

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JACQUELINE MCPEAKE,
Grievant,

v.

Docket No. 2018-0820-RaIED

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent, and

ROCKEY A. POWELL,
Intervenor.

DECISION

Jacqueline McPeake, Grievant, filed this grievance against her employer, Raleigh County Board of Education ("RCBE"), Respondent on December 22, 2017, challenging her non-selection for the position of principal at Woodrow Wilson High School. The grievance statement provides that Grievant is "filing a grievance on the selection of the Woodrow Wilson High School principal" alleging "violation of WV Policy 5000, WV Code 126-126-6, WV Code 18A-2-9, WV Code 18A-47A." The relief requested is "Compensation."

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.¹ A level three hearing was held before the undersigned Administrative Law Judge on May 18, 2018, at the Grievance Board's Beckley facility. Grievant appeared in person and by representative Ben Barkey, West Virginia Education Association. Respondent was represented by legal counsel Denise

¹ W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

M. Spatafore, Dinsmore & Shohl LLP. Intervenor appeared *pro se*.² This matter became mature for decision on or about May 31, 2018, the assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law.³

Synopsis

Grievant filed this grievance contesting her non-selection of principal at Woodrow Wilson High School. West Virginia Code § 18A-4-7a sets out specific criteria the Board must use in determining which candidate is the most qualified for a particular professional position. While each of the factors listed in W. VA. CODE § 18A-4-7a must be considered, this CODE Section permits county boards of education 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. A county board of education may determine that the factor "other measures or indicators" is the most important factor.

Respondent placed a weighted value on the interview process. In the statutory category of "other measurers or indicators" of the applicants' qualifications, this is permissible conduct in the circumstances of an administrative selection. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, that Respondent acted in an arbitrary and capricious manner, or that Respondent otherwise overstepped its broad discretion as described in W. VA. CODE § 18A-4-7a. This Grievance is DENIED.

² "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

³ Intervenor did not submit a post-hearing proposal.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a Principal at Park Middle School. She has been a professional employee of Respondent for many years.

2. In the fall of 2017, Raleigh County Board of Education posted a position for principal at Woodrow Wilson High School.

3. Grievant Jacqueline McPeake and the Intervenor Rockey Powell both applied for the position.

4. Approximately eight to ten individuals applied for the position. Of those applicants, six people met the minimum qualifications and were interviewed for the position. Anthony Jones, Human Resources Director, reviewed the qualifications of all applicants and prepared a chart which documented the applicants' qualifications in each of the categories set forth in West Virginia Code § 18A-4-7a.

5. Raleigh County officials conducted two interviews with two different teams to determine the most qualified applicant to recommend to the superintendent who makes the final decision.

6. After interviews of the initial group of six applicants, a second interview was conducted of what was considered the two most qualified applicants - Grievant and Intervenor Rockey Powell.

7. The interview committee, for the second set of interviews, consisted of Superintendent David Price, Assistant Superintendent Randy Adkins, and Assistant Superintendent Serena Starcher.

8. Each of the applicants was asked identical questions, and each interview committee member took independent notes. After the interviews, the committee met and discussed each person's response to the questions and provided their opinions regarding the quality of the answers and the applicant.

9. Superintendent Price asked each of the other committee members to explain and discuss whom they preferred, and he concurred with their selection of Intervenor as the outstanding applicant for this position. Intervenor demonstrated during the interview that he had a comprehensive vision for managing a high school, displaying very detailed knowledge and plans for the programs and issues which would be handled by its principal.

10. The committee members were unanimous in their opinion that Intervenor provided the best responses and demonstrated that he was most qualified for the position of principal at Woodrow Wilson High School.

11. It has been the practice of Respondent, when hiring administrators, to narrow down the pool of applicants to those who are minimally qualified, document their qualifications in each of the statutory categories, and select the successful applicant based upon the outcome of the interview process. It is within Respondent's discretion to give the most weight to "other measures or indicators" of the applicants' qualifications when hiring for non-teaching positions under W. Va. Code § 18A-4-7a.

