THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SCOTT E. WEESE,
Grievant,

v. **Docket No. 2011-1562-RanED**

RANDOLPH COUNTY BOARD OF EDUCATION,
Respondent, and

ALBERT CHEWNING
Intervenor.

DECISION

Grievant, Scott E. Weese, filed this action against his employer, Randolph County Board of Education, on April 27, 2011, asserting that "he was more qualified to fill the position of Building Construction Instructor than the successful applicant, Albert Chewning. Grievant contends that Respondent erred in failing to specify on the posting of the job the special criterion of the results of the job interview in violation of W. Va. Code 18A-4-7(a)(o)(C). As a consequence, giving total or almost total weight to the interview in filling the position violated W. Va. Code 18A-4-7a(a)-(c) as the interview was not one of the criteria specified by the statute. (Boards of education have discretion in how much weight to give to any of the statutory criteria, but are restricted to use of the statutory criteria. Though the seventh criterion is a sort of catch all provision, W. VA. CODE § 18A-4-7a(o)(C) requires that special criteria must be specifically stated in the job posting.)"[1] For relief,

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[1]The level one grievance asserts a claim that is slightly different from the grievance asserted within the level two and three grievance forms. The initial grievance makes a

Grievant "seeks instatement into the position in question with compensation for lost wages and benefits with interest to the extent allowed by law."

This grievance was denied at level one following a hearing conducted on June 24, 2011. A level two mediation was conducted on October 18, 2011. Grievant perfected his appeal to level three on November 4, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on April 2, 2012, in Elkins, West Virginia. Grievant appeared in person, and by his counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Gregory W. Bailey, Bowles Rice McDavid Graff and Love LLP. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on May 3, 2012.

Synopsis

Grievant alleged that he should have been selected over the successful applicant for the position of Building Construction Instructor at Respondent's Technical Center. An interview committee was appointed to recommend a candidate for the position. The interview questions were developed by the Director of the Technical Center and the Administrative Assistant of the Technical Center. After the interviews, the committee eventually recommended the intervenor for the position based upon his qualifications and his interview performance. Grievant claimed he was more qualified for the position, and that Respondent did not consider each statutory factor when hiring Intervenor. Evidence established that Respondent afforded consideration to statutory factors in evaluating the

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claim that Grievant was more qualified than the successful applicant.

qualifications of the candidates. Under the factor of other measures or indicators upon which the relative qualifications of the applicant may be judged, Respondent considered the results of the structured interview in making their selection. Respondent did not act arbitrarily or capriciously or abuse its broad discretion in hiring Mr. Chewning for the position. In addition, Grievant argued that the interview process was not listed as a qualification on the posting and it was inappropriate to utilize it as a criterion. This argument is without merit.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant is employed by the Respondent as a regular bus operator.

2. Respondent posted a position for a Building Construction Instructor at its vocational school from February 9, 2011, through February 15, 2011. The job description listed qualifications for the position.

3. Grievant, Intervenor, and seven other individuals applied for the position.

4. The parties stipulate that the position in question is a professional, instructional position, and because no permanently employed instructional personnel made application for the position, that the first set of criteria contained in W. VA. CODE § 18A-4-7a was appropriate to use in assessing the qualifications of the candidates.

5. Each of the factors contained in the first set of criteria was given consideration in evaluating the qualifications of the candidates. Under factor number 7, "[o]ther measures or indicators upon which the relative qualifications of the applicant may fairly be judged," Respondent considered the results of a structured interview.

6. The interview questions were developed by the Director of the Technical Center and the Administrative Assistant of the Technical Center. In addition, the questions were reviewed by Terry George, Assistant Superintendent. The questions were crafted to assess the qualifications of the candidates for the position. Grievant acknowledged that he considered the interview questions and process to be relevant to the position and to be fair.

7. Weight was given to the each candidate's interview performance in determining the candidate with the highest qualifications for the position.

