

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**MICHAEL SPATAFORE,
Grievant,**

v.

DOCKET NO. 2017-0980-HarED

**HARRISON COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Michael Spatafore, filed a grievance against his employer, the Harrison County Board of Education, on September 15, 2016. The statement of grievance reads, "WV §18A-4-7a; WV BOE Policy 5000 Non Selection for a Physical Education (PE) position. Mr. Spatafore was not interviewed based on erroneous information regarding the validity of his certification to teach Physical Education." As relief Grievant sought "[p]rocess redone with Mr. Spatafore included."

A conference was held at level one on September 27, 2016, and a level one decision denying the grievance was issued on October 24, 2016. Grievant appealed to level two on November 1, 2016, and a mediation session was held on January 19, 2017. Grievant appealed to level three on January 26, 2017, and a level three hearing was held on May 9, 2017, before the undersigned Administrative Law Judge in the Grievance Board's Westover, West Virginia office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Susan L. Deniker, Esquire, Steptoe & Johnson, PLLC. This matter became mature for decision on June 26,

2017, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a fourth grade teacher. He applied for a cover planning period teacher position at the same school where he is employed. The posting indicated that a specialty in physical education was preferred, as this teacher would be responsible for instructing students in physical education and health. Grievant did not have a specialty or endorsement in physical education. The applicant field was narrowed by the principal to reduce the number of applicants interviewed, by interviewing only those applicants who held a physical education endorsement. Respondent did not violate any law, rule, regulation, or policy by narrowing the applicant pool to reduce the number of applicants interviewed, nor did Grievant demonstrate that he was entitled to be interviewed, or that the actions of Respondent were arbitrary and capricious.

The following Findings of Fact are properly made from the record developed at levels three.

Findings of Fact

1. Grievant has been employed by the Harrison County Board of Education ("HBOE") as a teacher for 32 years, and has been a fourth grade teacher at Northview Elementary School for 13 years. He is certified in elementary education 1-6, multi-subjects K-8, and specific learning disabilities K-12, and he has a Masters Degree. He does not have an endorsement in physical education, nor does the record reflect that he has any particular expertise in physical education or health instruction.

2. On August 11, 2016, HBOE posted a position for a full-time cover planning period teacher at Northview Elementary School. The posting stated, "Physical Education preferred." Applications were received through August 17, 2016. Grievant applied, along with approximately 11 other individuals.

3. The role of a cover planning period teacher is to provide some type of instruction to students during the elementary classroom teacher's planning period. Cover planning period teachers may instruct students in art, music, computer technology, library use, or physical education, and may travel to schools other than their home school to provide this instruction.

4. Northview Elementary School Principal Danielle Veltri asked that the position at issue be posted with a physical education certification/endorsement preferred or required, because this position's primary role would be as a physical education teacher. Cover planning period teacher positions are often posted with a specific endorsement or certification preferred. Principal Veltri wanted someone in this position whose focus had been on physical education, because the student population at Northview Elementary School is composed of students who would not be involved in outdoor activities or sports outside of school, and she wanted someone in the position who could provide instruction in health and physical education.

5. Elementary students are required to have 30 minutes of physical education three times a week. At Northview Elementary School, the cover planning period teacher provides this instruction for two of the four 9-week periods. During two of the 9-week periods, classroom teachers, including Grievant, must provide this instruction one time a week.

6. Because physical education instruction is provided by classroom teachers during two of the 9-week periods, rather than by a physical education instructor, Northview Elementary School must submit an alternative physical education plan to the State Department of Education each year to provide information on how the physical education instruction time is being provided to students. In early summer 2016, Principal Veltri needed assistance answering one of the questions on the alternative plan form, and contacted Josh Grant at the State Department of Education. The question Principal Veltri asked was, if an elementary teacher “does not have a PE degree, would they be considered a WV certified Physical Education Teacher?” Mr. Grant’s response was “no.” Principal Veltri did not ask this question of Mr. Grant as part of the process of determining which applicants to interview.

7. At the beginning of the 2016-2017 school year, on August 15, 2016, the Northview Elementary School faculty senate designated 11 teachers to serve on interview committees for teacher vacancies at the school, with 3 of these teachers being assigned by the elected interview chairperson, Helen Adams, to any one interview committee.

