

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**REBECCA RHETT,  
Grievant,**

**v.**

**Docket No. 2016-0006-MnIED**

**MINERAL COUNTY BOARD OF EDUCATION,  
Respondent.**

**DECISION**

Grievant, Rebecca Rhett, is employed by the Mineral County Board of Education as a regular full-time teacher. Her statement of grievance dated July 7, 2015, alleged the following:

On or about June 18, 2015, the Mineral County Board of Education approved a professional personnel placement for a third grade teaching position at Keyser Primary School. Grievant alleges this hiring was arbitrary and capricious, and violated statutes, regulations, and policies governing the hiring of teachers, including but not limited to, West Virginia State Code § 18A-4-7a and WVDE Policy 5000.

Grievant seeks the following relief:

Grievant seeks the third grade position at Keyser Primary School with any lost pay and benefits and any other relief deemed appropriate by the hearing examiner.

This grievance was denied at Level One by decision dated September 1, 2015. Grievant then appealed to Level Two. A mediation session was conducted on December 18, 2015. Grievant perfected her appeal to Level Three on January 4, 2015. A Level Three evidentiary hearing was conducted before the undersigned on May 20, 2016, at the Westover office of the Grievance Board. Grievant appeared in person and by her counsel,

Jeffrey G. Blaydes, Carbone & Blaydes, P.L.L.C. Respondent appeared by its Superintendent and by counsel, Howard E. Seufer, Jr., Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on July 20, 2016.

### **Synopsis**

Grievant filed this action following her non-selection for the position of a third grade teacher at Keyser Primary School. The hiring committee members and principal determined that the successful applicant provided superior answers to the questions asked in regard to third grade common core and curriculum. Both the faculty senate hiring committee and the school principal recommended the successful applicant, Stephanie Stephen, to fill the teaching vacancy. The county superintendent concurred with their recommendation and nominated Ms. Stephen to be hired by Respondent. In accordance with applicable law, the county board was required to appoint the successful applicant to the teaching vacancy at Keyser Primary School. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for a posted third grade classroom teaching position at Keyser Primary was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation.

The following Findings of Fact are based on the record of this case.

### **Findings of Fact**

1. In May of 2015, Respondent posted notice of vacancy in the position of third grade teacher at Keyser Primary School. The vacancy was the result of the retirement of a teacher.

2. Retired Keyser Primary School principal Karen Wegener indicated that third grade is the grade in which students first take a state summative assessment test for state accountability purposes. The results, which measure the performance of a school's third graders, are used to determine where a school falls on the new West Virginia A-F grading system for individual schools. Third grade also has its own common core standards.

3. Nineteen people applied for the job using the Respondent's on-line application program. The on-line program required applicants to state whether they met the standards of the job posting and to relate information about their teaching experience, education and training, academic performance, past evaluations, certifications, relevant specialized training, and seniority.

4. Grievant was among the candidates. Grievant had 17 years seniority and National Board for Professional Teaching Standards certification in early childhood education. Grievant had never taught third grade, never worked on third grade curriculum, had no experience with third grade testing, and had never been trained in third grade common core. At the time of application, she taught a split first/second grade class at Keyser Primary School.

5. Teacher Stephanie Stephen also applied. She had worked as a substitute for the Respondent for one year followed by one year of regular employment as a third grade teacher. Unlike any of the other candidates, she had experience teaching at the third grade level. In addition to teaching third grade, Ms. Stephen had experience with third grade testing, worked on third grade curriculum, was familiar with third grade common core standards, and designed activities and written lesson plans to go with the third grade

standards. At the time of application, Ms. Stephens was a third grade teacher at Respondent's New Creek Primary School.

6. After printing out the candidates' applications, Respondent's Director of Human Resources, Susan Grady, forwarded them to the school for review by the Principal and the school's Faculty Senate.

7. Ms. Grady also began using information on the applications to fill out a matrix for the candidates. She did not send the matrix to the school. Instead, it was a tool that she employed solely for the benefit of the Superintendent and Board in determining which candidate should be appointed to fill the third grade teaching vacancy.

8. Ms. Grady's matrix listed the applicants. For each of them, the matrix provided room to indicate how each qualified applicant rated on each of the eleven qualification criteria listed in WEST VIRGINIA Code § 18A-4-7a. Ms. Grady would ultimately complete the matrix to reflect the recommendations of the Principal and Faculty Senate, then supply the matrix to the Superintendent and Board.

9. When Karen Wegener, Principal of Keyser Primary School, received the applications, she reviewed them to identify the three strongest candidates, who would be interviewed. In doing so, Principal Wegener took into account the qualification criteria of WEST VIRGINIA Code § 18A-4-7a, the requirements of West Virginia Board of Education Policy 5000, and any third grade teaching experience possessed by the applicants.

