

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

CHRIS JENEY,
Grievant,

v.

Docket No. 2020-1514-UTC

UNITED TECHNICAL CENTER,
Respondent.

DECISION

Grievant, Chris Jeney, was employed by the United Technical Center during the 2019-2020 school year as a Carpentry Instructor. Grievant filed this action on or about June 12, 2020, alleging:

WV Code 18A-4-71; WV BOE Policy 5000; Mr. Jeney was terminated (RIF'd) pursuant to state code at the end of the 2019-2020 term. A position combining Mr. Jeney's (grievant) position (Carpentry) and another (Masonry) was created and posted. Another terminated employee with more seniority but unqualified was hired for the vacancy. Position is a combination of Masonry and Carpentry. Mr. Jeney [sic] certification allows him to instruct both at some level. The successful applicant does not have any certification to instruct carpentry and may not be able to attain such by the end of the school term as is required by the posting. 18A-4-7a requires recall on the basis of seniority and QUALIFICATIONS. Grievant seeks placement in the position, back pay plus interest and all related benefits.

A level one conference was conducted on June 21, 2020. The grievance was denied by Respondent's level one evaluator following this conference. A level two mediation session was conducted on November 9, 2020. A level three evidentiary hearing was conducted before the undersigned on August 3, 2021, by Zoom video conferencing originating at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Ben Barkey, WVEA. Respondent appeared by

Matthew Call, UTC Director, and by its counsel, Kimberly S. Croyle, Bowles Rice, LLP. This matter became mature for consideration upon receipt of the parties' fact/law proposals on September 7, 2021.

Synopsis

Grievant was employed by Untied Technical Center as a Carpenter Instructor. Grievant was eligible to teach Carpentry based on his General Construction certification. Respondent reorganized its curriculum by eliminating the Carpentry position and Masonry position. Grievant is not certified in Carpentry or Masonry. Respondent posted a position for a Carpentry and Masonry Instructor. The successful applicant for this position was certified in Masonry and Carpentry. Grievant challenges this action by Respondent. Grievant failed to prove that he was entitled to the position in question rather than the fully certified applicant. This grievance is denied.

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

Findings of Fact

1. During the 2019-2020 school year, Grievant was employed by the United Technical Center as a Carpentry Instructor.
2. As part of a reorganization and realignment of the Respondent's curriculum, the Carpenter position and the Masonry position were eliminated for the 2020-2021 school year. Grievant did not challenge this reorganization and the elimination of the Carpentry position.
3. On April 21, 2020, Respondent posted a position for a Carpentry and Masonry Instructor for the 2020-2021 school year. The posting provided that the position required the successful applicant to hold certifications in both Carpentry and Masonry.

4. Grievant and Joseph DeFazio applied for the position.

5. Grievant is certified in Industrial Arts and General Building Construction.

Grievant is not certified in Masonry and Carpentry.

6. Joseph DeFazio is certified in Masonry and Carpentry.

7. On April 22, 2020, Grievant was informed by Rick Gillman, Assistant Director, West Virginia Department of Education Office of Career Technical Education, that he was eligible to teach Carpentry based on his General Building Construction certification, but he was not eligible for certification in Masonry. Mr. Gillman informed Grievant what he would have to do in order to be considered for certification in Masonry.

8. Grievant was told he would have to submit a V10 with at least four years relevant and verifiable masonry work experience. In addition, he needed to submit the application page; list of the correct endorsement numbers; notarized form V10 verifying required wage-earning experience; submit passing scores in the written and performance masonry NOCTI; and pay the non-refundable fee.

9. Grievant did not submit the documents requested by Mr. Gillman.

10. On June 2, 2020, Grievant brought a partially completed packet to Director Call. On June 2, 2020, Director Call informed the Grievant that his packet was not complete.

11. The packet submitted by Grievant did not contain the applicant information page; list the endorsement numbers sought; or contain a paid receipt.

12. The V10 submitted by Grievant indicated that Grievant was a concrete finisher/laborer from 1981 to the present, which appears to be inconsistent with the resume and employment history provided by Grievant.

13. Mr. Gillman and Director Call acknowledged that Masonry 1, 2, 3 and 4 were required to be offered at the United Technical Center.

14. Mr. Gillman explained that without the Masonry certification, Grievant was not eligible to teach Masonry 2, 3 or 4. Mr. Gillman further explained that based on the general building certification, Grievant was eligible to only teach Carpentry and Masonry 1.

15. During the 2020-2021 school year, both Masonry 1 and Masonry 2 were offered at the United Technical Center. Director Call explained that the Masonry program runs for two years, requiring Masonry 1, 2, 3 and 4 electives.

16. On June 5, 2020, the United Technical Center Administrative Council hired Joseph DeFazio, the only certified applicant, for the Carpentry and Masonry Instructor position.

17. Mr. DeFazio began teaching at the United Technical Center in 2004, Grievant began teaching at the United Technical Center in 2012. Grievant taught for the Harrison County Board of Education from 2007 until his hire at the United Technical Center.

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 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).

"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).

The issue in this case is whether the Respondent properly selected Mr. DeFazio, as the only certified applicant in both Masonry and Carpentry, for the Masonry-Carpentry Instructor position. Persons who hold professional positions must "meet the certification requirements of the state, licensing requirements of the state, or both . . ." WEST VIRGINIA CODE 18A-1-1(b). A county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. *Cowen v. Harrison County Bd. of Educ.*, 196 W. Va. 377, 465 S.E.2d 648 (1995). In the instant case, the Carpentry and Masonry position required the successful applicant to hold certifications in both Carpentry and Masonry. The Grievant holds neither. Mr. DeFazio held a permanent certification in Masonry, and a temporary certification, effective January 28, 2020, in Carpentry.

The Grievance Board has “repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the selection process.” *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994). See also *Weaver v. Mason County Bd. of Educ.*, Docket No. 94-26-028 (Oct. 25, 1994).” *Barber v. Mercer County Bd. of Educ.*, Docket No. 2008-0001-MerED (Aug. 26, 2008). There is no dispute that Grievant is not certified to teach Masonry, as required for the position by the West Virginia Department of Education Office of Career and Technical Education. Grievant does not have standing to grieve the filing and posting of the position as he was not qualified to fill the position.

In any event, the Grievance Board has also held that when a board of education posts for a professional position, “and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period.” *Mingo County Bd. of Educ. v. Jones*, 204 W. Va. 340, 512 S.E.2d 597 (W. Va. 1998). The only applicant qualified to fill the position was Mr. DeFazio and the Respondent was not arbitrary or capricious in appointing Mr. DeFazio to the position. Grievant failed to meet his burden of proof that he was entitled to the Carpentry and Masonry Instructor position over the successful applicant.

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 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).

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. The Grievance Board has “repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the selection process.” *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 94-20-364 (Dec. 29, 1994). See also *Weaver v. Mason County Bd. of Educ.*, Docket No. 94-26-028 (Oct. 25, 1994).” *Barber v. Mercer County Bd. of Educ.*, Docket No. 2008-0001-MerED (Aug. 26, 2008).

5. The Grievance Board has also held that when a board of education posts for a professional position, “and one or more qualified applicants apply for the position within the posting period, the school board must select a qualified applicant from those who applied during the posting period.” *Mingo County Bd. of Educ. v. Jones*, 204 W. Va. 340, 512 S.E.2d 597 (W. Va. 1998).

6. Grievant has failed to prove that he was entitled to the position in question. 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 (2018).

Date: September 28, 2021



Ronald L. Reece
Administrative Law Judge