CHRIS BAKER,

Grievant,

v. **Docket No. 97-22-482**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., Chris Baker (Grievant) filed this grievance against Respondent Lincoln County Board of Education (LCBE) on September 3, 1997. Grievant contends LCBE violated W. Va. Code § 18A-4-7a when it selected another professional employee to fill the position of Principal K-12 at LCBE's Hamlin Junior/Senior High School (HHS), and through the circumstances under which the position was posted. The grievance was denied at Level I, and Grievant appealed to Level II where an evidentiary hearing was conducted on September 17, 1997. Thereafter, the grievance was denied by the Superintendent's designee, Charles McCann, on October 8, 1997. Grievant appealed to Level III where LCBE waived participation in accordance with W. Va. Code § 18-29-4(c) on October 20, 1997. Grievant appealed to Level IV on October 31, 1997. Following a continuance for good cause shown, an evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on January 12,1998. The parties elected to submit post-hearing briefs, and this matter became mature for decision on February 4, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at both levels.

FINDINGS OF FACT

1. Grievant is employed by the Lincoln County Board of Education (LCBE) as Principal of Branchland Elementary School.

2. During the 1996-97 school year, and for some period of time prior to that, LCBE operated two separate schools, Hamlin Elementary School (HES) and Hamlin High School (HHS). The two schools are proximately located on the same "campus."

3. During the 1996-97 school year, Charles McCann was Principal of HES and Dwight Colburn was Principal of HHS. Sometime in July 1997, LCBE abolished the HES Principal's position held by Mr. McCann, leaving Mr. McCann employed by LCBE in another position he already held, Director of Drug Free Schools.

4. After LCBE abolished the position of Principal at HES, it applied to the West Virginia Board of Education to combine the two schools. On August 14, 1997, the state board approved a single K-12 school at Hamlin. See Ex 4 at L II. LCBE never took any action to transfer Mr. Colburn out of the HHS Principal's position.

5. On August 8, 1997, LCBE posted a newly-created position of Principal at the combined K-12 Hamlin School. Grievant timely applied for this position. 6. Grievant was interviewed for the Hamlin K-12 Principal's position by LCBE Superintendent Rick Powell. The interview included providing written answers to two essay questions. Grievant acknowledged that he was not able to answer one of the questions effectively because it dealt with a new subject peculiar to secondary schools on which he had not received any training.

7. The newly-created K-12 HHS Principal's position was awarded to the only other applicant, Mr. Colburn.

8. Grievant has nineteen years of administrative experience, with twenty-four years of experience in the school system. Mr. Colburn has five years of administrative experience, including four years as an Assistant Principal and one year as a Principal at HHS. He has eleven years experience in the school system.

9. Both Grievant and Mr. Colburn hold appropriate administrative certifications, as well as various teaching certifications in specific subject-matter areas. Both Grievant and Mr. Colburn received satisfactory evaluations for the two years prior to the posting.

10. Mr. Colburn has a master's degree plus thirty hours in Mathematics. Grievant has a master's degree plus forty-five hours in Education.

11. Grievant's administrative experience as a Principal has primarily been at the elementary level, with some experience as Principal at a K-8 school.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v.McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Filling vacancies for administrative positions, including Principals, is accomplished under the more flexible standards contained in the so-called "first set of factors" in W. Va. Code § 18A-4-7a:

> 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 degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

* * *

"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., 177 W. Va. 145, 351 S.E.2d 58 (1986). The selection of candidates for administrative positions is not simply a mechanical or mathematical process. See Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990); Villers v. Kanawha County Bd. of Educ., Docket No. 97-20- 294 (Jan. 30, 1998). Thus, W. Va. Code § 18A-4-7a permits county boards of education to determine the weight to be applied to each of the factors listed above in assessing a candidate's qualifications for administrative positions, so long as they do not abuse their discretion. E.g., Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29,1997); 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). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

The record indicates that Grievant had more total experience and substantially more administrative experience as a Principal than the successful applicant. However, W. Va. Code § 18A-4-7a permits school boards to look beyond such factors as experience and seniority when selecting applicants to fill vacancies in administrative or management positions. Villers, supra. Indeed, the Code allows the school board to consider "other measures or indicators upon which the relative qualifications of the applicant may be fairly judged." Further, while each factor specified in the first set of factors of § 18A-4-7a must be considered, the board is free to give consider one factor as more important than another. See Saunders, supra.

Superintendent Powell testified that he considered all of the factors required by the Code, but determined that Grievant was lacking in experience and knowledge regarding secondary school administration, which Superintendent Powell concluded was more critical to the position in question than elementary school administration, an area in which Grievant was tacitly acknowledged to be superior to the successful candidate. Superintendent Powell also expressed reservations concerning Grievant's admission during the interview that his greatest weakness was a "lack of tact," because that could e a significant liability in dealing with parents at the secondary level. While another individual might have selected Grievant for the position at issue based upon his greater experience as an administrator, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Villers, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Grievant failed to establish that his qualifications were so superior to Mr. Colburn's that LCBE's failure to select him as the K-12 HHS Principal was necessarily an abuse of the considerable discretion extended school boards when making such professional determinations. See Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-398 (Jan. 30, 1991).

