THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TAMMY HANSHAW,

Grievant,

v. **DOCKET NO. 06-20-398**

KANAWHA COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Tammy Hanshaw, (See footnote 1) filed this grievance on July 12, 2006, stating, "Kanawha County Schools did not follow state law in the hiring of an Executive Secretary position for the general counsel." Her stated relief sought is "Position posted and filled according to policy." (See footnote 2)

A level four hearing was held in the Grievance Board's Charleston office on February 13, 2007. Grievant was represented by Nick Roberson, West Virginia Education Association, and Respondent was represented by Vaughn Sizemore, Esq., Bailey & Wyant. The matter became mature for decision on March 9, 2007 (See footnote 3), the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 4)

Synopsis

Grievant asserts she should have received the position with Kanawha County Board of Education, as she was more senior than the successful applicant. Grievant also argues Respondent created a new job description for Executive Secretary to the General Counsel so as to favor certain candidates.

Respondent avers that while seniority, qualifications, and performance evaluations were all taken into consideration, the successful candidate was chosen based on her exemplary qualifications. Respondent also asserts the new job description that was created was not used in determining who

the successful candidate would be for the current vacancy, but instead is meant to for future use.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. On May 31, 2006, Respondent posted the position of Executive Secretary for its Legal Department.

2.

The posting contained the following:

Job duties include, but not limited to, scheduling and coordinating student hearings, grievance hearings and employee hearings form [sic] initial hearing through appeals, arranging for hearing examiner and court reporter for all hearings; maintaining and distributing the decision on all student and employee hearings; maintaining and distributing the register sex offender list; acting as recording secretary for all RIF, transfer and non-renewal hearings before the Board and other such meetings as requested; maintaining and updating the legal division's document management system; interacting with outside counsel to provide information necessary to assist such counsel in handling legal matters for the Board; interacting with principals, other administrators, board members and members of the public to effectively represent the interest of Kanawha County Schools; preparing trail [sic] notebooks, when necessary; and arranging and placing all legal advertisements and notices required by the Board.

3.

Twenty-two people, including Grievant, applied for the position.

4.

The applications were ranked by seniority and submitted to Jim Withrow, General Counsel for the Board.

5.

The application included a section labeled “Qualifications and Training.” In that section, it clearly states “List relevant qualifications or specific training.”

6.

The first page of the application also contains the following information,

"Note: It is the responsibility of the applicant to present all relevant qualifications he/she may possess relevant to this position."

7.

Grievant was the applicant with the third most seniority. The successful

applicant, Mala Bumgardner, was seventh with regard to seniority.

8.

On the application in the section labeled "Qualifications and Training"

Grievant listed "Microsoft Office/jWVEIS[sic] - Secretarial Skills."

9.

On the application in the section labeled "Qualifications and Training" Ms.

Bumgardner listed:

ASSOCIATES DEGREE Legal Secretarial Studies - WV Institute of Technology, Montgomery, WV; Business Law 1 & 2; Legal Dictation & Transcription; Legal Document Prep.; Legal Office training; several courses in shorthand including legal shorthand; and records management WORK HISTORY: Legal Secretary Shaw & Stein, Pt. Pl. -1 yr; Bill Forbes, Chas. - summer; Lovett, Vaughan & Cooper, Chas. - 5 yrs (responsible for scheduling appointment, hearings, court document preparation; Court Reporter for uncontested divorce hearings; typist for court reporter; legal dictation & transcription from tapes) Administrative Assistant - WV Housing Dev. Fund - 8 yrs Administrative & Human Relations Training as Pres. Of Junior League of Charleston & WV Symphony League.

10.

Mr. Withrow reviewed each application, and then forwarded all twenty-two

of them to the Superintendent for his review.

11.

Ms. Bumgardner's application, as well as that of a Substitute Aide's, wereflagged by the Superintendent as having superior qualifications. Grievant's application was not flagged by the Superintendent.

12.

Mr. Withrow had also selected these two applicants as having superior qualifications.

13.

Mr. Withrow reviewed the performance evaluations for at least the seven most senior applicants, this included Grievant. All applicants had satisfactory or better evaluations.

14.

After reviewing performance evaluations, seniority, and qualifications, Mr. Withrow decided to recommend Ms. Bumgardner, the seventh most senior applicant, for the position. Mr. Withrow based his decision on Ms. Bumgardner's experience in the legal field.

15.

The Board of Education voted unanimously to offer the position to Ms. Bumgardner.

16.

No interviews were conducted for this position.

17.

After the posting for this position was made, Carol Hamric, Assistant Administrator for Human Resources, recommended Mr. Withrow create a new job description for Executive Secretary to the General Counsel. She made this suggestion after reviewing the job duties and the job description for the position and comparing it with similar positions in comparable sized school districts throughout the country.

18. The new job description was not used in the selection of Ms. Bumgardner. It is meant to be used for any future vacancy.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

Grievant seems to assert that because the most senior applicant was not chosen to fill this position, Respondent did not follow the hiring practices established by law. 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 mannercontrary 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*.

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 causewhy an employee with the most seniority is not promoted or employed in the position for which he or she applies...

Grievant was not the most senior applicant who applied for the position. However, Mr. Withrow testified that he took into consideration seniority, performance evaluations and qualifications and recommended the applicant with superior qualifications. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

While Ms. Bumgardner was not the most senior, her qualifications matched the needs of the position. Grievant, however, may have had similar qualifications, but did not list them on the application which was her responsibility. Mr. Withrow could only consider the information he had been provided.

The following conclusions of law support this discussion:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

2. 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 thepositions, 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).

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).

4. 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*.

5. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

6. Grievant did not prove Respondent acted in an arbitrary and capricious manner by hiring Ms. Bumgardner.

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

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: April 16, 2007

_____**Wendy A. Campbell**

Administrative Law Judge

Footnote: 1

Originally Sherry Blake joined in this grievance. However, at the level four hearing, Grievant's representative informed all parties that Ms. Blake decided to withdraw.

Footnote: 2

Grievant's Representative informed the parties at the level four hearing that her relief requested had changed and she was now seeking an Executive Secretary position within Kanawha County Schools. Because Respondent did not consent to the change in relief sought, it will not be granted. See W. Va. Code § 18-29-3(k).

Footnote: 3

The original deadline for proposed findings and conclusions was February 27, 2007. However, the undersigned was informed by Mr. Roberson that the parties had agreed to extend the deadline to March 9, 2007.

Footnote: 4

Proposed findings of fact and conclusions of law were only received from Respondent.