

CHRIS BAKER,
Grievant,

v v.

Docket No. 00-22-081

LINCOLN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Chris Baker, [\(See footnote 1\)](#) employed by the Lincoln County Board of Education ("LCBOE" or "Board"), filed the following grievance on or about October 27, 1999:

STATEMENT OF GRIEVANCE: A less qualified, less senior, less certified employee was awarded the position of Drug Free Coordinator/21st Century Grant Director position (sic) (WV Code 18A-4-7a)[.] I feel the position was improperly posted for him.

RELIEF SOUGHT: To be awarded the Drug Free Coordinator/21st Century Grant Director position with back pay to the date of initial hire plus interest and all benefits.

It appears there was no filing at Level I. A Level II hearing was held on January 7, 2000, and a Level II decision denying the grievance was issued on February 21, 2000. Level III was bypassed, and Grievant appealed to Level IV on February 28, 2000. A Level IV hearing was held on April 11, 2000. [\(See footnote 2\)](#) The deadline for the parties' proposed findings of fact and conclusions of law was June 8, 2000, at which time this grievance became mature for decision. [\(See footnote 3\)](#)

Issues and Arguments

Grievant argues the successful applicant was less senior and less qualified than he. Grievant also maintains the position was specifically posted for the successful applicant because, as the least senior principal, it was likely the successful applicant would be RIF'd from his principal's position when schools were consolidated.

Respondent avers it gave all candidates equal consideration and picked the most qualified

candidate for this administrative position. Respondent notes Grievant lacked experience in secondary education, and also maintains he interpreted some of the requirements incorrectly.

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

Findings of Fact

1. Grievant has 25 years of educational experience and has 20 years of experience as a principal. He is employed as a principal at Branchland Elementary School, and has held that position for 14 years. He has no experience in secondary education, and his teaching certificates are also not for students above the ninth grade.

2. On August 3, 1999, LCBOE posted a position for a Director of Drug Free Schools/Secondary Education Supervisor/ Project Director 21st Century Community Grant. 3. Originally, the positions with the 21st Century Community Grant were extracurricular, but when the Project Director, Charles McCann, who was also the Director of Drug Free Schools Program, left these positions to become an Assistant Superintendent, the 21st Century Community Grant Committee and LCBOE saw an opportunity to combine some positions and create a full-time position. Assistant Superintendent McCann started his new duties in August 1999. [\(See footnote 4\)](#)

4. Both the 21st Century Community Grant Committee and LCBOE administrators believed this combination would benefit both programs, as they believed a full-time position would encourage more qualified professional applicants.

5. The successful applicant would be expected to divide his or her time between the three identified programs. As well as being in charge of the 21st Century Community Grant Program and Drug Free Schools program, the successful applicant would be expected to assist and evaluate secondary school principals as well as providing leadership to high schools for improvement of Stanford 9 testing.

6. The qualifications for the Drug Free Coordinator/21st Century Grant Director/ Secondary Supervisor were:

Valid West Virginia teaching certificate

Masters degree in School Administration [\(See footnote 5\)](#)

Experience in Student Services, such as Safe and Drug Free Schools

Experience in outdoor education such as ROPES Challenge Course

Experience in writing grants and administering grants.

Experience in administering educational programs in Pre K - 12 [\(See footnote 6\)](#)

Experience in administering after school programs, Responsible Student Programs, Transition for 7th grade, Student Assistance Program and Student Resiliency Programs

Helpful to have been trained in leadership programs such as the RESA II's Leadership Advantage Program, Principal's Assessment Program and etc.

7. Three people applied and interviews were conducted for all applicants.

8. All applicants were asked the same questions, although follow-up questions differed somewhat. Grt. Ex. No. 2, at Level II.

9. The Interview Committee was made up of Michael Tierney, [\(See footnote 7\)](#) the Director of Step By Step, a nonprofit community organization which functioned as LCBOE's partner in the 21st Century Project, [\(See footnote 8\)](#) Darlene Dalton, the 21st Century Community Grant Harts Area Director and Principal at Atenville Elementary School, and Mr. McCann. Superintendent Peggy Adkins also participated. [\(See footnote 9\)](#) 10. For the position of 21st Century Community Grant Director, the Interview Committee was looking for an individual with knowledge and abilities in community involvement and good communication skills. They were also looking for an individual with a vision that was compatible with the goals of community outreach and involvement.

