BRENDA TANNER,

Grievant,

v.

Docket No. 04-06-439

CABELL COUNTY BOARD
OF EDUCATION,

Respondent,

and

TODD ALEXANDER,

Intervenor.

DECISION

The grievant, Brenda Tanner ("Tanner"), challenges the action of her employer, respondent Cabell County Board of Education ("BOE"), in failing to place Tanner in the posted position of Coordinator of Student Services, which is a central office position that deals with student attendance. Tanner alleges a violation of the provisions of West Virginia Code section 18A-4-7a in that she was the most qualified applicant and, as such, she should have been awarded the position. She asks that she be "awarded the position and any compensation due."

Procedural Background

An initial conference between Tanner and her supervisor on July 13, 2004, did not resolve this matter. Therefore, on August 2, 2004, Tanner filed this grievance at Level I, where it was denied by decision dated August 12, 2004. An evidentiary hearing was conducted on September 9, 2004, upon Tanner's appeal to Level II. (See footnote 1) A written decision, entitled "Level Two Findings of Fact and Conclusions of Law," was issued on or about October 6, 2004, denying Tanner's grievance.

Tanner sought an appeal to Level III, at which point the successful applicant, Todd Alexander ("Intervenor Alexander"), intervened in the grievance. BOE held the Level III hearing on December 16, 2004. By correspondence, dated December 17, 2004, (See footnote 2) Tanner was informed, as follows, that BOE had denied her grievance:

> By a vote of 2 to 2 the Board denied your grievance and agreed to adopt the lower Level II Findings of Facts and Conclusion of Law as part of their decision. A majority vote is needed to overturn a prior level decision.

By correspondence postmarked December 22, 2004, Tanner submitted this grievance to the West Virginia Education and State Employees Grievance Board ("the Grievance Board") for a Level IV appeal. An evidentiary hearing was held in the Charleston office of the Grievance Board on April 5, 2005. At the Level IV hearing, Tanner was represented by Susan Hubbard of the West Virginia Education Association. BOE was represented by attorney Howard E. Seufer, Jr. Intervenor Alexander represented himself. This grievance matured for decision on May 2, 2005, after proposed findings of fact and conclusions of law had been submitted on behalf of Tanner and BOE.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. On May 17, 2004, BOE posted a vacancy in the central office administrative position of Coordinator of Student Services. This position deals with student attendance.

2 2. Tanner and Intervenor Alexander were among the qualified applicants who applied for the position of Coordinator of Student Services.

3 3. Tanner is employed by BOE as assistant principal of the Cabell County Career Technology Center. At the time she applied for the position in question she was employed by BOE as the principal of the Alternative School.

4 4. At the time she applied for the position in question, Tanner had been employed by BOE for 28 years, including 15 years as an assistant principal and 9 years as a principal.

5 5. At the time he applied for the position in question, Intervenor Alexander was serving as the principal of Huntington High School. He had two years experience as an assistant principal and one as a principal.

6 6. In assessing the qualifications of applicants for an administrative position, such as the one at issue in this case, West Virginia Code section 18A-4-7a directs that a board of education must consider each of the following seven factors:

> (1) Appropriate certification, licensure or both;
>
> (2) Amount of experience relevant to the position; or, in the case of aclassroom teaching position, the amount of teaching experience in the subject area;
>
> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
>
> (4) Academic achievement;
>
> (5) Relevant specialized training;
>
> (6) Past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and
>
> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

7 7. Superintendent Roach appointed a five-member committee to assist him in the selection process ("the Review Committee"). The Review Committee included two Assistant Superintendents, the two Administrative Assistants for Secondary Education and Elementary Education, respectively, and the Director of Curriculum and Instruction. This group was charged with providing Superintendent Roach with the names of the two best- qualified applicants.

8 8. The Review Committee reviewed the application materials and conducted interviews of all of the applicants who met the minimum qualifications for the position.

9 9. The application material for each applicant included the application, any resume that may have been submitted, and an executive summary, which addressed all seven statutory factors that BOE is required to consider in filling this position.

10 10. Tanner, Intervenor Alexander, and David Tackett ("Tackett") were among the applicants who were given an interview.

11 11. During the interview, each applicant was asked the same three questions. They were also required to provide written answers to two additional questions.

12 12. Upon completion of the interview process, the members of the Review Committee met and discussed the relative merits of the applicants who were interviewed. Although all seven statutory factors were considered, the Review Committee placed the greatest emphasis upon "[a]mount of experience relevant to the position" and "[o]ther measures or indicators upon which the

relative qualifications of the applicant may fairly be judged." Board Exhibit 8 at Level II.

13 13. The Review Committee reached a consensus and reported, without ranking them, that Intervenor Alexander and Tackett were the best qualified applicants for the Coordinator of Student Services position.

