

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DEBRA J. DEMPSEY,
Grievant,**

v.

Docket No. 2018-1184-KanED

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

DECISION

Grievant, Debra J. Dempsey, is employed by Respondent, Kanawha County Board of Education. On April 10, 2018, Grievant filed this grievance against Respondent stating, "I applied (for the 3rd time) for the Warehouse Supervisor position and was #1 and qualified, but not granted an interview or the position. I feel I am being discriminated against due to my age and gender; I see no other reason to be skipped." For relief, Grievant seeks assignment to the position or to be paid on an "H3 pay scale" for her current position.

Following the May 1, 2018 level one conference, a level one decision was rendered on May 10, 2018, denying the grievance. Grievant appealed to level two on May 31, 2018. Following mediation, Grievant appealed to level three of the grievance process on September 4, 2018. A level three hearing was held on March 21, 2019, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by George B. Morrone III, WV School Service Personnel Association. Respondent was represented by counsel, Lindsey D.C. McIntosh, General Counsel. This matter became mature for decision on May 8, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an Inventory Supervisor and grieves her non-selection for a Warehouse Supervisor position. Grievant argued the selection decision was arbitrary and capricious as Respondent exceeded its discretion in including additional qualifications for the position and argued that, regardless, she met the additional qualifications. Grievant failed to prove the selection decision was arbitrary and capricious. Respondent's addition of the specific qualifications was within its discretion. Grievant did not meet the additional qualifications and the successful candidate exceeded those qualifications. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as an Inventory Supervisor, Pay Grade D, with a 261-day employment term and has been so employed since April 26, 2016. Grievant has been employed by Respondent for approximately thirty years in total.
2. On January 16, 2018, Respondent posted a service vacancy for Warehouse Supervisor, Pay Grade H3, with a 261-day employment term. The posting had the following requirements:
 - Minimum of five years' supervisory experience directly related to warehouse operations and the supervision of employees in a warehouse setting; OR
 - Two year college degree with at least two years' supervisory experience directly related to warehouse operations and the supervision of employees in a warehouse setting.
3. The position is classified as a "director or coordinator of services."

4. A “director or coordinator of services” position is defined as “an employee of a county board who is assigned to direct a department or division.” W. VA. CODE § 18A-4-8(i)(34).

5. Grievant was qualified to hold a “director or coordinator of services” position by virtue of passing the state competency test for that classification in June 2017.

6. Respondent determined Grievant was not qualified for the Warehouse Supervisor position based on the requirement in the posting for supervisory experience directly related to warehouse operations and the supervision of employees in a warehouse setting and declined to interview her for the position.

7. Marcus Bays was selected to fill the position. Mr. Bays was not an employee of Respondent when he was selected. Mr. Bays qualified for the position based on his thirty years of experience as a warehouse supervisor for the Air National Guard. Mr. Bays operated seven warehouses on several continents.

8. Mr. Bays is the cousin of a member of the Kanawha County School Board.

9. Grievant possesses a two-year degree but Grievant does not have two years’ supervisory experience directly related to warehouse operations and the supervision of employees in a warehouse setting.

10. In her current job as Inventory Supervisor, Grievant does not supervise employees.

11. In a prior job at a daycare, Grievant oversaw the supplies of the daycare. Grievant’s duties related to the daycare supplies do not rise to the level of supervision of warehouse operations and, to the extent Grievant may have informally supervised

employees in the absence of the daycare's director, such supervision was not within a warehouse setting.

12. Grievant had previously applied for the warehouse supervisor position twice before and had not been selected. On the first posting, an employee with more seniority than Grievant was chosen. On the second posting, Respondent changed the minimum qualifications as above to add the requirement of specific warehouse supervision experience and Grievant was deemed not to be qualified.

13. The position originally did not have the authority to issue employee discipline or conduct employee performance evaluations. The position was changed to include those responsibilities.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues she should have been selected for the position as she was the only currently-employed applicant qualified to hold a director or coordinator of services position by virtue of passing the state competency test for that classification. Grievant argues it was improper for Respondent to require additional qualifications for the position but that, even so, she did meet the additional qualifications in the posting.

Respondent asserts it properly expanded the minimum qualifications and that Grievant did not meet those qualifications.

“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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). 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).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210

W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 [the employer].” *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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

County boards of education must make hiring decisions for service personnel positions based on the following statutory requirements:

(a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) 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. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy

whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

W. VA. CODE § 18A-4-8b. “The state board shall develop and make available competency tests for all of the classification titles defined in section eight of this article and listed in section eight-a of this article for service personnel. . . .” W. VA. CODE § 18A-4-8e(a). “The purpose of these tests is to provide county boards a uniform means of determining whether school service personnel who do not hold a classification title in a particular category of employment meet the definition of the classification title in another category of employment as defined in section eight of this article. . . .” W. VA. CODE § 18A-4-8e(b). “. . . Achieving a passing score conclusively demonstrates the qualification of an applicant for a classification title.” W. VA. CODE § 18A-4-8e(c)(3).

