JUDITH CHILDS,

Grievant,

v. **Docket No. 01-02-510**

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent,

and

PEGGY BUTTS,

Intervenor.

D E C I S I O N

Grievant, Judith Childs, employed by the Berkeley County Board of Education (BCBE) as a teacher, filed a level one grievance on August 1, 2001, in which she alleged violations of W. Va. Code § 18A-4-7a, and State Department of Education Policy 5300 when she was denied the position of Department Head. For relief, Grievant requested instatement with back pay and benefits. The grievance was denied at levels one and two, and Grievant elected to bypass level three, as is permitted by W. Va. Code § 18-29-4(c). Appeal was made to level four on September 20, 2001, and a hearing to supplement the record was conducted at the BCBE offices on October 30, 2001. Grievant was represented by Harvey Bane of the West Virginia Education Association, BCBE was represented by counsel, Laura L. Sutton, and Intervenor was represented by Kathleen Smith of the West Virginia Education Association. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by Grievant and BCBE on November 13, 2001.

The essential facts in this matter are undisputed and may be set forth as findings of fact.

Findings of Fact

1. Grievant has been employed by BCBE since 1974, and has been assigned as a Language Arts teacher at Martinsburg High School (MHS) at all times pertinent to this decision.

2. In June 2001, BCBE posted an extracurricular position of Language Arts Department Chairperson at MHS. Five teachers, including Grievant, applied for the position.

3. MHS Principal Ken Pack, and Assistant Principal Ron Stephens interviewed the applicants,

posing a series of eight questions to each.

4. At the conclusion of the interviews, the administrators determined that Peggy Butts (Intervenor) was the most qualified applicant for the position of Department Chair.

5. Grievant has twenty-seven years of seniority with BCBE, while Intervenor has only seven years.

6. Grievant has no previous administrative experience. Intervenor served as Director of Curriculum for the Kemp Independent School District from 1984 to 1993. As Director, Intervenor coordinated the Chapter I, ESL, Gifted and Talented, and At-Risk Programs, including the Honors courses. She was responsible for text books, curriculum guides, lesson plans, recruiting and interviewing teacher applicants, purchasing instructional materials, planning/presenting district staff development, development of a technology plan, and was editor of the district newsletter and information brochure.

Discussion

As 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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan CountyBd. 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.

Grievant argues that Principal Pack arbitrarily changed the BCBE job description for Department Chairperson which lists only two qualifications: that the individual be a faculty member within the department at the school, and hold a valid teaching certificate in the field. A Masters Degree is preferred, but not required. Principal Pack cited Intervenor's interview performance and previous administrative experience as the reason for her selection, and Grievant asserts that there is no reference to previous administrative experience as a qualification on the job description. Grievant contends that this additional qualification was in violation of W. Va. Code § 18A-4-7a(o) which states in pertinent part:

Boards shall be required to post and date notices which shall be subject to the following:

* * *

Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job.

Grievant also alleges the principal violated Department of Education Policy 5300 which requires that “all official and enforceable personnel policies must be written and made available to every employee of each county board of education.”

After Principal Pack testified that he had used the second set of criteria set forth in W. Va. Code §18A-4-7a as a guide to determine the most qualified applicant, Grievant then asserted that the principal was bound to utilize the same procedure throughout the selection process. Specifically, Code § 18A-4-7a requires that each criteria be given equal weight, and no organized method was applied, with the decision being made based upon impressions made by the applicants during their interviews. Finally, Grievant asserts that it has been past practice for BCBE to appoint Department Chairs based upon seniority. With twenty-seven plus years of seniority, Grievant opines that had Principal Pack followed the past practice of filling the position based on seniority, she would have received the appointment.

BCBE argues that the provisions of W. Va. Code § 18A-4-7a are not applicable to extracurricular positions, and that Grievant failed to prove the selection of Intervenor for the position of Department Chairperson was arbitrary or capricious.

"This Grievance Board has previously determined that the provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). Thus, 'the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' McCoy v. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Foley, supra; See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997)." Savilla v. Putnam County Bd. of Educ., Docket No. 00-40-058 (Apr. 7, 2000); Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999). Notwithstanding any informal past practice, seniority is not the determining factor in the selection of professional personnel for an extracurricular assignment.

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may notsubstitute her judgement

for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is arbitrary and capricious if the decision-maker 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 and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Certainly Grievant was qualified for the position. However, she did not demonstrate that the selection must be limited to those minimal qualifications, or that consideration of information gained during the interview, and the applicants' administrative experience was inappropriate. Grievant does not allege the interview questions were irrelevant, or that administrative experience would not enhance an applicant's ability to perform the duties of Department Chairperson. The decision that Intervenor was the most qualified applicant was not arbitrary and capricious, and the process used to select the successful applicant was reasonable. Grievant has not demonstrated BCBE abused its substantial discretion in selecting Intervenor for the position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. County boards of education have substantial discretion in matters relating to the assignment of school personnel, so long as they act reasonably, in the best interestsof the school, and in a manner which is not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

3. "The provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999).

4. "'The appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' McCoy v. Kanawha County Bd.

of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Foley, supra. See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997)." Lusher, supra.

5. Grievant did not demonstrate she was entitled to the position at issue, or that BCBE acted in an arbitrary and capricious manner or otherwise abused its substantial discretion.

Accordingly, this grievance is **DENIED**.

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

Date: November 26, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE