**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JOSEPH M. MORRIS,**
**Grievant,**

**v.** **Docket No. 2010-1578-MarED**

**MARSHALL COUNTY BOARD OF EDUCATION,**
**Respondent**,

**and**

**CHAD CLUTTER,**
**Intervenor.**

## DECISION

Grievant, Joseph M. Morris, filed a grievance against Respondent on June 14, 2010.[1] Grievant asserts that the questions asked during the interview for Science Department Head at Cameron High School were "incomplete, bias, and not inclusive for all of the stated job requirements in the job description." Grievant asserts that as a result of the interview questions, "the final outcome [was] flawed, arbitrary and capricious." Grievant claims a violation of W.VA. CODE § 18A-4-7a. As relief, Grievant seeks "deletion of any and all erroneous, arbitrary and capricious data/information from the interview.... placement as the Science Department Head at Cameron High School and payment of any lost wages."

[1]Grievant amended the grievance on June 16, 2010.

Chad Clutter was joined as an intervenor on or about June 18, 2010. A level one conference was held on June 28, 2010. The grievance was denied at that level. A level two mediation was conducted on September 16, 2010. On April 28, 2011, a level three hearing was conducted by Administrative Law Judge William McGinley at the Grievance Board's office in Westover, West Virginia.[2] Grievant was represented by Owens Brown, West Virginia Education Association. Respondent was presented by Richard Boothby, Esq., Bowles Rice McDavid Graff & Love LLP. Intervenor appeared *pro se.* This matter became mature on May 31, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.[3]

## Synopsis

Grievant contends that he should have been awarded the position of Science Department Head at Cameron High School instead of Chad Clutter. Grievant believes that some of the interview questions asked were intended to favor Mr. Clutter, Intervenor. Respondent and Intervenor assert that the interview questions asked were not intended to favor Intervenor and that the interview committee's scores reflect that Intervenor was the highest rated interviewee.

Grievant failed to prove that Respondent's interview questions and decision to select Intervenor were arbitrary and capricious, or represented an abuse of discretion. Consequently, the grievance is DENIED.

---

[2]For administrative purposes, the case was reassigned to the undersigned on October 7, 2011.

[3]Intervenor did not submit proposed findings of fact and conclusions of law.

## Findings of Fact

1. Grievant is employed by Respondent as a science teacher at Cameron High School.

2. The position of Science Department Head, an extracurricular position, was posted on May 14, 2010.[4]

3. The qualifications listed on the posting were that the applicant must possess a valid West Virginia Teaching Certificate, be employed full time at the school where the service is to be rendered, and demonstrate leadership skills.[5]

4. Grievant and Chad Clutter, another science teacher at Cameron High School, were the only applicants for the posted position.

5. Grievant is certified by the State of West Virginia Department of Education to teach Physics grades 9 through 12 with an Advance Placement endorsement, Biological Science grades 9 through 12, Chemistry grades 9 through 12 with an Advance Placement endorsement and General Science grades 5 through 12.[6]

6. Chad Clutter, Intervenor, is certified by the State of West Virginia Department of Education to teach Biological Science grades 9 through 12 and General Science grades 5 through 12.[7]

7. An interview committee was formed to interview the applicants for the

---

[4]*See* Grievant's Exhibit No. 4, Position Vacancy Posting #P-141.

[5]*See Id.*

[6]Grievant's Exhibit No. 2, Grievant's West Virginia Teaching Certificates.

[7]Grievant's Exhibit No. 5, Intervenor's West Virginia Teaching Certificates.

position. The interview committee consisted of five members: Jack Cain, Principal, Russell Dotson, Agricultural and Natural Resources teacher, Kelley Frazier, guidance counselor, Jack Hart, activities coordinator/athletic director, and Brad Hartley, coordinated science, biology, and anatomy & physiology teacher.

8. Brad Hartley, now retired, held the position of science department head at Cameron High School for approximately 30 years.

