

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RONALD E. SHAFFER,**

**Grievant,**

**v.**

**Docket No. 2016-1064-KanED**

**KANAWHA COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

Grievant, Ronald Shaffer, was employed by Respondent Kanawha County Board of Education as a heavy equipment operator. Grievant filed a grievance against Respondent, at Docket No. 2016-1064-KanED, asserting, "Carpenter job given to a less senior employee, [sic] Lonnie Harrison 3/2/10, Ron Shaffer 3-31-08 [sic] I want the job. I work with them anyway." The relief sought was, "Back pay with 10% interest. All money lost from date Lonnie was given the carpenter job."

A Level I hearing on this grievance was held on March 29, 2016, and a Level II mediation took place on October 4, 2016. A Level III hearing was held on January 10, 2017, before the undersigned in the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared at the hearing and was represented by Mr. John Roush, Esq., and Respondent was represented by Mr. James Withrow, Esq. Grievant testified on his own behalf and Respondent called Mr. Terry Hollandsworth as a witness. The transcript of the Level I hearing, with exhibits, was made part of the record of this grievance. At the conclusion of the Level III hearing, the parties agreed to submit

post-hearing arguments, the last of which was received on February 24, 2017, upon which date this matter became mature for consideration.

### **Synopsis**

Grievant, was employed as a “heavy equipment operator” for Respondent and, while so employed, applied for a position with Respondent as a “Carpenter II.” Due to the Carpenter II classification requirement that anyone occupying the position must be able to “read” and work from blueprints as appropriate to the trade, Respondent added a new assessment to the State competency carpenter test; specifically, a blueprint reading assessment. Respondent then required all of its future job applicants for carpentry positions to pass the blueprint reading assessment as a qualification to be hired as a Carpenter for the school district. Grievant refused to take the blue print test and asserts that it is arbitrary and capricious. Grievant further argues that because he passed the two-part portion of the State competency test before the Carpenter II position was listed, Respondent cannot properly require him to take its additional blueprint reading assessment. Respondent contends that it must have some means to ascertain whether applicants for the position of carpenter have the capability to read blueprints and the express language of the classification justifies testing for this skill. Respondent further asserts that Grievant was unjustified in refusing to take this necessary blueprint assessment, on the basis that he previously passed the two-part State competency test and believes he has, therefore, fully qualified for the carpenter position. However, even assuming Grievant met his burden of proof to support his foregoing arguments, Grievant must finally establish that he was “next in line” for the Carpenter II position in order to prevail. In fact, there were two other job applicants, who had also not passed the blue

print test, who were both senior to Grievant. As such, Grievant failed to establish that he was next in line for the position he sought.

Based on the foregoing, the following facts have been proven by a preponderance of evidence.

### **Facts**

1. At all times relevant to this grievance, Grievant was employed as a Heavy Equipment Operator, and has been employed by Respondent for approximately seven (7) years.<sup>1</sup>

2. Sometime during November of 2015, Respondent posted a “Carpenter II” position. Grievant applied for the position, together with nineteen (19) other applicants. (Level I - Unnumbered Ex.)

3. Prior to the November 2015, Carpenter II posting, Grievant had taken and passed a W. Va. State (“State”) competency test for the classification of Carpenter II, pursuant to the requirements of W. VA. CODE § 18A-4-8e.

4. The classification description in the Kanawha County Schools’ job description for a Carpenter II states, under “performance responsibilities,” “constructs and repairs structural woodwork and equipment in schools, working from blueprints, drawings, or oral instructions.” The job description specifies that to qualify for the position of Carpenter II, an individual must have the “ability to read and work from plans, drawings, and blueprints as appropriate to trade.”

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<sup>1</sup> Subsequent to the filing of this grievance, Grievant passed the blueprint-reading test and was awarded a position as a Carpenter II.

5. There are only two parts to the State competency test, a "hands on" performance test and a written test, which do not assess the test taker's ability to read blueprints.

6. Due to the Carpenter II classification requirement that anyone occupying the position must be able to "read" and work from blueprints as appropriate to the trade, Respondent added a new portion to the State competency test for carpenters; a blueprint reading assessment. Respondent then required all of its future job applicants for carpentry positions to pass the blueprint reading assessment to qualify for hiring as a Carpenter for the school district. An employee of Ben Franklin vocational school administers the blueprint-reading test. See, W. VA. CODE §18A-4-8e(c)(1).

7. Respondent arranged for the blueprint reading test to take place on Saturday, November 14, 2015, and informed all applicants, including Grievant, of the test date, and the necessity to pass the test to qualify for the position. (Level III - Respondent's Ex. 3.)

8. Grievant refused to take the blueprint test on November 14, 2015, responding that he had already passed the qualifying test.

