

PAUL BISHER,

Grievant,

v.

Docket No. 99-19-470

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent,

and

SUZANNE OFFUTT,

Intervenor.

DECISION

On July 29, 1999, Paul Bisher (Grievant) initiated this grievance pursuant to W. Va. Code § 18-29-1, et seq., alleging that Respondent Jefferson County Board of Education (JCBOE) violated W. Va. Code § 18A-4-7a when it selected Suzanne Offutt (Intervenor) to fill the position of Principal of Shepherdstown Elementary School. The parties agreed to waive level one proceedings, and a level two hearing was held on September 29, 1999. The grievance was denied in a written level two decision dated October 26, 1999. Level three consideration was waived, and Grievant appealed to level four on November 2, 1999. A level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on January 10, 2000. Grievant was represented by Harvey Bane of the West Virginia Education Association; Respondent was represented by counsel, Howard Seufer; and Intervenor was represented by Don Craft, also of WVEA. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 6, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by JCBOE as assistant principal at Jefferson High School.

2. On June 2, 1999, JCBOE posted a vacancy for the position of principal of Shepherdstown Elementary School. The minimum qualifications listed in the posting were a master's degree, at least three years of successful experience in education, and administrative certification. The attached job description also listed numerous areas of responsibilities and performance standards expected of school principals.

3. Fourteen individuals, including Grievant and Intervenor, applied for the principal position during the posting period.

4. JCBOE administrators reviewed the applications, and determined that seven individuals met the minimum qualifications for the position. These seven candidates were interviewed and ranked by a screening committee composed of teachers, parents, service personnel, a Board member, and a central office administrator.

5. After conducting interviews, the screening committee ranked the top three candidates, in order of preference, as Grievant, Intervenor, and Jacqueline Davis.

6. JCBOE's superintendent, David Markoe, and assistant superintendent John Rose interviewed the three finalists on July 14, 1999, asking them identical questions.

7. Along with the interview responses, Mr. Markoe and Mr. Rose reviewed the three finalists' responses to a written essay question, resumes, personnel files, and any other application materials submitted. 8. Both Grievant and Intervenor met the minimum qualifications for the position.

9. Grievant has eleven years of experience as an assistant principal at the junior high and high school levels. His only experience at the elementary level was as a substitute teacher in Kanawha County between 1982 and 1987, during which time he substituted at various grade levels from elementary to adult education. Grievant has a doctoral degree in education administration and two masters degrees.

10. At the time she applied for the principal position, Intervenor had been employed by JCBOE as a speech-language pathologist since 1991. She had been assigned to South Jefferson Elementary School (SJES) during most of her employment. Since 1995, Intervenor had served as "head teacher" at SJES, which required her to perform all of the principal's duties in her absence.

11. While based at SJES, Intervenor had also served in the following positions: officer in the faculty senate, chair of the local school improvement council, program coordinator for the PASS [\(See footnote 1\)](#) program (a mentoring program for troubled children), coordinator for Odyssey of the Mind

(a program aimed at developing gifted children), an inclusion plan (IEP) trainer, and various other committees and programs. Intervenor has three master's degrees, one of which is in education administration.

12. Grievant's grade point average during his doctorate work was 3.7 to 3.75. Intervenor had a 4.0 grade point average when she received her master's in education administration.

13. Grievant did not provide the screening committee or the superintendent and assistant superintendent with information regarding his specialized training and workshops, because it was not requested.

14. Mr. Markoe and Mr. Rose agreed that Intervenor was the most qualified candidate for the principal position at Shepherdstown Elementary, because of her experience at the elementary level, and her background in elementary school curriculum and instruction. Both testified that, even if Grievant had attended identical training and workshops as Intervenor, she was still more qualified than Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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); 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). See W. Va. Code § 18-29-6.

Filling vacancies for administrative positions, including principals, is accomplished under the more flexible standards contained in the so-called "first set of factors" in W. Va. Code § 18A-4-7a:

A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. . . . In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position, or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; 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 conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

"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. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). The selection of candidates for administrative positions is not simply a mechanical or mathematical process. See Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990); Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). Further, the grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended as a "super interview" but merely an analysis of the legal sufficiency of the selection process at the time it occurred. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997). Thus, W. Va. Code § 18A-4-7a permits county boards of education to determine the weight to be applied to each of the factors listed above in assessing a candidate's qualifications for administrative positions, so long as they do not abuse their discretion. E.g., Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); 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). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

The record indicates that Grievant had more total experience and substantially more experience as an administrator than Intervenor. Additionally, Grievant contends that, because he had a doctorate degree and Intervenor had only a master's, he was clearly the more qualified applicant. However, as previously noted, W. Va. Code § 18A-4-7a permits school boards to look beyond such factors as experience and education when selecting applicants to fill vacancies in administrative or management positions. Villers, supra. See Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-365 (June 18, 1997). Indeed, the Code broadly allows the school board to consider "other measures or indicators upon which the relative qualifications of the applicant may be fairly judged." See Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). Further, while each factor specified in the first set of factors of § 18A-4-7a must be considered, the board is free to consider one factor as more important than another. See Saunders, supra.

