WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LOREN WITHROW,
Grievant,

v. **Docket No. 2009-1426-KanED**

KANAWHA COUNTY BOARD
OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Loren Withrow, filed this grievance against Kanawha County Board of Education ("Board"), Respondent, on April 7, 2009 after Grievant was not selected to fill a position as a Secretary III-A in the Board's Central office. Grievant alleges violation of WEST VIRGINIA CODE § 18A-4-8b (a) and (b). He seeks to be placed in the position in the Curriculum and Instructional office of the Kanawha County Board of Education with all applicable back pay and benefits.

A conference was held at level one on April 20, 2009, and the grievance was denied at that level on May 7, 2009. Grievant appealed to level two on May 18, 2009. Grievant appealed to level three on July 22, 2009. A level three hearing was held before the undersigned Administrative Law Judge on November 16, 2009, in the Grievance Board's Charleston office. Grievant appeared in person and by Representative Felicia Law, WV Education Association. Respondent was represented by James W. Withrow, its General Counsel (Grievant Withrow and Respondent's counsel are not related).

At the level three hearing, Grievant called Betty Smith as a witness, and testified on his own behalf. Cindy Daniel, Assistant Superintendent of Curriculum and Instruction, Chrystal Godbey and Coleen Vannoy, Curriculum Specialists, testified on behalf of the

Respondent. Five joint exhibits were admitted into the record and the Respondent offered two additional exhibits which were entered without objection.[1]

This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law (FOF/COL) on December 14, 2009.

Synopsis

Grievant avers that he should be hired for a Secretary III-A position in the Curriculum and Instruction office of Respondent Kanawha County Schools because he is the most senior applicant holding the classification of secretary, who expressed a willingness to accept the position. Grievant alleges violation of WEST VIRGINIA CODE § 18A-4-8b (a) and (b). Respondent believes that it has the authority to assess the skills required to perform a particular job and likewise assess the skills possessed by an applicant and *sua sponte* determine whether or not the applicant has the requisite skills and abilities to perform the job.

Grievant was provided a list of "Expectations for Secretary: Curriculum and Instruction Office" after the job posting had closed and it was determined that he was the most qualified, senior applicant. The job posting for the position did not specify any additional qualifications. The "Expectations…" were not part of any job description, rules or regulations published by the Kanawha County Board of Education in reference to Secretary III-A positions.

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[1] Joint Exhibits: 1) Kanawha County School Expectations for Secretary: Curriculum and Instruction Office; 2) KCS Job Posting; 3) KCS Job Description; 4) KCS Application list; 5) Exemplary Group of Publications. Respondent's Exhibit: 1) KCS Staff Development History; 2) KCS 2007-2008 Arts Calendar of events

In the circumstance of this case, inserting previously non-posted and unpublished criteria into the hiring process as a prerequisite for the position amounted to reliance on criteria not intended to be considered thus arbitrary and capricious. Grievant has established entitlement to a position of Secretary III-A with Respondent. This Grievance is granted.

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

Findings of Fact

1. Grievant, Loren Withrow, is a regular service professional, employed in a full time position with Respondent. Grievant is currently employed by Respondent as a Secretary II and is assigned to South Charleston Middle School.

2. Since 2005, Grievant has held various full-time positions with Respondent including, Custodian III, Aide and Secretary.

3. Grievant obtained the qualification of Secretary, by successfully completing the competency testing in November of 2007. Grievant has held his current position since August of 2008.

4. On or about January 5, 2009 through January 9, 2009, Respondent advertised for an opening in the Central Office, specifically in the Curriculum and Instruction Office for a Secretary III-A with a 261 day contract. Joint Exhibit 2.

5. The individual who holds this Secretary III-A position is supervised by the Assistant Superintendent for Curriculum and Instruction and performs secretarial duties for seven curriculum specialists who work throughout the entire school system, as well as interact with the public. The duties of the position are many and varied and often times

involve producing complex documents for use both in the school system and at other activities such as the county-wide spelling bee, math field day and social studies and science fairs.

