

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**GARY WROBLEWSKI,
Grievant,**

v.

Docket No. 2019-1723-WayED

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

DECISION

Grievant, Gary Wroblewski, filed this grievance against his employer, Wayne County Board of Education ("WCBE"), Respondent, protesting that he was improperly denied a summer teaching position. The original grievance was filed on June 5, 2019, and the grievance statement provides:

Grievant applied for a summer teaching position in the extended school year program at Vinson Middle School. He did not receive this position. Grievant has previously taught summer school offered by the Respondent while the successful candidate has not to the best of the Grievant's knowledge. Grievant alleges a violation of W. VA. CODE § 18-5-39(e) and § 18A-4-7a.

Relief sought:

Grievant seeks instatement into this position, retroactive wages, benefits, & time-in-service in the summer school program. Grievant also seeks an award of interest on all monetary sums.

A conference was held at level one on October 16, 2019, and the grievance was denied at that level on November 8, 2019. Grievant appealed to level two on November 22, 2019, and a mediation session was held on February 20, 2020. Grievant appealed to level three on February 26, 2020. A level three hearing was held before the undersigned Administrative Law Judge on January 12, 2021, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Brandon Tinney, American-Federation of Teachers-WV, AFL-CIO. Respondent was represented

by its legal counsel, Leslie Tyree, Esquire. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on March 1, 2021, on receipt of the last of these proposals.

Synopsis

Grievant sought instatement into a teaching position in an extended school year program at Vinson Middle School. Extended school year programs are not traditional summer school but rather designed and only available for special education students to continue their educational process. Grievant was considered for the position at issue, but was not the successful applicant. A board of education making a hiring decision should use its best professional judgment to select the applicant best suited to the needs of the students based on qualifications and this discretion must be exercised reasonably. In the circumstances of this matter, Respondent's selection decision was not arbitrary and/or capricious. Respondent's selection process is not established to be a violation of applicable statute, policy, rule or regulation, thus this grievance is denied.

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

Findings of Fact

1. Grievant, Gary Wroblewski, is employed as a teacher by Respondent, Wayne County Board of Education.

2. On or about April 26, 2019, Wayne County Schools posted a vacancy for a position of an Extended School Year program during the summer of 2019 at Vinson Middle School.

3. The Extended School Year (ESY) program is governed by state law and policy as well as federal law regarding the education of special education students. The Extended School Year program is a specifically designed program for special education students, it is not part of the summer school program or related to traditional summer school in any way.

4. Extended School Year (ESY) is specifically addressed in West Virginia Department of Education policy 2419, Title 126 CSR 16, "Regulations For The Education of Students With Exceptionalities." R Ex 1

5. At the time relevant to this matter, the Extended School Year program is or was overseen by Sherry Webb, the Director of Special Education for Wayne County Schools.

6. ESY is specifically designed to meet the needs of special education students as determined by the student's IEP, Individual Education Plan, as required by state and federal law; (IDEA) Individuals with Disabilities Education Act.

7. Regular education students are never permitted to participate in Extended School Year.

8. ESY participants are those special education students which have had their critical skills evaluated and a determination has been made that without the intervention of ESY, Extended School Year, the student may exhibit:

- A. Significant regression during an interruption in their educational programming;
- B. A limited ability to recoup, or learn skills once programming has resumed;
- C. Regression/recoupment problems that interfere with the maintenance of identified critical skills as described in the current IEP; and
- D. Other factors that interfere with the maintenance of identified critical skills as described in the current IEP such as predictive data; degree of progress; emerging skills and breakthrough opportunities; interfering behaviors; nature and/or severity of the disability; and special circumstances.

9. Summer school and extended school year are not the same program.

Generally traditional summer school is designed for regular education students that have need and/or must retake identified courses.

10. The Wayne County Schools Summer School program has a separate and distinct supervisor.

11. Grievant timely applied for a teaching position in the extended school year program at the Vinson Middle School. The position in discussion was a special education teaching position for the ESY program. See posting, G Ex 2.

12. The posting for the position listed the minimum qualifications for the position as a special education certification. There were two applicants for the Vinson Middle School ESY position. Both applicants were qualified. Neither applicant were interviewed for the position.

13. Neither the Grievant nor the successful applicant had any prior seniority in the ESY program. The candidates were evaluated considering the criteria in West Virginia Code § 18A-4-7a.

14. The successful applicant Monica Smith was designated as the most qualified as a result of the hiring criteria prescribed in W. Va. Code § 18A-4-7a. The

successful candidate scored higher than Grievant using a matrix of the criteria in West Virginia Code § 18A-4-7a. Respondent awarded a point to the successful applicant under criteria 6 of the matrix; “Specialized training relevant to the performance of the duties of the job.” See G Ex 3.

15. The successful applicant Monica Smith had current autism training. Which Sherry Webb, Director of Special Education, indicated was important for the program in that autism students comprise the majority of students in the ESY program.

16. The successful applicant was hired over Grievant, due to the decision of the Special Education Director Ms. Webb, after a comparison of the candidates. It was determined that candidate Smith was the most qualified applicant for the ESY position.

17. Grievant had previously held positions in the county’s summer school program. Monica Smith had not previously held a position in the county’s summer school program.

