CHARLES S. OXLEY,

Grievant,

v. DOCKET NO. 98-45-134

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent, and

GARNETTE LYNN CROWDER,

Intervenor.

DECISION

This grievance was filed by Charles S. Oxley (Grievant) against Summers County Board of Education (Respondent)(SBOE), alleging that a violation of W. Va. Code § 18A-4-7a occurred when Respondent did not select him as Assistant Principal of Summers County High School. Grievant believes he is more qualified than the successful candidate, Intervenor Garnette Lynn Crowder (Intervenor)(Crowder). Grievant requests instatement into the position, back pay, benefits, and attorney fees.

The grievance was denied at Level I by Immediate Supervisor Gaye Shaver on June 26, 1997. A Level II hearing was held on April 1, 1998. Grievant was represented by John Feuchtenberger, Esq., and Respondent was represented by Kathryn Bayless, Esq. The grievance was denied at Level II by Billy Joe Kessler, Grievance Evaluator, on April 3, 1998. The grievance was waived to Level IV by Delvin D. Elwell, President of SBOE, on April 16, 1998.

A Level IV hearing was held on January 20, 1999, before the undersignedAdministrative Law Judge, at the Grievance Board's Beckley office. Grievant was again represented by John Feuchtenberger, Esq., and SBOE was again represented by Kathryn Bayless, Esq. Intervenor Crowder was represented by Jerry A. Wright, Esq. The parties were given until March 3, 1999, to submit proposed findings of fact and conclusions of law, and this grievance became mature for

decision at that time.

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

FINDINGS OF FACT

1. Grievant is a teacher employed by SBOE. Intervenor Crowder was the successful applicant for the position of Assistant Principal of Summers County High School.

2. On May 2, 1997, SBOE posted a position vacancy for Assistant Principal of Summers County High School. 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 qualifications listed in the posting were a teaching certificate with appropriate endorsements, two years experience as an administrator in grades nine through twelve, a Masters degree in administration or related field, a principal's certificate for grades nine 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 assistant principalship imposed by the North Central Association of Colleges and Secondary Schools. 5. The posting stated that, “[w]ith respect to the criteria on containing amount of course work, only Educational Administrative courses will be counted.”

6. Superintendent of Schools Charles Rodes (Rodes) assigned the two candidates scores of one or zero in six of the eight factors. (See footnote 1)

7. SBOE's scoring system assigned each scored factor equal weight.

8. Using this system, a perfect candidate would have scored six points. 9. Rodes did not consider the statutory factor “relevant specialized training,” or assign scores to the candidates for this factor.

10. Rodes did not consider the statutory factor “other measures or indicators upon which the relative qualifications of the applicants may fairly be judged,” or assign scores to the candidates for this factor. SBOE has often conducted interviews to determine the winner of this factor.

11. The candidates were not interviewed.

___12. Since each applicant had appropriate certification, satisfactory evaluations and degree level, each was assigned one point in each of those factors.

___13. Grievant won the point in the factor “amount of course work in administration.”

14. Crowder won the point in the factors “amount of experience relevant to administration” and “academic achievement.”

15. In the factor “academic achievement,” Rodes determined the superiorcandidate by comparing grade point averages. Rodes' score sheet assigned Grievant a grade point average (GPA) of 3.38, and Crowder a GPA of 3.43.

16. Grievant scored four points during the selection process. Intervenor Crowder scored five points.

DISCUSSION

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). 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-4-7a 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 levelgenerally; 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).

W. Va. 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 thehiring 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 (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. 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; Lillyv. 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 first contends that the selection of Intervenor Crowder as Assistant Principal of Summers County High School was arbitrary, capricious, and flawed. Grievant argues that he was deprived of administrative experience he won in a previous grievance, that the posting for the assistant principal position was different than one posted for the same position four years earlier, that Rodes did not assign scores to the candidates for the statutory factor "relevant specialized training," and that the factor "academic achievement" was improperly awarded to Crowder. (See footnote 2)

Grievant next contends that he was deprived of administrative experience he won in a previous grievance decision, Oxley v. Summers County Bd. of Educ., Docket No. 95- 45-123 (Feb. 13, 1997). However, this argument has been considered and rejected by this Grievance Board many times, and will not be considered again. Oxley v. Summers County Bd. of Educ., Docket No. 98-45-104 (Nov. 19, 1998); Oxley v. Summers County Bd. of Educ., Docket No. 96-45-124 (May 27, 1998); Oxley v. Summers County Bd. of Educ., Docket No. 96-45-001 (Apr. 30, 1997); Oxley v. Summers County Bd. of Educ., Docket No. 95-45-123 (Feb. 13, 1997).

Grievant contends that the factor "academic achievement" was improperly awarded to Crowder. In that factor, Rodes determined the superior candidate by comparing gradepoint averages. Rodes' score sheet assigned Grievant a GPA of 3.38, and Crowder a GPA of 3.43. SBOE and Crowder respond by arguing that this issue was improperly raised, for the first time, at Level IV.

