WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LLOYD BOOTHE,

Grievant,

v.

Docket No. 2008-0210-JacED

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

and

JANINE SAYRE,

Intervenor.

DECISION

Lloyd Boothe ("Grievant") grieves his non-selection for the position of Supervisor of Transportation by the Jackson County Board of Education ("BOE"). His August 7, 2007, Statement of Grievance provides that

> he [Grievant] is the most qualified candidate for this vacancy & holds more overall time-in-service than the successful candidate. The Grievant alleges violation of West Virginia Code § 18A-4-8b & 18A-4-8g.

As relief, Grievant seeks "instatement into the transportation supervisor vacancy, wages, benefits, & seniority retro-active to the date of the filling of this vacancy." He also seeks interest.

This grievance was denied at Level One. The parties mutually agreed to waive Level Two. A Level Three evidentiary hearing was held on May 30, 2008, before Administrative Law Judge ("ALJ") Landon R. Brown, in the Grievance Board's Charleston, West Virginia, Office. The Grievant appeared by and through his counsel, John Everett Roush, with the West Virginia School Service Personnel

Assocation. Respondent BOE appeared by and through its counsel, Howard E. Seufer, Jr., with Bowles Rice McDavid &Love, LLP. Janine Sayre ("Intervenor") appeared *pro se*.

This grievance was reassigned to the undersigned ALJ for administrative reasons. This matter became mature for decision on June 27, 2008, the date proposed findings of fact and conclusions of law were due. The Grievant and the BOE have submitted proposed findings of fact and conclusions of law. This grievance is mature for decision.

Synopsis

Grievant alleges error in the selection process for the position of Supervisor of Transportation and maintains that he was the most qualified applicant for the position.

Respondent maintains that there was no error in the selection process and argues that the Grievant was not the most qualified applicant.

Grievant has not met his burden of proving, by a preponderance of the evidence, that there was a flaw in the selection process sufficient to suggest that the outcome may be reasonably different. The BOE's hiring decision was not unreasonable. For the reasons set forth below, this grievance is denied.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. The BOE Transportation Department is managed by the Supervisor of Transportation, (See footnote 1) who reports to an Assistant Superintendent of Schools.

2. In July, 2007, the BOE posted a notice of vacancy for the position of Supervisorof Transportation.

3. The notice of vacancy for the Supervisor of Transportation position identified thirteen required qualifications:

1. Successful completion of the Competency Test for Supervisor of Transportation.

2. High School Diploma or GED Certificate.

3. Possess or eligible to obtain a valid State of West Virginia commercial drivers license with "S"

endorsement.

4. Possess broad knowledge of safety rules, traffic regulations, laws and ordinances governing use and operation of motor vehicles in West Virginia and specifically school buses.

5. Possess broad knowledge of West Virginia School Law which is relevant to public school transportation and student discipline.

6. Possess broad knowledge and understanding of preventive maintenance routines and mechanical operation of equipment.

7. Possess knowledge and understanding of administrative practices to include, but not limited to, budgeting, scheduling, purchasing, bidding, resolving problem issues, supervision of personnel, etc.

8. Possess a broad knowledge of the county road system.

9. Successful experience in providing in-service training in areas of bus safety, defensive driving, vehicle inspections, pre and post trips, positive student/parent/bus operator relations, etc.

10. Proficient in the use of computers.

11. Willing and able to work a flexible schedule.

12. Demonstrate good oral and written communication skills.

13. Additional training and experience which would lead to successful implementation of duties and responsibilities as listed on the job description.

See Grievant's Exhibit 1.

4. Eleven people initially applied for the position. One subsequently withdrew, leaving a total of ten. The ten applicants, all of whom passed an initial competency test, (See footnote 2) were then interviewed by a Committee consisting of Superintendent Blaine Hess, Assistant Superintendent for Instructional Programs and Personnel, Jay Carnell, and Assistant Superintendent for Non-Instructional Programs, Gary Samples (who is responsible for the Transportation Department). The purpose of the interview was to help determine the most qualified candidate.

5. In advance of the interviews and during the interview process, the three Committee members

consulted copies of the posted job description, as well as each candidate's application materials.

