C.C. LESTER,

Grievant,

v. Docket No. 01-34-581

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent,

and

VICKIE DILLON,

Intervenor.

D E C I S I O N

Grievant, C. C. Lester, filed this grievance against his employer, the Nicholas County Board of Education ("NCBOE") on August 21, 2001. The Statement of Grievance alleges:

> **The BOE violated W.V. Code 18A-4-7(a) by not selecting me for the posted position of Food Service Director. My qualifications were substantially greater than those of the successful applicant.**

Relief Sought: As relief, I seek instatement as the Director of Food Services.

This grievance was denied at all lower levels. Intervenor, Vickie Dillon, asked to intervene on September 6, 2001, and this request was granted. Grievant appealed to Level IV on November 14, 2001, and the parties agreed to submit this case on the record developed below. This case became mature for decision on January 2, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant alleges he was the most qualified candidate for the Food Service Director/Central Office Administrator position, utilizing the selection criteria for administrative positions contained in W. Va. Code § 18A-4-7a. Additionally, Grievant argued one member of the

Interview Committee may have held a prior disagreement against him.

The Board maintains its selection of the successful applicant for the position conformed with the selection requirements in the above-cited Code Section and was not arbitrary or capricious. Respondent avers it selected the best candidate for the position. Further, Respondent maintains the Interview Committee members were all Central Office Administrators, and these are the same people who are usually selected to serve on an Interview Committee for an administrative position.

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 is employed by NCBOE as Principal at Richwood Junior High School.

2. On July 3, 2001, NCBOE posted the administrative position of Food Service Director/Central Office Administrator.

3. The majority of the Job Description focuses on food management and nutrition and identifies the following multiple tasks required by the position: 1) purchasing and inventorying of food and supplies; 2) assisting staff in the preparing, pricing, and serving of food; 3) inspecting of facilities to ensure that standards of cleanliness, health and safety are maintained; 4) inspecting menus and portion size for dietary and nutritionalvalue and standards; and 5) applying all state and federal laws and regulations as they relate to subsidies, commodities, bids, nutritional requirements, etc. Additional duties include providing in-service training for food service personnel, frequent observational visits to cafeterias, budget preparation, and assistance and suggestions to cafeteria staff for the preparation and serving of government surplus food.

4. There were five applicants for the position, but two did not meet the minimum qualifications and were not interviewed. The applicants were directed to submit an application and resume.

5. Grievant did not submit a resume because he did not believe it was necessary, and Superintendent Gus Penix or the Interview Committee could ask for it if they needed it.

6. The three minimally qualified applicants were interviewed by a committee comprised

of three Central Office Administrators and Superintendent Penix. This Interview Committee had been given the materials submitted by the applicants. All applicants were asked the same questions and given sufficient time to answer. All applicants were also allowed to ask any questions they had about the position.

7. After the interviews and before he gave his opinion, Superintendent Penix asked the members of the Interview Committee to assess the candidates. The consensus of the committee, based on the interviews, was that Intervenor Dillon was the most qualified candidate for the position. Superintendent Penix agreed with this assessment.

8. After receiving this recommendation, Superintendent Penix created a matrix of all the applicants' qualifications relating to the selection criteria established in W. Va. Code § 18A-4-7a. Bd. Ex. 4. The ratings for Grievant and Intervenor are reproduced below:

Factors	Grievant	Intervenor
Appropriate certification	1	1
Amount of administrative experience	3	1
Course work/Degree Level	1	2
Academic Achievement	1	1
Relevant Specialized Training	0	1
Evaluations	1	1
Other Measures or Indicators	15	20
Totals	22	27

9. Grievant has 32 years of seniority with NCBOE, and has served as a principal since 1976. His area of teaching certification is in elementary education, with a specialization in Social Studies. During his time as a school principal Grievant has had the responsibility of overseeing the food programs in his school, as does every school principal. Grievant has no course work in the areas of nutrition or food service management.

10. Intervenor has been employed by NCBOE since 1973, and she is certified in Home

Economics/Education. During her course work, she took classes in nutrition, food service management, chemistry, and health. From 1992 to 2000, she served as an Assistant Principal, and the last year has served as Principal at Summersville Junior High School.