When new claims are raised at Level IV, the following statutes govern:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw it, the parties may consent to the evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the

> new grievance is measured from the date of such ruling. W. Va. Code § 29-6A-3(j).

Similarly, "[a]ny change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner." W. Va. Code § 29-6A-3(k).

The West Virginia Supreme Court of Appeals and this Grievance Board have consistently held that a grievance may not be granted at Level IV unless the theory upon which relief was awarded was developed at the lower levels. Hess v. W. Va. Dept. of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993), Nebel v. Bd. of Trustees/W. Va. Univ., Docket No. 97-BOT-422 (May 8, 1998), Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995), Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (April 13, 1995). The argument that this issue was improperly raised, for the first time, at Level IV, is without merit. The transcript of Grievant's Level II hearing contains three pages of discussion of this issue, at pages fourteen through sixteen. It also reflects that SBOE's counsel asked Grievant: "[w]ith Criterion No. 5, academic achievement, do you see any error there?" Grievant responded affirmatively. Respondent SBOE and Intervenor Crowder were on notice that Grievant contested his score in the factor "academic achievement."

During the Level IV hearing, Grievant submitted two handwritten letters, dated January 14, 1999, signed by Michael Underwood, Coordinator of Certification and Assistant to the Dean, of Marshall University Graduate College. (See footnote 3) These letters stated that Grievant's overall grade point average was 3.50, and that his GPA in educational administration courses was 3.53. (See footnote 4) He also testified that he felt his grade point average had not been calculated correctly.

In response, Superintendent Rodes testified that the GPA assigned to Grievant was calculated by Ms. Vickie Hinerman, that he trusted Ms, Hinerman to make the calculation correctly, that he could not explain how it was done, and that it was based solely oneducational administration courses as specified in the posting. (See footnote 5) In response to Grievant's subpoena duces tecum for "all documents, methods of calculation, and any and all other materials showing how the GPA's of the candidates. . . were calculated," Rodes produced no documents. SBOE did not call Ms. Hinerman as a witness.

As noted above, Crowder bested Grievant by only one point in the selection process. Grievant winning any factor previously won by Crowder changes the outcome of the selection process. In the

factor "academic achievement," where Intervenor Crowder prevailed by five one-hundredths of a percentage point, Grievant has produced at least some credible evidence that his GPA was higher that than Crowder's. Respondent SBOE failed to explain how its figure for Grievant's GPA was calculated, and failed to call as a witness the person who calculated it. It is SBOE's responsibility to call critical witnesses in support of its case. Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989); Sharp v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-497 (June 15, 1998). Under these circumstances, it is impossible for the undersigned administrative law judge to know which candidate had the higher GPA.

Accordingly, Grievant has established that SBOE did not properly rely on a factor, academic achievement, that was intended to be considered, and has established a significant flaw in the selection process, sufficient to suggest that the outcome might reasonably have been different. Hopkins, supra. A searching and careful inquiry into theselection process that SBOE chose to apply to the candidates for the position shows that it was not legally sufficient. When the hiring process is flawed because a sufficient review of the relative qualifications of the candidates has not been conducted, and where a grievant has not shown that he would have inevitably prevailed as the successful applicant, the proper remedy is to reassess the qualifications of the applicants. Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998); Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998); Baird & Hawley v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sep. 16, 1996); Milam v. Kanawha County Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988).

Therefore, SBOE will be ordered to reassess the qualifications of both Grievant and Crowder for the position of assistant principal of Summers County High School, consistent with the holdings herein.

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. 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. Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). 7. Grievant proved, by a preponderance of the evidence, a significant flaw in Respondent's selection process, sufficient to suggest that the outcome might reasonably have been different.

8. When the hiring process is flawed because a sufficient review of the relative qualifications of the candidates has not been conducted, and where a grievant has not shown that he would have inevitably prevailed as the successful applicant, the proper remedy is to reassess the qualifications of the applicants. Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998); Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998); Baird & Hawley v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sep. 16, 1996).

Accordingly, the grievance is **GRANTED IN PART**, and Respondent SBOE is **ORDERED** to reassess the qualifications of both Grievant and Intervenor for the position of assistant principal of Summers County High School, consistent with the holdings herein.

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

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated March 18, 1998

Footnote: 1 *SBOE divided the factor "the amount of course work and/or degree level in the relevant field and degree level generally" into two factors.*

Footnote: 2 *Because of the outcome of this grievance, it is not necessary to address Grievant's allegations that the posting for the assistant principal position was different than one posted for the same position four years earlier, and that Rodes did not assign scores to the candidates for the statutory factor "relevant specialized training."*

Footnote: 3 *Grievant provided typed versions of these letters, dated February 17, 1999, on Marshall University Graduate College stationery, with his proposed findings of fact and conclusions of law.*

Footnote: 4 *Throughout this grievance, many involved have misinterpreted the posting's statement that, "[w]ith respect to the criteria on containing amount of course work, only Educational Administrative courses will be counted" as meaning that only such courses would be used in calculating a candidate's GPA under the factor "academic achievement." Of course, "amount of course work" is a separate factor. See Footnote 1.*

Footnote: 5 *See Footnote 4.*