6. Respondent's Job Description of the Secretary III-A position includes the following:

> Secretary III: means personnel assigned to the county board of education office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities of purchasing and financial control.
>
> Job Description Summary: Performs clerical, stenographical, and secretarial duties within a program function necessary for effective and efficient operation of the school system.
>
> . . .
>
> Know-How Required: . . . Experience and/or training in typing and filling required and highly significant to the job. **Should be very skilled in office procedures with a high degree of communication skills and must be willing to learn to use a personal computer and other electronic equipment.** Emphasis added

Joint Exhibit 3 - Kanawha County Schools Job Description.

7. On January 5, 2009, Grievant submitted an electronic bid for the position of Secretary III-A at the Respondent's Central Office in the Curriculum and Instruction section.

8. In mid-February, Dr. Cindy Daniel, Assistant Superintendent of Curriculum and Instruction, was given permission by Joe Godish, Deputy Superintendent, to fill the Secretary III-A position. At that time, Dr. Daniel requested from the Human Resources Department the "rankings" of the individuals who had submitted bids.

9. Pursuant to applicable seniority ranking, Grievant was the sixth individual with a Secretary classification who had applied for the position. Grievant was the sixth most senior individual classified as a secretary to apply for the position.

10. All the individuals more senior than Grievant declined the position. Grievant was contacted to determine if he was interested in the position.

11. Grievant expressed an interest in filling the position.

12. Dr. Daniel scheduled a meeting with Grievant on March 5, 2009 to further discuss the position and Grievant's interest in the position.

13. A meeting was held at Roxalana Annex in which Grievant, the seven curriculum specialists and the Assistant Superintendent were present. At the meeting, the requirements of the job were discussed, and Grievant was shown examples of some of the work that he would be required to produce if he acquired the position.

14. Grievant was provided a list of "Expectations for Secretary: Curriculum and Instruction Office" after the position had closed and it was determined that he was the most qualified, senior applicant. Joint Exhibit 1.

15. The "Expectations…" are not part of any job description, rules or regulations published by the Kanawha County Board of Education in reference to Secretary III-A positions. The job posting for the Secretary III-A position for the Office of Curriculum and Instruction did not specify any additional qualifications.

16. The "Expectations for Secretary: Curriculum and Instruction Office" is a one page document with eight bullet points identifying specific assignments, duties and/or skill sets expected of the employee occupying the position. The first two bullet points read:

> Proficient in Microsoft Word and other applications (Excel, PowerPoint, etc.). This office produces the programs for all county academic events: Math Field Day, All County Chorus, Young Writers, Spelling Bee, etc.). Skills involve graphics, formatting a program, merging databases, creating attractive publications, inserting text, tables, charges, etc.
>
> Proficient in generating correspondence for specialist as needed. Example: A specialist tells you she needs a flyer sent to all secondary math teachers. She gives you the basic information and you then are responsible for putting the information together in a flyer, designing a cover, title, etc., editing for correct grammar, punctuation, etc. You would then need to retrieve the database of teacher names from Excel, create labels, and do a bulk mailing to those involved. This happens frequently in this office.

Joint Exhibit 1.

17. The expectations for the position, as a whole, are more demanding than the job description.

18. Grievant admits he is not knowledgeable with Word and Excel software.

19. Grievant acknowledged that he did not know how to do much of the work expected of the person filling the position, but would be willing to take classes and learn to do those things.[2]

20. Specifically, Grievant acknowledged that he had limited experience in working with Microsoft Office Programs, but that he would be willing to attend any training sessions as well as observe in the Curriculum and Instruction Office to learn more about specific job functions.

21. Dr. Daniel and the Curriculum Specialists at the March 5 meeting expressed concern as to whether or not Grievant could do the essential job as stated in the "Expectations…".

