

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GARY WROBLEWSKI,

Grievant,

v.

Docket No. 2020-1507-WayED

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Gary Wroblewski, filed this grievance against his employer, Wayne County Board of Education, dated June 8, 2020, stating as follows: "Respondent filled a Summer Food Service Supervisor for the summer of 2020 (PSP21-50) with a less senior and less qualified applicant in violation of W. Va. Code 18A-4-7a & 18-5-39." As relief sought, "Grievant seeks instatement to the position, compensation for lost wages with interest, and any other right or benefit, pecuniary or non-pecuniary, that he would have received if employed in the position."

A level one conference was held on an unknown date, but the grievance was denied by a level one decision issued October 13, 2020. Grievant appealed to level two on October 20, 2020. A level two mediation was conducted on February 11, 2021. Grievant perfected his level three appeal on February 19, 2021. A level three hearing was conducted in person on May 19, 2021, before this administrative law judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and by his representative, Brandon Tinney, AFT-West Virginia, AFL-CIO. Respondent appeared by its counsel, Leslie K. Tyree, Esquire. This matter became mature for decision on July 26, 2021, upon receipt of the last of the parties' post-hearing submissions.

Synopsis

Grievant was regularly employed by Respondent as a teacher. Grievant applied for the Summer Food Service Site Supervisor position, but he was not selected for the same. Grievant argued that he should have been selected for the position because of his summer seniority and because he was the applicant with the highest qualifications. Respondent denies Grievant's claims and asserts that the position was not a summer school position. Respondent asserts and that it properly selected the most qualified applicant based upon the factors listed in West Virginia Code § 18A-4-7a. Grievant proved his claims by a preponderance of the evidence. Therefore, the grievance is GRANTED.

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 regularly employed by Respondent as a classroom teacher at Spring Valley High School. He holds a Professional Administrative Certificate, which includes a Supervisor General Instruction (PK-AD) endorsement, as well as a Professional Teaching Certificate.

2. In addition to teaching, Grievant oversees the afterschool program at the school, and has done so for the last four years. Students who enroll in this program are given the opportunity to receive tutoring, or to attend activities such as band and choir. Also, students may use this time to attend school-related club meetings and activities. While there, the students receive snacks. Grievant is responsible for keeping records of the snacks distributed and any snacks left over, tallying the same, and sending the

totals to the county-wide Food Service Program Supervisor, Brenda Arrowood.

3. Grievant also worked in student food service programs during summer school from 2003 to 2006. He was responsible for keeping track of the breakfasts and lunches served each day to the students, using specific forms as required by Wayne County Schools, and providing that information to Ms. Arrowood each week.

4. Grievant also worked for a couple of years in a similar capacity overseeing the snack program for the Wayne County alternative school. It is noted that the alternative school program was held at Wayne County High School during in the evenings.

5. Before working at Wayne County Schools, Grievant worked for twenty years at a supermarket, Big Bear, managing the store's produce department and serving as the front manager.

6. On or about May 5, 2020, Respondent posted a vacancy for a Summer Food Service Site Supervisor (Rank: 1) at Spring Valley High School. This position was posted from May 15, 2020-May 21, 2020, as a "Professional/Support" position.¹

7. While a copy of the actual posting for the Summer Food Service Site Supervisor (Rank: 1) position was not presented at level three, the parties appear to agree that the person selected for the position would be scheduled to work one day each week and would be paid \$200.00 per day. Also, the position was expected to last ten to twelve weeks.

8. The food program that the Summer Food Service Site Supervisor was to

¹ See, Grievant's Exhibit 1, "Wayne County Schools Employment Bid Confirmation," dated May 18, 2020. Neither party introduced a copy of the posting at the level three hearing.

manage provided food to students who could not and had not been attending school in person because of the still ongoing COVID-19 pandemic.² Respondent refers to the food program as a “feeding program.” It is unknown what kinds of food were provided to the students, how such was distributed, and how often it was distributed. It is also unknown which and how many students were eligible for the program.³ All that is known about the program is that it was designed to ensure that students were receiving sufficient nutrition during that time period.

9. The job description for the Summer Food Service Site Supervisor states, in part, the following:

Qualifications: Holds or qualifies for a West Virginia Teaching Certificate. . .

Responsibilities: The Summer Food Service Site Supervisor shall have the following responsibilities and duties:

- Serving healthy meals to qualified children. Know what is required in the meal pattern and make sure the meal served meets this requirement. Follow regulations for meal service with the children.
- Ensuring safe and sanitary conditions at the site. Set up and tear down site while maintaining cleanliness of the site.
- Coordinating volunteers to assist with the meal delivery service.