9. Although not required, the interview committee considered the first set of seven factors under W.VA. CODE § 18A-4-7a as hiring criteria for the position. The interview consisted of fifteen questions developed by Mr. Cain, school principal, and Mr. Hartley, coordinated science, biology, and anatomy & physiology teacher. The committee members assigned one point for each of the first six factors under W.VA. CODE § 18A-4-7a(c)(1)-(6). For the seventh factor, "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged," the committee members asked nine questions and assigned one point for each of the nine questions.

10. A total of 15 points were available, one point for each question, from each of the 5 committee members. Each interviewed applicant could score a total of 75 points if the applicant received all possible 15 points from all 5 committee members.

11. Mr. Clutter received a total point score of 69. Grievant received a total point score of 52.[8] Mr. Clutter was selected by the interview committee as the successful applicant for the position.

12. A new Cameron High School will open during the next year or so, and this

---

[8] *See* Respondent's Exhibit No. 1, interview committee applicant score sheets.

building will contain science facilities sufficient to hold a county-wide science fair.

13. Benchmarking is a process by which students' baseline knowledge of a subject is assessed at a specific point in time. It is an important tool in developing an understanding of and use for the data from the annual West Test 2 science scores.[9]

**Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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 and 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.*

Grievant contends that he should have been awarded the position of Science Department Head at Cameron High School instead of Intervenor, Chad Clutter. Grievant believes that some of the interview questions asked were intended to favor Intervenor. Respondent and Intervenor assert that the interview questions asked were not intended to favor Intervenor and that the interview committee's scores reflect that Intervenor was the highest rated interviewee.

Brad Hartley, now retired, held the position of science department head at Cameron High School for approximately 30 years.[10] Mr. Hartley testified that, in the past, being the

---

[9]Level three hearing Testimony of Mr. Hartley.

[10]Level three hearing testimony of Brad Hartley, retired science teacher and science department head.

science department head included duties such as evaluating potential new science textbooks and overseeing the textbook ordering process, annually analyzing West Test 2 science section scores to determine what areas of the curriculum may need to be stressed more in the future, attending weekly professional learning community meetings, meeting with the other members of the science faculty, communicating with the West Virginia Board of Risk and Insurance Management about potential risks within the science labs, and overseeing the science classroom materials requisition process each year.

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. Upshire County Board of Education*, 186 W.Va. 267, 412 S.E.2d 265 (1991); *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986). The position of science department head is a professional extracurricular position under W.VA. CODE § 18A-4-16.[11] This Grievance Board has previously determined that the provisions of W.VA. CODE § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Lusher v. Putnam County Board of Education,* Docket No. 99-40-061 (May 7, 1999); *Hall v. Mingo County Board of Education*, Docket No. 95-29-529 (March 28, 1996); *Foley v. Mineral County Board of Education*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Board of Education*, Docket No. 91-23-040 (July 31, 1991). Thus, the appropriate standard of

[11]In defining extracurricular assignments, W.VA. CODE § 18A-4-16 states that "extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis..."

review for decisions concerning selection of professional personnel to fill extracurricular assignments is whether the Board of Education abused its broad discretion in the selection or acted in an arbitrary and capricious manner. *Filberto v. Hancock County Board of Education,* Docket No. 2008-1101-HanED (March 26, 2009); *Chaffin v. Wayne County Board of Education*, Docket No. 92-50-398 (July 27, 1993); *DeGarmo v. Wood County Board of Education*, Docket No. 06-54-025 (March 8, 2006); *Hood v. Brooke County Board of Education*, Docket No. 07-05-155 (Nov. 30, 2007).

"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). "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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant and Intervenor applied for the position posting for Science Department Head at Cameron High School. Both candidates were interviewed for the position. Both Grievant and Intervenor were qualified for the position. The interview consisted of 15

questions.[12] Grievant asserts that some of the questions asked were biased and slanted in favor of Intervenor. The questions Grievant believes to be biased were as follows:

> 8. Have you ever been involved in a state wide or regional evaluation of a school? If so, what was your role.
> 10. Have you ever put on an organized science fair?
> 13. Benchmarking will play a role in the 2010-11 school year in helping us determine curriculum pathways for our students. In what ways do you see the Deparment Head being involved in this process?
> 14. Cameron High needs to improve the transition process from the Elementary School to the Middle School. As the leader of the science department you would need to play a major role, what would you do to help that transition for our students?

