DR. FRIEDA OWEN,

Grievant,

v. DOCKET NO. 97-54-537

WOOD COUNTY BOARD OF EDUCATION,

Respondent,

and

F. GALE HAMMETT, JR.,

Intervenor.

DECISION

This grievance was initiated by Grievant Dr. Frieda Owen against Respondent Wood County Board of Education, alleging a violation of W. Va. Code § 18A-4-7a occurred when Respondent filled the newly created position of Assistant Superintendent, Pupil/Personnel Services. Grievant believes she is more qualified than the successful applicant, Intervenor F. Gale Hammett, Jr., but was not selected because of her age and favoritism. She also alleged a flaw in the selection process. Grievant requested instatement into the position and backpay. (See footnote 1) The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Wood County Board of Education ("WBOE") as Supervisor for Secondary Language Arts, Foreign Language and Gifted Education, and as principal of Rayon Center. She has been employed by WBOE for 25 years, and is 67 years old.

2. Prior to assuming his current position, Intervenor served as Director of Special Projects and Supervisor of Health, Physical Education and Safety. He is 57 years old, and has been employed 33 years by WBOE.

3. As part of a reorganization of the Central Office, on June 27, 1997, WBOE posted the newly

created position of Assistant Superintendent, Pupil/Personnel Services. This position would be responsible for personnel, testing evaluation, health services, public relations, accreditation, guidance, drug-free schools, technology, and data management. Superintendent Dr. Daniel B. Curry made it known that one of the goals of the reorganization was to reduce personnel as employees resigned or retired.

4. Grievant, Intervenor, and four other persons applied for the position.

5. At Superintendent Curry's direction, a Screening Committee was appointed by Assistant Superintendent Jim Morrison to conduct interviews and make recommendations to him. The Screening Committee members were a principal and three employees who would be supervised by the new Assistant Superintendent.

6. The members of the Screening Committee were directed by the Superintendent to recommend to him the top three candidates for the position. All those recommended were to be capable of performing the job, but they were not to rank them.

7. All applicants were interviewed by the Screening Committee. Each member of the Screening Committee asked each applicant interviewed the same questions, and each candidate was assigned to write a press release.

8. The Screening Committee reviewed the application materials and prepared a matrix to score the applicants in the statutory criteria of certification, experience, course work and degree level, academic achievement, relevant specialized training, and past performance evaluations. The Committee also considered seniority. Each category was assigned the same weight.

9. The Screening Committee gave each applicant credit in the category of relevant specialized training, because the members could not verify all the training listed by the applicants, or the content of the workshops or seminars listed. All applicants had stated on their applications that they had relevant specialized training. The posting did not list any particular training which was required.

10. The Screening Committee gave all applicants credit in the category of performance evaluations, based upon their answers in their applications that they had received satisfactory performance evaluations for the last two years.

11. The Screening Committee was struggling to provide three recommendations, and submitted four names to Superintendent Curry, including Grievant and Intervenor, which he acceptedas their recommendation. The Committee believed all four persons recommended were

qualified for the position. The recommendations were not ranked.

12. The Screening Committee provided Superintendent Curry with the completed matrix, showing how the applicants had scored in each of the criteria. Grievant and Intervenor were tied on the matrix. The Screening Committee also provided Superintendent Curry with a list of strengths of the four candidates which the Committee had compiled, and the writing assignment completed by each of the four. The Committee did not evaluate the writing assignment.

13. Superintendent Curry interviewed each of the four remaining applicants, and asked each of them the same three questions. He also gave each the same writing assignment. Superintendent Curry did not review the applicants' resumes, applications, or performance evaluations. He relied upon the Screening Committee to review the resumes for the candidates' initial qualifications in completing the matrix. Superintendent Curry believed the Screening Committee had determined that all four recommended candidates were highly qualified, and he had to determine which one stood out. He felt he needed to find out what was not on the resume, which was how much they understood the reorganization, how they would work with the new department, how they would organize the new department, and what they would do with the new department.

14. Grievant has a Ph.D. in English education. Intervenor holds a Master's Degree in Education, and has acquired an additional 60 course hours.