² Public schools in West Virginia were closed in March 2020 as a result of the pandemic, as there could be no safe gatherings. Students finished the school year through virtual learning, rather than attending in person. The record is not clear as to what was done in Wayne County Schools for summer school. However, given what is understood, no in-person classes were conducted in Wayne County for summer school. Whether virtual learning was utilized during the summer is unknown.

³ The job description states that the program is for student who qualify for free school meals, but the parties seem to otherwise indicate that the program was for all students.

- Working closely with the cooks. Properly order and adjust meal numbers according to need. Be comfortable preparing extra food on site, as needed.
- Organizing and delivering meals to students, operating a point of service.
- Keeping accurate paperwork; daily meal counts and submitted each Wednesday to the county Food Service Director; payroll and submitting payroll to the Food Service Director at the appropriate times.
- Keeping inventory of supplies and communicate needs to the SFSP manager, plan ahead for future needs.
- Communicating with volunteers to help establish partnerships and to encourage lasting participation.
- Working with other staff to network within the county to locate possible volunteers and to find opportunities to share information with families and children about the program. Share this information with the SFSP manager.
- Any other duties as assigned by the Food Service Director or superintendent.⁴

10. While the job description does not indicate that the Summer Food Service Site Supervisor would be responsible for supervising two cooks, the parties appear to agree that such was one of the position's responsibilities. The evidence suggests that these supervisory responsibilities were the reason the position was posted as a professional position, rather than a service personnel position.

11. The parties appear to agree that the person selected as Summer Food Service Site Supervisor was to work one day each week and would be compensated at the rate of \$200.00 per day. No documents were presented at level three to confirm the

⁴ See, Respondent's Exhibit 2, "Wayne County Job Description," "Created 5-5-20."

rate of pay for the position.

12. Grievant and Michelle Maynard were the only two applicants for the position. Respondent presented Ms. Maynard's application packet at level three, but neither party presented Grievant's. It is noted that Ms. Maynard included with her form application six "Certificates of Completion" from River Valley Family Day Care Food Program from the years 2009-2013 and two reference letters. It is unknown whether Grievant submitted anything along with his application, or if the posting directed applicants to submit any such documents with their applications.

13. Chanda Perry is the Director of Human Resources for Wayne County Schools. Ms. Perry was responsible for selecting the applicant who would serve as the Summer Food Service Site Supervisor.

14. Director Perry selected Michelle Maynard to fill the Summer Food Service Site Supervisor position. Director Perry conducted no interviews of the applicants before making her selection.

15. Neither party called Michelle Maynard as a witness to testify at the level three hearing. Based upon the evidence presented, at the time she applied for the Summer Food Service Site Supervisor, Ms. Maynard was employed as a classroom teacher for Wayne County Schools.⁵

16. According to her "Professional Application," Ms. Maynard held no professional administrative certificate, or credentials, at the time she applied for the Summer Food Service Site Supervisor position.

17. The dates during which Ms. Maynard worked as the Summer Food

⁵ See, testimony of Chanda Perry; Respondent's Exhibit 1, Ms. Maynard's "Professional Application" packet.

Service Site Supervisor at Wayne County Schools in 2020 are unknown. However, based upon the evidence presented, the program was to last the entire summer, or ten to twelve weeks, and there has been no suggestion that Ms. Maynard failed to serve in the position for the entire time period.

18. In both the level one decision and in Respondent's proposed post-level three hearing submissions, Respondent states that "[n]one of the applicants who applied for the position in question had summer seniority in a food service program."⁶

19. Until she was selected as the Summer Food Service Site Supervisor, Michelle Maynard never held a food service position with Wayne County Schools. She also held no summer seniority.

20. Ms. Maynard was previously self-employed as a state certified childcare provider operating a daycare out of her home. As a certified childcare provider, Ms. Maynard appears to have worked with the River Valley Food Program "to ensure all meals met guidelines."⁷ Also, according to one of her letters of recommendation, Ms. Maynard worked at the concession stand during Spring Valley High School basketball games in the past. Such appears to be the only food service experience Ms. Maynard had at the time she was selected for the position.

21. Respondent has made no attempt to dispute Grievant's claims regarding his food service experience while employed at Wayne County Schools, or prior to.