Nonetheless, given the specific circumstances in which this selection was accomplished, the undersigned Administrative Law Judge is compelled to conclude that Grievant was not provided a meaningful opportunity to compete for the position at issue. This conclusion primarily results from

LCBE's flawed attempt to combine two positions to create the "vacancy" at issue without taking proper action to transfer the employees who held the positions being combined.

LCBE sought to combine two Principal positions for an elementary school and a junior/senior high school which are located in virtually adjacent facilities. (See footnote 1) One of the incumbent Principals, Mr. McCann, was assigned to another position, allowing LCBE to properly eliminate his position as Principal of Hamlin Elementary. (See footnote 2) However, the otherPrincipal, Mr. Colburn, was not placed on transfer, remaining as the incumbent Hamlin Junior/Senior High Principal. Accordingly, had LCBE selected any applicant other than Mr. Colburn for the position of Principal for the combined K-12 HHS, and Mr. Colburn did not elect to waive his right to notice of transfer under W. Va. Code § 18A-2-7, LCBE would have two Principals at HHS for at least the 1997-98 school year, defeating its effort to promote organizational efficiency while reducing expenses. In such circumstances, Mr. Colburn's selection as Principal for the combined HHS would appear to be a foregone conclusion, without regard to the relative qualifications of the two candidates.

When the hiring process is flawed because no meaningful review of the relative qualifications of the candidates has been conducted, this constitutes an arbitrary and capricious selection decision. Cromley v. Mason County Bd. of Educ., Docket No. 94-26- 573 (Apr. 27, 1995). See Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996); Goodwin v. Kanawha County Bd. of Educ., Docket No. 93-20-260 (Mar. 14, 1994). Nonetheless, because Grievant failed to demonstrate that he would inevitably have prevailed as the successful applicant, the proper remedy in this situation is for the county board to provide proper notice to Mr. Colburn that his position is being eliminated, and place him on proposed transfer, consistent with its lateral transfer policy, and then repost the position, providing Grievant, Mr. Colburn, and any other qualified applicants, an opportunity to meaningfully compete for the position under the "best qualified" standard inW. Va. Code § 18A-4-7a. See Dunfee v. W. Va. Dept. of Human Serv., Docket Nos. 89- DHS-40/41 (June 12, 1989).

Consistent with the foregoing discussion, the following conclusions of law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket

No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the highest qualifications. In making its selection, the board must give consideration to appropriate certification, experience relevant to the position, course work and degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the relative qualifications of the applicants may be fairly judged. County boards have wide discretion in choosing administrators once they have reviewed the criteria in W. Va. Code § 18A-4- 7a. Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W. Va. 1991). 3. Grievant failed to establish that he was more qualified than the successful applicant for the K-12 HHS Principal's position at issue in accordance with the requirements of W. Va. Code § 18A-4-7a. See Pockl, supra; Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-398 (Jan. 30, 1991).

4. When the hiring process is flawed because no meaningful review of the relative qualifications of the candidates has been conducted, this constitutes an arbitrary and capricious selection decision. Cromley v. Mason County Bd. of Educ., Docket No. 94- 26-573 (Apr. 27, 1995). See Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996); Goodwin v. Kanawha County Bd. of Educ., Docket No. 93-20-260 (Mar. 14, 1994). Where the county board would have necessarily violated the notice and hearing provisions in W. Va. Code § 18A-2-7 by selecting any applicant other than the applicant who already held a portion of a "combined" position, Grievant was not provided a meaningful opportunity to compete for the posted vacancy.

Accordingly, this Grievance is **GRANTED**, **IN PART**. Respondent Lincoln County Board of Education is hereby **ORDERED** to repost the position of K-12 Principal at Hamlin High School, to be filled in accordance with W. Va. Code § 18A-4-7a, as soon as the Lincoln County Board of Education has completed all appropriate notices and related action required to place Dwight Colburn, the incumbent Principal at Hamlin High School, on notice of possible transfer, as required by W. Va. Code § 18A-2-7.

Any party may appeal this decision to the Circuit Court of Lincoln County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days ofreceipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: March 5, 1998

Footnote: 1

The record indicates that the high school building and elementary school building are adjacent, while the junior high school building is directly across the street from the other two school facilities.

Footnote: 2

To the extent Grievant complains that Mr. McCann's position as HES Principal hadnot been properly vacated as of the time of the posting, this contention is without merit. Mr. McCann was not a candidate for the combined K-12 Hamlin Principal position, and his incumbency had no bearing on filling the new position. Moreover, Superintendent Powell credibly testified at Level IV that LCBE eliminated the position formerly held by Mr. McCann in July 1997, prior to the posting at issue.