6. In preparation for the interviews, Assistant Superintendent Samples drafted proposed interview questions. The questions were devised to gather information about the applicants' qualifications, in part by presenting them with situations that the Supervisor of Transportation might encounter. Mr. Samples circulated the proposed interview questions to the Superintendent and Assistant Superintendent Carnell. Both reviewed his work and made suggestions that were incorporated into the final list of twenty-two questions. (See footnote 3)

7. The Committee's interviews of the ten candidates were spread over two days. They varied in length from 45 minutes to over an hour. Each candidate was asked the same twenty-two questions. The last open-ended question invited candidates to share anyadditional information about their qualifications that might not have been elicited in the application process. Based upon the interviews and other information available to the Committee, each Committee member separately scored the applicants' qualifications in 25 categories. The scoring sheets first listed three criteria: whether the candidate met the posted qualifications, the amount of experience relevant to the position and past performance evaluations. The scoring sheets also listed each of the twenty-two interview questions. (See footnote 4)

8. In scoring the applicants' qualifications, the Committee agreed that for each of the 25 categories on the scoring sheets, the best possible score would be five points. Accordingly, the highest possible total score that a candidate could achieve was 25 multiplied by 5, or 125 points. No candidate achieved 125 points.

9. After separately scoring all ten candidates, the Committee members met to share their total scores for each applicant. For each applicant, the Superintendent totaled the three Committee members' scores, then divided by three to arrive at an average score. The average scores for the 10 candidates ranged from a high of 107.42 to a low of 59.

10. The candidates' ranking based upon the average scores was, in most instances, the same as the rankings arrived at separately by each of the three Committee members. Significantly, the Intervenor received not only the highest average score from the Committee as a whole (107.42 points), but was also scored by each of the three Committee members as having the highest qualifications. The second most qualifiedcandidate based upon the average score (100.57) was also rated by all three members as the second most qualified of the ten. The applicant who received the

third highest average qualifications points (99.5) was the third choice of each member.

11. The Grievant received the fourth highest average score, 97.96 points. He was also the fourth choice of each of the three members of the Committee.

12. Because the Intervenor was considered by the Committee to be the most qualified of the ten candidates, the Superintendent nominated her to fill the Supervisor of Transportation vacancy. At a meeting on July 17, 2007, the BOE approved the appointment, effective July 18. The Intervenor has served as the BOE's Supervisor of Transportation ever since.

13. The Intervenor's career as a regular BOE employee began in August of 1999 as an executive secretary. By the time she was appointed as Supervisor of Transportation, Intervenor had completed eight years as the Transportation Department's executive secretary. During those eight years the Intervenor worked with the Supervisor of Transportation, developed an in-depth knowledge of the laws and policies related to school transportation, and became very familiar with safety procedures. Four times she attended the annual state Pupil Transportation Conference. She also gained experience in selecting and assisting with in-service training for bus operators. During her time in the Transportation Department, the Intervenor handled bus operators' problems, fielded and resolved parents' concerns about school transportation and addressed school bus discipline issues. (See footnote 5) 14. The Grievant began working for the BOE as a full-time bus operator in December of 1993 and has held that job ever since. He received his “S” endorsement three or four years ago. As a school bus operator he had addressed school bus discipline issues and was familiar with safety requirements and the county's roads. In high school, and later as an employee of an automotive parts store, the Grievant became familiar with auto mechanics. He was also appointed by the BOE to help train substitute bus operators. In that role the Grievant had helped with the interviews of potential substitutes. At the time of his interview, he had trained one class of new substitutes and a second was apparently underway.

Discussion

As this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his grievance by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008). "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.*

"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). "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 are closely related to actions 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*. "[T]he grievance procedure is not intended as a 'super interview,' but merely an analysis of the legal sufficiency of the selection process *at the time it occurred*. *Stover v. Kanawha County Bd. of Educ*., Docket No. 89- 20-75 (June 26, 1989)." *Sparks v. Mingo County Bd. of Educ*., Docket No. 96-29-447 (Feb. 18, 1997)(emphasis added). Nevertheless, a grievant may obtain relief by proving, by a preponderance of the evidence, a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. *Hopkins v. Monroe County Bd. of Educ*., Docket No. 95-31-477 (Feb. 21, 1996). In this grievance, there is no indication that a significant flaw occurred that could have reasonably altered the outcome.

First, there is no indication that a significant flaw in the selection process occurred. A county board of education must make decisions affecting the hiring of service personnel on the basis of seniority, qualifications and evaluation of past service. 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. (See footnote 6) 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. Applicants shall be considered in the following order:

(1) Regularly employed service personnel;
(2) Service personnel whose employment has been discontinued in accordance with this section;
(3) Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
(4) Substitute service personnel; and(5) New service personnel.

