LOIS SCHOOLCRAFT,

Grievant,

v. Docket No. 01-34-576

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent,

and

DAVID BABER,

Intervenor.

D E C I S I O N

Grievant, Lois Schoolcraft, filed this grievance against her employer, the Nicholas County Board of Education ("NCBOE") on September 24, 2001. The Statement of Grievance alleges:

> **Grievant is a regularly employed Secretary/Accountant. (Grievant also works for Respondent as an internal auditor.) Grievant contends that the Respondent has violated West Virginia Code §§18A-4-15, 18A-4-8e, & 18A- 4-8b in filling a posted vacancy for the Director of Transportation with a less senior applicant.**
>
> **Relief Sought: Grievant seeks instatement into the position with back pay, seniority, and all other benefits of the position (pecuniary and nonpecuniary) retroactive to the date that the successful applicant received the position. Grievant also seeks interest on all sums to which she is entitled.**

This grievance was denied at all lower levels. Intervenor, David Baber, asked to intervene on October 3, 2001, and this request was granted on October 11, 2001, at the Level II hearing. Level III was by-passed. Grievant appealed to Level IV on November 9, 2001, and the parties agreed to submit this case on the record developed below. Thiscase became mature for decision on February 19, 2002, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant alleges she should have received the position of Temporary Director of Transportation because she was the most senior candidate. She also asserts she was the most qualified candidate.

Respondent maintains it selected the most qualified candidate for the position, and with an administrative service personnel position of this importance, seniority is not the only issue for consideration. Respondent avers the key issue for consideration is possession of the required qualifications necessary to perform the job. Respondent also notes it followed the guidelines established by the West Virginia Supreme Court of Appeals in Ohio County Board of Education v. Hopkins, Docket No. 92-35-359 (Aug. 12, 1993); rev'd Ohio County Cir. Ct., Civil Action No. 93-CAP-25B (Feb. 2, 1994), aff'd, 193 W. Va. 600, 457 S.E.2d 537 (1995).

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 a Secretary/Accountant.

2. Intervenor was employed by NCBOE as a Shop Foreman in the Transportation Department prior to his selection as the Director of Transportation. 3. On July 27, 2001, NCBOE posted the position of Temporary Director of Transportation. (See footnote 2) **A copy of the Job Description was included with the posting.** (See footnote 3)

4. Twelve people applied, and because none of them possessed the classification, the applicants were given in-service training and the competency examination for the "Director or coordinator of services" classification.

5. Eleven applicants continued to the interview stage.

6. These eleven applicants were interviewed by a committee comprising four central office administrators and Superintendent Gus 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. These questions were based on the qualifications and responsibilities identified in the Job Description. 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. Every member of the Interview Committee, based on the interviews, ranked Intervenor Baber number one, the most qualified candidate for the position. Superintendent Penix agreed with this assessment. 8. Each committee member only ranked his or her top four candidates of the eleven applicants interviewed. Grievant was not ranked by any member of the Interview Committee, and Superintendent Penix ranked Grievant fourth.

9. Superintendent Penix presented his recommendation of the Intervenor to NCBOE, and it was adopted.

10. Grievant was initially hired in August 1976, and Intervenor was initially hired in May 1977. Accordingly, Grievant has nine months more seniority than Intervenor. (See footnote 4)

11. The Director of Transportation is an important position, and the individual who holds this position is ultimately responsible for 60 - 65 bus runs a day. He or she would, in general, be responsible for the supervision of staff, scheduling of duty assignments, staff training and evaluation, maintenance of the fleet, maintenance of records, handling a budget, management of student behaviors, setting of goals and priorities, and evaluation of the transportation system. Grt. Ex. No. 2, at Level II.