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[2] As of the date of the level three hearing, Grievant had not taken any additional classes in order to upgrade his skills.

22. On March 6, 2009, Grievant went to the Central Office to see the office in which he would be working and to speak with Ms. Brenda Petry, who was at the time an Executive Secretary at the Central Office (Ms. Petry has since retired).

23. Grievant was given further explanation of the job duties and given an opportunity to observe the working environment.

24. Grievant and Dr. Daniel met on March 6, 2009, and after speaking with Assistant Superintendent Daniel, Grievant reiterated his interest in the position.

25. Grievant accepted the position of Secretary III-A and was told by Dr. Daniel that he would be put on the Personnel Agenda for approval at the next Board meeting on March 12, 2009 and his start date would be March 30, 2009.

26. Despite having misgivings about Grievant's ability to perform the required work, Assistant Superintendent Daniel forwarded the appropriate paperwork to Human Resources in order to have Grievant approved for the position.

27. Grievant's name was to be submitted to the Kanawha Board of Education for approval on March 16, 2009.

28. At the board meeting on March 16, 2009, the Superintendent of Schools withdrew his recommendation for Grievant to be hired for the position.

29. Subsequent to March 16, 2009, Grievant was informed that his name had been withdrawn from the Board Agenda and that he was not being recommended for the position.

30. At the time of his non-selection, Grievant had not received an evaluation as a Secretary; however, his overall performance evaluations as a full-time, regular employee had been rated "satisfactory."

31. Since March 16, 2009, the Secretary III-A position in question has not been filled. The duties of the position have been performed by temporary substitute employees.

32. More specifically, while the position has remained officially unfilled, the duties of the position have been performed by two specific substitute employees, both of whom are retired Kanawha County Schools' employees with over thirty years of experience.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

With the assistance of Representative Felicia Law, WV Education Association, Grievant avers that he should be hired for the Secretary III-A position in the Curriculum and Instruction office of Respondent because he is the most senior applicant, holding the classification of secretary, who expressed a willingness to accept the position. Respondent Kanawha County Schools believes that it has the authority to assess the skills required to

perform a particular job and likewise assess the skills possessed by an applicant and determine whether or not the applicant has the requisite skills and abilities to perform the job.

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 Bd. of Educ., 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).

It is not being debated whether a county board of education has the ability to identify and require particular skill sets as essential for a given job opening, beyond the statutory definition of its classification title. 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. 97-33-010 (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); *Herbert Hyre v Upshur County Bd. of Educ.*, Docket No. 49-88-127 (Nov. 7, 1988).

What is of issue is whether requisite skills can be identified **after** proper posting and be determined as exclusively prohibiting the employment of a particular applicant, given he is deemed qualified pursuant to relevant WEST VIRGINIA CODE and wishes to assume the duties of the position (e.g., W. VA. CODE § 18A-4-8e(c)(4)).[3]

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.**
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> (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. Applicants shall be considered in the following order:
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> (1) Regularly employed service personnel;

[3] WEST VIRGINIA CODE § 18A-4-8e(c)(4) states, "Once an employee passes the competency test of a classification title, the applicant is fully qualified to fill vacancies in that classification category of employment as provided in [W. VA. CODE § 18A-4-8b]."

> (2) Service personnel whose employment has been discontinued in accordance with this section;
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> (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;
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> (4) Substitute service personnel; and
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> (5) New service personnel.