12. Applicants' qualifications are assessed pursuant to the statutory criteria. Ideally only the qualified applicants, pursuant to their qualifications in the required categories, are interviewed. In accordance with the board of education's discretion, more times than not the interview process is given a weighted factor. The interview is usually the determinative factor as to which person receives the position.

13. Both final interviewees were fully qualified for the position, in accordance with W. Va. Code § 18A-4-7a criteria. The interview process was the deciding factor for who would be selected for the principal position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

This is a non-selection case. Grievant alleges and/or strongly infers that the statutory criteria was never adequately addressed, or the decision/process was arbitrary and capricious. 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).

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).

The selection process for filling a professional position is governed by W. VA. CODE § 18A-4-7a and West Virginia Department of Education Policy 5000. West Virginia Code § 18A-4-7a governs the hiring of professional personnel and provides, 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. . . .

(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 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.⁴

While each of these factors must be considered, this code section permits county boards of education 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. *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *Hughes v. Lincoln County Bd. of Educ.*, Docket No. 94-22-543 (Jan. 27, 1995); *Blair v. Lincoln County Bd. of Educ.*, Docket No. 92-22-009 (July 31, 1992). Once a board reviews the criteria required by W. VA. CODE § 18A-4-7a, it may determine that “other measures or indicators” is the most important factor. *Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97022-482 (Mar. 5, 1998).

⁴ The instant case involves an administrative position, factors 10 and 11 were not applied in this situation.

Nothing in the language of W. VA. CODE § 18A-4-7a restricts the area of measures or indicators, as long as they are factors “upon which the relative qualifications of the applicant may fairly be judged.” Indeed, W. VA. CODE § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993); *English v. Logan County Bd. of Educ.*, Docket No. 03-23-307 (Feb. 27, 2004). The selection of candidates for educational positions is not simply a "mechanical or mathematical process." *Hoffman v. Mingo County Bd. of Educ.*, Docket No. 97-29-266 (June 15, 1998)(citing *Tenny v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990)); See *Deadrick v. Marion County Bd. of Educ.*, Docket No. 90-23-071(Jan. 30, 1991). This is especially true in the selection for an administrative position.

Anthony Jones, Human Resources Director, reviewed the qualifications of all applicants and prepared a chart which documented the applicants' qualifications in each of the categories set forth in West Virginia Code § 18A-4-7a. G Ex 2 Statutory criteria as applicable to each of the final interviewees was documented and reviewed. Superintendent Price L-3 testimony. In this case, both final interviewees were fully qualified for the position. Grievant contend more emphasis should be paid to variations or comparison of statutory criteria between applicants. Grievant may have a valid point. It is the intent of W. VA. CODE § 18A-4-7a to facilitate that professional positions be equitably filled by the most qualified applicant.

Nevertheless, in the fact pattern of this case, the interview was pivotal to determining which person would be best suited for this particular position. As is Respondent's practice and permitted, pursuant to the statute, Respondent placed a weighted value on the interview process, in the statutory category of "other measurers or indicators" of the applicants' qualifications. Ultimately, Intervenor communicated and presented a more positive and complete impression regarding how he would govern and lead as the principal at Woodrow Wilson High School.

Interview Committee members were of the opinion that Intervenor had a much more comprehensive vision for managing a high school. As a member of the Committee, Superintendent Price testified that Intervenor displayed very detailed knowledge and plans for all of the programs and issues which would be handled by its principal. Further, it was held that Grievant's responses reflected more of an "assistant principal" mentality, rather than the leadership vision needed for a head high school principal. The Committee members were unanimous in their opinion that Intervenor provided the best responses and demonstrated that he was most qualified for the position of principal at Woodrow Wilson High School.