22. The parties presented no evidence on the type of summer education

⁶ See, "Level One Conference Decision," pg. 1, paragraph 5; "Respondent's Proposed Findings of Fact and Conclusions of Law," pg. 2, paragraph 8.

⁷ See, Respondent's Exhibit 1, Ms. Maynard's "Professional Application" packet, pg. 1; Six (6) "Certificates of Completion" from River Valley Family Day Care Food Program dated 2009-2013.

programs conducted in 2020 at Wayne County Schools.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 that he should have been selected for the Summer Food Service Site Supervisor position because he has summer seniority and because he is more qualified than the successful applicant. Respondent argues that the position was not a true summer school position, asserting that it was wholly separate from the actual summer school program, and that Ms. Maynard was properly selected to fill the position pursuant to the requirements of West Virginia Code § 18A-4-7a. Despite this, Respondent includes a proposed finding of fact that states “[n]one of the applicants who applied for the position in question had summer seniority in a food service program.” It is unclear why Respondent would include said finding of fact given its argument that the position is not a summer position and the undisputed evidence presented is to the contrary. Grievant testified that he had summer seniority and Respondent has not attempted to dispute his claims whatsoever. In fact, Respondent declined to question Grievant at the level three hearing and offered no evidence to counter his claims. Respondent, especially its one witness, Director of Human Resources, Chanda Perry,

had access to Grievant's employment and personnel records and introduced none.

"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). 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).

West Virginia Code § 18A-4-7c, "Summer employment of professional educators," states as follows: "[a] county board shall hire professional educators for positions in summer school programs in accordance with section thirty-nine [§ 18-5-39], article five, chapter eighteen of this code or section seven-a [§ 18A-4-7a] of this article, as applicable, except that a professional educator who is regularly employed by the county board on a full-time basis shall be given employment preference over applicants who are not regularly employed by the county board on a full-time basis." *Id.* "'Supervisor' means a professional educator who is responsible for working primarily in the field with professional and other personnel in instructional and other school improvement. This category includes other appropriate titles or positions that fit within this definition." W. Va. Code § 18A-1-1(c)(3). West Virginia Code § 18-5-39 further provides that, "[n]otwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the prior provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. In the event that no employee who has been previously employed in the summer school program holds a valid certification or licensure, a board shall fill the position as a classroom teaching position in

accordance with section seven-a [§ 18A-4-7a], article four, chapter eighteen-a of this code." W. VA. CODE § 18-5-39(e).

Accordingly, the first issue to resolve is whether the position was a summer school position. The job title and description of the position clearly indicate that it is a summer position. The job description reads as follows: "[t]his person is working with other staff members to ensure that children who qualify for free school meals receive a healthy breakfast and lunch *throughout the summer*."⁸ (Emphasis added). There has been no evidence presented as to whether there was any other summer food program operated during the summer of 2020 that could have been deemed the actual summer school food program. As the students were not allowed to gather in person at the schools during that time given the COVID-19 pandemic, it would not seem that there would have been another food program operating from which to distinguish the program supervised by the Summer Food Service Site Supervisor. The parties presented no evidence about the 2020 summer curriculum or programs. It is noted that Respondent has asserted that the justification for the position itself was to provide food to the students who could not attend school in-person. Lastly, Respondent appeared to assert at the level three hearing that this was not a summer position because it was overseen by someone other than Ms. Arrowood. This makes no difference. The fact that the someone other than Ms. Arrowood was to oversee the position, makes it no less of a summer program.

Also, during the level three hearing, Director Perry seemed to assert that because this was a newly created position, summer seniority did not matter. It is true

⁸ See, Respondent's Exhibit 2, "Wayne County Schools Job Description."

that this was the first year for this exact position because it was necessitated by the ongoing COVID-19 pandemic, but that does not matter because the position was a professional position. If this had been a service personnel position rather than a professional one, a designation as a “newly created position” would have required that the regular hiring statute for service personnel, West Virginia Code § 18A-4-8b, be used to determine who would receive the position, instead of the service person who held the position in a previous summer receiving it automatically, if he or she were available.

Despite Respondent’s proposed findings of fact that states neither applicant had summer seniority, Respondent has not disputed or rebutted, or even attempted to do so, Grievant’s testimony that he held summer seniority. Therefore, it appears that Respondent concedes that Grievant has the summer seniority he claims. While both Grievant and Ms. Maynard were regularly employed professional employees at Wayne County Schools, Ms. Maynard had no summer seniority. Accordingly, pursuant to explicit language of West Virginia Code § 18-5-39(e), Respondent should have filled the Summer Food Service Site Supervisor position with Grievant, not Ms. Maynard.

