DELLA HOUCK,

Grievant,

v. DOCKET NO. 99-55-290

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Della Houck (Grievant) filed two grievances against Wyoming County Board of Education (Respondent)(WBOE), alleging that a violation of W. Va. Code § 18A-4-7(a) occurred when WBOE did not select her as temporary or permanent Principal of Road Branch Grade School. The grievance concerning the temporary position (Road Branch temporary grievance) was filed on October 8, 1998, and the grievance concerning the permanent position (Road Branch permanent grievance) was filed on July 30, 1999.

The Road Branch permanent grievance was denied on that same date. The record does not clearly reflect what other proceedings, if any, occurred in either grievance at Levels I, II, and III. After protracted discussions, changes in attorneys by both parties, settlement talks, and pre-hearing conferences on November 10, 1999, April 12, 2000, and July 27, 2000, the undersigned Administrative Law Judge permitted these grievances to proceed to Level IV for their first evidentiary hearing. A Level IV hearing was held on May 25 and 26, and September 5, 2000, before the undersigned, at the Grievance Board's Beckley office. Grievant was represented by Derrick Leffler, Esq., and WBOE was represented by Greg Bailey, Esq. (See footnote 1) The parties were given until November 6, 2000, to submit proposed findings of fact and conclusions of law, and these grievances became mature for decision on that date.

The following Findings of Fact are made based upon a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is currently employed by WBOE as an Assistant Principal at Oceana High School.

2. On August 20, 1998, WBOE posted the temporary position of Principal of Road Branch Grade School. The minimum qualifications for the position were a valid Elementary Teaching Certificate and Elementary Administrative Certificate.

3. On July 2, 1999, WBOE posted the permanent position of Principal of Road Branch Grade School. The minimum qualifications for the position were a valid Elementary Teaching Certificate and Elementary Administrative Certificate.

4. WBOE's requirement of these elementary certificates reflects its policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators. 5. Grievant, successful applicant Connie Walls, (Walls), Dennie Brown, (See footnote 2) and Melinda Hamilton, applied for the Road Branch temporary position.

6. Grievant, successful applicant Walls, Stephen Anderson, Rebecca Cooke, and Gloria Cline, applied for the Road Branch permanent position.

7. Both selection processes were controlled by the first set of factors in W. Va. Code § 18A-4-7(a).

8. WBOE Superintendent Frank Blackwell (Blackwell) prepared two matrices, using the first set of factors in W. Va. Code § 18A-4-7(a), to assess the qualifications of the candidates for each position.

9. Grievant had four years administrative seniority and 23 years overall seniority. She had a Masters + 45 in Education Administration. She had teaching certificates in Elementary 1-8, Early Childhood, English 7-8, Art 7-8, and Music 7-8. She had administrative certificates in Principal K-8, Principal 5-12, Superintendent K-12, Supervisor of General Instruction K-12, and Vocational Administrator 5-Adult. She had attended the Principals' Academy.

10. With respect to the Road Branch temporary position, Walls had two years 176 days administrative seniority and 21 years overall seniority. She had a Masters + 45 in Educational Administration and Speech Communication and certificates in Elementary Education 1-8, Math 1-9, Principal K-8, and Principal 5- 12/Superintendent/Supervisor/Vocational Administrator.

11. With respect to the Road Branch permanent position, Walls had three years 144 days administrative seniority and 22 years overall seniority. She had a Masters + 45in Educational Administration and Speech Communication and certificates in Elementary Education 1-8, Math 1-9, Principal K-8, and Principal 5-12/Superintendent/Supervisor/ Vocational Administrator. She had

permanent authorizations in General Science 8, Physical Education 8, and Music 8.

12. The record does not reflect whether Walls attended the Principals Academy.

13. Blackwell recommended that WBOE select Grievant for the Road Branch temporary position.

14. WBOE did not accept Blackwell's recommendation of Grievant for the Road Branch temporary position. At its October 5, 1998, meeting, WBOE selected Walls for the position by a four to one vote.

15. At its July 29, 1999, meeting, WBOE unanimously selected Walls for the Road Branch permanent position.

16. On June 26, 1998, Grievant received a written reprimand for failure to follow established administrative guidelines.

17. On July 10, 1998, Grievant received a written reprimand for submitting an inaccurate workshop attendance list.

18. Grievant was Principal of Baileysville Elementary School for the 1997-1998 school year.

19. During the period of time relevant to this grievance, a Title 1 review took place at Baileysville Elementary School, concerning Grievant's occasional use of Title 1- funded teachers to “supplant” her school's regular teachers. The West Virginia Department of Education disagreed with this aspect of the use of Title 1 funds at Baileysville and, byletter of June 15, 1998, ordered WBOE to credit its Title 1 account with $4557.24. Grievant was not reprimanded concerning this review.

20. On May 23, 2000, WBOE issued a resolution stating that Grievant was not selected as Principal of Road Branch Grade School because of the nature and closeness in time of her two written reprimands and the Title 1 review findings.

DISCUSSION

These grievances are two of three filed by Grievant over WBOE's failure to select her for three principal positions. These grievances have a confused procedural history. On September 22, 1998, Grievant filed a grievance over her non-selection to be Principal of Glen Rogers Grade School. (See footnote 3) On October 8, 1998, Grievant filed a grievance over her non-selection as temporary Principal of Road Branch Grade School. (See footnote 4) On July 30, 1999, Grievant filed a grievance over her non-selection as permanent Principal of Road Branch Grade School. (See footnote 5) The

lower-level record of these grievances is confused by various procedural letters that do not identify to which grievance they refer, the parties inability to schedule lower level hearings, and by the fact that both parties switched attorneys during the pendency of the three grievances. However, undersigned permitted these grievances to proceed to Level IV for their first evidentiary hearing, provided that WBOE could preserve any timeliness defenses it may have. In the Road Branch temporary grievance,Grievant seeks instatement into the position, back pay, benefits, and attorney fees. (See footnote 6) In the Road Branch permanent grievance, Grievant seeks instatement as Principal of Glen Rogers Grade School, back pay, benefits, and attorney fees.