8. The Northview Elementary School faculty senate also voted at the beginning of the 2016-2017 school year that, when the applicant pool was to be narrowed for interviews, a minimum of three applicants would be interviewed. The faculty senate also relinquished its right to narrow the candidates to be interviewed to the principal of Northview Elementary School. The interview committee did not decide who would be

interviewed, but there was still collaboration between the interview committee and the principal with regard to narrowing the candidates.¹

9. Principal Veltri has found that it becomes difficult to evaluate candidates if more than six applicants are interviewed. After consultation with the Chair of the interview committee, she narrowed the applicants to be interviewed by looking to whether the applicants held a physical education endorsement.

10. Six applicants had a physical education endorsement, and only those applicants were to be interviewed. One of these applicants withdrew prior to the interviews, leaving five applicants who were interviewed. Grievant was not interviewed.

11. Teachers certified in elementary education K-6 are qualified to teach physical education at the elementary level in West Virginia. Grievant was minimally qualified for the posted position.

12. In order to obtain a physical education endorsement, a teacher must pass a standardized test. There is no requirement that the teacher take any physical education courses in order to take this test or obtain a physical education endorsement. The record does not contain any information regarding the subject matter or difficulty level of this test, other than that it is a standardized test which tests the person's knowledge in that content area. The physical education endorsement indicates a specialization in the subject.

¹ Part of this Finding of Fact was stipulated to by the parties at the beginning of the level three hearing, with one modification. The stipulation stated that the interview committee relinquished its right to narrow the candidates, but Respondent's Exhibit Number 4 indicates that it was the faculty senate which relinquished this right.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant made clear at the hearing that he is contending only that he should have been interviewed, and is not challenging the selection process beyond this. Grievant argued it was arbitrary and capricious to not interview every minimally qualified applicant; otherwise, Respondent could not determine which applicant was the best qualified. Respondent argued it was not arbitrary and capricious to narrow the field of applicants to those who held a physical education endorsement.

The process for filling teacher vacancies is governed by WEST VIRGINIA CODE § 18A-4-7a, most recently amended by the West Virginia Legislature in 2013, which states in pertinent part:

(a) A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications: *Provided*, That the county superintendent shall be hired under separate criteria pursuant to section two [§ 18-4-2], article four, chapter eighteen of this code.

(b) In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

- (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 classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to the performance of the duties of the job;
- (7) Past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter and section two [§ 18A-3C-2], article three-c of this chapter 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;
- (10) In the case of a classroom teaching position, the recommendation of the principal of the school at which the applicant will be performing a majority of his or her duties; and
- (11) In the case of a classroom teaching position, the recommendation, if any, resulting from the process established pursuant to the provisions of section five [§ 18-5A-5], article five-a, chapter eighteen of this code by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

(c) In considering the filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications: *Provided*, That if one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, each criterion under subsection (b) of this section shall be given equal weight except that the criterion in subdivisions (10) and (11) shall each be double weighted.

(d) For a classroom teaching position, if the recommendations resulting from the operations of subdivisions (10) and (11), subsection (b) of this section are for the same applicant, and the superintendent concurs with that recommendation, then the other provisions of subsections (b) and (c) of this section do not apply and the county board shall appoint that applicant notwithstanding any other provision of this code to the contrary.

(e) The state board shall promulgate a rule, including an emergency rule if necessary, in accordance with the provisions of article three-b [§§ 29A-3B-1 et seq.], chapter twenty-nine-a of this code to implement and interpret the provisions of this section, including provisions that may provide for the compensation based on the appropriate daily rate of a classroom teacher who directly participates in making recommendations pursuant to this section for periods beyond his or her individual contract.

(f) Recommendations made pursuant to subdivisions (10) and (11), subsection (b) of this section shall be made based on a determination as to which of the applicants is the highest qualified for the position: *Provided*, That nothing in this subsection shall require principals or faculty senates to assign any amount of weight to any factor in making a recommendation.

These new provisions give the faculty senate committee and principal at a school much discretion in the selection of a classroom teacher.

WEST VIRGINIA CODE § 18-5A-5 establishes a faculty senate at every public school.

That CODE § states at (b)(2) that:

A faculty senate may establish a process for members to interview or otherwise obtain information regarding applicants for classroom teaching vacancies that will enable the faculty senate to submit recommendations regarding employment to the principal. To facilitate the establishment of a process that is timely, effective, consistent among schools and counties, and designed to avoid litigation or grievance, the state board shall promulgate a rule pursuant to article three-b [§§ 29A-3B-1 et seq.], chapter twenty-nine-a

of this code to implement the provisions of this subdivision. The rule may include the following:

. . .