15. Grievant worked five years as a newspaper reporter, eleven years as a college instructor, three years as Director of Community Relations for Owensboro City Schools in Kentucky, 11 years as a teacher, 18 years as Supervisor of Secondary English Language Arts, and three yearsas Principal of Rayon Center. Intervenor has 28 years of administrative experience with WBOE, and five years of teaching experience, with two of those years in health and physical education.

16. Grievant has leadership training and experience, and has received many leadership awards.

17. Grievant has interviewed applicants for vacant positions, made hiring decisions, completed performance evaluations, and attended a number of workshops on personnel and evaluations. She has worked with the personnel department in some training of beginning teachers and mentoring. Intervenor has been a level two hearing officer since 1989, and has completed performance evaluations.

18. Grievant has participated in and arranged for training in how to administer medication to

students, and is familiar with state requirements for health services. Intervenor has been a supervisor of health, physical education and safety since 1969.

19. Grievant took graduate courses in counseling, and received training in peer mediation and conflict resolution.

20. Grievant has worked in testing as a teacher and department chair, and in analysis of test scores. She assisted in developing the in-depth analysis used to measure student achievement in English Language Arts. She served on the State Advisory Committee for the West Virginia Step, and helped train teachers in scoring West Virginia Step.

21. Grievant worked on the technology committee for Wood County Schools, and on the Success Committee for computers in secondary schools. She has worked with the technology director at Rayon Center to prepare a technology plan and develop the Internet lab. She has used the MIS and WVEIS computer data systems for assessment and data collection. 22. Grievant has worked 15 years as a deputy coordinator for accreditation. She works with another employee in staff development related to accreditation, and monitoring the accreditation process, preparing staff and principals for site visits, and has conducted on-site visits for the State Department of Education. She has been trained by the State Department of Education in accreditation, and has been a presenter at a training session.

23. Grievant received training in strategic planning, and served on the administrative team, the action team for communication, and the communications team for curriculum in the strategic planning process.

24. Intervenor has served on numerous committees involving all aspects of the Wood County School System throughout his 33 years of employment.

25. Grievant told Superintendent Curry during her interview that it might not be appropriate for her to be a media representative, because her husband is Editor of the Parkersburg Sentinel.

26. Grievant has a reputation for playing a "devil's advocate" role, and brought this to Superintendent Curry's attention during the interview, indicating she thought she could control this tendency. This character trait concerned Superintendent Curry, particularly since this would be a key position in maintaining good community relations while working through a crisis.

27. Superintendent Curry had observed that Grievant did not handle rejection well and could be intimidating, and considered this in evaluating the candidates, as he believed the Assistant

Superintendent would often face rejection of his or her ideas. Superintendent Curry also had doubts about whether Grievant would be able to fully support decisions with which she disagreed. 28. When Grievant explained to Superintendent Curry during the interview that she wanted the posted position because of the challenge, he responded using words to the effect, "Oh? Not to sweeten your salary for retirement?" He asked Intervenor the same question.

29. Superintendent Curry wanted to hire someone who was going to stay in the position a few years. He knew that this position would mean a significant salary increase to both Grievant and Intervenor, and that if either stayed in this position five years it would improve his or her retirement income.

30. Superintendent Curry had observed Grievant and Intervenor in the Central Office over his two year tenure. He liked the hands on approach taken by Intervenor in dealing with visitors to the Central Office, in that he tried to solve their problems, rather than simply sending them to someone else.

31. Grievant saw the posted position as a leadership role. Intervenor approached the position as though he would do a lot of the work required of the department, as well as supervise the work of other personnel in the department. Superintendent Curry also viewed the position this way.

32. Intervenor was not provided advance notice of when the position would be posted. Intervenor was not provided with any information regarding the position or Superintendent Curry's reorganization plans, which was not also available to all other applicants. Superintendent Curry did not receive Intervenor's application personally, or review it.

33. Both Intervenor and Grievant were well qualified for the position.

34. Superintendent Curry recommended Intervenor as the best candidate for this particular position, and WBOE approved his recommendation.