12. The Director of Transportation Job Description identified the following qualifications: 1) Working knowledge of school bus transportation or motor fleet management; 2) Broad knowledge of safety rules, traffic regulations, laws and ordinances governing use and operation of motor vehicles in West Virginia and specifically school buses; 3) Broad knowledge of the county road system; 4) Broad knowledge and understanding of preventive maintenance routines and mechanical operation of equipment; 5) Broad knowledge and understanding of business administration and practices to include, but not limited to, budgeting, scheduling, inventory control purchasing, bidding, letterwriting, etc.; 6) Successful experience in planning, assigning, and supervision of the work activities of employees; 7) Successful experience in record keeping and inventory control to include computer literacy skills; 8) West Virginia State Transportation Certification training to instruct new drivers preferred[,] and must obtain if employed; 9) Recognizable leadership skills; 10)

High school graduate or equivalent; college degree preferred; and 11) Valid West Virginia drivers' license. (See footnote 5) Grt. Ex. No. 2, at Level II.

13. Duties of the Director of Transportation include: 1) determine the qualifications of applicants for the position of bus operator; 2) provide staff development; 3) establish and adjust bus schedules; 4) supervise bus maintenance; 5) arbitrate and administer student discipline; 6) determine specifications and recommend vehicles to be purchased; 7) supervise the vehicle portion of the Drivers' Education Program; 8) supervise and administer drug and alcohol testing; 9) monitor road and weather conditions and assists with decision-making regarding school closings and early dismissals. (See footnote 6) Grt. Ex. No. 2, at Level II.

14. In his twenty-five years with NCBOE, Intervenor has worked as a bus operator, mechanic, and shop foreman. He has driven every bus route, and he is aware of the "trouble spots." Intervenor has experience in planning work schedules, scheduling trip assignments, investigating accidents, planning bus preventive maintenance, repairing buses, and supervising workers. Intervenor is certified as a bus operator trainer and has trained other bus operators. He has multiple mechanical certifications in the areas of brakerepair, vehicle inspection, body repair, welding, and electronic engine repair. Intervenor has performed evaluations, worked in the drug testing area, and has dealt with student discipline problems. He also has a Class A Commercial Drivers License ("CDL"), and has ordered parts and supplies for his area. His evaluations have been satisfactory. Intervenor does not have a college degree.

15. Grievant started her career with NCBOE as a custodian, and in 1978 moved to a clerk position which was later reclassified as a school secretary. She is currently classified as a Secretary III/Accountant II, and she works at a high school. She also functions as an internal accountant within the county and as an Athletic Director for her school. During some period of time, she worked as a homebound teacher, but the record is unclear when and how often she performed this task. In the early 1970's, prior to her employment with NCBOE, Grievant worked with the Head Start Program, and as a portion of her job duties there, she evaluated employees and planned the Head Start bus route. In 1993, Grievant obtained a regent's degree in accounting and business management from Glenville State College, and she possesses a teaching permit. (See footnote 7) Grievant has experience in accounting, budgets, record

keeping, and fiscal matters. She is computer literate, and through her work as a real estate agent and census taker, she became knowledgeable about the county's roads.

16. Grievant has no experience as a bus operator, no CDL, has never driven a bus, nor is she certified to do so, has no knowledge of mechanics, vehicle repair, or busmaintenance. She has never dealt with drug testing, the bidding process, or school accident reports.

17. Prior to her interview, Grievant studied the manual for bus operators.

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 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.

I. Seniority

Grievant contends NCBOE's failure to select her for the Director of Transportation vacancy violates W. Va. Code §§ 18A-4-15, (See footnote 8) 18A-4-8b, and 18A-4-8e. (See footnote 9) W. Va. Code § 18A-4-8b controls hiring of school service personnel, and includes the following provisions pertinent to this grievance:

> **(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.**
>
> **(b) Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight of this article, that relates to the promotion or vacancy. If requested by the employee, the board must show valid cause why an employee with the most seniority is not promoted or employed in the position for which he or she applies. Applicants shall be considered in the following order:**
>
> **(1) Regularly employed service personnel;**
>
> **(2) Service personnel whose employment has been discontinued in**

accordance with this section;

(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;

(4) Substitute service personnel; and

(5) New service personnel.

