FRIEDA M. OWEN,

Grievant,

v.

DOCKET NO. 98-54-481

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Frieda M. Owen, filed the following grievance against her employer, the Wood County Board of Education ("Board") on October 30, 1998:

> This grievance arises out of the reevaluation of applicants for the position of director of Curriculum and Instruction for Secondary Schools as ordered by the West Virginia Education State Employees Grievance Board in the matter of Owen v. Wood County Board of Education, Docket No. 97- 54-557. The superintendent determined that J. Timothy Swarr was the most qualified candidate for the position. Dr. Owen maintains that she possesses the highest qualifications for the position and that the superintendent failed to abide by the decision of the Administrative Law Judge. Accordingly, the superintendent's decision violated both W. Va. Code § 18A-4-7a and the Administrative Law Judge's decision. Dr. Owen further contends that the superintendent's decision was affected by unlawful discrimination and favoritism as previously stated in Owen v. Wood County Board of Education, Docket No. 97-54-557.
>
> Dr. Owen seeks the following relief: (1) determination that she possesses the highest qualifications for the position and should therefore have been awarded the position; and (2) back pay with interest.

The grievance was denied at level one by Superintendent Daniel D. Curry, and a level two hearing was conducted on November 10, 1998. The Superintendent's Designee, George B. Summers, denied the grievance by decision dated November 20, 1998. Grievant by-passed level three, and appealed to level four on November 25, 1998. The decision was submitted on the record developed below in the instant grievance, as well as the entire record underlying this Grievance Board's decision

in Owen v. Wood County Board of Education, Docket No. 97-54-557 (July 2, 1998)("Owen I"), and became mature for decision on January 15, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Richard D. Owen, Esq., Goodwin & Goodwin, LLP, and the Board was represented by Dean Furner, Esq., Spilman, Thomas & Battle.

SUMMARY OF EVIDENCE

Level Two General Exhibits

Ex. 1 - Grievance form.

Ex. 2 -

Response of Superintendent Daniel Curry to grievance.

Exs. 3-5

Grievance documents.

Level Two Grievant's Exhibits

Ex. 1 -

Decision in Owen v. Wood County Board of Education, Docket No. 97-54- 557 (July 2,1998)(Owen I).

Ex. 2 -

Wood County Schools posting for Director of Curriculum and Instruction for Secondary Schools (also part of Owen I).

Ex. 3 -

Application materials of Frieda M. Owen (also part of Owen I).

Ex. 4 -

Application materials of J. Timothy Swarr (also part of Owen I).

Testimony

No testimony was presented at level two in the instant grievance. The parties relied on the

testimony and evidence presented in Owen I, as well as the above exhibits.

FINDINGS OF FACT

1. This grievance arises out of the reevaluation of applicants for the position of Director of Curriculum and Instruction for Secondary Schools. 2. This reevaluation of applicants was ordered by this Grievance Board in the matter of Owen v. Wood County Bd. of Educ., Docket No. 97-54-557 (July 2, 1998).

3. In that previous grievance, the Administrative Law Judge ordered the Board "to reevaluate the applicants for the posted position of Director of Curriculum and Instruction of Secondary Schools in the statutory criteria relevant experience and relevant specialized training, based upon the experience and training the applicants had when the Selection Committee first evaluated them, giving Grievant appropriate credit for her experience as a department chairwoman, and omitting work experience in evaluating the criteria relevant specialized training, and to select the most qualified candidate for the position, consistent with the findings in [that] Decision." Owen, supra, p. 21.

4. By the time the Administrative Law Judge had ordered a reevaluation of the candidates in her Decision, Dave White, who was the Assistant Superintendent for Curriculum and Instruction and involved in putting together and overseeing the Selection Committee, had retired. LII Tr., p. 21.

5. The position which Grievant originally sought, Director of Curriculum and Instruction for Secondary Schools, is no longer in existence. LII Tr., p. 15.

6. Subsequent to the Decision in the previous grievance, Superintendent Daniel Curry reviewed the application materials of both applicants which were submitted with the original job posting, and interviewed Grievant and J. Timothy Swarr to fulfill the requirements of the Decision. LII Tr., p. 9.

7. Superintendent Curry determined that Mr. Swarr was the most qualified candidate. 8. Accompanying Superintendent Curry's written response to Grievant's level one grievance, he provided Grievant with a written explanation of the reasons for his decision to select Mr. Swarr as the most qualified candidate for the position. LII Tr., p. 9; Gen. Ex. 2.