11. Although the Interview Committee considered each of the criteria listed in W. Va. Code § 18A-4-7a, they did not complete a matrix as the position was an administrative one. [\(See footnote 10\)](#)

12. The results of the interview were an important factor in selecting the successful applicant.

13. The Interview Committee found Grievant was not well informed about the 21st Century Program, even though it had been in place for over six months, and data was available on the Internet concerning this program.

14. The Interview Committee, after discussion of the candidates' strengths and weaknesses, unanimously selected Dwight Colburn as the successful applicant. This recommendation was accepted by the Board.

15. Prior to his selection for the position at issue, Mr. Colburn had been the Principal at Hamlin High School for three years, which, at that time, also included the Hamlin School Complex, K - 12. Prior to that time, Mr. Colburn had been Assistant Principal at Duval High School and Hamlin High

School.

16. Mr. Colburn met the qualifications for the position at issue. Grievant did not possess the posted requirements as he did not have one of the key components of the posting, experience with secondary education.

17. Both candidates' student Stanford test scores were above the 50% level, and the pattern of both school's test scores showed a decrease in the number of students in the bottom quartile in the last three years. Grievant's school has typically had some of the highest test scores in the county.

[\(See footnote 11\)](#)

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-7a sets forth the criteria to be used in filling administrative positions. That Code Section directs county boards of education to hire "professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications." Further, in judging qualifications, consideration shall be given to each of the following:

Appropriate certification and/or licensure; amount of experience relevant to the position . . . the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations . . . and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

W. Va. Code § 18A-4-7a.

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school, and are not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). Additionally, a county board of education is free to determine the weight to apply to

each of the above-stated factors when assessing an applicant's qualifications for an administrative position, as long as this substantial discretion is not abused. Workman v. Wayne County Bd. of Educ., Docket No. 99-50-099 (June 11, 1999); Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998); 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 (July 31, 1992). The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990). See Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998).

Once a county board of education reviews the criteria, it has "wide discretion in choosing administrators . . .". March v. Wyoming County Bd. of Educ., Docket No. 94-55- 022 (Sept. 1, 1994). See Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995). W. Va. Code § 18A-4-7a permits school boards to look beyond such factors as experience and certifications when selecting applicants to fill vacancies in these types of administrative positions. Indeed, the Code allows the school board to consider "other measures or indicators upon which the relative qualifications of the applicant may be fairly judged." Further, while each factor specified in the first set of factors of W. Va. Code § 18A-4-7a must be considered in selecting an administrator, the board is free to assign more weight to one factor over another. See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997). The standard of review in cases brought by unsuccessful candidates for administrative posts generally entails an inquiry into whether the criteria set forth in W. Va. Code § 18A-4-7a were accurately assessed for each applicant; whether favoritism and/or discrimination played a role in the selection process; and whether flaws in the process were so significant that the outcome might reasonably have been different. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). See Mills v. Wayne County Bd. of Educ., Docket No. 99-50-016 (Feb. 22, 1999). Consistent with these standards of review, the grievance procedure is not intended as a "super interview", but merely an analysis of the legal sufficiency of the selection process at the time it occurred. Stover, supra. See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997). Ultimately, it must be decided whether the Board abused its considerable discretion in personnel matters, or if its decision was arbitrary and capricious. See Dillon, supra; Amick v. Nicholas County Bd. of Educ., Docket No. 95-34- 037 (Aug. 23, 1995). "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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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)). " 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievant has not proven the Interview Committee or the Board violated any statute, policy, rule, or regulation in assessing the criteria. As previously noted, the Board has wide discretion in matters involving the selection of administrative personnel, and has broad discretion to determine the weight to be afforded a particular criterion. Workman, supra; Christian v. Logan County Bd. of Educ., Docket No. 94-23-173 (Mar. 31, 1995). W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants, especially with an administrative position. Alt v. Mineral County Bd. of Educ., Docket No. 97-28-015 (Aug. 25, 1997); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55- 183 (Sept. 30, 1993). Thus, the fact that the Board gave great weight to the interview process does not render the selection process flawed.

