WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ROBERT WILMOTH,

Grievant,

v. **Docket No. 07-42-344**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent,

and

DAVID FINCHAM, Intervenor.

DECISION

Robert Wilmoth ("Grievant") initiated this proceeding on April 30, 2007, challenging the selection of Intervenor David Fincham for the position of Principal of Elkins High School. Grievant seeks placement in the principal's position, with back pay and benefits. The grievance was denied at level one on May 11, 2007, and at level two on May 14, 2007. The grievance was waived at level three on June 22, 2007. Grievant appealed to the Grievance Board on June 29, 2007. Due to legislative changes affecting the grievance process and the Grievance Board, a level four hearing was not held until March 12, 2008. Grievant was represented by Stephen G. Jory, Esquire; Respondent was represented by counsel, Kimberly S. Croyle; and Intervenor was represented by Bruce W. Boston, representative for the West Virginia Education Association. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 15, 2008.

Synopsis

Grievant challenges the board of education's selection of Intervenor, rather than Grievant, for the position of principal of Elkins High School. Two principal positions wereposted together, and a single interview committee assessed and interviewed the applicants. Intervenor was the top applicant for both positions. Grievant only applied for the Elkins High School position, and he was the second highest scorer. Steve Wamsley, who was ultimately hired for the other position at Tygarts Valley High School, applied only for that position, but had a lower overall score than Grievant's.

Grievant's allegations regarding events which occurred at the board meeting when the recommendations for the positions were considered were found not to be relevant to the selection of Intervenor, nor did they establish that the selection decision was arbitrary and capricious or an abuse of discretion. As the top-scoring applicant, with no challenge to his qualifications, the selection of Intervenor over Grievant was reasonable and not legally improper in any respect. The grievance is denied.

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

Findings of Fact

1. Grievant has been employed by the Randolph County Board of Education ("BOE") as a teacher, assistant principal and assistant superintendent for 32 years.

2. Grievant has worked at Elkins High School ("EHS") for 31 years, most recently as assistant principal.

3. On February 20, 2007, the BOE posted vacancies for two positions, contained in a single posting, for principals of EHS and Tygarts Valley High School ("TV").

4. Grievant, along with four other people, applied for the EHS position.

5. Grievant applied for the EHS position only, while David Fincham applied for both positions. Steve Wamsley applied for TV only. 6. Superintendent Susan Hinzman asked the faculty senate for each school to nominate two to three faculty members to serve on an interview committee to select candidates for the two positions.

7. In addition to the faculty members from the two schools, the interview committee included Terry George, Assistant Superintendent of Secondary Education, and Pamela Hewitt, Assistant Superintendent of Elementary Education.

8. All applicants were scored regarding the first six factors set forth in West Virginia Code § 18A-4-7a. These scores were combined with each candidate's interview score.

9. Mr. Fincham had the highest overall score of all applicants for both positions. 10. Of the EHS applicants, Mr. Fincham had the highest overall score with 78.14 total points, and Grievant was close behind with 78 points.

11. Of the TV applicants, Mr. Fincham had the highest score, and the next highest score was held by Steve Wamsley, with a score of 70.28, which was a lower overall score than Grievant's.

12. After the scores were totaled, Superintendent Hinzman consulted the faculty senate members of the committee, allowing EHS to have “first pick” of the applicants; they expressed a desire to have Mr. Fincham, the highest scoring applicant, as their principal.

13. Superintendent Hinzman prepared her recommendations for the two positions for the BOE's March 19, 2007, meeting. She prepared packets for the BOE members, distributed a day or so before the meeting, which included the score sheets and her recommendation of Mr. Fincham for the EHS position and Mr. Wamsley for the TV position. 14. At the March 19 meeting, Superintendent Hinzman made her recommendations for the two principal positions, at which time the BOE voted to go into executive session.

15. During the executive session, concerns were expressed by one particular Board member regarding the hiring of Mr. Wamsley, particularly with regard to his qualifications and reputation. One of the BOE members is Lisa Wamsley, who is Steve Wamsley's wife. Mrs. Wamsley participated in the executive session.

16. The recommendation of hiring Mr. Fincham for the EHS position was not discussed during the executive session and was not a concern of any of the BOE members. The subject of the executive session was the recommendation to hire Mr. Wamsley at TV.

17. After the executive session was concluded, the Board member who was concerned regarding Mr. Wamsley moved to table a vote on the Superintendent's recommendations.

18. There were two votes to table the recommendations and two votes against it. BOE member Wamsley voted not to table the recommendations, breaking the tie. However, if Mrs. Wamsley had not voted, the recommendations would not have been tabled on a tie vote.

