

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**PAULA JO ATHEY,
Grievant,**

v.

Docket No. 2018-0872-MnIED

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

DECISION

Grievant, Paula Jo Athey, employed by the Mineral County Board of Education as a principal, filed this action at Level One on January 10, 2018 alleging:

On January 2, 2018, the Mineral County Board of Education, in its rejection of the Superintendent's recommendation for Director of Curriculum and instruction, PreK/Elementary/ Headstart, was arbitrary and capricious in its reasoning for rejection and violated the statutes, regulations and policies governing and hiring of professional staff/administrators, including, but not limited to WV Code 18A-4-7a Employment, promotion and transfer of professional personnel.

For relief, Grievant sought the following:

I seek to be placed in the position of Director of Curriculum and instruction, Pre k/Elementary/ Headstart with any lost pay and benefits and any other relief deemed appropriate. I also ask that each Board member articulate both verbally and in writing the response used for rejecting the Superintendent's recommendation. Reimbursement for legal cost associated with this grievance.

This grievance was denied at Level One by Decision dated February 22, 2018. A Level Two mediation session was conducted on April 27, 2018. Grievant perfected her appeal to Level Three on May 18, 2018. A Level Three evidentiary hearing was conducted before the undersigned on September 7, 2018, at the Grievance Board's Westover office.

Grievant appeared in person and by her counsel, Patrick E. McFarland. Respondent appeared by its counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on November 2, 2018.

Synopsis

Grievant alleged that she should have been selected over the successful applicant for the position of the Director of Curriculum and Instruction. The record demonstrated that the Superintendent's recommendation to Board members was based on personal opinions about the job applicants, and not their qualifications based upon criteria set out in WEST VIRGINIA CODE § 18A-4-7a. In addition, mistakes were made in the matrix provided to Board members relating to the successful applicant's qualifications. Notwithstanding this input, the record was not developed as to what the Respondent knew or did not know regarding the overall qualifications of the applicants. In any event, 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.

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

Findings of Fact

1. On December 13, 2017, Respondent posted the position of Director of Curriculum and Instruction, Pre-K/Elementary/Headstart. Barbara Kesner, Paula Athey, and Kevin Shupe applied for the position.

2. Ultimately, the Mineral County Board of Education voted unanimously to

approve Barbara Kesner for the position.

3. Grievant is the principal of Wiley Ford Elementary School. Barbara Kesner was the principal of Keyser Primary School before she was hired for the position of Director of Curriculum and Instruction, Pre-K/Elementary/Headstart.

4. The interview committee consisted of Superintendent Dilly, Assistant Superintendent Dwight Williams, and Director of Curriculum Scott Staley.

5. The interview committee interviewed Ms. Kesner and Ms. Athey separately.

Each applicant was asked the following questions:

1. Please provide a brief description of your work experiences.
2. What issues in education are of greatest concern to you? Why?
3. Why do you want to be a leader in Mineral County Schools?
 - a. A number of modifications need to be completed in areas that you will be in charge of. How would you go about communicating the necessary changes?
4. Describe your vision of the leadership team including your role as a member of the team.
 - a. Follow-up: Give an example in your career on how you demonstrated leadership in an educational setting.
5. Name your greatest strength as an administrator. Name your greatest weakness as an administrator.
6. Would you explain your thoughts about how you can assist a school in focusing on student achievement and supporting elementary/prekindergarten and Head Start students?
7. How do you believe you can assist Principals in better serving the needs of elementary students?
8. Describe your work with professional development and PDs role for supporting the schools.