Discussion

Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). In this case, Grievant bears a heavy burden, as the selection process for filling an administrative position is governed by the "first set of factors" set forth in W. Va. Code § 18A-4-7a, which 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, this Code Section permits county boards of education to 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. Thus, 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).

> All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. 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. Again, 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.

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. 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 substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 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 candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper, supra. 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).

Grievant has excellent qualifications. She is well educated and articulate, and has many life

experiences. She has a Ph. D., while Intervenor does not. She has actively participated in the growth of the Wood County Schools, as has Intervenor. She has some experience and training in all areas for which this Assistant Superintendent would be responsible, and is particularly well qualified in the areas of accreditation and testing, while Intervenor is particularly well qualified in personnel and health. She would be an asset in any administrative position, and Wood County is lucky to have such a qualified employee. However, Grievant failed to establish that her qualifications were so superior to Intervenor's that WBOE's failure to select her for the Assistant Superintendent positionwas an abuse of the considerable discretion extended county boards of education when making such professional determinations.

Grievant made a number of arguments. She alleged a deficiency in Superintendent Curry's evaluation of her qualifications because he failed to read her resume, application or past performance evaluations. However, Grievant presented no basis to support her assertion that he was required to do so. That is what the Screening Committee was to do; and it did so. If Superintendent Curry were required to check everything the Screening Committee did in preparing the matrix, there really was no reason for the Screening Committee in the first place. Grievant's argument in this regard is flatly rejected. See Amick and Friend v. Nicholas County Bd. of Educ., Docket No. 96-34-354 (June 6, 1997).

Grievant argued that the matrix did not accurately reflect the candidates' specialized training, experience or performance evaluations. Grievant argued she should have received more credit than Intervenor in these categories, as she had excellent performance evaluations, and she had listed many relevant workshops on her resume, while Intervenor had listed none. The Screening Committee gave each applicant credit for evaluations and relevant specialized training, as each applicant stated he or she had specialized training and had received satisfactory performance evaluations. Intervenor testified at the hearing that he also had attended many relevant workshops, but had not listed them on his resume.

Grievant has not proven WBOE violated any statute, policy, rule or regulation in assessing the statutory criteria in a quantitative, rather than a qualitative manner, or that this was an arbitrary or capricious act. See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29,1997). The statute simply requires that these areas be considered, which the Screening Committee did.

Grievant argued that Superintendent Curry changed his explanation of why he selected Intervenor

three times over the course of the grievance proceedings, and this proved the selection was arbitrary and capricious. Grievant noted that Superintendent Curry told her in the informal conference that specialized training was the tie-breaker; that at the Level II hearing he focused on how the candidates would organize the department, whether they understood his vision of the reorganization, and whether Grievant could control her opinions; and that at the Level IV hearing he focused on Intervenor's interpersonal skills, personnel experience, administrative experience, seniority, and working knowledge of the departments.

The undersigned was not privy to the informal conference; however, Grievant testified that Superintendent Curry had stated at the informal conference that specialized training was the tie-breaker, and then referred to Intervenor's interpersonal skills in dealing with irate or concerned citizens, and that he felt he could work well with Intervenor. At the Level II hearing Superintendent Curry again noted Intervenor's interpersonal skills and approach to and understanding of the reorganization, while contrasting Grievant's reputation as a "devil's advocate" or "rabble rouser," her reaction to rejection of her ideas, and her lack of understanding of the reorganization. He also noted that on occasion he had found her intimidating. All of these relate to interpersonal skills, and the Superintendent's belief that he could work well with Intervenor in the reorganization. He also noted with regard to specialized training, Intervenor's experience and training in school law, personnel law, grievances, other complaints, health services and education, and physical education. At the Level IV hearing, Superintendent Curry again referred to Intervenor's interpersonal skills, including hisbetter performance in the interview, Grievant's reputation, and that Grievant did not seem to understand his vision for the reorganization. He added to that Intervenor's experience in personnel issues, that he had a good working knowledge of all departments, and that he had more experience as an administrator and more seniority. Superintendent Curry's stated reasons for choosing Intervenor have remained constant, with some additional points in Intervenor's favor added at Level IV. The undersigned does not find these few additions to his testimony to prove his decision or that of WBOE in approving his recommendation, was arbitrary and capricious.