9. Mr. Lonnie Harrison was the most senior applicant for the Carpenter II position at issue who had passed both the State administered test and the additional blueprint test. Therefore, Respondent awarded the Carpenter II position to him.

10. There were two other applicants for the Carpenter II position who were more senior than Grievant, and who had not passed the blueprint portion of the carpenter test either, at the time of their application. (See Transcript of Level I hearing at p. 15,

Testimony of Ms. Tabitha Gillespie, responsible for service personnel hiring for Respondent, and Level III - Respondent's Ex. 3)

### **Discussion**

In a grievance that does not involve a disciplinary matter, the grievant has the burden of proving his/her grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3 (2008); *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). School personnel laws and regulations must be strictly construed in favor of the employees that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

Grievant asserts that Respondent is generally prohibited from adding any further tests requirements beyond the State competency test in order to evaluate applicant qualifications for the Carpenter II position, arguing that this assessment is arbitrary. The passing of the competency examination is not "the alpha and the omega of a board's hiring process." *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999). See *Shaffer v. Kanawha Bd. of Educ.*, Docket No. 00-20-085 (June 12, 2000) and *Blake et al., v. Kanawha County Bd. of Educ.*, Docket No. 02-20-343 (March 11, 2003). Grievant further contends that because he passed the two-part State competency

test before the Carpenter II position at issue was posted, Respondent was prohibited from requiring him to take any further testing in order to qualify to be a Carpenter II for Respondent. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE §18A-4-8b. Achieving a passing score on the State competency test for a particular classification shall conclusively demonstrate an applicant is qualified to hold that classification title. W. VA. CODE §18A- 4-8e.

Respondent replies that the requirement to read blueprints conforms to the Carpenter II classification description and that the evidence Grievant offered was insufficient to prove this requirement was arbitrary, capricious, or unrelated to performing the job of a carpenter. 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 interests of the schools, and in a manner that is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Respondent further contends it demonstrated that it was reasonably necessary for individuals employed as carpenters to be able to read and interpret blueprints and other drawings to permit them to properly perform their job duties. Respondent argues that it must have some means to ascertain whether applicants for the position of carpenter have the capability to read blueprints and that testing its applicants through Ben Franklin is a reasonable means to make this determination. A board may expand the qualifications for a position found in W. VA. CODE §18-4-8, so long as this expansion is consistent with the statutory definition. *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995); *Mayle v. Barbour County Bd. of Educ.*, Docket

No. 94-01-260 (Feb. 28, 1995). *Dawson v. McDowell County Bd. of Educ.*, Docket No. 97-33-010 (May 29, 1998); *aff'd* Kanawha County Cir. Ct., Civil Action No. 98-AA-99, *ref'd* West Virginia Supreme Court of Appeals, No. 001293 (Sept. 7, 2000).

Even assuming the undersigned determined that Grievant proved Respondent arbitrarily and capriciously added the blueprint test, or determined that the test itself was inadequate to actually assess this skill, or that Grievant was somehow properly exempt from taking the same blueprint test that all the other applicants were required to take, Grievant must finally establish that he was "next in line" for the Carpenter II position at issue. *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999; *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1997). See also, *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008). In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was next in line. At the time of the November 2015, posting in question, there is no dispute that there were two individuals on the list of applicants for the position who, like Grievant, had only passed the written and hands on portions of the State competency test, and who both had seniority over Grievant. In conclusion, even accepting Grievant's above arguments as valid, Respondent could not be compelled to offer the carpenter position to Grievant; because he lacked seniority over two other similarly situated job applicants, who had also applied for the position. As such, the grievance is denied.

## Conclusions of Law

1. In a grievance that does not involve a disciplinary matter, the grievant has the burden of proving his/her grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3 (2008); *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

2. School personnel laws and regulations must be strictly construed in favor of the employees that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

3. "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). An action is



recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 a board of education. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

4. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE §18A-4-8b.

5. In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was next in line. *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006) (citing in support *Richards v. Kanawha Co. Bd. of Educ.*, Docket No. 99-20-108 (May 26, 1999; *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (Apr. 30, 1998); *Little v. Kanawha County Bd. of Educ.*, Docket No. 96-20-352 (Apr. 30, 1997). See also *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008).

6. Even assuming Respondent arbitrarily and capriciously added the test to assess whether Carpenter II job applicants had mastered the skill of reading blueprints, or that Grievant was somehow properly exempt from taking the same blueprint test that all the other applicants were required to take, Grievant failed to finally meet his burden of proof to establish that he was "next in line," for the position at issue.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: April 5, 2017**

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**Susan L. Basile**  
**Administrative Law Judge**