(D) The authorization of the faculty senate to delegate the process for making a recommendation to a committee of no less than three members of the faculty senate; . . .

The faculty senate at Northview Elementary School properly established a procedure at the beginning of the school year to be followed, and designated members to serve on interview committees. There is no evidence that the statutory provisions or faculty senate provisions were violated during the selection process for the position at issue. Specifically, the regulations adopted by the State Department of Education make clear that there is no requirement that all qualified applicants be interviewed. “A faculty senate may, but is not required to, adopt a policy permitting the superintendent or his or her designee to narrow the pool of qualified applicants to no fewer than three qualified applicants, unless fewer than three qualified applicants apply, who appear to be the most qualified based on an examination of the factors set forth in W. VA. CODE § 18A-4-7a(b)(1) through (9).” 126 C.S.R. 126 § 7.2.a.² In fact, there is no requirement that any interviews be conducted. “Nothing in this policy or in statute requires that any applicant be interviewed prior to being recommended or selected to fill a vacancy and nothing requires that every applicant meeting the minimum qualifications of a posting be interviewed prior to being recommended or selected to fill a vacancy. However, the superintendent, principal, hiring

² The record does not contain any information regarding the appointment of Principal Veltri as the Superintendent’s designee, but Grievant did not challenge this aspect of the regulation.

committee, or single designee, as applicable, shall each have the authority to interview qualified job applicants at their discretion.” 126 C.S.R. § 7.2.e.

In this instance, there were 12 applicants. Assuming all 12 applicants were qualified for the position, interviewing every candidate would make the process unwieldy. The only qualifier in the above-cited regulation is that the applicant field be narrowed based on those applicants “who appear to be the most qualified based on an examination of the factors set forth in W. VA .CODE § 18A-4-7a(b)(1) through (9).” Grievant did not put forward any evidence that he was entitled to an interview because he was among those most qualified based on the statutory factors, except his hearsay testimony that he was told that one of those interviewed had only one point in the statutory factors, which seems unlikely, while he had six points out of a possible seven or eight points. No evidence was introduced to support this assertion. Moreover, the statute cited above “provides that if the faculty senate hiring committee and the school’s principal both recommend the same applicant, as they did in this matter, and the superintendent concurs, as happened here, it makes no difference how many points another applicant received, even if they received a majority of the points. Because the statute states that ‘the county board **shall** appoint that applicant notwithstanding any other provision of this code to the contrary,’ this indicates the Legislature’s intent to make such appointment mandatory. See *W. Va. Employers’ Mutual Ins. Co. v. Summit Point Raceway Associates, Inc.*, 228 W. Va. 360, 719 S.E.2d 830 (2011); Syl. Pt. 1, *Nelson v. W. Va. Public Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982).” *Dye v. Wirt County Bd. of Educ.*, Docket No. 2016-0181-WirED (July 14, 2016).

County boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 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)). The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. *Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Jan. 28, 1997). See *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

While Grievant is certainly correct that a physical education endorsement is not required in order for a teacher with elementary education certification to teach physical education, nor is there any requirement that a teacher with a physical education

endorsement do anything other than pass a test, it was not unreasonable to narrow the interview field to those who had demonstrated some expertise and interest in physical education by actually taking and passing the test, which Grievant had not done.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The regulations adopted by the State Department of Education make clear that there is no requirement that all qualified applicants for a classroom teaching position be interviewed. "A faculty senate may, but is not required to, adopt a policy permitting the superintendent or his or her designee to narrow the pool of qualified applicants to no fewer than three qualified applicants, unless fewer than three qualified applicants apply, who appear to be the most qualified based on an examination of the factors set forth in W. VA.

CODE § 18A-4-7a(b)(1) through (9).” 126 C.S.R. 126 § 7.2.a.³ In fact, there is no requirement that any interviews be conducted. 126 C.S.R. 126 § 7.2.e.

3. County boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 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)). The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for

³ The record does not contain any information regarding the appointment of Principal Veltri as the Superintendent's designee, but Grievant did not challenge this aspect of the regulation.

that of the school board. *Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Jan. 28, 1997). See *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

5. The interview committee was not required by any law, rule, regulation, or policy to interview all minimally qualified applicants.

6. Grievant did not demonstrate that it was unreasonable to interview only those applicants with a physical education endorsement, or that he was so highly qualified that it was unreasonable to not interview him.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: July 26, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge