JAMES FRASHIER,

Grievant,

v. **Docket No. 98-18-485**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

and

BLAINE HESS,

Intervenor.

D E C I S I O N

In accordance with W. Va. Code §§ 18-29-1, et seq., James Frashier (Grievant) filed this grievance against Respondent Jackson County Board of Education (JCBE) on August 10, 1998. Grievant contends JCBE violated W. Va. Code § 18A-4-7a when it selected another professional employee, Blaine Hess (Intervenor), to fill the position of Principal at JCBE's Ripley High School (RHS). The grievance was waived at Level I, as Grievant's supervisor did not have authority to grant the relief requested, and Grievant appealed to Level II where an evidentiary hearing was conducted on October 12, 1998. Thereafter, the grievance was denied by the Superintendent's designee, James Lydon, on November 23, 1998. Grievant by-passed Level III, as authorized by W. Va. Code § 18-29-4(c), appealingto Level IV on November 30, 1998. Following a telephonic pre-hearing conference on December 21, 1998, a Level IV evidentiary hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on January 25 and March 5, 1999. (See footnote 1) The parties elected to submit post-hearing arguments, and this matter became mature for decision on May 3, 1999, upon

receipt of written briefs from Grievant and Respondent.

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

FINDINGS OF FACT

1. Grievant is presently employed by the Jackson County Board of Education (JCBE) as an Assistant Principal at Ripley High School (RHS).

2. Intervenor is currently employed by JCBE as Principal at RHS.

3. On June 26, 1998, JCBE posted a vacancy notice for the position of Principal at RHS, to replace Jack Wiseman, who was retiring after serving as RHS Principal for 17 years.

4. Six persons, including Grievant and Intervenor, timely applied to fill the vacancy. 5. Delores Ranson is employed by JCBE as an Assistant Superintendent whose primary responsibilities include personnel matters.

6. Dale Summitt became JCBE's Superintendent of Schools in early July 1998. Filling the Principal vacancy at RHS was one of his first personnel decisions as the new Superintendent.

7. Ms. Ranson completed a matrix to apply the statutory criteria in W. Va. Code § 18A-4-7a, ranking the six applicants numerically. Superintendent Summitt reviewed and approved this process.

8. Based upon application of the statutory factors, the parties scored as follows: Grievant 16.87; Intervenor 12.75. Two other applicants scored higher than Intervenor on this matrix.

9. At the time this selection decision was made, Grievant had eleven years of experience as an Assistant Principal while Intervenor had served one year as Assistant Principal at JCBE's Ravenswood High School. Ms. Ranson and Superintendent Summit evaluated Grievant and Intervenor as substantially equal in terms of appropriate certification, past performance evaluations, academic achievement, and degree level in the relevant field and degree level generally. See R Ex 8 at L II.

10. Superintendent Summitt and Ms. Ranson discussed the selection procedures to be followed under W. Va. Code § 18A-4-7a, and Superintendent Summitt elected to employ an interview process to provide input in selecting the best qualified applicant for the RHS Principal's vacancy. 11. Superintendent Summitt designated Assistant Superintendent Ranson, Secondary

Education Director Ron Ray, Federal Programs Director Tilden “Skip” Hackworth, Special Education Director Lisa Martin, Ravenswood Middle School Principal Judy Hetzer, and the Vice President of the Faculty Senate at RHS, Lora Sturm, to serve with him on the committee interviewing the applicants.

12. Initially, Superintendent Summitt elected to interview the three top-ranked applicants on the matrix, Grievant and two others. After a phone call from Kent Kennedy, Principal of Ravenswood High School, and Intervenor's immediate supervisor, recommend ing Intervenor as well-qualified for the position, Superintendent Summitt reviewed Intervenor's personnel record and evaluations, and decided to add Intervenor to the list of applicants being interviewed.

13. The interviews were conducted on July 16, 1998. The committee members asked each applicant the same questions from a list of questions which had been prepared in advance with input from the committee members.