A board may expand upon the qualifications for a position found in West Virginia Code § 18A-4-8, so long as this expansion is consistent with the statutory definition. *See Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995)(*per curiam*); *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; *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); *Brewer v. Mercer County Bd. of Educ*., Docket No. 07-27-010 (Apr. 30, 2007). In this case, the BOE provided potential applicants with thirteen requirements for the position. It selected the most qualified applicant based upon seniority, qualifications and evaluation of past service.

Grievant attacks the twenty-two questions used by the interview committee, claiming that the questions asked to the interviewees did not precisely parallel the qualifications contained within the

posting for the position. (See footnote 7) As aforementioned, the committee asked each interviewee the exact same questions. Upon review of the twenty-two interview questions, Grievant's argument is unpersuasive. The questions are open-ended and meant to incite narrative comments from the interviewee concerning relevant qualifications. Each and every question is geared towards a specific or implicit qualification of theposition. The grievance procedure is not intended to be a super review of the selection process. *Sparks*, *supra*. This ALJ will not specify the particular level of question abstraction an interview committee must utilize when crafting interview questions. Each question explicitly or implicitly relates to a job qualification.

There is no indication that the selection process, or any inquiry made therein, violated or considered criterion not contemplated by West Virginia Code §18A-4-8 or the thirteen job requirements posted in the notice of vacancy.

Secondly, assuming some minuscule flaw did occur, the outcome of the selection process is not reasonably questionable. Grievant was not the most qualified applicant. As this tribunal has previously recognized, “[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.” *Schoolcraft v. Nicholas County Bd. of Educ.,* Docket No. 01-34-576 (Mar. 5, 2002), *aff'd* Kanawha County Cir. Ct., Civil Action No. 02-AA-45 (internal quotes and citations omitted). In this matter, there is no indication that the BOE's selection of the Intervenor was arbitrary, capricious or unreasonable.

Because of her work in the Transportation Department, Intervenor was well versed in the Department's budgeting, purchasing, bidding, inventory and scheduling procedures. She had a broad knowledge of the county road system, worked with local and state transportation offices, and was highly skilled in the use of computers, including the West Virginia Education Information System (WVEIS). During the former- supervisor's six-month absence, the BOE was unable to recruit a substitute to take his place. For that period, theIntervenor performed most of the supervisor's administrative duties, was “a part of almost everything that [took] place,” and, from all reports, did a fine job. She received good performance evaluations throughout her tenure, and was commended for her communication ability, particularly her listening skills. (See footnote 8)

Grievant did not have direct comparable knowledge of the Transportation Department. The

Grievant served on the county's Service Personnel Advisory Council and Staff Development Committee. He has no experience in operating WVEIS, in scheduling the system's bus operators, or budgeting; has never attended the annual state Pupil Transportation Conference; and has no track record of performing the administrative duties of the Supervisor of Transportation.

Grievant argues that he was the most qualified applicant for the position. He makes this argument after testifying extensively during this grievance process about his qualifications. However, Grievant admits that he was overconfident going into the interview and did not provide great detail to the committee. Even though the Grievant's interview lasted for more than an hour, in retrospect, he wondered whether he should have elaborated more upon his qualifications for the Supervisor of Transportation position. He claims to have said more about his qualifications in his Level One testimony than at theinterview, in part because, going into the interview, he was confident that he would be hired:

In my mind at that point, to be quite honest with you, this is probably just my own ego talking, I thought I had the position. I mean I just looked at who all was there and everything and I thought I had it.

Level One Transcript, 26. As the Grievant further explained at Level Three, prior to the interview he thought the odds were slim of another candidate getting the job, since his own credentials put him “a step above” the others. As indicated by the Grievant's own testimony, he was over-confident and perhaps did not interview as well as the other candidates. Ultimately, Grievant was the fourth-ranked candidate for the position.