However, “in the exercise of their discretion, school boards may consider job-related factors in addition to the specific statutory qualifications in selecting an applicant to fill a posted vacancy.” *Bd. of Educ. v. Scott*, 217 W. Va. 128, 132, 617 S.E.2d 478,

482 (2005) (per curiam). In determining that a school board can demand additional qualifications beyond the passing of the competency test the West Virginia Supreme Court of Appeals has found: “In light of the importance we place upon providing students with ‘a thorough and efficient system of free schools’ [citation omitted] we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process.” *Hancock Cty. Bd. of Educ. v. Hawken*, 209 W. Va. 259, 263, 546 S.E.2d 258, 262 (1999) (per curiam). Thus, in those cases and others, the West Virginia Supreme Court of Appeals has upheld the hiring decisions of boards of education when selecting better-qualified outside applicants over existing qualified service employees. See also *Hyre v. Upshur Cty. Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991) (per curiam); *Ohio Cty. Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995) (per curiam).

In this case, it was certainly reasonable for Respondent to expand the qualifications required for the position. Respondent's warehouse is thirty thousand square feet, houses millions of dollars of inventory, and serves over seventy locations. The warehouse supervisor is responsible for the supervision of all operations and multiple categories of employees. Adding the requirement for experience directly related to warehouse operations and the supervision of employees in a warehouse setting was reasonable for the position considering the complexity of the operations and duties required.

Grievant did not prove that she had experience directly related to warehouse operations and the supervision of employees in a warehouse setting. In her current position of Inventory Supervisor, Grievant is responsible for the supervision of parts and

the processing of work orders. Grievant orders, stocks, and distributes the parts. Grievant reviews the work orders and routes them to the appropriate person and when the work orders are complete the order is returned to Grievant to enter into the computer system. Most work orders are routed to the supervisor of the employee but there are two employees to whom Grievant routes the work orders directly. Grievant does not discipline or evaluate these employees and has no authority to instruct them on how to complete the work. This does not constitute the supervision of employees.

In her prior position at the daycare, Grievant oversaw the supplies of the daycare. The daycare was small, serving approximately twenty-five children, and the supplies were housed in a closet. Grievant's duties related to the daycare supplies do not rise to the level of supervision of warehouse operations. While it appears Grievant may have had the informal supervision of employees while the director of the daycare was unavailable, this was clearly not the supervision of employees in a warehouse setting.

The successful candidate had thirty years of relevant experience so clearly exceeded the additional qualifications. While it appears the successful candidate is the cousin of one of the board members, no evidence was presented that this relationship had any impact on the selection of the successful candidate.

Grievant failed to prove the selection decision was arbitrary and capricious. Respondent's addition of the specific qualifications was within its discretion. Grievant did not meet the additional qualifications and the successful candidate exceeded those qualifications.

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. W. VA. CODE ST. R. § 156-1-3 (2018). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). 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).

3. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 [the employer].” *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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

4. County boards of education must make hiring decisions for service personnel positions based on the following statutory requirements:

(a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) 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. If requested by the employee, the county

board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

- (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
- (2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;
- (3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;
- (4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;
- (5) Substitute service personnel who hold a classification title within the classification category of the vacancy;
- (6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and
- (7) New service personnel.

W. VA. CODE § 18A-4-8b.

5. “The state board shall develop and make available competency tests for all of the classification titles defined in section eight of this article and listed in section eight-a of this article for service personnel. . . .” W. VA. CODE § 18A-4-8e(a). “The purpose of these tests is to provide county boards a uniform means of determining whether school service personnel who do not hold a classification title in a particular category of employment meet the definition of the classification title in another category

of employment as defined in section eight of this article. . . .” W. VA. CODE § 18A-4-8e(b). “. . . Achieving a passing score conclusively demonstrates the qualification of an applicant for a classification title.” W. VA. CODE § 18A-4-8e(c)(3).

6. “[I]n the exercise of their discretion, school boards may consider job-related factors in addition to the specific statutory qualifications in selecting an applicant to fill a posted vacancy.” *Bd. of Educ. v. Scott*, 217 W. Va. 128, 132, 617 S.E.2d 478, 482 (2005) (per curiam). In determining that a school board can demand additional qualifications beyond the passing of the competency test the West Virginia Supreme Court of Appeals has found: “In light of the importance we place upon providing students with ‘a thorough and efficient system of free schools’ [citation omitted] we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process.” *Hancock Cty. Bd. of Educ. v. Hawken*, 209 W. Va. 259, 263, 546 S.E.2d 258, 262 (1999) (per curiam).

7. Grievant failed to prove the selection decision was arbitrary and capricious. Respondent’s addition of the specific qualifications was within its discretion. Grievant did not meet the additional qualifications and the successful candidate exceeded those qualifications.

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 (2018).

DATE: July 17, 2019

Billie Thacker Catlett
Chief Administrative Law Judge