10. On that basis, Principal Wegener determined that the three strongest candidates were Grievant, Stephanie Stephen, and a third candidate, Hannah Wingler. All three were then separately interviewed.

11. Prior to the interview, Grievant approached Principal Wegener and asked for assurance that Grievant would be selected for the third grade job. Grievant asked whether the Principal thought the Faculty Senate would recommend Grievant's appointment. Principal Wegener answered the question by saying that she thought it would be difficult for Grievant to get the Faculty Senate's recommendation.

12. The interview team included three of the school's third grade teachers. Their task was to recommend, on behalf of the school's Faculty Senate, one of the three finalists. The three teachers were joined for the interviews by Principal Wegener and the school's Assistant Principal, Barbara Kesner. Assistant Principal Kesner had already been appointed by Respondent to take over as principal of Keyser Primary School when Principal Wegener retired at the end of the 2014-2015 school year.

13. The interview team was provided with copies of the applications submitted by the three people who were to be interviewed. In advance of the interviews, the interview team formulated standard questions to be asked in each interview. Some of the questions expressly concerned the candidates' experience with third grade curriculum and the third grade summative assessment process.

14. After their review of the three finalists' applications, and following the interviews, both the Faculty Senate and the Principal recommended that Respondent fill the third grade vacancy with Stephanie Stephen. Both the Principal and the Faculty Senate considered third grade teaching experience and knowledge of third grade curriculum and testing to be of paramount importance.

15. Stephanie Stephen was judged by the team to have given an outstanding interview that demonstrated her familiarity and experience with what is required to

successfully teach and test third graders. From her application for the vacancy and from her interview, the team was impressed by her experience teaching third grade, her familiarity with third grade common core, her experience with third grade curriculum, and her work in designing activities and lesson plans to go with the third grade standards.

16. Grievant admittedly had no third grade teaching experience. Grievant had no training in third grade common core or curriculum.

17. Director of Human Resources Grady then added to her matrix the information from the Principal and Faculty Senate, the matrix reflected that Stephanie Stephen and Grievant were tied on the three WEST VIRGINIA CODE § 18A-4-7a qualifications criteria: certification, degree level in the appropriate field and past performance evaluations. The matrix showed that Grievant prevailed over Stephanie Stephen on four factors: experience in the required certification area, academic achievement, National Board certification and seniority. As for the factors of specialized training relevant to the performance of the job and other measures or indicators of relative qualifications, the Director's matrix simply referred to Grievant's and Ms. Stephen's application documents.

18. Giving equal weight to each of the first seven of nine qualifications criteria under WEST VIRGINIA CODE § 18A-4-7a, Grievant received 7 points and Ms. Stephen received 7 points. This calculation does award points to either candidate on the remaining two qualification criteria: specialized training relevant to the performance of the job, and other measures or indicators of relative qualifications.

19. Principal Wegener established that she, the Assistant Principal and three third grade teachers, considered Stephanie Stephen's specialized training in third grade curriculum standards, and what she had learned from working with third grade curriculum

and lesson plans, more relevant to the posted vacancy than Grievant's generalized training, none of which were shown to focus on third grade.

20. As a result, the interview team agreed that Stephanie Stephen could reasonably be considered to have been entitled to two more points for relevant specialized training and other indicators of relative qualification, for a total of 9 points as compared to Grievant's 7 points.

21. The Superintendent recommended, and the Board approved, Stephanie Stephen's appointment to fill the third grade vacancy at Keyser Primary School, effective with the 2015-2016 school year.

22. Grievant objects to Assistant Principal Kesner's participation on the interview team. Grievant raised no such objection during the interview process or before the Superintendent recommended that the Board appoint Stephanie Stephen to fill the posted vacancy.

23. Grievant claims that because the Assistant Principal is Stephanie Stephen's aunt, the Assistant Principal should not have participated on the interview team. The record demonstrated that it was the Principal, and not the Assistant Principal, charged with making a recommendation to the Board. The record also demonstrated that no other members of the interview team were aware of the alleged relationship, and, when questioned, the Assistant Principal testified that the alleged relationship did not color her treatment of the finalists.

24. The record established that Assistant Principal Kesner is not Stephanie Stephen's aunt. She was married to Stephanie Stephen's uncle in 1990, lived with him for four years, was separated from him for six years, and divorced him around 2000. Upon

separating from her former husband, Ms. Kesner was separated from his entire family, including Stephanie Stephen, who was but a child at the time.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

WEST VIRGINIA CODE § 18A-4-7a(a),(b) provides:

(a) A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with highest qualifications: Provided, That the county superintendent shall be hired under separate criteria pursuant to section two, article four, chapter eighteen of this code.

(b) In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

(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 required certification area;

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

(4) Academic achievement;

(5) In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;

(6) Specialized training relevant to the performance of the duties of the job;

(7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;

(8) Seniority;

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

(10) In the case of a classroom teaching position, the recommendation of the principal of the school at which the applicant will be performing a majority of his or her duties;  
and

(11) In the case of a classroom teaching position, the recommendation, if any, resulting from the process established pursuant to the provisions of section five, article five-a, chapter eighteen of this by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

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).