14 14. Each of the minimally-qualified applicants had experience as a building principal, which meant that each of them would have "dealt with the attendance monitoring process that would prepare them for the [Coordinator of Student Services] position." Board Exhibit 8 at Level II.

15 15. What distinguished Intervenor Alexander and Tackett from the other qualified applicants, all of whom had been principals, was that during their interviews each of them demonstrated "an extensive knowledge of effective strategies that would improve school attendance and involve hard to reach parents." Board Exhibit 8 at Level II.

16 16. Under the term "[o]ther relevant qualification," the Review Committee noted that interview questions were designed to allow the Review Committee to assess the applicant's "decision making and communication skills specific to effectively dealing with hard to reach parents and human services agencies." The questions were also intended to prompt self-examination and evoke predictive skills. Board Exhibit 8 at Level II.

17 17. Both Intervenor Alexander and Tackett "did very well" during their interviews. Board Exhibit 8 at Level II.

18 18. The Review Committee reported that Intervenor Alexander "demonstrated current knowledge of collaborative agency initiatives and a great deal of insight from his experience as principal of Huntington High School." Board Exhibit 8 at Level II.

19 19. The Review Committee reported that Tackett "was able to demonstrate effective work with students and parents." Board Exhibit 8 at Level II.

20 20. While recognizing that Tanner and another applicant were "the more senior of the group," the Review Committee noted that neither demonstrated "the same level of innovation and current knowledge in their responses." Board Exhibit 8 at Level II.

21 21. After receiving the written "Conclusions of the Review Committee for Coordinator of Student Services - Job Posting #5438," (See footnote 3) Superintendent Roach recommended Intervenor Alexander for the position of Coordinator of Student Services.

22 22. His recommendation was adopted by BOE by a unanimous vote on June 22, 2004.

Prior to taking that vote, BOE had an opportunity to question the Review Committee about its recommendation and the selection process.

23 23. Two members of BOE, Dr. Gregory D. Borowski ("Dr. Borowski") and Mr. David W. Stevenson ("Mr. Stevenson"), who joined in the unanimous vote to award the position to Intervenor Alexander, subsequently voted in favor of granting Tanner's grievance at Level III.

24 24. Dr. Borowski voted to grant this grievance at Level III because the evidence adduced at the Level III hearing did not persuade him that Intervenor Alexander was more qualified than Tanner.

25 25. Mr. Stevenson voted to grant the Level III grievance because he thought the fact that Tanner had more administrative experience should have been dispositive in her favor.

Discussion

As the unsuccessful applicant for the position of Coordinator of Student Services, Tanner bears the burden of proving, by a preponderance of the evidence, that she was the best qualified applicant and, as such, should have been selected for the position in question, or that, but for a substantial flaw in the selection process, it is reasonable to believe that the outcome of the selection process might have been different. *Napier v. Logan County Bd. of Educ*., Docket No. 99-23-114 (July 15, 1999), *Pack v. Summers County Bd. of Educ*., Docket No. 98-45-097 (Nov. 24, 1998). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001). For reasons discussed more fully below, Tanner did not meet this burden. In considering the selection at issue herein, it must be remembered that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Actions by a board of education have been deemed arbitrary and capricious when the board "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." *Baker v. Lincoln County Bd. of Educ*., Docket No. 01-22-528 (Mar. 1, 2002).

Tanner predicates her argument on West Virginia Code section 18A-4-7a(a), which requires that "[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." In determining which applicant possesses the highest qualifications, the statute requires that "consideration shall be given" to the seven enumerated criteria, which include 1) appropriate certification, licensure or both; 2) amount of experience relevant to the position; 3) amount of course work, degree level or both 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. W. Va. Code § 18A-4-7a(c). Although all seven of these factors must be considered during the selection process, a board of education is entitled "to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion." *English v. Logan County Bd. of Educ*., Docket No. 03-23-307 (Feb. 27, 2004)(citing *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *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)). As recently noted in *Bell v. McDowell County Bd. of Educ*., Docket No. 05-33-020 (Mar. 25, 2005), the only restriction upon the use of "other indicators or measures" is that they must be "factors 'upon which the relative qualifications of the applicant may fairly be judged.'"

> Indeed, 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. *Anderson v. Wyoming County Bd. of Educ*., Docket No. 93-55-183 (Sept. 30, 1993). The selection of candidates for educational positions is not simply a "mechanical or mathematical process." *Hoffman v. Mingo County Bd. of Educ*., Docket No. 97-29-266 (June 15, 1998)(citing *Tenny v. Bd. of Educ*., 183 W. Va. 632, 398 S.E.2d 114 (1990)); See *Deadrick v. Marion County Bd. of Educ*., Docket No. 90-23-071 (Jan. 30, 1991). This is especially true in the selection for an administrative position. *Stinn v. Calhoun County Bd. of Educ*., Docket No. 98-07-085 (Aug. 28, 1998).

Bell v. McDowell County Bd. of Educ., Docket No. 05-33-020 (Mar. 25, 2005).

