

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GAIL BOONE,
Grievant,

v.

Docket No. 2022-0159-CONS

CABELL COUNTY BOARD OF EDUCATION,
Respondent
and

MICHAEL A. McCORMICK,
Intervenor.

DECISION

Gail Boone, Grievant filed five grievances against her employer, the Cabell County Board of Education, Respondent, protesting her non-selection for one of five full-time Technology Support and Training Specialist positions posted. The original grievance was filed on August 11, 2021, and the grievance statement provides:

Non-Selection positions P-2134 Huntington Middle Tech Support Training Spec. WV §6C-2-2 Discrimination, W. V. Code 18A-4-7a, WVBOE Policy 5000, Cabell County BOE discrimination and/or selection policy. Posting had requirement that unfairly limited potential applicants and discriminated against older applicants. Non-Selection

The relief requested:

Placement in position, backpay and related benefits.

The individual case numbers of Grievant's five grievances were consolidated into the above-referenced case number. A conference was held at level one on August 12, 2021, and the grievance was denied at that level by a written decision dated August 25, 2021. Grievant appealed to level two on September 8, 2021. A mediation session was held on January 10, 2022. Grievant appealed to level three on January 14, 2022. On March 9, 2022, Michael A. McCormick, filed as an Intervenor. A level three hearing was

held before the undersigned Administrative Law Judge on April 8, 2022 at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Ben Barkey, West Virginia Education Association. Respondent appeared by its Deputy Superintendent, Tim Hardesty, and by its counsel, Sherrone D. Hornbuckle, Esquire.

Notably, Intervenor Michael A. McCormick was not in the hearing room until half-way through the hearing. Following careful examination and consideration, it was agreed by the parties that since Intervenor was only interested in the position at the Cabell County Career and Technology Center, he had not been prejudiced nor deprived of his rights if the Cabell County Career and Technology Center Principal, Frank Barnett, re-testified, under Oath, in his presence. At the level three hearing, testimony was taken from eight witnesses: Debbie Smith, Manager of Professional Personnel; Jason Jackson, Director of Technology; Frank Barnett, Principal, Cabell County Career Technology Center; Keri Smith, Principal, Barboursville Middle School; Jim Paxton, Principal, Huntington Middle School; De Perry, Principal, Huntington East Middle School; Curt Mann, Principal, Milton Middle School; and Grievant. A total of 12 exhibits were admitted into evidence. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. Grievant and Respondent submitted their fact/law proposals and this matter became mature for decision on or about May 5, 2022, on receipt of the last of these proposals.

Synopsis

Grievant, an Adult Education Teacher and part-time Systems Operations Specialist, protests her non-selection for one of five full-time Technology Support and

Training Specialist positions posted for identified schools of Cabell County. Respondent maintains Grievant is not qualified in that Grievant is lacking an identified requisite for the posted position(s). Grievant does not possess an IC3 Digital Literacy Global 5 Certification. Grievant did not establish that Respondent's actions were "arbitrary and capricious" or "clearly wrong." Accordingly, 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 is employed by Respondent as an Adult Education Teacher and part-time Systems Operations Specialist (SysOP) at the Cabell County Career and Technology Center.

2. The Cabell County Board of Education, Respondent, posted five full-time Technology Support and Training Specialist positions representing individual positions at four middle schools and the Cabell County Career and Technical Education Center.

3. Grievant applied for five separate Technology Support and Training Specialist positions:

- a. P-2134- Huntington Middle School
- b. P-2130- Cabell Career and Technology Center
- c. P-2140- Milton Middle School
- d. P-2141- Huntington East Middle School
- e. P-2139- Barboursville Middle School

4. The posting for the Technology Support and Training Specialist position identified various requisite criteria, qualifications, and prerequisite for the position.

5. Grievant held the requisite qualifications for criteria 1- 7 listed on the Job Description.¹

- a. Current West Virginia teacher certification.
- b. Demonstrated expertise in Microsoft Office Products with an emphasis on virtual meetings and online storage.
- c. Demonstrated ability to train professional staff on current online education platforms.
- d. Demonstrated ability to communicate with other professional staff regarding technology issues.
- e. Demonstrated working knowledge of basic computer network management.
- f. Must hold Apple Teacher Certificate.
- g. Must hold Microsoft Innovative Educator Certificate.