14. Two of the committee members, Ms. Hetzer and Ms. Ranson, ranked Intervenor first in the interview, but nonetheless recommended Grievant's selection due to his superior experience. The remaining committee members, excepting Superintendent Summitt, rated Grievant first in the interview.

15. Following the interview, and after receiving the recommendations from the other committee members, Superintendent Summitt assigned 15 points to Intervenor and 6 points to Grievant as their interview scores. As a result, Intervenor's overall score was 27.75 and Grievant's was 22.87. Although the previous JCBE Superintendent had givenless weight to interviews in selecting applicants for administrative positions, Superintendent Summitt determined that the interview should represent 50 percent of the total score.

16. On July 24, 1998, Superintendent Summitt wrote a memorandum to the JCBE board members recommending Intervenor's selection as the new RHS Principal. R Ex 7 at L II.

17. On July 27, 1998, by a 3-2 majority, JCBE accepted Superintendent Summitt's recommendation, and appointed Intervenor as the new RHS Principal. G Ex 13 at L II.

18. None of JCBE's board members influenced Superintendent's Summitt's recommendation for or against a particular applicant.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ.

& State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

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

> A county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications. . . . In judging qualifications, consideration shall begiven to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position, or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

* * *

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). The selection of candidates for administrative positions is not simply a mechanical or mathematical process. See Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990); Villers v. Kanawha County Bd. of Educ., Docket No. 97-20- 294 (Jan. 30, 1998). Further, the grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended as a “super interview” but merely an analysis of the legal sufficiency of the selection process at the time it occurred. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997). Thus, W. Va. Code § 18A-4-7a permits county boards of education to determine the weight to be applied to each of the factors listed above in assessing a candidate's qualifications for administrative positions, so long as they do not abuse their discretion. E.g., Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29,1997); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). See Pockl v.

Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

The record indicates that Grievant had more total experience and substantially more experience as an administrator than Intervenor. However, as previously noted, W. Va. Code § 18A-4-7a permits school boards to look beyond such factors as experience and seniority when selecting applicants to fill vacancies in administrative or management positions. Villers, supra. See Blankenship v. Mingo County Bd. of Educ., Docket No. 96- 29-365 (June 18, 1997). Indeed, the Code broadly allows the school board to consider "other measures or indicators upon which the relative qualifications of the applicant may be fairly judged." See Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). Further, while each factor specified in the first set of factors of § 18A-4-7a must be considered, the board is free to consider one factor as more important than another. See Saunders, supra.

Grievant concedes W. Va. Code § 18A-4-7a allows considerable discretion to JCBE in selecting a new Principal for RHS, but argues that under the facts and circumstances presented, JCBE abused that discretion by making an arbitrary and capricious employment decision to select an employee that was clearly less qualified. In determining whether a discretionary decision was "arbitrary and capricious" a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Mar. 22, 1995). Alternatively, it may be shown that the county board and school superintendent, in making their selection determination, “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 & Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Because Superintendent Summitt recalled that Grievant admitted during the interview that he was weak in the curriculum aspect of secondary school administration, but a preponderance of the evidence indicates that Grievant made no such concession during his interview, Grievant contends Intervenor's selection was made contrary to the evidence. A preponderance of the evidence indicates

Superintendent Summitt recommended Intervenor as the best candidate to serve as RHS Principal for a number of reasons. Superintendent Summitt's faulty recollection of this supposed concession represents only a portion of one of those reasons. Superintendent Summitt's recollection that Intervenor was aware that curriculum forms the basis for instruction, and had an overall better grasp on the concept of curriculum and instructional leadership was not contradicted. Moreover, Superintendent Summitt's overall impression that Grievant did not have as much experience with curriculum as he did with discipline and other aspects of school administration was not shown to be incorrect. Superintendent Summitt credibly testified that he was looking for an administrator who could lead RHS, already an outstanding school, to higher levels of achievement. Based upon his own experience in working in a number of school systems in multiple states, as both a Principal and Superintendent, Superintendent Summitt reasoned that Intervenor's singular accomplishments as a teacher, and his articulated approach to school administration presented during the interview, represented the type of individual with the most potential to achieve the goals he and JCBE hoped to attain. In recommending Intervenor's selection to JCBE, Superintendent Summitt candidly noted "there is no single candidate who rates as strong in every single criteria that as superintendent I consider critically important in profiling the ideal candidate." R Ex 7 at L II.