Out of 5 possible points for each question, one point per each of the five member interview committee, Grievant received 0 points for question 8. Intervenor received 5 points for question 8. For question 10, Grievant received 0 points and Intervenor received 5 points. For question 13, Grievant received 3 points and Intervenor received 5 points. For question 14, Grievant received 0 points and Intervenor received 5 points.[13]

Grievant asserts that he was penalized for answering interview questions 8 and 10 with simply a yes or no answer. Intervenor responded to questions 8 and 10 by providing more information and explanation than a simple yes or no. Grievant was free to answer the questions as he liked during the job interview. At no time during the interview did any person cut him off or ask him to stop speaking.[14]

Grievant believes that questions 10 and 13 were unfair and biased. Grievant asserts that because Cameron High School does not put on a science fair, the question

---

[12]Grievant's Exhibit No. 6, 15 interview questions.

[13]*See* Respondent's Exhibit No. 1, interview score sheets.

[14]*See* Level three hearing testimony of Grievant and Principal Cain.

is irrelevant. Mr. Hartley testified at the level three hearing that a science fair has not been held recently at Cameron High School due to inadequate facilities. However, a new Cameron High School with large enough science facilities to hold a science fair will open in the next year or so. As a result, Respondent hopes that a county-wide science fair will once again be held there.

Grievant contends that question 14 was biased in the manner in which the question was structured. Grievant believes the question would have been better structured to ask how the interviewee would be able to help students transfer from high school to college, or to the workforce. Cameron High School consists of grades 7 through 12. Students transition from elementary school sixth grade into high school seventh grade. Although, Grievant's suggested revised phrasing of question 14 may in fact have been a good interview question, that does not render question 14 as presented at the time of the interview as unreasonable or biased.

Grievant asserts that he is more qualified than Intervenor because he has more teaching certifications. Both Grievant and Intervenor meet the qualifications required for the position. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994). The interview questions were not biased against Grievant. Grievant has failed to prove that Respondent's interview questions and decision to select Intervenor were arbitrary and capricious, or represented an abuse of discretion. Accordingly, the grievance is DENIED.

## Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the

burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "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 and 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. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. The position of science department head is a professional extracurricular position under W.VA. CODE § 18A-4-16.

4. This Grievance Board has previously determined that the provisions of W.VA. CODE § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Hall v. Mingo County Board of Education*, Docket No. 95-29-529 (March 28, 1996); *Foley v. Mineral County Board of Education*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Board of Education*, Docket No. 91-23-040 (July 31, 1991). Thus, the appropriate standard of review for decisions concerning selection of professional personnel to fill extracurricular assignments is whether the Board of Education abused its broad discretion in the selection or acted in an arbitrary and capricious manner. *Filberto v. Hancock County Board of Education,* Docket No. 2008-1101-HanED (March 26, 2009); *Chaffin v. Wayne County Board of Education*, Docket No. 92-50-398 (July 27, 1993); *DeGarmo v. Wood County Board of Education*, Docket No. 06-54-025 (March 8,

2006); *Hood v. Brooke County Board of Education*, Docket No. 07-05-155 (Nov. 30, 2007).

5. “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).

6. "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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

7. The grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.,* Docket No. 93-RS-489 (July 29, 1994).

8. The interview questions were not biased against Grievant.

9. Grievant failed to prove that Respondent’s interview questions and decision to select Intervenor were arbitrary and capricious, or represented an abuse of discretion.

Accordingly, this grievance must be 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 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: October 25, 2011**

_____
**Jennifer Lea Stollings-Parr**
**Administrative Law Judge**