STEPHEN R. PACK,

Grievant,

v. DOCKET NO. 98-45-097

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent, and

HARRY KEATON,

Intervenor.

DECISION

This grievance was filed by Stephen R. Pack (Grievant) against Summers County Board of Education (SBOE)(Respondent), alleging that a violation of W. Va. Code § 18A-4-7a occurred when Respondent did not select him as principal of Summers County High School. (See footnote 1) Grievant believes he is more qualified than the successful candidate, Intervenor Harry Keaton (Keaton)(Intervenor). Grievant requests instatement into the position, back pay, benefits, and attorney fees.

The grievance was denied at Level I by Immediate Supervisor Vickie Hinerman on March 28, 1997. A Level II hearing was held on February 25, 1998. Grievant was represented by Steve Angel of the West Virginia Federation of Teachers, and Respondent was represented by Kathryn Bayless, Esq. Intervenor Keaton was represented by Jerry A. Wright, Esq. The grievance was denied at Level II by Richard Lawrence on March 11,1998. On March 26, 1998, SBOE waived the grievance to Level IV. At Level IV, both parties agreed to submit this grievance on the record developed at Levels I and II. The parties were given until October 24, 1998, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date.

The following Findings of Fact are made based upon a preponderance of the evidence presented at Levels I and II.

FINDINGS OF FACT

1. Grievant is a homebound teacher employed by Respondent SBOE. Intervenor Keaton was the successful applicant for the position of principal of Summers County High School.

2. On January 21, 1997, SBOE posted a position vacancy for principal of Summers County High School. The position was re-posted on January 30, 1997, because one of the applicable statutory selection factors, academic achievement, had been inadvertently omitted from the original posting. Four persons, including Grievant and Intervenor, applied for the vacancy.

3. The selection process was controlled by the first set of factors in W. Va. Code § 18A-4-7a.

4. The minimum qualifications listed in the second posting were a teaching certificate with appropriate endorsements, two years experience as a teacher or administrator in grades seven through twelve, a Masters degree in administration or related field, a principal's certificate for grades seven through twelve, and a vocational administrator's certificate for grades five through adult. The posting also indicated that applicants would have to meet the requirements for principalship imposed by the NorthCentral Association of Colleges and Secondary Schools (North Central).

7. A hiring committee consisting of Superintendent of Schools Charles Rodes, James Irwin, Robert Mazzella and Vickie Hinerman interviewed the four candidates and assigned them scores of one or zero in the first seven of the eight factors. (See footnote 2)

8. Since each applicant had appropriate certification, satisfactory evaluations and a Masters degree, each was assigned one point in each of those factors. In the factors of academic achievement, amount of course work in administration, amount of experience relevant to administration, and relevant specialized training, only the most highly qualified candidate received a point.

9. The eighth factor, other measures or indicators upon which the relative qualifications of the applicant may fairly be judged, consisted of an interview with seven questions. The interview questions were written in advance of the interviews. The first question required a written response.

10. This system accorded factor eight equal weight with the first seven factors. 11. Using this system, a perfect candidate would have scored 14 points.

12. Grievant scored seven points during the selection process. Intervenor Keaton scored eight points. Another candidate scored five points. Candidate Oxley scored four points.

DISCUSSION

Grievant bears the burden of proving his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991).

The parties agree that the selection process is governed by the flexible standards in the “first set of factors” set forth in W. Va. Code § 18A-4-7a. Fitro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Cutlip v. Braxton County Bd. of Educ., Docket No. 92-04-406 (Nov. 30, 1992).