9. In his reevaluation of the relevant experience of the candidates, Superintendent Curry gave Grievant and Mr. Swarr a full year's credit for each year the candidate worked in a full time

administrative position for secondary school issues. He also gave each candidate a credit of ".5" or one-half year credit, for each year in which a candidate worked in a position in which there were part-time administrative responsibilities for secondary school issues. This calculation gave Mr. Swarr 22 years and Grievant 21.5 years of relevant experience. Gen. Ex. 2.

10. With regard to the area of relevant specialized training, the Administrative Law Judge was of the opinion that Grievant should have prevailed in that category. Owen, supra, p. 16. However, rather than substitute her judgment for that of the Board in holding that Grievant in fact did prevail in that category, the Administrative Law Judge ordered the Board to "reevaluate the applicants for the posted position . . .". Owen, supra, p. 21.

11. In his reevaluation of the candidates, Superintendent Curry determined that, with regard to the training choices of the two candidates, "there is no way to assess the value, quality, or potential impact on future positions." Gen. Ex. 2. Therefore, he decided that it was "most fair to declare a tie under this area." Gen. Ex. 2.

12. In the current grievance, as in the original, Grievant has alleged "unlawful discrimination." However, the Administrative Law Judge who decided the earlier grievance,determined that Grievant failed to sustain her burden on that claim. Grievant has presented no additional evidence on this issue in the present grievance.

13. In the original grievance, the Administrative Law Judge did find that the selection process was "skewed in favor of Intervenor", and that she had made a prima facie case of favoritism in the treatment of Mr. Swarr. The remedy given was a reevaluation of the candidates.

14. The weighting system devised by the original Selection Committee would weight the categories by assignment a half point each to certification, degree level, academic achievement, and evaluation, four points to total experience, seven points to specialized training, and twelve points to other measures or indicators. Gen. Ex. 2.

15. Superintendent Curry gave Grievant and Mr. Swarr equal points in the areas of certification, academic achievement and evaluations. Grievant received the points for the area coursework and degree level. Mr. Swarr received 4 points for relevant experience, and 3 points were given to Grievant, "since they are so close". (Mr. Swarr was credited with 22 years and Grievant with 21.5 years). Grievant and Mr. Swarr tied in the relevant specialized training area. Finally, the selection committee had determined that each subcategory under "other measures" was to be worth

2 points, and it identified the winners in those areas. Superintendent Curry changed the scoring to give the “loser” of each category one point instead of a zero.

13. The resulting matrix as scored by Superintendent Curry is as follows:

	Swarr	Owen
Certification (.5)	.5	.5
Experience (4)	4	3
Course/degree (.5)	.5	Academic Achievement (.5) .5 .5
Specialized Training (7)	7	7
Evaluations (.5)	.5	.5
Other measures		
Purpose and direction	2	1
Cognitive Skills	2	1
Leadership	2	1
Enhancement	2	1
Organization	2	1
Communications	1	2
	23.5	19

14. Superintendent Curry interviewed the candidates, and upon reevaluating the criteria relevant experience and relevant specialized training, determined that Mr. Swarr was the most qualified candidate for the position at issue.

DISCUSSION

Grievant argues that the selection process was once again flawed, in that Superintendent Curry disregarded the opinion of the Administrative Law Judge in Owen I, that Grievant should have prevailed in the category “relevant specialized training”. Further, Grievant argues that the weighting system applied by Superintendent Curry was arbitrary and capricious, and evidence of discrimination against her and favoritism in the treatment of Mr. Swarr in the selection process, and that she should

be determined the most qualified candidate for the position at issue.

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. Harper, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). 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 alleges the selection process was flawed because Superintendent Curry entirely ignored the Administrative Law Judge's opinion that she should have prevailed in the category relevant specialized training. However, as noted above in Finding of Fact No. 10, the Administrative Law Judge did not substitute her judgment for the Selection Committee, and did not make a finding that Grievant did prevail in that category. Rather, she ordered a reevaluation of the applicants with respect to that category.