Grievant argued that Superintendent Curry's evaluation of the interpersonal skills of Intervenor and Grievant does not fall within the category of other measures or indicators, and could not be considered. Grievant cited Dillon v. Board of Education of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986), in support of her position, arguing that such subjective measures may not be used in this

analysis. In Dillon, however, the facts indicated that the selection system had perhaps been manipulated to benefit the Superintendent's sister-in-law. There is no indication of manipulation of the system in this case. Subsequent Supreme Court cases have noted the substantial discretion afforded school boards (See Hyre, supra), and emphasized the importance of the most qualified person being placed in the position (See Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995)). In Jones v. Monroe County Board of Education, 190 W. Va. 646 (1994), our Supreme Court of Appeals stated in Syllabus Point 2, "[i]n general, the higher the governmental position to which a candidate for employment aspires in terms of its policy-making authority, the more legitimate that candidate's positions on public issues become as criteria for employment." Thus the board of education's act was upheld when it rejected an applicant for Director of Curriculum andInstruction, because he had actively opposed school consolidation, and the superintendent believed this opposition would undermine the board's implementation of school consolidation.

It is important to remember that after application of the statutory criteria, Grievant and Intervenor were considered equally qualified, and the tie had to be broken. The determination to be made was who was best qualified for this particular position. Inasmuch as the position to be filled would require good interpersonal skills, Superintendent Curry's evaluation of the candidates' skills in this area was a reasonable method of choosing which candidate was best qualified for this particular position.

Grievant argued Superintendent Curry's conclusion that Intervenor understood his vision of the reorganization better was contrary to the evidence. Superintendent Curry noted Grievant's surprise in the interview when he asked her which of the areas under the new Assistant Superintendent she would take on as her own job, that Grievant thought one of the retiring employees would be replaced rather than those duties being reallocated to the remaining personnel in order to reduce staff, and that he had to coach her during the interview to obtain responses to his questions about the reorganization; while Intervenor believed in a team approach where he would take on certain duties himself and supervise other duties, and understood that the retiring employee would not be replaced. Grievant noted that the job description contained no requirement that the Assistant Superintendent perform some of the department tasks, the organizational chart presented by the Superintendent to WBOE did not indicate a reduction in staff in this department, and the Assistant Superintendent was supposed to have the discretion to reorganize the department, and the Superintendent had no preconceived notion as to how this would be achieved. The organizational chart could not indicate

a reduction in staff in the department because this would be achieved by retirement and resignation. Obviously Superintendent Curry could not foresee the order of retirements and resignations so that he could determine where staff would be reduced. One of the goals of the reorganization, however, was to reduce staff by retirements and resignation, which Grievant did not seem to understand could apply to this department. The job description lists a number of duties, including supervisory duties. It is understandable that Grievant would see the position as a supervisory position, but it is not the only conclusion which could be drawn from the job description. As Superintendent Curry explained it, Intervenor simply interviewed better than Grievant. The fact that she was surprised in the interview by Superintendent Curry's questions because she had a different view of the position does not demonstrate a flaw in the selection process, abuse of discretion, or an arbitrary and capricious act, but is a normal part of the interview process for which an interviewee must be prepared.

Grievant also pointed out that while Superintendent Curry was concerned about her ability to control her tendency to play devil's advocate, he did not want someone who would simply agree with him all the time; and that while he wondered whether she could support a decision with which she disagreed, he could not point to a single instance when she had not supported policy. She also believed she had superior interpersonal skills, having spent years in leadership positions, serving on committees, receiving awards, and receiving excellent performance appraisals. She argued that Superintendent Curry did not cite any evidence to support his assertion that Intervenor had stronger interpersonal skills.