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991). The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is

narrow, and the undersigned may not substitute his judgment for that of the board of education. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. *Harper, supra*; *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

It is not unnoticed by the undersigned that Grievant's Exhibit 2 indicates that Grievant outperformed other candidates in measurable variable under W. Va. Code 18A-4-7a with the exception of "other indicators." This is thought provoking but not conclusive data. The position in discussion is an administrative selection, providing the Respondent more discretion as to what constitutes the best applicant for the position. Although Grievant had more administrative experience and a higher degree level than Intervenor, the interview process was the deciding factor for who would be selected for the principal position, based upon Respondent's discretion to give the most weight to "other measures or indicators" of the applicants' qualifications when hiring for non-teaching positions under W. Va. Code § 18A-4-7a. It was the opinion of the Interview Committee members, including Superintendent Price that Intervenor was better equipped to shepherd Woodrow Wilson High School. Of particular importance to this case is the longstanding principle

that, when selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in the section, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *Hughes v. Lincoln County Bd. of Educ.*, Docket No. 94-22-543 (Jan. 27, 1995); *Blair v. Lincoln County Bd. of Educ.*, Docket No. 92-22-009 (Apr. 10, 1992); *Komorowski v. Marshall County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009).

Grievant has not shown the selection process, as a whole, to be arbitrary and capricious. Both final interviewees were fully qualified for the position. Respondent has a reasonable degree of discretion. Grievant did not demonstrate the decision-making process to be fatally flawed, or that Respondent overstepped its broad discretion as described in W. VA. CODE § 18A-4-7a. Grievant did not establish by a preponderance of the evidence that mandatory factors were not taken into consideration. Respondent placed the most weight on the interview process, in the statutory category of “other measurers or indicators” of the applicants’ qualifications, this is permissible conduct in the circumstances of this matter.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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 Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. "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 Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. West Virginia Code § 18A-4-7a sets out specific criteria the Board must use in determining which candidate is the most qualified for a particular professional position. When selecting a candidate for a professional position other than a classroom teacher, a

county board of education must consider each applicable criterion listed in the section, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *Hughes v. Lincoln County Bd. of Educ.*, Docket No. 94-22-543 (Jan. 27, 1995); *Blair v. Lincoln County Bd. of Educ.*, Docket No. 92-22-009 (Apr. 10, 1992); *Komorowski v. Marshall County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009).

5. While each of the factors listed in W. VA. CODE § 18A-4-7a must be considered, this CODE Section permits county boards of education 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. Thus, a county board of education may determine that the factor "other measures or indicators" is the most important factor. *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998).

All that CODE §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

6. Nothing in the language of W. VA. CODE § 18A-4-7a restricts the area of measures or indicators, as long as they are factors 'upon which the relative qualifications

of the applicant may fairly be judged.’ Indeed, W. VA. CODE § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993); *English v. Logan County Bd. of Educ.*, Docket No. 03-23-307 (Feb. 27, 2004).

7. Once a board reviews the criteria required by W. VA. CODE § 18A-4-7a, it may determine that “other measures or indicators” is the most important factor. *Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97022-482 (Mar. 5, 1998). A board may determine that the last criterion, “other measures or indicators,” is the most important and determining factor. *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998); *Zago v. Brooke County Bd. of Educ.*, Docket No. 2010-1299-BroED (Apr. 18, 2011).

8. The selection of candidates for educational positions is not simply a “mechanical or mathematical process.” *Tenney v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990). Moreover, 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). Consistent with these standards of review, the grievance procedure is not intended as a “super interview,” but merely an analysis of the 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). See *Sparks v. Mingo County Bd. of Educ.*, Docket No. 96-29-447 (Feb. 18, 1997).

9. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, that Respondent acted in an arbitrary and capricious manner, or that it otherwise overstepped its broad discretion as described in W. VA.CODE § 18A-4-7a.

10. Grievant did not demonstrate that Respondent acted unlawfully in making the determination that Intervenor was the best candidate for this particular administrative position.

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: June 29, 2018

Landon R. Brown
Administrative Law Judge