None of the applicants for the Director of Transportation vacancy held the classification at the time they applied. In such circumstances, county boards employ competency testing to determine qualification for employment in a particular classification in accordance with the provisions in W. Va. Code § 18A-4-8e. This was done.

Grievant asserts that because she passed the exam, and she is the most senior applicant, she is entitled to the position. NCBOE maintains the controlling factor is who is the most qualified and cites Hopkins for support of this contention. NCBOE is correct.

The most recent case on this issue to come before the West Virginia Supreme Court of Appeals is Hancock County Bd. of Educ. v. Hawken, __ W. Va. __, 546 S.E.2d 258(1999)(per curiam) (See footnote 10) **which dealt with a Superintendent of Maintenance position. In that case, the grievant asserted he should receive the position because he was the most senior, and he had passed the competency examination. The West Virginia Supreme Court of Appeals agreed with the Circuit Court that "county boards of education have the right to expand the required qualifications for a given position beyond the statutory definition of its classification title."**

The Hawken Court also noted "a county school board has great latitude in running the affairs of its school system[,] . . . ha[s] substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel" and "this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." See Dillon v. Wyoming County Board of Education, Syl. Pt. 3, 177

W. Va. 145, 351 S.E.2d 58 (1986). The Court clarified that the phrase "best interests of the schools" meant "what is in the best interest of the children of this State."

In Hawken, the grievant asserted W. Va. Code § 18A-4-8e supported his argument because it stated: "'[a]chieving a passing score shall conclusively demonstrate the qualification of an applicant for a classification title' . . . meant that the passing of the test is both the beginning and the end of a board's inquiry into the qualifications of an applicant for a given position." Hawken further argued "the Legislature intended a passing grade on the test to serve as a replacement for any review of qualifications; once two candidates have passed the test, both are equally qualified, and the job must go to the applicant withthe most seniority." The West Virginia Supreme Court of Appeals did not agree, and held "[i]n light of the importance we place upon providing students with 'a thorough and efficient system of free schools,' we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process." (Emphasis in the original).

In Hawken, The West Virginia Supreme Court of Appeals also noted Hyre v. Upshur County Board of Education, 186 W. Va. 267, 412 S.E.2d 265 (1991), spoke to similar determination in a case dealing with a Supervisor of Transportation. In that instance, the Court found hiring a manager with greater experience in administration did not violate any statutes.

Additionally, the cases of Hopkins, supra and Cox v. Board of Education of the County of Hampshire, 177 W. Va. 576, 355 S.E.2d 365 (1987)(per curiam), are also directly on point. In both cases a newly-hired person was hired to fill an administrative service personnel position. The West Virginia Supreme Court of Appeals in Hopkins cited Cox, and said "we emphasized that the management of a county school transportation system is for the welfare of the children . . . ," and that it was within the county board of education's discretion to place the responsibility for its transportation system with an applicant "more acquainted with the administrative and managerial skills necessary to the operation of an efficient transportation system." Additionally, a county board of education has an implicit obligation "to supervise the system in a responsible and efficient manner" and to choose the candidate who, by virtue of experience, is more acquainted with "the administrative and managerial skills necessary to the operation of an efficienttransportation system." Cox at 370. See Hopkins, supra. The Hopkins Court noted the transportation of school children has a "special degree of

responsibility," and it was within the parameters of the board of education's discretion to look outside the statutory definition to assess the qualifications, and the decision should not be based on seniority alone. A board of education may hire an individual from outside the school system or with less seniority if the person is more qualified, and this action would not be an abuse of discretion. Accordingly, if an assessment of Intervenor's qualifications demonstrates he was more qualified, for the position, hiring him would be in the best interest of the school system.

II. QUALIFICATIONS

Grievant's next contention is she was the most qualified candidate for the position. The standard of review in cases brought by unsuccessful candidates generally entails an inquiry into whether the qualifications were accurately assessed for each candidate, whether the qualifications were necessary for the performance of the positions, 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 be decided 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.