Superintendent Curry was in the fortunate situation of having to choose from among four highly qualified candidates. It appears from the evidence that either Grievant or Intervenor couldhave performed the duties of the position well. Quite simply, Intervenor performed better in the interview than Grievant, and had demonstrated commendable interpersonal skills on the job which Superintendent Curry testified he had personally witnessed. Grievant had demonstrated a tendency to Superintendent Curry not to accept rejection well, was known as someone who played the devil's advocate, and could be intimidating. Superintendent Curry believed Intervenor's style was more appropriate to the position, and Superintendent Curry believed Intervenor was the best choice in the interests of the schools for this particular position. The undersigned finds nothing arbitrary or capricious in Superintendent Curry's choice in this situation.

Grievant alleged she was unlawfully discriminated against because of her age, in violation of W.

Va. Code §§ 29-6A-2(d) and 5-11-1, et seq. (the Human Rights Act), and the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq. ("ADEA"). "This Grievance Board does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act . . .. Nevertheless, the Grievance Board's authority to provide relief to employees for `discrimination,' `favoritism,' and `harassment,' as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act." Bowman v. W. Va. Educ. Broadcasting Auth., Docket No. 96-EBA-464 (July 3, 1997).

W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under either under the Human Rights Act or theADEA, as such claims are subsumed by § 29-6A-2(d). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995).

W. Va. Code § 29-6A-2(o) defines favoritism as:

> unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

A grievant alleging discrimination or favoritism must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne

County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Steele, supra.

In support of her discrimination argument, Grievant relied primarily upon the fact that Superintendent Curry had asked her during the interview if she wanted the position simply to boost her retirement income. Such a statement standing alone cannot support a finding that Grievant wastreated differently from any other applicant. See Shepard and Gregory v. W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-186/187 (Dec. 29, 1997). Even if it could support such a finding, she was treated the same as Intervenor in this regard, as he was asked the same question. Grievant failed to show that age played any role in the selection process. See Aglinsky, supra. Grievant was treated exactly the same way as all other applicants. She was interviewed and asked the same questions, and evaluated in the same areas as the other candidates. She proceeded to the second interview, while two of the candidates did not. She was asked the same questions in the second interview as the other candidates, and was evaluated in the same areas. The fact that she was not selected is not sufficient to meet her burden of proving discrimination.

In support of her allegation of favoritism, Grievant attempted to demonstrate that Intervenor had some inside knowledge of when the position would be posted and how Superintendent Curry viewed the position. No evidence was presented which supported these allegations.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving each element of her 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 assignment 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. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). 3. With regard to the hiring for an administrative position, boards of education must select the applicant with the highest qualifications. In evaluating qualifications, a board of education must consider each of the seven "qualifying 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 be fairly judged. The appropriate weight to be given each factor is within the discretion of the board of education. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

4. Grievant failed to prove by a preponderance of the evidence that she was more qualified than Intervenor to fill the posted position, or that it was arbitrary and capricious for WBOE to place Intervenor in the position as the most qualified candidate.

5. The W. Va. Code § 29-6A-2 definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievants' claims under either the Human Rights Act or the ADEA, as such claims are subsumed by § 29-6A-2(d). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995).

6. A grievant alleging discrimination or favoritism must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Robert Ridinger, et al., v. Hancock County Bd. of Educ., Docket No. 97-15-452 (Mar. 31, 1998); West v. Putnam County Bd. of Educ., Docket No. 97-40-524 (Mar. 20, 1998); Steele, et al., v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Grievant failed to present a prima facie case of discrimination or favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Wood 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 18, 1998

Footnote: 1

This grievance was filed on or about September 2, 1997, and was denied at Level I on that date. Grievant appealed to Level II. The grievance was denied at Level II on November 26, 1997, following a hearing held on October 15, 1997. Level III was waived, and Grievant appealed the Level II Decision to Level IV on December 3, 1997. A Level IV hearing was held on February 19, 1998. Grievant was represented by Richard D. Owen, Esq., and J. David Fenwick, Esq., and Respondent was represented by Dean A. Furner, Esq. This case became mature for decision on March 19, 1998, upon receipt of the last of the parties' written arguments. This grievance wasadvanced on the undersigned's docket at the request of Grievant. She has another selection grievance pending which became mature for decision on February 10, 1998, and elected to have this grievance decided first. Her other grievance will be decided as though it became mature on March 19, 1998.