The Administrative Law Judge based her opinion on the quantitative aspect of Grievant's credentials, finding that she had attended and/or participated in many more workshops and seminars than the successful applicant. Thus, if the determination of that category was based on amount, Grievant should have prevailed. Superintendent Curry didnot approach that category in a quantitative fashion, but rather looked at the content of the workshops and seminars from a qualitative standpoint. He concluded that he could not determine which applicant had more relevant specialized training and declared a tie in that category. Gen. Ex. 2. This determination was similar to the one made by the Board in Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998), and was referenced by the Administrative Law Judge in Owen I with regard to the current position: “the statute does not require that the applicants be rated in the amount of relevant specialized training each has. . . “. Owen, supra, p. 19. Thus, I cannot find that Superintendent Curry erred in rating the category relevant specialized training in the manner he did, nor was the selection process fatally flawed because he did not follow the Administrative Law Judge's opinion based on quantitative amount of training.

Grievant also alleges the selection process is flawed with regard to the relevant experience category because the Superintendent ignored certain aspects of her experience. Grievant contends that the Board erred in failing to consider her three years of experience in the Owensboro, Kentucky

school system. LII Tr., p. 10. Grievant worked 15 years as a college instructor, three years as Director of Community Relations for Owensboro City Schools in Kentucky, 14 years as a teacher, 18 years as Supervisor of Secondary English Language Arts, six years as chairwoman of the English Department at Parkersburg South High School, and three years as Principal of Rayon Center. She had no experience as a secondary school principal.

The Administrative Law Judge in Owen I ordered the Board to reevaluate this category, and to credit Grievant for her experience as chairwoman towards relevant experience. However, the Administrative Law Judge did provide the caveat that, "while itmay not be appropriate to credit [Owen] with six full years of experience for her experience as a department chair, it likewise would not be appropriate to credit [Swarr] with two full years . . . for the period he has served as Title One Director." Owen, supra, p. 15. Thus, Superintendent Curry gave Grievant .5 x 6 years of credit for her experience as chairwoman, and likewise gave Mr. Swarr .5 x 2 years of credit for his experience as Title I Director. This calculation, along with the calculations of the Selection Committee, resulted in Mr. Swarr receiving a total of 22 years relevant experience, and Grievant receiving 21.5 years, not counting her experience in Kentucky.

Grievant now contends that it was error to ignore her experience in Kentucky in calculating relevant experience for the position at issue. In the previous grievance, the Administrative Law Judge did not mandate that Grievant's experience in Kentucky be considered in determining which candidate won the category relevant experience. Additionally, as the Administrative Law Judge pointed out, "[i]t is not so clear that Grievant should have prevailed in the criterion relevant experience." Owen, supra, p. 16. It is clear, however, that Grievant would not have prevailed on the weighting system used by the Selection Committee and Superintendent Curry even if she had been determined to have the most relevant experience, because she would have to also prevail in the category of relevant specialized training. Had Grievant been credited with a .5 x 3 for her years in Kentucky, she would have received a total relevant experience score of 23 years, rather than the 21.5 years she received without it. Mr. Swarr received 22 years relevant experience. Superintendent Curry gave Mr. Swarr a point score of 4 in that category, and Grievant a point score of 3, because they were so close. Assuming he would have done the same even if Grievant had received 23 years, and Mr. Swarr 22 years, she would havereceived the 4 points and Mr. Swarr would have received the 3 points in that category. All else being equal, the total calculation would give Grievant a total score of

20, and Mr. Swarr a total score of 22.5. Thus, Grievant still would not have won the overall score on the matrix.

Grievant alleges, though, that the weighting system itself used by the Selection Committee and the Superintendent was arbitrary and capricious. This argument is rejected based upon the conclusions of law in this case, specifically, that county boards are permitted to determine the weight to be applied to each factor when filling an administrative position. The evidence does not demonstrate that the weighting system used by the Selection Committee and the Superintendent was in any way an abuse of discretion.

Finally, Grievant alleges that she has again been the victim of favoritism shown to Mr. Swarr in the selection process. W. Va. Code § 18-29-2(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.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.

Grievant contends that the Superintendent's decision not to count her Kentucky experience in calculating relevant experience, and his decision to tie the candidates in the category relevant specialized training, is evidence that he skewed the selection process in order to favor Mr. Swarr. The Board rejects any implication of favoritism in the selection process. The reevaluation has not

been found to flawed, or arbitrary and capricious, and thus, the result of a fair scoring system cannot be found to prove favoritism on the part of the Board towards Mr. Swarr and against Grievant.

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. 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 positionor, 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.

3. 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).

> 4. 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).

5. 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, andthe 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. Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

6. 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).

7. Grievant has failed to prove by a preponderance of the evidence that the selection process was flawed or arbitrary and capricious.

8. Grievant has failed to prove the Board engaged in favoritism in the selection of Mr. Swarr for the subject position.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 27, 1999