EARL SNYDER,

Grievant,

v. **Docket No. 98-39-509**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent,

and GARY HENLINE,

Intervenor.

DECISION

Earl Snyder (Grievant) challenges the Preston County Board of Education's (PCBOE) selection of Gary Henline (Intervenor) to fill the position of Principal of Preston High School. Grievant alleges that the selection process was flawed and that he should have been selected to fill the position. He seeks instatement to the position, with back pay and benefits. The grievance was filed directly at level two on July 28, 1998. (See footnote 1) A level two hearing was held on September 10, 1998, followed by a written decision denying the grievance, dated December 14, 1998. Level three consideration was waived, and Grievant appealed to level four on December 16, 1998. Following one continuance for good cause shown, a level four hearing was held in the Grievance Board's office in Morgantown, West Virginia, on April 16, 1999. Grievant was represented by Don Craft of the West Virginia Education Association, and Respondent was represented by counsel, Howard Seufer. (See footnote 2) This matter became mature for consideration on May 10, 1999, upon receipt of the parties' proposed findings of fact and conclusions of law.

The following findings of fact are made from a preponderance of the credible testimonial and documentary evidence introduced at levels two and four.

Findings of Fact

1. In April of 1998, PCBOE posted a vacancy (See footnote 3) for the position of Principal of Preston High School. Qualifications listed in the posting included:

Possess Master's Degree and earned West Virginia Principal's certification for applicable grades;

Appropriate certification as required by State Policy 5202;

Minimum of three years successful teaching experience;

Minimum of three years successful experience as a principal/assistant principal;

Superior interpersonal skills and organizational abilities;

Excellent verbal and writing skills;

Knowledge of school law, state policy, and federal education law and policy;

Ability to work with school community/public relations;

Proficiency in the use of WVEIS, WINDOWS, and INTERNET;

General understanding of the School-to-Work Program;

Knowledge of the process for developing and implementing a Unified School Improvement Plan;

Ability to effectively develop and implement a positive or preventive Student Management Program;

Knowledge and understanding of how to effectively utilize evaluations and staff development to improve employee effectiveness;

Knowledge of effective strategies for meeting the educational needs of at-risk students;

Ability to effectively carry out responsibilities of position.

2. A total of nine applicants responded to the posting, including Grievant and Intervenor.

3. Superintendent Charles Zinn selected a “screening committee” of community members, who reviewed the applications of the nine candidates, utilizing a list of the first set of statutory criteria contained in W. Va. Code § 18A-4-7a. At Mr. Zinn's direction, the committee compiled a list of the top three most qualified candidates, who would be interviewed for the position.

4. The list of the top three candidates, selected by the screening committee, did not include Grievant or Intervenor.

5. Because none of the top three candidates were PCBOE employees, Mr. Zinn added Grievant to the list of candidates to be interviewed.

6. Mr. Zinn assembled an interview committee, which consisted of himself and three other Preston County school officials.

7. The four candidates were interviewed by the committee, which utilized a list of prepared questions and a “rating form”, which contained all of the first set of criteria from W. Va. Code § 18A-4-7a. 8. Utilizing a point system assigned to each statutory criterion, the interview committee rated the candidates from most to least qualified, in the following order: Mr. Gary Tenney, Dr. Dwaine Wilcox, Mr. Jim Biggs, and Grievant.

9. After Mr. Tenney declined the position, Mr. Zinn determined that the other three candidates were not sufficiently qualified. Mr. Zinn did not believe Grievant should be recommended, because he was not satisfied with Grievant's responses to the interview questions.

10. On the last day of the school term for the 1997-1998 school year, Intervenor was in the PCBOE central office. Because he believed that Intervenor was well-qualified for the position, and because the position's duties were scheduled to begin very soon, Mr. Zinn decided to interview Intervenor that day.

11. Only one other member of the interview team was available to interview Intervenor. Mr. Zinn and Mr. Steve Shaffer, a PCBOE member, interviewed Intervenor, utilizing the same questions and scoring sheet used during the prior interviews. Intervenor received a higher score than Grievant.

12. Intervenor was recommended by Mr. Zinn for the position and approved by the PCBOE.

13. None of the candidates interviewed for the position, including Intervenor, were evaluated with regard to academic achievement or past performance evaluations.

14. The candidates were not asked to provide information regarding academic achievement or past evaluations during the application and interview process.

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). 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 feelsare 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 is best suited to the position. 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., 769F.2d 1017 (4th Cir. 1985).

Grievant has made several allegations regarding alleged flaws in the interview process utilized in selecting a candidate for the Preston High School position, one of which concerns the failure by Mr. Zinn and the interviewing committee to evaluate two of the statutory criteria. As to the failure to evaluate academic achievement, Mr. Zinn testified at level two that the committee did not have transcripts or grade point averages for all of the candidates, so it was not possible to evaluate this criterion. However, it is quite obvious from the posting and the evidence in this grievance that this information was not requested from the applicants. Mr. Zinn also stated that the academic achievement criterion was considered, “but by the information and the different schools and the different degree[s] it would be pretty hard to - we didn't do that on any of them.” Level II Tr. at 42. As to the interview team's failure to assign any scores to the criterion of past performance evaluations, Mr. Zinn simply testified that none of the candidates were awarded any points in that area. He gave no explanation as to why. Level II Tr. at 43-44.