19. The BOE voted to hire Mr. Wamsley as principal of TV, and Mr. Fincham as principal of EHS. Mrs. Wamsley abstained from the vote to hire her husband.

20. If the BOE had filled the TV position first, selecting the highest scoring applicant, Grievant would have been the next highest scoring applicant for EHS and would have been recommended for that position.

Discussion

Grievant has the burden of 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. (See footnote 1) "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 employee has not met his burden. *Id*.

When filling administrative positions, W. Va. Code § 18A-4-7a requires the best or most qualified individual be selected. These qualifications are judged by the following factors, referred to as the "first set of factors," outlined in that statute:

> (1) Appropriate certification, licensure or both;
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> (2) Amount of experience relevant to the position; or, in the case of a classroom teaching position, the amount of teaching experience in the subject area;
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> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
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> (4) Academic achievement;
>
> (5) Relevant specialized training;
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> (6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and

(7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *See Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). As previously stated, when selecting an administrator, the first set of factors listed in W. Va. Code § 18A-4-7a is utilized. While each of these factors must be considered, this Code Section permits county boards of education 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. *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). Once a board reviews the criteria required by W. Va. Code § 18A-4-7a, it has "wide discretion in choosing administrators . . . ." *March v. Wyoming County Bd. of Educ.*, Docket No. 94-55-022 (Sept. 1, 1994).

The standard of review for a county board of education's decision is whether it was arbitrary and capricious or an abuse of discretion. "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, orreached 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)).

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. Further, consistent with this standard of review, the grievance process 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). *See Sparks v. Mingo County Bd. of Educ.*, Docket No. 96-29-447 (Feb. 18, 1997).

In the instant case, Grievant does not contest any of the scores given to the various applicants, including himself, during the selection and interview process. Rather, he contends that the filling of the EHS position with Mr. Fincham, rather than placing Mr.Fincham at TV and thereby leaving Grievant as the top applicant for EHS, was arbitrary and capricious.

Much of Grievant's evidence and argument has focused upon the alleged improprieties involved in Board member Wamsley's participation in the executive session and proceedings which involved the hiring of Mr. Wamsley for the TV position. He has argued various statutes and regulations which address nepotism issues when relatives of BOE members are hired by school systems, contending that, if Mr. Wamsley had not been placed at TV and Mr. Fincham had, he would have been given the EHS position.

Respondent does not dispute that, if events had occurred as Grievant desires, and Mr. Fincham had been placed at TV, Grievant would have been the most qualified applicant for the EHS position. However, Grievant's arguments ignore one simple fact, which is a board of education's ample discretion in personnel matters, absent arbitrary and capricious decision-making. As Superintendent Hinzman testified, no one can dispute that Mr. Fincham was the highest-qualified applicant for both positions. She further explained that, because EHS is considered to be Randolph County's “flagship” school, it seemed best to allow that school to select which applicant they preferred, and, not surprisingly, they preferred the top-scoring candidate who applied for their principal's position.

Even if Superintendent Hinzman had not sought the input of the EHS committee members in her final recommendations, it would still have been within her discretion to recommend the top-qualified candidate for either EHS or TV, since that applicant applied for both positions. While it is likely true that, as Grievant has argued extensively, he would have been placed in the EHS position had the TV selection been made first, he has cited no legal obligation on the BOE's part to do so. Since the top-scoring applicant happenedto have applied for both positions, it was within the Board's discretion to place him in either position, regardless of the “domino effect,” as Grievant has called it, upon other applicants. Moreover, Grievant's various allegations regarding the series of events that occurred

at the BOE meeting when Mr. Wamsley's candidacy was discussed, while certainly interesting, are irrelevant to the issue of whether Grievant should have been selected for EHS instead of Mr. Fincham. While it appears that there may have been some valid concerns raised regarding the hiring of Mr. Wamsley at TV, Grievant did not apply for a position at TV. Therefore, even if Mr. Wamsley was not the appropriate selection for that position, it is not Grievant's place to grieve that issue.

Accordingly, the undersigned finds no abuse of the Board's ample discretion in selection cases here, nor can its decision to hire Mr. Fincham be found to have been arbitrary and capricious. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. Grievant has the burden of 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.

2. When selecting an administrator, the first set of factors listed in W. Va. Code § 18A-4-7a is utilized. While each of these factors must be considered, this Code Section permits county boards of education 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. *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).

3. County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *See Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. "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).

5. Respondent's selection of Intervenor for the position of principal of Elkins High School was not arbitrary and capricious, an abuse of the Board's discretion in such matters, or otherwise legally improper.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Randolph County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1, supra)*. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative LawJudges 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 30, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A- 12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.