8. The Director of the Technical Center and the Administrative Assistant of the Technical Center, Dan Johnson and John Daniels, served as an interview committee and asked each of the questions to each candidate. Responses were assessed individually by the committee, and the overall interview performance of each candidate was determined in rank order.

9. The candidate who received the highest interview performance ranking withdrew his application before a recommendation was made to fill the position. The intervenor was ranked second in interview performance and was recommended for the position. Grievant was ranked third in the interview rankings.

Discussion

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). "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).

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). "The grievance procedure . . . allows for an analysis of 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).

W. VA. CODE § 18A-4-7a requires that professional positions be filled by the most qualified applicant, as determined by the factors outlined in that section. 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;

(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;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) Relevant specialized training;

(6) Past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and

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

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 professional positions, 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 may determine that "other measures or indicators" is the most important factor. *Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998).

Additionally, nothing in the language of W. VA. CODE § 18A-4-7a restricts the area of measures or indicators, as long as they are factors "upon which the relative qualifications of the applicant may fairly be judged." Indeed, W. VA. CODE § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and

length of experience in assessing the relative qualifications of the applicants. *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993); *English v. Logan County Bd. of Educ.*, Docket No. 03-23-307 (Feb. 27, 2004). 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).

It is not usual for interview performance to be assigned significantly more weight when selecting high-ranking candidates under the first set of criteria contained in W. VA. CODE § 18A-4-7a. *Baker*, *supra*. The record established that the interview questions were developed by the Director of the Technical Center and the Administrative Assistant of the Technical Center. In addition, the questions were reviewed by Terry George, Assistant Superintendent. The questions were crafted to assess the qualifications of the candidates for the position. Grievant acknowledged that he considered the interview questions and process to be relevant to the position and to be fair.

Each of the factors contained in the first set of criteria was given consideration in evaluating the qualifications of the candidates. Under factor number 7, “[o]ther measures or indicators upon which the relative qualifications of the applicant may fairly be judged,” Respondent considered the results of a structured interview. The most important factor was calculated to be the candidate’s interview performance in determining the candidate with the highest qualifications for the position.

Grievant does make a valid point that he possesses a slight edge in qualifications

as it relates to the first four factors; however, Respondent was entitled to give factor number 7, or the structured interview, greater weight than the first four factors when making its hiring decision. In fact, the instant case mirrors other selection cases in which the Grievance Board has clearly indicated that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. The candidate who received the highest interview performance ranking withdrew his application before a recommendation was made to fill the position. The Intervenor was ranked second in interview performance and was recommended for the position. Grievant was ranked third in the interview rankings.

Finally, Grievant argues that since the interview process was not listed as a qualification on the posting it was inappropriate to use it as a criterion per W. VA. CODE § 18A-4-7a(o)(C). That paragraph provides that "[a]ny special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job." The structured interview itself did not amount to substantive criteria for the position. It was a measure for the evaluation of the qualifications of the candidates. This argument is without merit.

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 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. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

3. W. VA. CODE § 18A-4-7a requires that a county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; 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; the amount of course work and/or degree level in the relevant field and past performance evaluations and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

4. Boards of education may 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).

5. Once a board reviews the criteria required by W. VA. CODE § 18A-4-7a, it may determine that "other measures or indicators" is the most important factor. *Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998); *Baker v. Lincoln County Bd. of Educ.*, Docket No. 97-22-482 (Mar. 5, 1998).

6. Nothing in the language of W. VA. CODE § 18A-4-7a restricts the area of measures or indicators, as long as they are factors "upon which the relative qualifications of the applicant may fairly be judged." Indeed, W. VA. CODE § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993); *English v. Logan County Bd. of Educ.*, Docket No. 03-23-307 (Feb. 27, 2004).

7. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, or that Respondent acted in an arbitrary and capricious manner, or otherwise overstepped its broad discretion as described in W. VA. CODE § 18A-4-7a.

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 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: August 1, 2012

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Ronald L. Reece
Administrative Law Judge