Grievant has presented no evidence to demonstrate the selection process violated W. Va. Code § 18A-4-7a, was arbitrary and capricious, or was an abuse of LCBOE's substantial discretion. Grievant asserted he was more qualified than the successful applicant, but in his testimony he did not compare his qualifications to those of the successful applicant, and did not demonstrate he was more qualified than the successful applicant. The successful applicant appeared at the Level II hearing, as requested by Grievant, but was not asked in any detail about his qualifications. ([See footnote 12](#))

Although Grievant had many skills and qualifications, he did not possess the necessary secondary

schools experience; the successful applicant did. It cannot be seen as arbitrary and capricious to require this type of experience for a Secondary Curriculum Supervisor. In this portion of the requirements, Grievant was not qualified.

Testimony of the Interview Committee also revealed Grievant did not have sufficient experience or knowledge in community development, generally, and about the 21st Century Program, specifically. The Interview Committee, especially, Mr. Tierney, felt Grievant's vision of what the 21st Century Program could be, appeared limited. Accordingly, Grievant has not demonstrated he was more qualified than the successful applicant. The Interview Committee unanimously recommended the selection of Mr. Colburn. There is no evidence that any aspects of Grievant's qualifications or experience were ignored, or that this decision was in any way arbitrary and capricious. This decision, on the evidence submitted, cannot be seen as arbitrary and capricious or an abuse of discretion.

As for Grievant's contention that the position was created for the successful applicant to prevent his being RIF'd from a principal's position, no credible evidence to support this theory was submitted. See Villers, supra. First of all, this position was posted in August of 1999, the planned consolidation would not take place until Fall of 2000. Second, according to the exhibit submitted by Grievant, the successful applicant was not the least senior applicant, Sheila Burns was. Third, the fallacy in this type of linear thinking was demonstrated by the fact that by the time of the Level IV hearing, there were two additional, less senior principals.

Grievant presented no evidence to support his contention the position was person- specific. Even Grievant testified this opinion was only his belief, based on double hearsay, and he had not heard anything, other than rumors, to support this belief. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustees, Docket No. 97 BOT-359 (Apr. 30, 1998).

Although it certainly would not have been necessary, and perhaps may have been a better idea to have a shorter, less specific list of qualifications, this was a multifaceted position requiring many talents and a variety of experiences. As previously stated, Grievant was not qualified for the position, as he lack required experience in secondary education. The successful applicant was qualified for the position. From the limited testimony on the qualities needed for the numerous facets of the position, it is clear LCBOE's decision to select Mr. Colburn cannot be seen as arbitrary and capricious.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-4-7a sets forth the criteria to be used in filling administrative positions. That Code Section directs county boards of education to hire "professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications." Further, in judging qualifications, consideration shall be given to each of the following:

Appropriate certification and/or licensure; amount of experience relevant to the position . . . the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations . . . and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

W. Va. Code § 18A-4-7a.

3. It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school, and are not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. "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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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)). " 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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

5. Additionally, a county board of education is free to determine the weight to apply to each of the above-stated factors when assessing an applicant's qualifications for an administrative position, as long as this substantial discretion is not abused. 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 (July 31, 1992). Once a county board of education reviews the criteria, it has "wide discretion in choosing administrators . . . ". March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994).

6. The standard of review in cases brought by unsuccessful candidates for administrative posts generally entails an inquiry into whether the criteria set forth in W. Va. Code § 18A-4-7a were accurately assessed for each applicant; whether favoritism and/or discrimination played a role in the selection process; and whether flaws in the process were so significant that the outcome might reasonably have been different. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Ultimately, it must be decided whether the Board abused its considerable discretion in personnel matters. See Dillon, supra; Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995).