The record reflects that the selection process comported with the requirements of West Virginia

Code section 18A-4-7a, in that each of the statutory factors was considered. It was within BOE's purview to weight those factors as they deemed appropriate, as long as BOE did not abuse its discretion in doing so. There is no dispute about the fact that the Review Committee weighted two of the seven factors more heavily than the others. All of the qualified applicants for the Coordinator of Student Services position had experience with student attendance issues during their tenures as principals. Beyond this baseline level of experience, however, it was reasonable for BOE to look for a candidate with dynamic ideas for a proactive approach to the problems the successful applicant would be expected to address. BOE did not abuse its discretion in focusing on Intervenor Alexander's "extensive knowledge of effective strategies that would improve school attendance and involve hard to reach parents." Nor did BOE abuse its discretion in focusing on Intervenor Alexander's knowledge of "collaborative agency initiatives," and the fact that he demonstrated "a great deal of insight" into the problems that fell within the bailiwick of the Coordinator of Student Services.

These are factors that reasonably relate to an applicant's potential for success in the position in question. In a time when resources are scarce and the school system is expected to stand as a bulwark against a tide of societal ills, it is appropriate and necessary for the school system to seek out and promote creative, innovative administrators who can effectively interact with agencies that provide important social services to students and their families.

All of applicants were asked the same three questions during the interviews. All of the applicants were required to submit written answers to the same two questions. The selection process was transparent, well-documented, and susceptible to meaningful review. The statutory factors were properly considered, and there was no abuse of discretion in the way those factors were weighted. The grounds relied upon by the ReviewCommittee in recommending Intervenor Alexander were not arbitrary and capricious but rather fairly based upon reasonable and appropriate concerns. Tanner has not proven by a preponderance of the evidence that she was the best qualified applicant for the position of Coordinator of Student Services.

BOE did not abuse its discretion in selecting Intervenor Anderson. His selection was not arbitrary and capricious. Tanner has failed to prove otherwise.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, the grievant, Tanner, bears the burden of proving her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *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).

2 2. "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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001). 3 3. It is well-established that the grievance procedure is not intended to be a "super interview" but, rather, "it allows analysis of the legal sufficiency of the selection process at the time it occurred. If the decision was properly based on the information then available to the board of education, and the process was not flawed to the point that the outcome might reasonably have been different otherwise, the hiring will be upheld." *Harrison v. Wyoming County Bd. of Educ.*, Docket No. 89-45-500 (citing *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989)). The selection process at issue in this grievance passes muster.

4 4. Selection of the Coordinator of Student Services is governed by the statute that requires BOE to "make decisions affecting the hiring of professional personnel *other than classroom teachers* on the basis of the applicant with highest qualifications[.]" W. Va. Code § 18A-4-7a(a)(emphasis added).

5 5. During the selection process, BOE complied with the requirements of West Virginia Code section 18A-4-7a(c) by giving the requisite "consideration" to each of the following factors:

> (1) Appropriate certification, licensure or both; (2) Amount of experience relevant to the position . . .; (3) The amount of course work, degree level or both 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.

6 6. Although all seven of the factors set forth in West Virginia Code section 18A- 4-7a must be considered during the selection process, a board of education is entitled "to determine the weight

to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion." *English v. Logan County Bd. of Educ*., Docket No. 03-23-307 (Feb. 27, 2004)(citing *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *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)). BOE did not abuse its discretion in giving greater weight to the factors of "prior administrative experience" and "[o]ther relevant qualifications," as described in the written "Conclusions of the Review Committee for Coordinator of Student Services - Job Posting #5438." Board Exhibit 8 at Level II.

7 7. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). This discretion is particularly broad with respect to selecting administrators. "Once a board reviews the W. Va. Code § 18A-4-7a criteria it must consider, it has 'wide discretion in choosing administrators[.]'" *March v. Wyoming County Bd. of Educ.*, Docket No. 94-55-022 (Sept. 1, 1994). Therefore, BOE was vested with broad discretion in selecting a Coordinator of Student Services. BOE did not abuse its discretion in selecting Intervenor Alexander for the position in question. 8 8.

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, reached a decision that is unsupported by the evidence, explained its decision in a manner that is inconsistent with the evidence before it, or came to a decision that was so implausible that it cannot be ascribed to a difference of opinion. *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). The selection of Intervenor Alexander was not arbitrary and capricious.

9 9. Tanner has failed to meet her burden of proving, by a preponderance of the evidence, that she was more qualified than Intervenor Alexander for the posted position. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 West Virginia Code section 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: July 26, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

All of the lower level record is incorporated at Level IV. References to pages in the Level II transcript shall appear herein as "Tr.__."

Footnote: 2

A copy of this correspondence appears at Tab 18 of the bound, lower level record provided by BOE.

Footnote: 3

Board Exhibit 8 at Level II.