However, WEST VIRGINIA CODE § 18A-4-7a(d) provides, in pertinent part:

For a classroom teaching position, if the recommendations resulting from the operations of subdivisions (10) [recommendation by the school principal] and (11) [recommendation by the faculty senate], subsection (b) of this section are for the same applicant, and the superintendent concurs with that recommendation, then the other provisions of subsections (b) and (c) of this section do not apply and the county board shall appoint that applicant notwithstanding any other provisions of this code to the contrary.<sup>1</sup>

In the instant case, because the school Principal, the school's Faculty Senate and the Superintendent all recommended Stephanie Stephen for the posted third grade teacher vacancy at Keyser Primary School, the Board was required to appoint her to the job, regardless of the eleven-factor judgment of the candidate's relative qualifications under WEST VIRGINIA CODE § 18A-4-7a(b). See *Dye v. Wirt County Bd. of Educ.*, Docket No. 2016-0181-WirED (July 14, 2016).

In any event, even if the 11-factor assessment under WEST VIRGINIA CODE § 18A-4-7a(b) applied, Grievant has failed to demonstrate that she would have prevailed over the successful candidate. Both the Principal and the Faculty Senate considered third grade teaching experience and knowledge of third grade curriculum and testing to be of paramount importance. Principal Wegener established that she, the Assistant Principal and three third grade teachers, considered Stephanie Stephen's specialized training in third grade curriculum standards, and what she had learned from working with third grade curriculum and lesson plans, more relevant to the posted vacancy than Grievant's

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<sup>1</sup>West Virginia Board of Education Policy 5000, 126 C.S.R. 126 § 6.4 (2013), contains the same language concerning the hiring of classroom teachers.

generalized training, none of which were shown to focus on third grade. As a result, the interview team agreed that Stephanie Stephen could reasonably be considered to have been entitled to two more points for relevant specialized training and other indicators of relative qualification, for a total of 9 points as compared to Grievant's 7 points. Here, where one or more permanently employed instructional personnel did apply, the record demonstrated that the selection of Stephanie Stephen was justified by the 11-factor analysis, giving equal weight to each of the first nine qualification criteria, and double weight to the recommendations of the Principal and Faculty Senate.<sup>2</sup>

Finally, applicable law did not prohibit Assistant Principal Kesner from participating with Principal Wegener on the interview team. The statute in question, WEST VIRGINIA CODE § 18A-2-1(a)(2), bars a principal from recommending for employment an individual who is related to the principal as an aunt. The Principal, rather than the Assistant Principal, made the recommendation under WEST VIRGINIA CODE § 18A-4-7a that Stephanie Stephen be appointed to fill the third grade teacher vacancy at Keyser Primary School. In addition, the Assistant Principal was not then the successful applicant's aunt. Her divorce from Stephanie Stephen's uncle 15 years earlier ended that relationship. There is no evidence in the record to demonstrate that the Assistant Principal's long ago marriage to Ms. Stephen's uncle in any way affected the outcome of the hiring process.

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<sup>2</sup>WEST VIRGINIA CODE § 18A-4-7a(c) requires that

if one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, each criterion under subsection (b) of this section shall be given equal weight except that the criterion in subdivisions (10) and (11) shall each be double weighted.

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 her 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. "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).

3. WEST VIRGINIA CODE § 18A-4-7a(d) provides, in pertinent part:

For a classroom teaching position, if the recommendations resulting from the operations of subdivisions (10) [recommendation by the school principal] and (11) [recommendation by the faculty senate], subsection (b) of this section are for the same applicant, and the superintendent concurs with that recommendation, then the other provisions of subsections (b) and (c) of this section do not apply and the county board shall appoint that applicant notwithstanding any other provisions of this code to the contrary.

4. In circumstances where the recommendation of the school principal made in accordance with WEST VIRGINIA CODE § 18A-4-7a(b)(10), and the recommendation of the faculty senate made in accordance with WEST VIRGINIA CODE § 18A-4-7a(b)(11), are

for the same applicant, and the county superintendent concurs with that recommendation, WEST VIRGINIA CODE § 18A-4-7a(d) explicitly nullifies the applicability of the provisions in subsections (b) and (c) of WEST VIRGINIA CODE § 18A-4-7a.

5. 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).

6. 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, 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).

7. Grievant failed to establish, by a preponderance of the evidence, that her non-selection for a posted third grade classroom teaching position at Keyser Primary was arbitrary and capricious, an abuse of Respondent's discretion, or otherwise contrary to any applicable law, rule or regulation.

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 (eff. July 7, 2008).

**Date: August 24, 2016**

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**Ronald L. Reece**  
**Administrative Law Judge**