18. Respondent did not rely upon W .Va. Code § 18-5-39(e) to determine the most qualified applicant. W. Va. Code § 18-5-39(e) provides that professional positions for summer school programs shall be filled on the basis of certification and length of time the professional has been employed in the county’s summer school program.

19. The position in discussion was not a summer school position but rather an extended school year program 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 (2018). "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.*

"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).

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 is 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). 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

On or about April 26, 2019, Wayne County Schools posted a vacancy for a position of an Extended School Year (ESY) program during the summer of 2019 at Vinson Middle School. Grievant timely applied for a teaching position. Grievant's argument is that he had more summer school seniority than the teacher chosen for the ESY position, thus, the Board was required to hire him for the ESY position. Grievant relies upon W.Va. Code § 18-5-39(e) as authority for his position. West Virginia Code § 18-5-39(e) states in part, that "[n]otwithstanding any other provision of this code to the contrary, the board shall fill professional positions established pursuant to the 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." The West Virginia Supreme Court of Appeals has made clear that W.Va. Code § 18-5-39 governs traditional summer school, not ESY teaching positions. See *Board of Education of the County of Wood v. Enoch*, 186 W.Va. 712, 414 S.E.2d 630 (1992).

Extended School Year programs are federally mandated to provide certain "handicapped students with education and related services for a period that continues beyond the end of the traditional 180 day school year. See 20 U.S.C. § 1400 *et seq.* See also *Armstrong v. Kline*, 146 F.Supp. 583 (E.D.Pa. 1979). These federally mandated periods of additional school beyond the traditional 180 day school year is free of charge

instruction for certain students beyond the school year with a curriculum based upon federal and state policies. The position in discussion was not a traditional summer school position but rather an extended school year program position. The Court in *Enoch* dealt with this exact issue and made clear that extended school year teaching programs are not traditional summer school as contemplated by W. Va. Code § 18-5-39. Thus, Grievant's argument is less than persuasive.

Grievant timely applied for a teaching position in the extended school year program at the Vinson Middle School. The position in discussion was a special education teaching position for the extended school year ESY program. Respondent relied upon the hiring criteria prescribed in W. Va. Code § 18A-4-7a, to determine the successful applicant for the posted position. W. Va. Code § 18A-4-7a, requires a board of education to fill positions based on the qualifications of the applicants. Decisions of a county board of education affecting teacher promotions and the filling of vacant teaching positions must be based primarily upon the applicants' qualifications for the job. Seniority is a factor but not necessarily the determinative factor.

Using a matrix of the criteria in West Virginia Code § 18A-4-7a, Respondent determined Monica Smith the most qualified applicant. Monica Smith had current autism training. Respondent awarded a point to the successful applicant under criteria 6 of the matrix; "Specialized training relevant to the performance of the duties of the job." A board of education making a hiring decision under W. VA. CODE § 18A-4-7a should use its best professional judgment to select the applicant best suited to the needs of the students based on qualifications and evaluations of the applicants' past service. Only when all other factors are equal should a board of education look to seniority. *Board of*

Education of the County of Wood v. Enoch, 186 W.Va. 712, 414 S.E.2d 630 (1992). Grievant was considered for the position, but was not the successful applicant. Sherry Webb, Director of Special Education, indicated that having had current autism training was relevant and important for the program in that autism students comprise the majority of students in the ESY program. Respondent's selection decision was not arbitrary and capricious or a violation of applicable statute, policy, rule or regulation.

Summer school and extended school year programs are not the same. While Grievant may have more summer school seniority than the successful applicant, that factor doesn't mandate that Respondent hire him for the ESY position in discussion. While traditional summer school is governed by W. Va. Code § 18-5-39, ESY programs are not. See *Board of Education of the County of Wood v. Enoch*, 186 W.Va. 712, 414 S.E.2d 630 (1992). A board of education making a hiring decision should use its best professional judgment to select the applicant best suited to the needs of the students based on qualifications and this discretion must be exercised reasonable. Grievant has not established by a preponderance of the evidence that the Respondent erred in its decision to award the extended school year position in question to the successful applicant rather than Grievant.

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 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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, a party has not met its burden of proof. *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. A board of education making a hiring decision should use its best professional judgment to select the applicant best suited to the needs of the students based on qualifications and evaluations of the applicants' past service. Only when all other factors are equal should a board of education look to seniority. *Board of Education of the County of Wood v. Enoch*, 186 W.Va. 712, 414 S.E.2d 630 (1992).

4. While traditional summer school is governed by W. Va. Code § 18-5-39, extended school year programs are not. See *Board of Education of the County of Wood v. Enoch*, 186 W.Va. 712, 414 S.E.2d 630 (1992). A board of education making a hiring decision should use its best professional judgment to select the applicant best suited to the needs of the students based on qualifications and this discretion must be exercised reasonable. *Id.*

5. Grievant has not established by a preponderance of the evidence that Respondent erred in its decision to award the extended school year position in question to the successful applicant.

6. Respondent's selection decision is not established to be arbitrary and capricious or a violation of applicable statute, policy, rule or regulation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2018).

Date: March 24, 2021

Landon R. Brown
Administrative Law Judge