7. The Board has wide discretion in matters involving the selection of administrative personnel, and has broad discretion to determine the weight to be afforded a particular criterion. Christian v. Logan County Bd. of Educ., Docket No. 94-23-173 (Mar. 31, 1995). W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. Alt v. Mineral County Bd. of Educ., Docket No. 97-28-015 (Aug. 25, 1997); Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993).

8. The fact LCBOE gave great weight to the interview process does not render the selection process flawed. 9. Grievant has failed to prove by a preponderance of the evidence that the selection criteria of W. Va. Code § 18A-4-7a were not utilized and considered, or that the decision to

award the position to the successful applicant was arbitrary and capricious.

10. Grievant has failed to demonstrate the position was posted for Mr. Colburn. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustees, Docket No. 97 BOT-359 (Apr. 30, 1998).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Lincoln County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS
Administrative Law Judge

Dated: June 28, 2000

[Footnote: 1](#)

It appears that at one time Sheila Burns had joined this grievance. She did not participate at Level II, and there is no explanation regarding her participation in the record other than her name on the grievance form. It is assumed she withdrew from this grievance.

[Footnote: 2](#)

The hearing in this matter was conducted by Administrative Law Judge Lewis Brewer. Due to Mr. Brewer's resignation, this case was reassigned to the undersigned Administrative Law Judge for decision.

[Footnote: 3](#)

Grievant was represented by Anita Mitter from the West Virginia Education Association, and the Board was represented by Attorney James Gabehart.

[Footnote: 4](#)

It appears Assistant Superintendent McCann was also the secondary curriculum director, but this fact is somewhat

unclear from the record.

[Footnote: 5](#)

In the State Department of Education ("SDOE") Preliminary Audit Report dated October 1999, SDOE stated this requirement was incorrectly listed, and the correct requirement should say "Professional Administrative Certificate was required". Assistant Superintendent McCann believed this requirement was implied in this phrase in the posting. Grt. Ex. No. 7, at Level II.

[Footnote: 6](#)

Grievant interpreted this as requiring the successful applicant to possess experience in a K-12 school setting. This interpretation of this qualification is too narrow, and does not comport with a plain meaning of the phrase.

[Footnote: 7](#)

Mr. Tierney stated he was present for all interviews, and Principal Burns stated he was suppose to be present by phone for her interview, but was not. Neither of these statements was followed up on, and the conflict in this limited testimony is insufficient to find Mr. Tierney was lying as asserted by Grievant.

[Footnote: 8](#)

This exact title was taken from Respondent's brief, as Mr. Tierney was not asked to identify himself or his title in the lower level record.

[Footnote: 9](#)

At Level IV, Grievant submitted into evidence an undated newspaper article indicating Ms. Dalton, Assistant Superintendent McCann, and Superintendent Adkins had signed a conciliation agreement with the State Ethics Board for applying for administrative positions in a federal program. It appears the federal program referred to was the 21st Century Community Grant program, although this was not specified in the article. They were each fined \$500.00. This agreement, according to the newspaper, concludes they did not intentionally violate the state ethics law. Although admitted into evidence, it is unclear what relevance this article has to the selection of the successful applicant. Grievant's argument was that if the Interview Committee had shown favoritism to themselves, they would show favoritism to Mr. Colburn. Grt. Ex. B, at Level IV.

[Footnote: 10](#)

Grievant contended the Interview Committee did not consider the required criteria. This assertion goes directly against the testimony of the Interview Committee members, who, with the exception of Mr. Tierney, who is not knowledgeable about W. Va. Code § 18A-4-7a, stated the criteria were considered, but there was no matrix completed. It is not necessary to complete a matrix when selecting the successful applicant for an administrative position.

[Footnote: 11](#)

No evidence was given to compare the test scores of Hamlin High School versus other high schools in the county;

thus, it is impossible to assess whether this was a "weak" area for Mr. Colburn. The parties noted that high school scores are usually lower than elementary scores.

[Footnote: 12](#)

At the Level IV hearing, Respondent attempted to introduce the successful applicant's resume. Grievant objected stating that it might not be the same resume submitted to the Interview Committee. Whether this document was to be admitted was to be resolved later, at a second hearing. The parties then elected not to have a second day of hearing at Level IV.