BONITA REDD,

Grievant,

v. **DOCKET NO. 03-33-372**

McDOWELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On October 2, 2003, Grievant Bonita Redd filed a grievance against her employer, McDowell County Board of Education, Respondent, that stated:

> Title 126-18-4 4.2.3 School Law 18A-4-7a. Grievance is filed on the basis of discrimination and WV School Law section 18A-4-7a, whereby the position of Team Leader was held by me for the past three years at Big Creek High School. Preference was supposed to be given to the past coordinator of the Drug-free program at Big Creek High School, therefore, I was the person that was previously employed, though not compensated, in this position. Discrimination must apply in that there is no other reason for another person to be given this position over me.

Grievant stated her Relief Sought as, “Reinstated as Team Leader/Drug Free Coordinator at Big Creek High.”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Beckley office on March 10, 2004. Grievant represented herself, and Respondent was represented by counsel, Kathryn Bayless. The matter became mature for decision at the close of the hearing. Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Classroom Teacher at Big Creek High School.
2. Prior to the beginning of the 2003-2004 school year, Respondent posted several

professional extracurricular positions designated “Team Leader,” including one at Big Creek High School. The stated goal of the positions was to “accomplish the goals and objectives of the Safe and Drug Free Schools Grant.”

3. The “Qualifications” listed on the job posting were that an applicant must have: a W. Va. Teaching certificate; experience with elementary, middle and high school students; knowledge and experience with facilitating programs and activities to meet specific goals; and knowledge and experience with the Safe and Drug Free Schools Program.

4. The posting also listed the following “Performance Responsibilities” for the Team Leader positions:

1 *

Attend all scheduled meetings by the Safe and Drug Free Schools Coordinator.

2 *

Participate and schedule school wide events and activities for Red Ribbon Week

3 *

Participate and schedule school wide events and activities or Alcohol and Other Drug Awareness Week

4 *

Sponsor poster contests within school

5 *

Assist with and attend the McDowell County Drug Free Alternative Day

6 *

Present information from Safe and Drug Free Schools meetings to Administration/Faculty Senate

7 *

Prepare and submit articles to the newspaper relevant to Safe and Drug Free Schools events and activities within the school and community

8 *

Prepare and submit a monthly calendar of events to students for Red Ribbon Week

and Alcohol and Other Drug Awareness Week 9 *
Other duties necessary to meet the goals and objectives of the Safe and Drug Free School grant

5. Grievant applied for the Big Creek High School position, and was not selected. (See footnote 1)

6. In the past several years, the Team Leader was a volunteer, uncompensated position. For the 2003-2004 school year, Respondent received a extra grant monies and therefore had money to pay the employees filling the Team Leader role. Grievant had been the volunteer Team Leader for the past three years.

7. Grievant was told by Bonnie Lavender, Coordinator for Adult Student Services, that preference for the Team Leader positions would be given to the past volunteers.

8. In past years, Grievant has coordinated and set up her school's Drug Free Week in the fall and spring, and also exhibited a booth at the yearly Drug Free Alternative day.

9. Of 13 Safe And Drug Free Schools program meetings held at the Board Office by Ms. Lavender since 1999, Grievant has attended five. She did not attend any of these meetings in 2002 or 2003. When the Team Leader does not attend these meetings, the materials are then sent to the Team Leader at her school. On these occasions, Grievant received the materials and then presented the material to the faculty.

10. Ms. Lavender identified attendance at the program meetings as the most important duty of the Team Leader position, because that is when she explains the program materials and what needs to be done with them. 11. At the same time the Team Leader Positions were posted, Respondent also posted positions for Responsible Student Coordinator and Conflict Resolution Coordinator. Like the Team Leader, these were formerly volunteer positions now funded through a grant. Grievant had volunteered for these positions in the past, and for 2003-2004, was awarded the contract for these jobs at her school.

12. Grievant was not selected for the Team Leader position because of her lack of past participation in the program meetings and lack of a leadership role in the Drug Free Alternative Days (See footnote 2).

DISCUSSION

Grievant claims a violation of 126 C.S.R. 18 § 4.2.3, a legislative rule of the State Board of Education, that defines “Racial Harassment” as “physical, verbal or written conduct relating to an individual's race when the conduct . . . adversely affects an individual's employment or academic opportunities.” (See footnote 3) She also claims a violation of W. Va. Code § 18A-4-7a, which covers “employment, promotion, transfer and seniority for professional personnel.” Respondent denies any impropriety in filling the position in question.

Grievant presented no evidence of Racial Harassment as defined by 126 C.S.R. 18 § 4.2.3. 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 standardgenerally 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. There was no testimony or other evidence of any conduct relating to Grievant's race and no evidence of the race of the successful candidate. (See footnote 4) Accordingly, she has failed to meet her burden of proving this claim.