Further, even if the Summer Food Service Site Supervisor position was somehow deemed to be something other than a summer school position, Respondent still should have filled the position with Grievant. Director Perry testified that she selected Ms. Maynard based upon what the two applicants submitted with their applications and a matrix of the factors listed in West Virginia Code § 18A-4-7a, “Employment, promotion, and transfer of professional personnel; qualifications,” which states as follows:

- (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 . . .

(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 principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to performing the duties of the job;
- (7) Past performance evaluations conducted pursuant to §18A-2-12 and § 18A-3C-2 of this code 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

Id. No written matrix, or matrix document, was presented at the level three hearing and such is not otherwise part of the record of this grievance. Also, there was no evidence presented regarding how the two applicants were evaluated, or scored, on these factors, or what, if any, weight was assigned to the various factors. When selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in West Virginia Code § 18A-4-7a, 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). It is noted that no Wayne County Board of Education meeting minutes were presented in this matter. Therefore, it is unknown when, or if, the filling of the Summer Food Service Site Supervisor position was addressed by the Respondent Board.

Based upon the evidence, while both Grievant and Ms. Maynard held teaching certificates as required in the job description, Grievant had many years of experience working in food service in Wayne County Schools. Grievant has worked in summer school, during the regular year with the afterschool program, as well as with the alternative school program, and the 21st Century program. He has experience using the required food service forms, keeping records of the food distributed, as well as food that was not distributed. Aside from his Wayne County Schools food service experience, Grievant has twenty years of experience working as a supermarket produce section manager and front manager where he also gained supervisory experience. Ms. Maynard had no food service experience at Wayne County Schools and had only limited food service experience during the years she operated an at-home daycare and when she worked at the concession stand during Spring Valley High School basketball games. Additionally, the position was designated a "supervisor" position, and purportedly supervised two cooks. Grievant holds a Professional Administrative Certificate with a "Supervisor General Instruction (PK-AD)" endorsement. Ms. Maynard held no professional certificate and had no known supervisory experience.

Comparing Grievant and Ms. Maynard, Grievant was the applicant with the highest qualifications. Therefore, even if the position were not a true summer school position, Grievant should have been selected to fill the Summer Food Service Site Supervisor position based upon the factors listed in West Virginia Code § 18A-4-7a. Accordingly, Grievant has met his burden of proof. Therefore, this grievance should be granted.

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

3. 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).

4. “[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).

5. “A county board shall hire professional educators for positions in summer school programs in accordance with section thirty-nine [§ 18-5-39], article five, chapter

eighteen of this code or section seven-a [§ 18A-4-7a] of this article, as applicable, except that a professional educator who is regularly employed by the county board on a full-time basis shall be given employment preference over applicants who are not regularly employed by the county board on a full-time basis." W. VA. CODE § 18A-4-7c.

6. "Notwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the prior provisions of this section on the basis of certification and length of time the professional has been employed in the county's summer school program. In the event that no employee who has been previously employed in the summer school program holds a valid certification or licensure, a board shall fill the position as a classroom teaching position in accordance with section seven-a [§ 18A-4-7a], article four, chapter eighteen-a of this code." W. VA. CODE § 18-5-39(e).

7. "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" W. VA. CODE § 18A-4-7a(a).

8. "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 principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to performing the duties of the job;
- (7) Past performance evaluations conducted pursuant to §18A-2-12 and § 18A-3C-2 of this code 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 "

W. VA. CODE § 18A-4-7a(b).

9. When selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in West Virginia Code § 18A-4-7a, 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).

10. Grievant proved by a preponderance of the evidence that he should have been selected to fill the Summer Food Service Site Supervisor position, and that Respondent's decision fill the position with Ms. Maynard was improper pursuant to the applicable statutes and arbitrary and capricious.

Accordingly, this Grievance is **GRANTED**.

It is hereby **ORDERED** that Respondent pay Grievant all back pay to which he would have been entitled, plus interest, from the date Ms. Maynard began in the

position until the position ended, and to adjust any and all of his benefits and seniority, including summer seniority, which would have been affected had he been selected to fill the Summer Food Service Site Supervisor position, retroactively to the date Ms. Maynard began working in the position.

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, 2018).

DATE: September 7, 2021.


Carrie H. LeFevre
Administrative Law Judge