THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DAN BREWER,

Grievant,

v v.

Docket No. 05-27-432

Janis I. Reynolds

Administrative Law Judge

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dan Brewer, is employed by Mercer County Board of Education ("MCBOE" or "Board") as a bus operator. He filed this grievance on August 9, 2005, about his non-selection for the Supervisor of Transportation and Safety position. The Relief Sought is placement into the position.

This grievance was denied at all lower levels. Grievant appealed to Level IV on December 6, 2005, and a Level IV hearing was held June 26, 2006. This case became mature for decision on July 24, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Ben Barkey, from the West Virginia Education Association, and the Board was represented by Attorney John Shott.

Synopsis

Grievant asserts he was the best qualified applicant for this service personnel position "in all phases." Confusingly, Grievant also asserts the criteria from W. Va. Code § 18A-7-4a were not utilized properly. Since this Code Section is used when fillingprofessional positions, and this opening was for a service personnel position, this assertion will not be addressed further. (See footnote 1)

Respondent asserts it selected the best qualified applicant, and this selection was within its discretion pursuant to Ohio County Board of Education v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995), and its progeny, which allows boards of education to add other qualifications to a supervisory position beyond the passing of the competency examination. Respondent also avers the standard of review is whether the selection was arbitrary and capricious or an abuse of discretion.

Grievant has failed to meet his burden of proof and demonstrate a flaw in the selection process, or that the selection of the successful applicant was arbitrary and capricious or an abuse of discretion.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a bus operator and became a full-time employee in October 1979. He has had satisfactory evaluations for the past two years and experience running his own small construction firm for many years. He served in the military 35 years ago. He has an Associate's Degree in management and marketing, received a Bachelor's Degree in business administration in 1987, and took some additional courses in cost accounting. 2. During the 2004 - 2005 school year, William Hopkins, who had been the Transportation Coordinator for 20 years decided to retire. He submitted his resignation, and MCBOE accepted it as effective August 1, 2006.

3. Following past practice, Superintendent Debra Akers assessed what duties might be added to the position before it was posted. She had been informed by the Board of Risk and Insurance Management ("BRIM") that having a safety committee and following recommended changes could decrease MCBOE's premium. She decided to add these duties to the Transportation Coordinator, changed the title of the position to Supervisor of Transportation and Safety, and increased the salary by $6,000. Superintendent Akers calculated these additional duties would take approximately 10% of the position's time.

4. The new position of Supervisor of Transportation and Safety was posted on July 17, 2005, and Grievant, Mr. Hopkins, and eleven other people applied.

5. The thirteen applicants were interviewed by Superintendent Akers and Assistant Superintendent Dan White using previously prepared questions that related to the duties listed in the job description. All applicants were asked the same questions. The personnel files of all the applicants were reviewed.

6. After scoring the applicants, Mr. Hopkins was far and away the most qualified candidate for the position. Mr. Hopkins' score was 154 out of approximately 184 possible points. (See footnote 2) Grievant was ranked 10th out of 13 applicants, with a score of a 47.5. 7. Superintendent Akers recommended Mr. Hopkins for the position, and this recommendation was accepted by MCBOE on July 26, 2005. At this same Board meeting, Mr. Hopkins' resignation was withdrawn.

8. Prior to the selection, Mr. Hopkins had been the Transportation Coordinator for twenty years, always had very good evaluations, had been an employee since 1984, and was one of the few people in the state who possessed the West Virginia State Transportation Certificate.

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 (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). 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends he was more qualified for the position than the successful applicant. 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 v. Wyoming County Board of Education, Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986); Blake v. Kanawha County Bd. of Educ., Docket No. 02-20-434 (Mar. 11, 2003); 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 Res., 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 ofeducation. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

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. . . .

The selection process for filling supervisory service personnel positions has been examined by the West Virginia Supreme Court of Appeals. The most recent case on this issue to come before the West Virginia Supreme Court of Appeals is, Hancock County Board of Education v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999) (per curiam), (See footnote 3) 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 therequired 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 Bd. of Educ., 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 West Virginia Supreme Court of Appeals also cited Hyre v. Upshur County Board of Education, 186 W. Va. 267, 412 S.E.2d 265 (1991), and spoke to its 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 are instructive. In both cases, a newly-hired person was employed 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 noted 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 efficient transportation 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 comparison of Grievant's and the successful applicant's qualifications demonstrates the successful applicant was clearly the most qualified choice, as he had been successfully performing 90% of the job duties for 20 years. Additionally, his knowledge of the duties of the position was demonstrated by his score on the interview questions. Respondent's determination that Mr. Hopkins had the skills, training, and experience necessary to perform the duties of the position was not arbitrary and capricious, nor was this assessment an abuse of discretion.

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 Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 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). 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 & Human Res., 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 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 Res., 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.

5. 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).

6. 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. Hawken, supra; Hopkins, supra.

7. The selection of Mr. Hopkins for the position of Superintendent of Transportation and Safety was not arbitrary and capricious nor an abuse of discretion.

8. Grievant has not met his burden of proof and demonstrated Respondent violated any rule, regulation, statute, or policy in making this selection.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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 tosuch 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

SENIOR ADMINISTRATIVE LAW JUDGE

Dated: August 25, 2006

Footnote: 1

At the time of this selection, the successful applicant's was still a regular employee of MCBOE. His request to retire was withdrawn at the time of his selection for this position and before it became effective.

Footnote: 2

Mr. Hopkins did not receive credit for the West Virginia State Transportation certification in the scoring for the position, and his total score should be increased by ten points.

Footnote: 3

The full cite is Docket No. 95-15-577 (Apr. 29, 1996), rev'd Hancock County 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.