6. Jason Jackson is employed as Cabell County Director of Technology and Information Systems. As director he testified at the level three hearing. The rationale and thought process used to determine the prerequisite for the Technology Support and Training Specialist position was identified and explained.

7. Initially the posted positions required a certain digital literacy qualification known as IC3 GS6. Later, it was determined that IC3 GS6 was not available at the time of the posting, so the requirement was changed to IC3 GS5. (Jackson L3 testimony)

8. Grievant does not possess an IC3 Digital Literacy Global 5 Certificate.

9. Grievant was removed from consideration by the principals of Huntington Middle, Barboursville Middle, Milton Middle and the Cabell Career Center once they determined she did not have the IC3 GS5 qualification.

¹ When selecting a candidate for a professional position other than classroom teacher, a county board of education must consider applicable criterion to determine the most qualified, but statute (e.g., W.Va. Code §18A-4-7a) permits a board to determine the weight to be applied to each factor, so long as weighting does not result in an abuse of discretion. (Cites omitted) Criteria not in dispute will not be discussed further in this decision.

10. Other applications were awarded the Technology Support and Training Specialist positions posted. Intervenor, Michael A. McCormick, was awarded the position at the Cabell County Career and Technical Education Center.

11. Respondent extended an opportunity for Grievant to submit additional documentation to support her claim that the classes she had completed were the same as possessing a IC3 Digital Literacy Global Standard 5 Certificate.

12. Information provided by Grievant to Respondent included an IC3 Digital Literacy Certificate Global Standard 3 from 2005 issued May 21, 2007; a GCF LearnFree coursework certificate for Word 2016 dated August 13, 2021; a GCF LearnFree coursework certificate for Power Point 2016 dated August 13, 2021; and a GCF LearnFree coursework certificate for Excel 2016 dated August 13, 2021.

13. None of the supplemental information provided by Grievant was established to be the equivalent of an IC3 Digital Literacy Global Standard 5 Certificate.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. See 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, the party bearing the burden has not met its burden. *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).

Respondent posted five full-time Technology Support and Training Specialist positions representing individual positions at four middle schools and the Cabell County Career and Technical Education Center. Qualifications and desired skill levels were established and finalized for the job. The posting identified various requisite criteria, qualifications, and prerequisites for the position. Ultimately, Respondent interviewed and selected successful applicants for the five positions. Grievant was not selected for any of the posted positions. Respondent maintains Grievant did not qualify for consideration citing Grievant's failure to possess an identified digital literacy qualification. Grievant does not possess an IC3 Digital Literacy Global 5 Certificate.

Grievant is of the opinion that her non-selection was not proper.² Overall, Grievant

² 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).

contends that the IC3-GS5 Certification is irrelevant and/or is a qualification Respondent should not have considered in its list of qualifications for the positions. More specifically, Grievant argued that:

- 1) the qualifications requiring the most up to date IC3 Digital Literacy Global Standard is discriminatory against older applicants;
- 2) the requirement that applicants have the IC3 Digital Literacy Global Standard 5 Certificate unfairly limited the potential applicants;
- 3) the IC3 Digital Literacy Global 3 Certificate held by Grievant was equivalent to the IC3 Digital Literacy Global 5 Standard Certificate;
- 4) she had completed class requirements equivalent to possessing an IC3 Digital Literacy Global Standard 5 Certificate.

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)).

A board of education making a hiring decision should use its best professional judgment to select the applicants best suited to meet the needs of the students based on qualifications and the discretion exercised must be reasonable. Respondent highlights

that technology is constantly evolving and changing. It is contended that the identified prerequisite was intended to ensure that technology specialists were prepared to instruct Cabell County students with the most current knowledge available. Grievant failed to prove that Respondent abused its discretion or acted in an arbitrary and capricious manner. Respondent strives for its students to be college and career ready, and it is reasonable to want its technology instructor to be equipped with most up to date expertise. Respondent has a reasonable degree of discretion.