11. In rating the area of "other measures or indicators," Superintendent Penix assessed four areas based on the interview information. These areas were: 1) Supervising food service programs at school level; 2) Relevant work in food service programs at schoollevel; 3) Computer skills; and 4) Degree in a nutrition field. Grievant received five points in the first three areas, and the successful applicant received five points in all four areas. (See footnote 2)

12. Superintendent Penix was aware that effective for the 2002-2003 school year, administrators in charge of food services would be required by 126 C.S.R. 86 to possess at least six hours of course work in the areas of nutrition and/or food service management. (See footnote 3) **Resp. Ex. No. 5, at Level II.**

13. The possession of a degree in nutrition or a related field was not a requirement for the position.

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 § 4.21 (2000); 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.

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. 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). 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). Ultimately, it must bedecided whether the Board abused its considerable discretion in personnel matters, or if its decision was arbitrary and capricious. See Dillon, supra; Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-85 (Aug. 28, 1998); Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); 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, 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)). "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 Board violated any statute, policy, rule, or regulation in assessing the criteria. As previously noted, the Board has wide discretion in mattersinvolving 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). Thus, the fact Superintendent Penix and NCBOE gave weight to the interview process and the possession of a background in food management and nutrition for the position of Food Service Director does not render the selection process flawed.

Grievant claims he is more qualified for the position than the successful applicant, and his testimony indicated he believed his administrative experience was more important to the position than the possession of food management skills or nutritional knowledge. Grievant stated he did not see "what a nutritional background has to do with menus, with measuring or the oversight of a kitchen cafeteria," and when he reviewed the performance responsibilities contained in the Job Description, he claimed a background in nutrition would not benefit the person assigned to the position. Grievant believes the majority of food information is given to the cooks via in-service training.

The matrix completed by the Superintendent confirms Grievant and the successful applicant were both qualified for the position. Superintendent Penix decided to give possession of special knowledge and training applicable to the position and the decision of the Interview Committee great weight. Superintendent Penix also gave weight to the fact that a

background and course work in food management would soon be required bythe State Board of Education. The Interview Committee unanimously recommended the selection of Intervenor, and Intervenor Dillon had special training. Superintendent Penix, after reviewing the qualifications of the applicants and compiling his own matrix, recommended Intervenor Dillon for the position. There is no evidence Superintendent Penix ignored any aspects of the applicants' qualifications or experience, or that his decision was in any way arbitrary and capricious. Given Intervenor Dillon's experience in food management and nutrition, Superintendent Penix's and the Board's decision cannot be seen as arbitrary and capricious or an abuse of discretion. Additionally, Superintendent Penix's decision to follow the State's requirements early is not arbitrary and capricious or unreasonable.

Grievant's allegation about the make-up of the Interview Committee will be briefly addressed. Grievant stated he believed the interview had gone well, but he "felt" there might be a bias because he had words with a member of the Interview Committee a year or so ago. Superintendent Penix testified he saw no bias on the part of any member of the Interview Committee. The Interview Committee member at issue was not called to testify. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustee/W.Va. Univers. - Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998). Accordingly, the undersigned Administrative Law Judge does not find the make-up of the Interview Committee influenced the selection of the successful applicant.

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 Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21(2000); 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. 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 forthe 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, 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)). " 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; Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-85 (Aug. 28, 1998); Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); 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. 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.

9. Grievant has also failed to demonstrate the selection process was so flawed that the outcome might reasonably have been different. Stover, supra.

10. Grievant has failed to prove he was more qualified than the successful applicant.

11. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustee/W.Va. Univers. - Parkersburg, Docket No. 97-BOT- 359 (Apr. 30, 1998). 12. Grievant has failed to demonstrate the make-up the Interview

Committee affected the selection of the successful applicant.

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 Nicholas 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: January 25 , 2002

Footnote: 1

Grievant was represented by Gary Archer, UniServ Consultant, from the West Virginia Education Association, Intervenor represented herself, and Respondent was represented by Attorney Greg Bailey from Bowles Rice McDavid Graff & Love. Grievant and Intervenor did not submit proposals.

Footnote: 2

Superintendent Penix gave Grievant 5 points in the computer area even though he did not possess all the computer skills that would be required for the position and the successful applicant did.

Footnote: 3

Current employees would be grandfathered into the position.