Grievant further claims that he has more seniority than the Intervenor and, therefore, he should have been selected for the Supervisor of Transportation position. That seniority need not be given significant weight in employing a Supervisor of Transportation is clear from the facts of *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537. There the Supreme Court of Appeals upheld the school board's choice of an outsider to serve as its Supervisor of Transportation. The outsider had never before been employed by the board and had no seniority whatsoever. Yet, his hiring was upheld by the Court even though another candidate, who challenged the hiring, was an Ohio County Board of Education bus operator who had general experience in management from other jobs. *See also Brewer v. Mercer County Bd. of Educ.,* Docket No. 07-27-010 (Apr. 30,

2007)(rejecting the most senior candidate's claim that he should have been selected as Supervisor of Transportation).

In this matter, the Committee gave consideration to the applicants' relativeseniorities as BOE employees, but did not view seniority as a decisive factor. Instead, the Committee's process emphasized qualifications as set forth in the posted job description. That being said, the Grievant had more seniority as a BOE employee than the successful candidate and, therefore, received a slightly higher score than the Intervenor for "experience." (See footnote 9) However, when all the criterion were considered by committee, Grievant was simply not the most qualified candidate.

The BOE reasonably determined that the Intervenor, "by virtue of experience, is more acquainted with the administrative and managerial skills necessary to the operation of an efficient transportation system." *Cox v. Board of Educ.*, 177 W. Va. 576, 581, 355 S.E.2d 365, 369 (1987)(*per curiam*). The BOE demonstrably did not make the decision on the basis of seniority alone, but rather, it considered other relevant factors when determining which applicant was the most qualified. Intervenor was the most qualified applicant.

The Grievant has not met his burden of establishing a significant error in the selection process for the position of Transportation Supervisor. Moreover, even if the BOE did commit some minimal error, there is not indication that the Grievant was as qualified as the successful application. The BOE's decision was reasonable and neither arbitrary nor capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burdenof proving his grievance by a preponderance of the evidence. *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. The selection of the Intervenor, Janine Sayre, for the position of Supervisor of Transportation was not arbitrary and capricious nor an abuse of discretion.

4. The Grievant has not met his burden of proof to demonstrate that the BOE violated any rule, regulation, statute, or policy when it selected the most qualified applicant for the position of Supervisor of Transportation.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. 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.However, the appealing party is required by West Virginia Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 9, 2008

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Mark Barney

Administrative Law Judge

Footnote: 1

"'Supervisor of transportation' means a qualified person employed to direct school transportation activities properly and safely, and to supervise the maintenance and repair of vehicles, buses and other mechanical and mobile equipment used by the county school system." W. Va. Code § 18A-4-8 (80).

Footnote: 2

See generally W.Va. Code § 18A-4-8e (discussing competency tests).

Footnote: 3

See Level III, Grievant's Exhibit 3.

Footnote: 4

The scoring sheet used by each interviewer was five pages long and provided space for the interviewer to write comments after each particular question. See Grievant's Exhibit 3.

Footnote: 5

As required by the job posting, the Intervenor was eligible, when she became Supervisor of Transportation, for a valid West Virginia commercial drivers license with an"S" (school bus) endorsement. She has since received her CDL and "S" endorsement.

Footnote: 6

Grievant did not hold the "Supervisor of Transportation" classification title. Nor did any other applicant.

Footnote: 7

Specifically, Grievant maintains that "[n]early half (6 of 13) of the qualifications listed on the Posting are not covered at all in the [question] Matrix. Four of the Matrix Questions cover areas that do not appear among the Posting Qualifications. Of the remaining twenty-one Matrix Questions, nearly half (10 of 21) relate to a single (1 of 13) Posting Qualification, i.e. Posting Qualification #7. While it may not be quite fair to say that the composers of the Matrix Questions ignored the Posting Qualifications, it is clear that it was of little importance to them." See Proposed Findings of Fact and Conclusions of Law Filed on Behalf of the Grievant, 7.

Footnote: 8

Assistant Superintendent Carnell testified why Intervenor was the most qualified applicant. Mr. Carnell pointed to the spread of more than ten points between the total points he awarded the Intervenor and the Grievant following the interviews, and the difference of about ten points in the average total scores compiled by the Committee. He cited the Intervenor's responses to the interview questions, particularly those bearing on conflict resolution and personnel issues. Mr. Carnell said that he felt he could better rely on the Intervenor and her experience to operate the Transportation Department. He also noted that the Grievant, during the interview, stated that if he received the job, he would rely on the Intervenor and her experience to help him transition into the job of Transportation Supervisor.

Footnote: 9

Grievant was not the most senior applicant for the Supervisor of Transportation vacancy; two other applicants were more senior.