Emphases added

A similar matter came before the West Virginia Supreme Court of Appeals in *Hancock County Board of Education v. Hawken*, 209 W.Va. 259, 546 S.E.2d 258 (1999), which dealt with a Supervisor 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 the required 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: County Boards of Education have 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 Board of Education*, 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 grievant asserted W. VA. CODE §18A-4-8e supported his argument because it stated: "'[a]chieving a passing score shall conclusively demonstrate the

qualification of an applicant for a classification title'... meant that the passing of the test is both the beginning and the end of a board's inquiry into the qualifications of an applicant for a given position." 209 at 261. Grievant further argued "the Legislature intended a passing grade on the test to serve as a replacement for any review of qualifications; once two candidates have passed the test, both are equally qualified, and the job must go to the applicant with the most seniority." 209 at 261 - 262. The West Virginia Supreme Court of Appeals did not agree, and held "[i]n light of the importance we place upon providing students with 'a thorough and efficient system of free schools,' we do not believe the Legislature intended for the passing of the test to be the alpha and the omega of a board's hiring process." 209 at 262. W. Va. School Boards are limited in their employment decisions in that such decisions must be reasonable, in the best interest of the students, and not arbitrary or capricious. *Board of Educ. of County of Randolph v. Scott*, 217 W.Va. 128, 617 S.E. 478 (2005).[4]

In the present case, Grievant has passed the competency test for the classification of secretary and is the most senior applicant who has expressed a willingness to accept the position. Further Grievant is currently employed as a Secretary II. *See* FOF 1. However, Respondent contends as authorized by *Hawken*, it is not required to place Grievant in the position if the respondent has a non-arbitrary and non-capricious reason not to do so. Respondent professes such rationale exists. Respondent argues that their emphasis on the identified training was proper because of the specialized nature of the

[4] It is noteworthy that in the last paragraph of the *Scott* decision the Court set out that the Boards' exercise of this discretion must be limited to avoid making the statutory protections set out in the statute a "dead letter." The undersigned is mindful of this potential ramification in the circumstances of this case.

duties of a Secretary III-A position in the Office of Curriculum and Instruction. Respondent artfully proposes that it would not be in the "best interests of the schools" to place Grievant in the position in question, given that misfeasances by Grievant could be embarrassing and reflect negatively on the agency. The professional image of the program is a consideration but it is not of equal weight as the statutory rights of Grievant.

It is recognized that a county board of education has a right to expand job qualifications before the fact. However, Grievant further highlights, distinguishes, and avers the required qualifications for a position beyond the statutory definition in the classification title present in *Hawken* and *Hyre* do not exist in this record.[5] In the present case, the requirements were only expanded after the job had been posted and the list of applicants whittled down until it reached Grievant. The job posting and position description relevant to the position in discussion did not identify essential duties with specialized skill sets for qualification status. Joint Exhibit 1 and 2. Grievant was provided a list of "Expectations for Secretary: Curriculum and Instruction Office" after the position had closed and it was determined that he was the most qualified, senior applicant.

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[5] "Without conceding the correctness of *Hancock BOE v. Hawken*, 209 W.Va. 259, 263, 546 S.E.2d 258, 262 (1999), and *Hyre v. Upshur County Board of Education*, 186 W.Va. 267, 412 S.E.2d 265 (1991), it must be noted that they are readily distinguishable from this situation involving the filling of a more routine secretarial job in the lower pay grades of the service personnel structure[.] . . . Further those authorities are distinguishable because there were competitors for the position and, rightly or wrongly, the differing qualifications of those competitors came into issue. By contrast on the record in this case the applicants for the secretarial job were considered in seniority order, one at a time and one after the other, so that when Mr. Withrow's name was arrived at in position number 6 on the seniority list, there was no "competing" candidate." Grievant's Proposed FOF/COL document.

"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*.

___County Board postings of service positions are not incidental announcements. Notice of a job vacancy shall include the job description and **other information that is helpful to prospective applicants to understand the particulars of the job**. Job postings for vacancies made pursuant to W. VA. SCHOOL LAW should be written so as to ensure that qualified applicants may apply. Job postings may not require criteria which are

not necessary for the successful performance of the job. *See* W. VA. CODE §18A-4-8b (g)(2).

