LOUIS WATTS,

Grievant,

v. **DOCKET NO. 03-22-063**

LINCOLN COUNTY BOARD OF EDUCATION

and W. VA. DEPARTMENT OF EDUCATION,

Respondent.

DECISION

In a grievance filed on or about January 21, 2003, Grievant Louis K. Watts stated, "The recent filling of the Administrative Assistant Position at the Central Office was in violation of [W. Va. Code §] 18A-4-7a which indicates: '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.'" He further stated, "I contend that the criteria used to award the job to another candidate were not sufficient to overlook the areas in which I should be judged as more highly qualified." Grievant seeks instatement into the position.

After being denied at the lower levels, a level four hearing was held August 14, 2003, at the Grievance Board's Charleston office, where Grievant appeared *pro se,* Respondent W. Va. Department of Education was represented by Heather Deskins, Esq., and Respondent Lincoln County Board of Education was represented by Howard Seufer, Esq. The parties agreed to submit their Proposed Findings of Fact and Conclusions of Law by September 14, 2003, whereupon the matter became mature for decision. I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. On October 23, 2002, Respondent posted a position for an Administrative Assistant for Federal Programs and Elementary/Middle Schools.

2. Grievant, currently Principal at Midway Elementary School, was one of 14 persons who

applied for the position, was qualified, and was one of three candidates interviewed. (See footnote 1)

3. Another candidate, Jeff Huffman, was selected. (See footnote 2)

4. At the time of his application for the position, Grievant had 29 years of seniority in Lincoln County, a Master's Degree in Education Administration and a Doctorate in educational leadership. He has 23 years of administrative seniority, three of which were in the central office (1994-1997). He held certification in Elementary Education 1-8, Language Arts 1-9, Principal 1-9, Principal 5-12, Superintendent K-12 and Supervisor K- 12. Grievant submitted only a one-page Application for Professional Personnel.

5. Mr. Huffman had 15 years of seniority, six of which were administrative. He listed on his application a degree level of Master's plus 15, and certifications in Elementary Education 1-6 and Education Administration. At the time he applied, Mr. Huffman was employed by Respondent as the Coordinator of Federal Programs in the central office. Mr. Huffman submitted an Application and résumé.

6. The job posting listed as qualifications, "At least five years successful administrative Experience (preferred). A Master's Degree or higher in EducationalAdministration, Curriculum and Instruction or Elementary Education. Has understanding of the elementary/middle school curriculum. Assumes responsibility for the No Child Left Behind mandates.

7. Attached to the Posting was the Job Description, which lists the responsibilities of the position as attending Board meetings and preparing reports for the Board, studying federal programs for entitlements and grant opportunities, writing and evaluating Title I, Title II and other federal programs, working with schools in writing grants, evaluating elementary principals, assisting in determining types of programs needed for elementary and middle schools, and other related duties.

8. The candidates were evaluated based on their applications, interviews using identical questions, and identical writing exercises.

9. In June 2000, the State Board of Education intervened in the operation of the Lincoln County School System, appointing William Grizzell as Superintendent.

10. In September 2002, one of Respondent's Co-Directors of Title I and Elementary Schools resigned. A week later, the Assistant Superintendent of Schools retired. Then Danny Plumley, the other Co-Director of Title I announced he would retire in January 2003.

11. Lincoln County had a review scheduled by the State Department of Education in late

January/early February 2003 of its Title I programs.

12. Superintendent Grizzell wanted to have the new Administrative Assistant for Federal Programs hired and working in time to prepare for the Title I review.

13. Mr. Huffman, as Coordinator of Federal Programs, worked with the Title I Co- Directors on some projects, and attended Title-I workshops. He also attended Title I meetings in place of Mr. Plumley, who had become ill. 14. Both Grievant and Mr. Huffman were well-qualified for the position, with Grievant having greater overall experience and higher academic credentials, but Mr. Huffman having more federal programs experience, training relevant to Title I, and more recent central office experience.

DISCUSSION

Since this is a non-disciplinary grievance, the grievant bears the burden of proof, and must prove his allegations by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "Grievant bears the burden of proving, by a preponderance of the evidence, that [he] should have been selected for a particular position rather than another applicant, by establishing that [he] was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used." Goodwin v. Monongalia County Bd. of Educ., Docket No. 01-30-495 (June 26, 2003).

Grievant alleges Respondent did not make its selection for the Administrative Assistant Position in accordance with W. Va. Code § 18A-4-7a, and that he was the most qualified candidate for the position. Respondent avers it chose the best-qualified candidate, giving more weight to specialized training and other factors.