Grievant concedes W. Va. Code § 18A-4-7a allows considerable discretion to JCBE in selecting a new principal for Shepherdstown Elementary, but argues that under the facts and circumstances presented, JCBE abused that discretion by making an arbitrary and capricious employment decision

to select an employee that was clearly less qualified. In determining whether a discretionary decision was "arbitrary and capricious" a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Mar. 22, 1995). Alternatively, it may be shown that the county board and school superintendent, in making their selection determination, "did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view." Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985).

The evidence of record clearly shows that each of the seven factors set forth in W. Va. Code § 18A-4-7a was considered by JCBOE. Grievant has raised several arguments regarding why he should have "won" each of the various categories. However, as explained by Mr. Markoe and Mr. Rose, this hiring decision was based entirely upon Intervenor's demonstration of "instructional leadership" qualities, as evidenced by her interview responses, her written essay, and her work at the elementary school level. Although Grievant does have vast experience on an administrative level, the superintendent believed that he exhibited more of a "managerial" approach to school principalship, which was not desired for filling this position. Because Intervenor clearly exhibited a more instructional and curriculum-oriented approach, she was the more desirable candidate for this position.

Grievant contends that, because JCBOE did not solicit information regarding his specialized training, which Intervenor voluntarily provided with her application, its decision was contrary to the statute. Indeed, this Grievance Board has held that "it is incumbent upon a board of education, when filling an administrative position, to request all information pertinent to the statutory criteria from all applicants," so that each criterion can be considered. Snyder v. Preston County Bd. of Educ., Docket No. 98-39-509 (May 26, 1999). However, in order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have

been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

The superintendent and assistant superintendent both testified that, regardless of any training Grievant had obtained, Intervenor was the more qualified applicant because of her instructional approach and experience at the elementary school level. Moreover, none of the training and/or workshops Grievant attended, which he discussed at the level two hearing, were specifically directed toward elementary school instruction or curriculum. Therefore, Grievant has not established any entitlement to relief on this basis. Grievant also argued W. Va. Code § 18A-4-7a required the relevant specialized training which would be considered to be listed in the job description. While Grievant is correct that this requirement is found in that statute, it is applicable only when applying the second set of factors, and is not applicable to administrative positions. Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998).

Grievant also contends that Intervenor's work as "head teacher" should not have been considered, and that his overall greater experience as an administrator should have made him the successful applicant. As discussed above, a board of education is permitted to give "other measures or indicators" more weight than the other factors set forth in the statute. In this case, JCBOE officials were looking for an instructional leader with experience at the elementary level. Although not a classroom teacher, Intervenor has been working with elementary school children for approximately nine years. In addition, over the past several years, she has been very actively involved in the administration of the school and development of programs at SJES. Grievant's experience as a substitute in elementary schools many years ago was simply not as relevant to this position, which was a determination within the superintendent's discretion to make.

While another individual might have selected Grievant for the position at issue based upon his greater overall experience as an administrator, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. Villers, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford Memorial Hosp., supra; Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Grievant failed to establish that his qualifications were so superior to Intervenor's that JCBE's failure to select him for this position was necessarily an abuse of the considerable discretion

extended school boards when making such professional determinations. See Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-398 (Jan. 30, 1991).

Consistent with the foregoing findings and discussion, the following conclusions of law are made in this matter.

Conclusions of Law

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of 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); 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). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the highest qualifications. In making its selection, the board must give consideration to appropriate certification, experience relevant to the position, course work and degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the relative qualifications of the applicants may be fairly judged. Once they have reviewed the criteria in W. Va. Code § 18A-4-7a, county boards have wide discretion in choosing school administrators. Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

4. The grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended to be a "super interview" for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). 5. In reviewing a county board's exercise of discretion in a hiring decision, the inquiry into the process by which the decision was made must be thorough and searching, but considerable deference must be

afforded those conducting it. Fittro, supra; Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

6. Grievant failed to establish that he was more qualified than Intervenor for the Shepherdstown Elementary School principal's position at issue in accordance with the requirements of W. Va. Code § 18A-4-7a. See Pockl, supra; Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-398 (Jan. 30, 1991).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson County and 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.

Date: March 28, 2000 _____

DENISE M. SPATAFORE
Administrative Law Judge

[Footnote: 1](#)

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