Jason Jackson, Director of Technology for Respondent testified as to the qualifications needed for the Technology Support and Training Specialist position. Director Jackson testified that he helped develop Respondent's criteria for the position. He acknowledged that technology changes over the years and this includes things like updated graphic systems and graphic interfaces. Director Jackson was able to clarify why the positions were posted, pulled, and then re-posted. The job description was changed to ask for the IC3-GS5 which was then the most current, available version. Grievant acknowledged she did not have or attempt to obtain an IC3-GS5 certification prior to interview dates. All five-job position(s) required the IC3-GS5 certifications. Director Jackson's testimony set forth the difference in operating systems and the voluminous amount of differences of various programs. It was provided that the 2017 test included new applications, operating systems, and computer systems on which to be trained.

Further, Director Jackson testified that he was on the interview committee for the Cabell County Career Technology Center, Barboursville Middle School, and Milton Middle

School. He provided that none of those three interview committees interviewed any candidates that did not have the requisite IC3-GS5 Certification.

Frank Barnett, Principal of the Cabell County Career Technology Center testified twice.³ Among other things, Principal Barnett explained that two weeks prior to the interview, he went to Grievant and told her she did not have the required certification and without such, he would not be able to interview her. Intervenor was provided the opportunity to cross examine Principal Barnett. All of the principals of the various schools testified they only interviewed applicants who had the IC3-GS5 Certification.

The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). 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 his judgment for that of [the employer]. *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

This Grievance Board is authorized by statute to provide relief to employees for discrimination, and favoritism as those terms are defined in W. VA. CODE § 6C-2-2.

³ Intervenor, Michael A. McCormick, who was only interested in the position at the Cabell County Career and Technology Center, was not in the hearing room when Principal Barnett first testified. It was agreed by all parties that Intervenor would not be prejudiced nor deprived of his rights if the Cabell County Career and Technology Center Principal, Frank Barnett, re-testified, under Oath, in his presence.

“Discrimination” is defined by statute as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee” unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievant did not establish discrimination in the facts of this case. The requirement that applicants have an IC3 Digital Literacy Global Standard 5 Certificate did not unfairly limit potential applicants. Grievant acknowledged that she did have a conversation with Frank Barnett, Principal, Cabell County Career Technology Center and Curt Mann, Principal, Milton Middle School concerning the fact that she did not have the IC3-GS5 Certification. The prerequisite was designed to ensure that technology specialists were prepared to instruct students with the most current knowledge available. Grievant failed

to prove that the prerequisite certification was not related to the job responsibilities of the position. None of the supplemental information provided by Grievant to Respondent was established to be the equivalent of an IC3 Digital Literacy Global Standard 5 Certificate. In addition, the requirement that applicants have an IC3 Digital Literacy Global Standard 5 Certification did not discriminate against older applicants. Multiple tests have been offered since the IC3 Digital Literacy Global Standard 3 Certificate. These tests are offered at various times throughout the year. There was nothing preventing an applicant of any age from pursuing the certification.

Grievant did not demonstrate a flaw in the selection process, nor did she demonstrate that she was more qualified than the successful candidate(s). It is undisputed that the Grievant lacked the IC3-GS5 Certification required for the Technology Support and Training Specialist position. Grievant knew of the requirements of attaining this certification from the bid sheet and job posting. Grievant was also approached by at least two principals, who informed her she would not even be eligible for an interview without this certification. Grievant's testimony that she had been teaching in computer science since the 80's and in her opinion, her lack of IC3-GS5 Certification should not have excluded her as a qualified applicant was not persuasive. Grievant was treated the same as similarly situated employees who did not possess the IC3-GS5 Certification. Grievant was not interviewed. Grievant has not shown the selection process, as a whole, to be arbitrary or discriminatory.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The subject of 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 (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. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden 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)). See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

4. Grievant failed to prove that her non-selection was an arbitrary and capricious, or unreasonable decision.

5. Grievant failed to demonstrate, by a preponderance of the evidence, that there was a significant flaw in the selection process.

6. Grievant failed to demonstrate that she was the most qualified applicant for one or more of the posted positions.

7. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); See also *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

8. Grievant failed to demonstrate that she was a victim of discrimination or favoritism. It is not established by a preponderance of the evidence that Respondent discriminated against Grievant.

9. Grievant has not established by a preponderance of the evidence that Respondent's selection decision(s) were unreasonable or unlawful.

10. Respondent's selection decisions within the facts of the instant matter are not established to be arbitrary and capricious or a violation of an 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: June 3, 2022

Landon R. Brown
Administrative Law Judge