Grievant has likewise failed to prove she was discriminated against under the more liberal definition of “Discrimination” found in W. Va. Code § 18-29-2(m). “[That section] defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'” Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01- 50-056 (Apr. 5, 2001). In order to establish a claim of discrimination, an employee must establish a *prima facie* case by a preponderance of the evidence. In order to meet this burden, Grievant must show:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of Grievant and/or the other employee(s) and were not agreed to by Grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

No evidence was presented regarding the similarity of situation between Grievant and the successful candidate, other than that they were both applicants for the position inquestion. Obviously, it is not discrimination to choose one applicant for a position over another. Grievant did not identify the other candidate or present any other information about the successful candidate, so there is no way to compare them.

Grievant claims a violation of W. Va. Code § 18A-4-7a, alleging she was more qualified than the successful applicant, and that code section requires Respondent to hire the most qualified. This grievance Board has previously held 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)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999). A separate line of cases starting with Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993) reaches the same conclusion with respect to extracurricular coaching assignments, but through different reasoning. Chaffin regards W. Va. Code § 18A-4-16, the statute that defines extracurricular assignments, as self-contained.

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)." Lusher, *supra*; Baker v. Lincoln County Bd. of Educ., Docket No. 01-22-518 (Mar. 1, 2002). "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs andqualification and placement of personnel implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Cowen, et al. V. Harrison County Bd. of Educ., 195 W. Va. 377, 456 S.E.2d 648 (1995)." Duncan v. McDowell County Bd. of Educ., Docket No. 96-33-231 (Sep. 2, 1997).

The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute his judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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)).

Grievant's argument that she was the more qualified candidate relies on the assumption that, since she performed some of the duties of the position in prior years, ona volunteer basis, she should be presumed to be more qualified than a candidate who has never performed the duties. However, Respondent contends the successful candidate did perform the most important duties of the position - attending meetings - more often than Grievant did. Grievant, who has the burden of proof, presented no evidence by which she could be compared to the successful candidate, other than the fact that she was a volunteer Team Leader for her school in the past few years, and the successful candidate was not. Respondent, on the other hand, identified the most important duties of the position, and demonstrated that Grievant had not meet these responsibilities in the past as reliably as the successful candidate. (See footnote 5)

While Grievant and Respondent differ on how to evaluate the most qualified candidate for the position, the undersigned cannot find the criteria Respondent used to be arbitrary and capricious. Given the narrow scope of review and the dearth of evidence supporting Grievant's position, she has not proven by a preponderance of the evidence that Respondent abused its considerable discretion.

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 HumanResources, 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. "Racial Harassment" is defined as "physical, verbal or written conduct relating to an individual's race when the conduct . . . adversely affects an individual's employment or academic opportunities," and is prohibited in West Virginia schools. 126 C.S.R. 18 § 4.2.3. The Grievance procedure is an appropriate avenue of recourse for victims of racial harassment. 126 C.S.R. 18 § 10.1.

3. Grievant did not prove she was the victim of Racial Harassment.

4. "West Virginia Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

5. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievant did not establish a *prima facie* claim of discrimination.

7. The provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for the extracurricular assignments. Lusher v. Putnam CountyBd. of Educ., Docket No. 99-40-061 (May 7, 1999); 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)." Lusher, *supra*; Baker v. Lincoln County Bd. of Educ., Docket No. 01-22-518 (May 1, 2002).

8. “County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnel implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Cowen, et al. V. Harrison County Bd. of Educ., 195 W. Va. 377, 456 S.E.2d 648 (1995).” Duncan v. McDowell County Bd. of Educ., Docket No. 96-33-231 (Sep. 2, 1997).

9. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's actionis arbitrary and capricious if it 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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)).

10. Grievant did not meet her burden of proving Respondent's decision was the result of an abuse of discretion.

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

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 action number so that the record can be prepared and transmitted to the circuit court.

Date: April 13, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The successful applicant was not identified in the record or at the level four hearing.

Footnote: 2

Ms. Lavender testified Grievant did present a booth, but did not help set up or coordinate the day overall.

Footnote: 3

126 C.S.R. 18 defines and prohibits racial, sexual, religious and ethnic harassment and violence in West Virginia schools, and sets forth complaint procedures and consequences for violations. 126 C.S.R. 18 § 10.1 provides that the Rule does not preclude a victim from pursuing a complaint through other forums. The grievance procedure is an appropriate alternate avenue of recourse for violations of this Rule.

Footnote: 4

The undersigned takes judicial notice of the fact that Grievant is African-American.

Footnote: 5

It is unclear why the successful candidate attended these meetings, since she was not the Team Leader.