There is no statutory or case law which prohibits a county board from modifying a job posting. W. VA. CODE §§ 18A-4-8b, 18A-4-7a; *Toney v. Lincoln County Bd. of Educ.,* Docket No. 98-22-009 (Mar. 24, 1998); *Otto v. Berkeley County Bd. of Educ.,* Docket No. 89-02-369 (Dec. 28, 1990); *Fulk v. Monongalia County Bd. of Educ.*, Docket No. 94-30-616 (Mar. 30, 1995). However, the ability of a county board to do such is tempered by timeliness, and must be exercised with proper reason and procedure. The job descriptions for a Secretary III-A position states that the applicant "**must be willing to learn to use a personal computer and other electronic equipment.**" Emphasis added. Joint Exhibit 3.

WEST VIRGINIA CODE § 18A-4-8e(c)(4) states, "Once an employee passes the competency test of a classification title, the applicant is fully qualified to fill vacancies in that classification category of employment as provided in [§18A-4-8b]. Grievant obtained the qualification of Secretary by successfully completing the competency testing in November of 2007. Grievant was the only remaining candidate and he met the three qualifications of W. VA. CODE § 18A-4-8b(a), thus he maintains that he should have been hired and Respondent cannot, at this time, lawfully choose to deny him this opportunity contending he lacks the qualifications for the position.[6] Grievant's point of distinction is received favorably by the undersigned. In this case the Board went with the description of the position which was in the statute and then wanted to surreptitiously measure

[6] Grievant cites W. VA. CODE § 18A-4-8e(c)(4).

specialized training **after** the applicants applied. Further, it is deemed relevant that Grievant is currently employed in the job classification, in discussion.[7]

The paradox of this case should not be lost in the details of the information. Qualification for consideration under W. VA. CODE §18A-4-8b (b) is simply defined as attaining the definition of the job title as outlined in WEST VIRGINIA CODE §18A-4-8. *Poling v. Tucker Board of Education*, 215 W.Va. 231, 237, 599 S.E.2d 654, 660, 2004 W. Va. LEXIS 73 (2004). Grievant is lawfully qualified for the position as posted. However, he admittedly does not currently possess the skill sets allegedly demanded by the position. The position posting did not specify, what Respondent has now identified as, uniquely essential knowledge for the performance of the position's duties. Ultimately, Respondent did not hire Grievant for the position determining that he lacks the competency necessary for the duties. The actions of Respondent, even if well intended, is not consistent with the statement of WEST VIRGINIA CODE that the job posting contain the job description "and other information that is helpful to prospective applicants to understand the particulars of the job."

The notice of a job vacancy shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to

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[7] The point of distinction intended may not be readily apparent to individuals unfamiliar with school law. Generally, "classification" means a category of "class titles" requiring similar responsibilities. Each classification title defined and listed is considered a separate classification category of employment for service personnel **except** for those class titles having Roman numeral designations, which are considered a single classification of employment. W. VA. CODE 18A-4-8e (a). **Grievant is currently employed in the Secretary classification.** "Class title" means the name of the position or job held by a service person. *See* W. VA. CODE § 18A-4-8. Applicable relevant class title definitions set out in W. VA. CODE 18A-4-8 include: W. VA. CODE 18A-4-8 (77), Secretary II and W. VA. CODE 18A-4-8 (78), Secretary III.

the employees to understand the particulars of the job. W. VA. CODE §18A-4-8b (g)(2). The posting at issue did not contain a requirement that the successful applicant be proficient in Microsoft Word, Excel, PowerPoint , etc., at the time he or she entered into the duties of the position. Although Respondent could have posted the position to require the successful applicant to posses or obtain identified skill sets within a specified period of time after entering into the position, this was not done. The posting at issue did not contain such requirement and to now profess these skills are essential to establish eligibility for the position is arbitrary and capricious.