Respondent has alleged that Grievant did not complain about the committee's failure to assign scores for academic achievement or evaluations in his written grievance complaint and that he did not raise arguments regarding this issue in his level two brief. However, as set forth above, these

issues were addressed by the evidence submitted by Grievant at level two, and Grievant has argued these points in his level four brief. W. Va. Code §§ 18-29-3(j) and (k) limit a grievant's ability to change his grievance, providing as follows:

> (j) Once a grievance has been filed, supportive or corroborative evidencemay 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 same; the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling.
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> (k) Any 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.

Grievant's arguments do not change the grievance or the relief sought. He is and always has been grieving his non-selection for the same position, and seeking instatement into the position. Moreover, Grievant's written grievance statement says “I believe the interview process was flawed for the principal's position at Preston High School. If the proper interview process had been followed, I would have been hired for the principal's position.” A grievant is not required to identify each argument he intends to make in his statement of grievance. In many instances, a grievant will not know what arguments can be made until evidence is presented to clarify exactly what has occurred. However, in this case, Grievant's statement of grievance clearly encompasses the entirety of the interview process, part of which included the evaluation of each of the seven statutory criteria. This was sufficient to place Respondent on notice of Grievant's argument. Further, Respondent was clearly on notice of this potential argument, because it is fully addressed in Respondent's level four brief.

As Mr. Zinn testified, that the statutory criterion of academic achievement was“considered”, but that it could not be assessed due to insufficient information, is insufficient conduct on the part of a board of education in order to comply with the requirements of W. Va. Code § 18A-4-7a. Moreover, it is incumbent upon a board of education, when filling an administrative position, to request all information pertinent to the statutory criteria from all applicants. PCBOE clearly did not do so in this

case. When the information has not been requested, a board of education cannot then be excused from the requirement that this statutory criterion be considered. Additionally, PCBOE has provided absolutely no explanation as to why past performance evaluations were not assessed for each of the applicants. Grievant has clearly established by a preponderance of the evidence that PCBOE has failed to give consideration to two of the statutory criteria of W. Va. Code § 18A-4-7a.

In order 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 v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Grievant has met his burden in this case. However, Grievant has not proven that he is entitled to instatement to the position. Because two of the required statutory criteria were not properly assessed for any of the applicants, the appropriate remedy is to remand the case to PCBOE for a reassessment of all of the candidates' qualifications. See Owen v. Wood County Bd. of Educ., Docket No. 97-54-557 (July 2, 1998); Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

Grievant has also alleged that Superintendent Zinn's use of a “citizen's committee”as a screening mechanism was improper, along with his use of a board member as a member of the interview team. However, so long as a superintendent makes his own independent review of the candidates and makes an independent hiring recommendation, these practices are not improper. See Hanlon v. Logan County Bd. of Educ., Docket No. 93-23-502 (Dec. 29, 1994). There can be no question in this case as to the independence of Superintendent Zinn's hiring recommendation. Even after the citizen's committee comprised a list of the top three candidates, Mr. Zinn added Grievant to that list as a candidate to be interviewed. Then, after the interviewing committee had interviewed and rated the four applicants, Mr. Zinn once again rejected their recommendation, choosing to interview another candidate of his own choosing. The screening committee and Mr. Shaffer's presence on the interview committee have not been shown to have improperly influenced Mr. Zinn's decision.

However, the interview process which led to Intervenor's recommendation for the position is far more troubling. In essence, Intervenor's total score, pursuant to the system set up by the interview committee, is invalid when compared to the other candidates. Because he was interviewed and scored only by Mr. Zinn and Mr. Shaffer, Intervenor's application and qualifications were not subjected to the same scrutiny as the other applicants' who were interviewed. Accordingly, when the

qualifications of the candidates for this position are reassessed, PCBOE is directed to assess all of the candidates using the same system and review committee for all applications.

Consistent with the foregoing findings and discussion, the following conclusions of law are 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 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/or degree level in the relevant field and 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. 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 proved that PCBOE violated W. Va. Code §18A-4-7a by failing to give the criteria of academic achievement and performance evaluations the required consideration, and that the error was so significant, that the outcome may have been different absent the error. 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. In order to be given equal statutory consideration, all candidates must be subjected to the same interview and scoring process, and review by the same interview committee, as all other candidates.

Accordingly, this grievance is **GRANTED, IN PART**. Respondent Preston County Board of

Education is hereby **ORDERED** to repeat the selection process for the position of Principal of Preston High School, assessing the nine candidates' (See footnote 4) qualifications as of the date of Superintendent Zinn's hiring recommendation, in accordance with this decision.

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

Date: May 26, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Respondent has not challenged the initiation of the grievance at level two.

Footnote: 2

Intervenor did not appear at the level four hearing.

Footnote: 3

There had been a previous posting for the same position approximately one month before. However, Grievant has not challenged the fact that there were two postings.

Footnote: 4

The evidence established that academic achievement and performance evaluations were also not evaluated by the initial screening committee, so all of the original candidates are entitled to reassessment.