West Virginia Code § 18A-4-7a states in pertinent part:

> (a) 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.
>
> . . .
>
> (c) In judging qualifications for hiring employees pursuant to subsections (a) and (b) of this section, consideration shall be given to each of the following:
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> (1) Appropriate certification and/or licensure;
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> (2) 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;

(3) The amount of course work and/or degree level in the relevant field and degree level generally;

(4) Academic achievement;

(5) Relevant specialized training;

(6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and

(7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

Although Grievant did establish that there were flaws in the selection process, he did not meet his burden of proving the outcome would have been different had they been corrected. Grievant presented no more evidence at the hearings by which he could be objectively compared to Mr. Huffman than he did during the selection process, but relies entirely on his greater overall seniority and academic achievement. Although Respondent did not utilize a "matrix" or chart to compare the relative strengths of the applicants using the seven 18A-4-7a factors, the Applications submitted by the applicants did have areas for the applicants to list their qualifications in each area. Respondent used these responses to cull the applications, narrowing the field of candidates to three.

Respondent had an upcoming Title I review, and needed to have someone in the position who could quickly take control of the program and execute the duties in time to be fully prepared for the review. Thus, it weighted recent Title I and federal program experience and training heavily. A county board of education is free to determine the weight to apply to each of the above-stated factors when assessing an applicant'squalifications 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). Grievant did not prove that Respondent abused its considerable discretion in this regard.

Abuse of discretion is evaluated by reviewing an action against the arbitrary and capricious standard. "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. " 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.* "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 [his] judgment for that of a board of education. " Trimboli, *supra* .

Respondent had a critical need for an administrator who could quickly get "on task" and prepare the school system for its upcoming review. While this circumstance did favor Mr. Huffman, there was no evidence the posting or description were designed just for him. It was simply a quirk of timing, complicated by the recent resignations. Even if there had been more time for the new administrator to get accustomed to the job, Grievant presented no evidence that proved the outcome would have been different. The fact of the matter is, both candidates were highly qualified, experienced administrators with provenperformance records. Respondent made its decision with deliberation and consideration, and it was not unreasonable.

One flaw in the selection process was evident, but was not shown to have had an undue effect on the outcome. This was the assumption made by Assistant Superintendent Donna Martin that Grievant would have less time for the job because of his extensive community involvement, of which she knew because she was familiar with Grievant. Dr. Martin assisted Superintendent Grizzell with the interviews, but the final decision was his and he testified credibly that he gave no consideration to this issue. Grievant made no mention of these activities in his application, and Dr. Martin did not ask him about them in the interview. It was improper to consider these activities as a detriment to Grievant's application, without giving him a chance to address the issue, but there was no evidence it affected the outcome.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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. "Grievant bears the burden of proving, by a preponderance of the evidence, that [he] should have been selected for a particular position rather than another applicant, by establishing that [he] was the more qualified applicant, or that there was such asubstantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). *See also*, W. Va. Code §18-29-6." Goodwin v. Monongalia County Bd. of Educ., Docket No. 01-30-495 (June 26, 2003).

3. West Virginia Code § 18A-4-7a requires a county board of education to make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications, taking into consideration: (1) Appropriate certification and/or licensure; (2) Amount of experience relevant to the position; (3) The amount of course work and/or degree level in the relevant field and degree level generally; (4) Academic achievement; (5) Relevant specialized training; (6) Past performance evaluations; and (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

4. 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).

5. While each of the factors listed in W. Va. Code § 18A-4-7a must be considered, this Code section permits county boards of education to determine the weightto be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Santer v. Kanawha County Bd. of Educ., Docket No. 01-20-557 (Aug. 14, 2003); Switzer v. Kanawha County Bd. of Educ., Docket No. 03-20-013 (Apr. 11, 2003); Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

6. All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the

candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such. Santer, *supra*; Switzer, *supra* ; Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

7. Abuse of discretion is evaluated by reviewing an action against the arbitrary and capricious standard. "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)." Trimboliv. 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, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, *supra* .

8. Grievant did not establish by a preponderance of the evidence that Respondent had abused its considerable discretion in failing to select him for the position.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of 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 Grievance Board with the civil

Date: September 22, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Many of the candidates were from outside the county, and their applications were entirely ignored.

Footnote: 2

The third candidate to be interviewed, Chris Baker, also filed a grievance over the selection, but withdrew it at level two.