9. What work have you done with federal programs? Budgets?
10. Can you explain the responsibility of the school with the Birth to 3 program?
11. Can you describe your work with special education and its role in elementary education?
12. What involvement have you had with strategic planning (county/school)? And what role does it play in the district?
13. What steps would you follow to remove or release from employment a tenured, non-performing administrator, teacher, and/or service personnel?
14. Given the declining State Aid and Federal support, what creative cost saving ways would you employ to provide quality education to students without increasing staff and expenditures?
15. How do you believe the Universal PreK/Head Start program should support a student's first introduction into school?
16. What familiarity do you have with PALS, ERSEA, PSTEPS and CLASS, other reporting and compliance programs associated with PreK/Head Start?
17. Do you have any questions for the committee or anything else you would like us to know?

6. Superintendent Dilly told the other two members of the interview committee that they should consider the following four questions when deciding which applicant provided the best answers to the interview questions:

Who would fit the climate and culture of the central office and be a strong team member in the Curriculum and Instruction Office?

Who would be respected and better received by the building level administration and staff to lead them from the director position?

Which candidate would handle difficult situations and maintain high standards and expectations under problematic circumstances?

Trustworthiness - Which candidate would understand the value of maintaining the loyalty of the team even if a difference of opinion arises?

7. On January 2, 2018, Respondent conducted a regular meeting to consider, among other things, Superintendent Dilly's recommendation of Ms. Athey to fill the position of Director of Curriculum and Instruction position.

8. During the January 2, 2018, meeting of Respondent, the Board members convened in executive session for twenty-five minutes prior to voting on filling the position.

9. Susan Grady, Respondent's Human Resources Director, prepares a matrix of job applicants' qualifications for Board members to review when a professional employee is to be hired at a Board meeting. She did so for this position.

10. The matrix sheet prepared by Ms. Grady, given to the Board members on January 2, 2018, contained errors. Ms. Grady failed to show that Ms. Kesner earned a Master's Degree. Ms. Grady also failed to show that Ms. Kesner had the most overall seniority. Ms. Kesner also possessed a Certificate of Educational Leadership which was not reflected in the matrix.

11. The matrix prepared by Ms. Grady did correctly show that Ms. Kesner had more teaching experience than Ms. Athey at the Pre-K and elementary programmatic level.

12. Superintendent Dilly and Board President Rob Woy led the discussion about the applicants' qualifications during the executive session on January 2, 2018.

13. Superintendent Dilly told the Board that Ms. Kesner and Ms. Athey were both qualified for the position. However, Superintendent Dilly told the Board members that he believed that Ms. Athey was the most qualified applicant.

14. When the Board members reconvened in open session, a motion to accept the recommendation that Ms. Athey be hired for position of Director of Curriculum and Instruction was unsuccessful.

15. On January 16, 2018, Respondent convened a regular meeting. Several persons spoke to the Board that evening about their views on who should be hired for the position of Director of Curriculum and Instruction position.

16. Once again, the Board met in executive session to discuss the applicants for the position of Director of Curriculum and Instruction.

17. When the Board reconvened in open session, Superintendent Dilly recommended that Ms. Athey be hired for the position. The Board, once again, voted three to two against the recommendation.

18. At this same meeting, Board President Rob Woy asked Superintendent Dilly to recommend a different applicant for the position. Superintendent Dilly recommended Barbara Kesner.

19. A motion was made to accept the Superintendent's recommendation of Ms. Kesner for the Director of Curriculum and Instruction position. The Board members voted unanimously in favor of that motion.

20. Ms. Grady opined that it was not possible that the Board members could have considered the factors under the code in deciding to hire Ms. Kesner. Ms. Grady felt that Mr. Woy, when he was superintendent, had selected less qualified candidates over more qualified candidates for certain positions when it suited him. However, Ms. Grady could not identify any employee grievances or any evidence in support of her opinion.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2018); *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-4-7a(a),(b) provides:

(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 highest qualifications: Provided, That the county superintendent shall be hired under separate criteria pursuant to section two, 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, article two of this chapter and section two, 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, article five-a, chapter eighteen of this by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

It is well settled that 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).

While each of the factors listed in WEST VIRGINIA 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).