Superintendent Summitt was duly impressed with Intervenor's professional accomplishments and leadership experience. He specifically noted Intervenor's service as Faculty Senate President at George Washington High School in Kanawha County, President of the Kanawha County Bandmasters Association, Vice-President of the West Virginia Bandmasters Association, and Chairman of the West Virginia All-State Band. In addition, Intervenor was a member of the Steering Committee of the North Central Accreditation Association, and was selected as Bandmaster of the Year in West Virginia for 1992. Further, Intervenor had completed the Kanawha County Schools Leadership Academy and an Administrative Internship at George Washington High School. See R Exs 3 & 7 at L II.

Although Superintendent Summitt was in the minority of JCBE administrators who determined that Intervenor was better qualified than Grievant to serve as Principal of RHS,based upon the credible evidence presented, the undersigned can only attribute this opinion to a plausible difference of view. See Bedford County Memorial Hosp., supra. Intervenor certainly had sufficient job-related attributes and accomplishments to support Superintendent Summitt's hiring recommendation and

JCBE's acceptance of that recommendation. While another individual might have selected Grievant for the position at issue based upon his greater experience as an administrator, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Villers, supra; Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford Memorial Hosp., supra; Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Grievant failed to establish that his qualifications were so superior to Intervenor's that JCBE's failure to select him as the RHS Principal was necessarily an abuse of the considerable discretion extended school boards when making such professional determinations. See Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-398 (Jan. 30, 1991).

After the Level IV hearing, Grievant argued, for the first time, that he was a victim of “favoritism” prohibited by W. Va. Code § 18-29-2(o). (See footnote 2) That Code Section defines"favoritism" to mean "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism under W. Va. Code § 18-29-2(o), a grievant must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
>
> (c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can then offer a legitimate reason to substantiate its actions. Thereafter, the grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights

Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). The fact that another qualified applicant was selected for promotion to Principal over Grievant is insufficient to establish a prima facie case of favoritism. Grievant was not singled out for disparate treatment; he simply did not receive the position he sought. See Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994). Moreover, even if Grievant did establish a prima facie case of favoritism under W. Va. Code § 18-29-2(o), as previously discussed in addressing Grievant's contention that the hiring decision was arbitrary and capricious, JCBE articulated sufficient non-pretextual reasons for selecting Intervenor for the vacancy at issue to substantiate its personnel action in this matter.

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). 3. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the highest qualifications. In making its selection, the board must give consideration to appropriate certification, experience relevant to the position, course work and degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the relative qualifications of the applicants may be fairly judged. Once they have reviewed the criteria in W. Va. Code § 18A-4-7a, county boards have wide discretion in choosing school administrators. Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

4. The grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended to be a "super interview" for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. In reviewing a county board's exercise of discretion in a hiring decision, the inquiry into the process by which the decision was made must be thorough and searching, but considerable deference must be afforded those conducting it. Fittro, supra; Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

6. Grievant failed to establish that he was more qualified than Intervenor for the RHS Principal's position at issue in accordance with the requirements of W. Va. Code§ 18A-4-7a. See Pockl, supra; Tracewell v. Wood County Bd. of Educ., Docket No. 90-54- 398 (Jan. 30, 1991).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 26, 1999

Footnote: 1

Grievant was represented by counsel, Stephen P. Goodwin, of Goodwin & Goodwin. Respondent was also represented by counsel, Kimberly S. Croyle, of Bowles Rice McDavid Graff & Love. Intervenor appeared pro se.

Footnote: 2

Because Grievant has consistently alleged that JCBE failed to select him as the best qualified applicant for the RHS Principal's vacancy, this argument simply represents an additional theory to support his claim, not a new grievance which

the undersigned is prohibited from considering because it was not raised at the lower levels. See W. Va. Code § 18-29-3(j); W. Va. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357,432 S.E.2d 27 (1993).