W. Va. Code § 18A-4-7(a) provides:

> 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, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

While each of these factors must be considered, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson, supra; Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994); See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v.Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). A county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

West Virginia Code §18A-4-7a requires that when a decision concerning the hiring of professional personnel is made, Respondent must review the credentials of the candidates in relation to the factors set forth, to determine the applicant with the highest qualifications. However, an applicant

could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Because a board is free to give whatever weight it deems proper to various credentials of the candidates, and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such. Jenkinson, supra; Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986), See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not simply substitute his judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (W. Va. 1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidatesfor vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper, supra. See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29- 447 (Feb. 18, 1997). This Board's function is to serve as a reviewer of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

To obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover, supra; Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990). See Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

Grievant contends that the selection of Intervenor Keaton as principal of Summers County High

School was arbitrary, capricious, and flawed. Grievant argues that he was the most qualified applicant for the position, that the computation of the scoring matrix was not necessarily valid, that there was no tie breaking process, that standards of selection in the job posting gave an unfair advantage to one or more applicants, that one or more applicants were permitted to attend courses in relevant specialized training that he was not, and that adding a factor to the second job posting weighted the selection process in favor of one or more other candidates. From the record in this grievance, it is clear that the selection of Keaton, instead of Grievant, as the new principal of Summers County High School was not arbitrary, capricious, or flawed. A searching and careful inquiry into the selection process that SBOE chose to apply to the candidates for the position shows that it was legally sufficient.

Grievant presented no evidence to support his contentions that the computation of the scoring matrix was not necessarily valid, that there was no tie breaking process, that standards of selection in the job posting gave an unfair advantage to one or more applicants, and that one or more applicants were permitted to attend courses in relevant specialized training that he was not. At Level II, Grievant called no witnesses, but instead relied solely on his own testimony regarding his belief that the selection process was deficient.

Mere allegations alone, without substantiating facts, are insufficient to prove a grievance. Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-112A (June 26, 1998), Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97- BOT-359 (Apr. 30, 1998), See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995).

Grievant failed to show that SBOE's computation of the scoring matrix was invalid, and the undersigned Administrative Law Judge is unable to find any errors in SBOE's scoring. Grievant's contention that no tie breaking method existed is not supported by any evidence, and is irrelevant, because no tie occurred. His complaint that one or more applicants were permitted to attend courses in relevant specialized training that he was not
was similarly unsupported by any evidence. Respondent, however, proved that Grievant chose not to attend at least one such training for personal reasons. Finally, Grievant contends that adding a factor to the second job posting weighted the selection process in favor of one or more other candidates. The position was re-posted on January 30, 1997, because one of the applicable statutory selection factors, academic achievement, had been inadvertently omitted from the original

posting.

However, Grievant testified at Level II that he was unaware that W. Va. Code § 18A-4-7(a) sets forth the factors which SBOE must use to select the most highly qualified candidate. One of these factors is academic achievement, and SBOE can hardly be faulted for including this factor in its corrected posting. Grievant's argument on this point must also fail. Grievant failed to prove, by a preponderance of the evidence, that he was the most qualified applicant for the position

SBOE was fortunate to have had a very good group of applicants from which to choose. Given the fact that there is only one position as a high school principal available in Summers County, it is not surprising that grievances would be filed, regardless of SBOE's choice. However, SBOE's selection process was legally sufficient. It was not arbitrary, capricious, or flawed.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. County boards of education have substantial discretion in matters relating to the selection of school personnel, so long as they act reasonably, in the best interests of the school, 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), See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

3. A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

4. To obtain relief, a grievant may establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. With regard to the hiring of new professional personnel, boards of education must select the applicant with the highest qualifications. In evaluating qualifications, a board of education must consider each of the seven factors, the “first set of factors,” set forth in W. Va. Code §18A-4-7a:

appropriate certification, experience relevant to the position, degree level, course work and degree level in the relevant field, academic achievement, relevant specialized training, past performance evaluations, and other measures or indicators upon which the relative qualifications of the applicants may fairly be judged. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

6. Respondent's decision to select Intervenor Keaton as principal of Summers County High School was not arbitrary, capricious, or flawed.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to theCircuit Court of Summers County, and such appeal must be filed within thirty (30) days of receipt 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated November 24, 1998

Footnote: 1 *Candidate Charles S. Oxley also grieved his non-selection to the position. Oxley v. Summers County Bd. of Educ., Docket No. 98-45-104 (Nov. 19, 1998). By order dated July 7, 1998, Grievant Oxley's grievance was consolidated, pursuant to Procedural Rule 156-1-4.3 of the Board, with the instant grievance.*

Footnote: 2 *SBOE divided the factor "the amount of course work and/or degree level in the relevant field and degree level generally" into two factors.*