Whether or not Respondent considered a certain factor or factors set out in WEST VIRGINIA CODE § 18A-4-7a cannot be ascertained with a degree of certainty by the undersigned from the record. The record of this case clearly demonstrates that Barbara Kesner was qualified for the Director of Curriculum and Instruction position. The record put forth by Grievant, if anything, calls into question why Grievant was recommended in the first place. When asked why Superintendent Dilly had recommended Grievant initially for the Director of Curriculum and Instruction position, Board member Kevin Watson indicated that he did not know why this recommendation was made. Mr. Watson also acknowledged that he initially voted for Ms. Athey based solely on Mr. Dilly's recommendation. Mr. Watson did not review either of the applicants' submitted materials, and felt that Ms. Kesner was qualified for the position.

The record also made clear that Mr. Watson was simply relying on Mr. Dilly's opinion in initially voting for Grievant, as opposed to considering one or more of the hiring factors under WEST VIRGINIA CODE § 18A-4-7a. Superintendent Dilly and his interview team, by their own admission, were focused on loyalty and the best fit during the application process rather than the statutory hiring factors.¹ Respondent's counsel aptly points out that personal opinions like these are not legitimate qualifications under WEST VIRGINIA CODE § 18A-4-7a. *Barnett, et al. v. Cabell County Bd. of Educ.*, Docket No. 2015-1762-CONS (May 31, 2016); *Napier v. Logan County Bd. of Educ.*, Docket No. 95-23-102 (July 31, 1995). The undersigned agrees that it was not appropriate for the interview committee to have decided which candidate "won" the interview, on the basis of the committee members'

¹See Finding of Fact Number 6.

personal opinions about which applicant would be the “better fit” at the central office, or be more respected by other administrators in the Mineral County Schools community, or handle “difficult situations” better, or be more trustworthy and loyal. These considerations were the basis of Superintendent Dilly’s recommendation to the Board. That is undisputed.

As previously mentioned, Mr. Watson based his initial vote in favor of Ms. Athey on the Superintendent’s flawed recommendation. Mr. Watson voted in favor of Ms. Kesner when her name was offered by Superintendent Dilly. The other Board Member, Laura Courier, apparently voted in favor of Ms. Athey because of Mr. Dilly’s recommendation and little else. Ms. Courier conceded that Ms. Kesner was qualified for this position and voted for her when her name was presented.

The record lacked evidence proving, by a preponderance of the evidence, why Respondent rejected Grievant’s nomination in favor of Ms. Kesner. The record also lacked evidence establishing by a preponderance of the evidence that any such reason was improper, impermissible or illegal. Board President Rob Woy indicated that Grievant and Ms. Kesner were both qualified for the Director of Curriculum and Instruction position. However, the record did establish that Mr. Woy found that Ms. Kesner’s experience to be more relevant to this county-wide position. As compared to the elementary school where Grievant serves as principal, Ms. Kesner’s school is much larger, has a more diverse population and includes a larger number of special education students. The undersigned cannot view the fact that Mr. Woy and other Board members would find such experience to be more relevant to the county-wide position at issue controversial, or 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 her 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).

2. "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).

3. 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).

4. Personal opinions about job applicants are not legitimate qualifications under WEST VIRGINIA CODE § 18A-4-7a. *Barnett, et al. v. Cabell County Bd. of Educ.*, Docket No. 2015-1762-CONS (May 31, 2016)(ruling that which candidate would make the most

“seamless transition” into the job was not a legitimate qualification); *Napier v. Logan County Bd. of Educ.*, Docket No. 95-23-102 (July 31, 1995)(ruling that which candidate had the most “community acceptance” was not a legitimate qualification).

5. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for the Director of Curriculum and Instruction position was arbitrary and capricious, an abuse of Respondent’s discretion, or otherwise contrary to any applicable law, rule or regulation.

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 (eff. July 7, 2008).

Date: December 3, 2018

Ronald L. Reece
Administrative Law Judge