The undersigned is not convinced, based upon the facts of this case, the answer to the instant matter is as convoluted as some would argue.[8] Respondent has the duty to describe accurately the position being posted. If specific expectations are essential for the proper execution of a position's duties, such should be clarified at the onset, the posting, not after candidates have been vetted.[9] Grievant was interviewed and lead to believe he was to be hired. Boards need not list every detail of a position into job postings but job descriptions should contain essential qualifications for the position they describe.

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[8] Respondent reluctantly concedes there is a learning curve with every job and no one is expected to know everything about a job when hired; however, counters that Kanawha County Schools should not be required to "muddle along" until Grievant obtains the skills required for the position. Respondent maintains that an employer should not be required to place an applicant in a position when there is no question the applicant is unable to perform. The undersigned agrees that an applicant should have at least a baseline level of capability before being placed in a position; however, notes that Grievant is currently employed in the Secretary classification and met the baseline level as posted.

[9] This decision does not impart a significant burden for boards of education. If these expectations existed before the position was posted and were indeed essential to the successful completion of the job it would have been a simple matter to incorporate them into the position description and job posting.

The "Expectations of Secretary: Curriculum and Instruction Office" was not a part of the job posting. Joint Exhibit 1. In that the "Expectations . . ." was not a part of the qualifications for the position of Secretary III-A as posted and is not part of the job description for "Secretary III" as set forth in W. VA. CODE 18A-4-8(i)(78), the "Expectations …" were not valid criteria to exclusively disqualify a candidate and should have played only a limited role in the process. The action of inserting these previously non-posted and unpublished criteria (as late as it was) into the hiring process was arbitrary and capricious in that it amounted to exclusive reliance on criteria that was not intended to be considered. Respondent's actions of setting aside the statutory description for "Secretary III" and to interject *defacto* an entirely new criteria into the process, is found to be inappropriate.

It is agreed that an applicant should have at least a baseline level of capability before being placed in a position; however, Grievant met the baseline level as posted. In the circumstance of this case, inserting previously unspecified skills as prerequisites for the position is found to be improper procedure. Grievant established he suffered harm as a result of the identified arbitrary and capricious actions of Respondent. It is the determination of this ALJ that Grievant should be instated to a position of Secretary III-A with Respondent.

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. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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. It is well-established that "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. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. 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).

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. 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. Achieving a passing score on the state competency test for a particular classification shall conclusively demonstrate an applicant is qualified to hold that classification title. W. VA. CODE § 18A-4-8e.

6. 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). There is no statutory or case law which prohibits a county board from modifying a job posting. W. VA. CODE §§ 18A-4-8b, 18A-4-7a; *Toney v. Lincoln County Bd. of Educ.,* Docket No. 98-22-009 (Mar. 24, 1998); *Otto v. Berkeley County Bd. of Educ.,* Docket No. 89-02-369 (Dec. 28, 1990); *Fulk v. Monongalia County Bd. of Educ.*, Docket No. 94-30-616 (Mar. 30, 1995). However, the ability of a county board to do such is tempered by timeliness, and must be exercised with proper reason and procedure.

7. Grievant met the criteria identified for the position posted. Grievant is employed in the Secretary classification and met the baseline level of competency as posted.

8. In the circumstance of this case, inserting previously non-posted and unpublished criteria into the hiring process as prerequisite qualifications for the position amounted to reliance on criteria not intended to be considered, thus arbitrary and capricious.

9. Respondent's actions in the circumstance of this case were arbitrary and capricious.

10. By a preponderance of the evidence, Grievant established he suffered harm as a result of the identified arbitrary and capricious actions of Respondent. Grievant proved that Respondent's inappropriate actions resulted in his loss of employment as a Secretary III-A.

Accordingly, this grievance is **GRANTED** in that Grievant is awarded the position of Secretary III-A with Respondent and all differential back-pay and benefits associated with the increase in class title dating back to April 1, 2009.

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 W. VA. 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: March 26, 2009

Landon R. Brown
Administrative Law Judge