A comparison of Intervenor's and Grievant's qualifications demonstrates Intervenor was clearly more qualified for the position. Respondent's determination that Intervenor had the skills and training necessary to perform the duties of the position was not arbitrary and capricious nor was this assessment an abuse of discretion. Grievant does not have the required "hands on" experience, and this preparation and training is essential to the position. On the other hand, Intervenor has a broad background which meets the qualifications, and he has had extensive experience in the required duties. The selectionof the successful applicant was not arbitrary and capricious, and it was within the discretion of NCBOE.

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 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); 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. "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 and Human Resources, 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 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. "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 implausiblethat 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.

4. Boards of education in West Virginia must fill school service personnel positions on the basis of seniority, qualifications and evaluation of past service. W. Va. Code § 18A-4-8b. Achieving a passing score on the state competency test for a particular classification shall conclusively demonstrate an applicant is qualified to hold that classification title. W. Va. Code § 18A-4-8e.

5. "In light of the importance [placed] upon providing students with 'a thorough and efficient system of free schools," the passing of the competency examination is not "the alpha and the omega" of a board's hiring process. Hancock County Bd. of Educ. v. Hawken, __ W. Va. __, 546 S.E.2d 258 (1999). See Shaffer v. Kanawha Bd. of Educ., Docket No. 00-20-085 (June 12, 2000). 6. A board may expand the qualifications for a position found in W. Va. Code § 18-4-8, so long as this expansion is consistent with the statutory definition. Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Dawson v. McDowell County Bd. of Educ., Docket No. 97-33-101(May 29, 1998); aff'd Kanawha County Cir. Ct., Civil Action No. 98-AA-99, ref'd West Virginia Supreme Court of Appeals, No. 001293 (Sept. 7, 2000); Mayle v. Barbour County Bd. of Educ., Docket No. 94-01-260 (Feb. 28, 1995); Brewer v.

Mercer County Bd. of Educ., Docket No. 49-88-127 (Nov. 7, 1988).

7. A county board is not precluded from considering other job-related qualifications in determining which applicant is the most qualified to fill a posted vacancy. Hancock County Bd. of Educ. v. Hawken, __ W. Va. __, 546 S.E.2d 258 (1999)(per curiam); Hopkins, supra.

8. The selection of Intervenor for the position of Director of Transportation was not arbitrary and capricious nor an abuse of discretion.

9. Grievant has not met her burden of proof and demonstrated Respondent violated W. Va. Code §§ 18A-4-15, 18A-4-8e, & 18A-4-8b in filling the posted vacancy for the Director of Transportation

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: March 5, 2002

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, Respondent was represented by Attorney Greg Bailey from Bowles Rice McDavid Graff & Love, and Intervenor represented himself. Intervenor did not submit proposals.

Footnote: 2

The Director of Transportation is currently employed as the Temporary Director of Maintenance.

Footnote: 3

Prior to the posting, Superintendent Penix rewrote the Job Description as it had not been revised in

approximately eighteen years. He sought input from other counties, central office administrators, the former Director of Transportation, and reviewed the qualifications identified in Hopkins, supra.

Footnote: 4

At Level II, Grievant testified she had two years more seniority than Intervenor. Intervenor challenged this statement, and Grievant then agreed with the above dates.

Footnote: 5

Many of these qualification are similar to the one identified in the Hopkins Decision.

Footnote: 6

This a partial listing as the duties and qualifications overlap.

Footnote: 7

Grievant identified herself in her resume as a certified, long-term substitute.

Footnote: 8

This Code Section states temporary absences "shall" be filled pursuant to W. Va. Code § 18A-4-8b.

Footnote: 9

The only issue raised about the competency examination was whether passing the exam entitled Grievant to the position, as she was the most senior service personnel candidate. Grievant was not the most senior candidate, as other professional employee applicants had greater seniority. As previously stated, Grievant took and passed the competency examination.

Footnote: 10

The full cite is Docket No. 95-15-577 (Apr. 29, 1996), rev'd Hancock Cir. Ct. Civil Action No. 96-P-17W (May 13, 1996). The action by the West Virginia Supreme Court of Appeals affirmed the action of the circuit court.