Must have successfully completed or be willing to compete the KCS Supervisor Training Program.

5. Grievant and eight others met the minimum qualifications for the job, and were offered an interview. One applicant declined the interview.

6. The Executive Director of Maintenance, Terry Hollandsworth, was responsible for hiring the position. As part of the hiring process, Director Hollandsworth formed an interview committee consisting of himself, Tabitha Gillespie, Human Resources Specialist, Amy Scott, principal of McKinley Middle School, David Anderson, principal of Shoals Elementary School, and Angel Gurski, principal of Dunbar Primary School.

7. Director Hollandsworth created the ten interview questions. The questions were worth ten points each. Each member of the interview committee scored the questions independently based on his or her opinion of the completeness of the answer.

8. Respondent created a matrix to score the applicants in experience, performance evaluations, overall seniority, custodian seniority, attendance, and the interview.

9. Intervenor, Bernard Balser, has been employed by Respondent for approximately twenty years, and has been employed as a Custodian I through IV.

10. Mr. Hollandsworth indicated that being able to communicate effectively was an important part of the job of Supervisor of Maintenance. The Supervisor must communicate with subordinates, superiors, coworkers, schools, suppliers and the public. As a result, the interview was weighted heavily in determining the qualifications of the applicants.

11. Mr. Balser scored the highest in the interview category and was scored as the top applicant in the process. Grievant scored third in the interview category and third overall in the application process. The position was offered to Mr. Balser.

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 Board 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).

WEST VIRGINIA CODE § 18A-4-8b provides, with regard to selection for service personnel positions, that:

A county board shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article.

The record is undisputed that the nine candidates met the minimum qualifications for the position. Grievant argues that, with his good record of past service, possession of the greatest overall seniority, as well as custodial seniority, he was entitled to the position, and the heavy reliance on an interview was arbitrary and capricious. Respondent asserts that the controlling factor in hiring is which candidate is the most qualified for the position, and the interview was developed to assist Respondent in determining which candidate was the most qualified.

The West Virginia Supreme Court of Appeals has repeatedly upheld service personnel hiring decisions in which seniority was not the determinative factor. *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999); *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995). In addressing supervisory

positions, it was determined that additional factors could be considered in making the selection for the position.

The most recent case on this issue to come before the West Virginia Supreme Court of Appeals is *Nottingham v. Kanawha County Board of Education*, Case No. 15-0602, June 21, 2016. In that case an individual who had applied for a position as Supervisor of Maintenance argued that Kanawha County Schools placed too much emphasis on the results of a structured interview and did not consider seniority and past evaluations sufficiently. Kanawha County Schools asserted that while it was required to consider seniority, qualifications and evaluation of past service, it was not required to give equal weight to each criterion, and could assign weight as it deemed appropriate.

The West Virginia Supreme Court of Appeals agreed with the Kanawha County Board of Education and stated, “in this case, petitioner claims that respondent failed to properly consider his seniority and his past service when it hired a less senior applicant. The circuit court, on the other hand, agreed with respondent that petitioner’s satisfactory evaluations and lengthy seniority were considered by respondent, but those factors could not overcome petitioner’s failure to meet the necessary qualifications for the supervisory position. Having reviewed the parties’ argument, the record on appeal, and the pertinent legal authority, we find no error in the circuit court’s ruling.”

In this case, the candidates were given scores ranking in descending order for years of seniority, qualifications and evaluations, as well as attendance. Similar to *Nottingham*, the outcome was driven in large part by the weight attributed to the interview scores. The burden of proof is on Grievant to prove that the manner in which the qualifications of the

candidate were judged was arbitrary and capricious.¹ The undersigned was not provided with any authority that has determined the circumstances in which an interview would be weighted so heavily that it would constitute an abuse of discretion. In the instant case, the interview was worth a possible total of 100 points. On the other hand, in the *Nottingham* case the interview was worth a possible 300 points, which the courts did not determine to be excessive. Respondent has determined that the results of a structured interview are the best method by which to determine the qualifications of the applicants. There is nothing in the record which would suggest that this is not the case or is arbitrary or capricious.

Mr. Balsler met the minimum qualifications for the position and performed better on the interview portion than the remaining candidates. Respondent's determination that Mr. Balsler had the skills necessary to perform the duties of the position was not arbitrary and capricious nor was this assessment an abuse of discretion.

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 his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan*

¹Generally, 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).

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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interest 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. The West Virginia Supreme Court of Appeals has repeatedly upheld service personnel hiring decisions in which seniority was not the determinative factor. *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999); *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995).

4. Grievant has not met his burden of proof of demonstrating that the selection of Intervenor for the position of Supervisor of Maintenance was arbitrary and capricious or was an abuse of discretion.

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 6, 2017

Ronald L. Reece
Administrative Law Judge