However, Grievant was awarded the relief she seeks in the Road Branch permanent grievance, to the extent that such relief was possible under the circumstances, in Houck v. Wyoming County Bd. of Educ., Docket No. 99-55-289 (Mar. 1, 2001). (See footnote 7) This Grievance Board has consistently denied grievances when the remedy sought brings only de minimus relief, Carney v. W.Va. Div. of Rehabilitation Serv., Docket No. VR-88-055 (Mar. 28, 1989); when the grievant seeks an advisory opinion, Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988); when "relief, if provided, would have no practical effect," Parsons v. Hancock County Bd. of Educ., Docket No. 15-88-249 (July 31, 1989); or when the grievance has become moot. Fratto v. Harrison County Bd. of Educ., Docket No. 89-17-294 (Nov. 30, 1989). See Harrison v. Cabell County Bd. of Educ., 177 W.Va. 257, 351 S.E.2d 605 (1986). Accordingly, Grievant's Road Branch permanent grievance will be dismissed as moot.

As these grievances do not involve disciplinary matters, Grievant has the burden of proving them by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Apreponderance 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); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

WBOE's timeliness argument will be addressed first. WBOE argues that the record contains no

indication that Grievant appealed the Road Branch temporary grievance from Level I to Level II. (See footnote 8) However, and as noted above, the lower-level record of this grievance is confused by various procedural letters that do not identify to which grievance they refer. For example, by letters of October 20, and November 30, 1998, Blackwell informed Grievant that her Level II hearing had been continued. These letters could refer to either Grievant's previous grievance concerning the Glen Rogers Grade School position, or the Road Branch temporary grievance, but do not indicate to which grievance they refer. Other letters from Grievant's attorney at the time, W. Richard Staton, Esq., dated October 30, 1998, and November 23, 1998, concerning scheduling matters, also do not identify to which of Grievant's two pending grievances they refer. The record also appears to show that, with respect to the Road Branch temporary grievance, attorney Staton mistakenly believed that Grievant could unilaterally waive the grievance from Level I to Level IV. (See footnote 9) Grievant also argued that WBOE had balked at attending a Level II hearing in the instant grievance, an argument supported by the long delay it suffered at the lower levels, and by pre-hearing conferences in which neither party could explain what was going on at the lower levels.

This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya v. Bd. of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989), the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, "[i]n the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with filing provisions contained in W. Va. Code §§ 18A-2-8 and 18-29-1, et seq., is entitled to the requested hearing." Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991); Duruttya, supra.

Consistent with the established principle that cases should be decided upon their merits as opposed to being dismissed for technical or procedural reasons, it is inequitable to dismiss a grievance upon the basis of timeliness when grievant's counsel, and not Grievant, is at fault. Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991). It appears that not only was

attorney Staton unfamiliar with the procedural requirements of the grievance procedure for education employees, (See footnote 10) but that he was distracted by the death of his mother. WBOE also hindered the processing of this grievance by failing to issue a Level I decision in the Road Branch temporary grievance and by issuing the imprecise letters described above. The undersigned declines to penalize Grievant for any errors WBOE and Mr. Staton may have made. His letter of April 1, 1999, which purported to unilaterally waive Grievant's first two grievances to Level IV, as well as his letter of August 5, 1999, which requests that Grievant's Road Branch permanent position grievance be consolidated with her two others, reflect Grievant's desire to advance her grievances to their first evidentiary hearing, a hearing which, for whatever reasons, was not forthcoming at the lower levels. There is also no evidence of bad faith on Grievant's part. Duruttya, supra. Accordingly, WBOE's timeliness argument with respect to the Road Branch temporary grievance is rejected.

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-4-7(a). 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-4-7(a) 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 ofthe 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, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson, supra; Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); 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-4-7(a) 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 impropercredentials 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 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. 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). It is the duty of the county board of education to consider the candidates recommended ornominated by the county superintendent in a thoughtful

manner, and with the best interest of the schools in mind. The rejection of the recommended or nominated candidate must not be arbitrary and capricious or demonstrate an abuse of discretion. Stinn v. Calhoun County Bd. Of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

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; Lilly v. 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).

The record in this grievance contains a great deal of evidence of little relevance to its central issue, the legal sufficiency of WBOE's selection process for temporary Principal of Road Branch Grade School, evidence concerning Grievant's two reprimands and the Title 1 review findings concerning Baileysville Elementary School. However, because these events are cited by WBOE in its Resolution of May 23, 2000, explaining its reasons for not selecting Grievant for the position, the voluminous evidence about them will be summarized very briefly.

On June 26, 1998, Grievant received a written reprimand for failure to follow established administrative guidelines. This reprimand arose when Grievant rescheduled a faculty senate meeting because so many teachers were absent that a quorum was impossible. Grievant maintained that she left a message on WBOE Assistant Superintendent McGrady's answering machine informing him of her decision. McGrady received a garbled message, and Grievant was reprimanded for failing to get permission to change the meeting date. On July 10, 1998, Grievant received a written reprimand for submitting an inaccurate workshop attendance list. This reprimand occurred when a staff development workshop at Baileysville Elementary School that some teachers claimed did not occur raised a question about payments to teachers who might not have attended this session.

The Title 1 review at Baileysville Elementary School concerned Grievant's occasional use of Title 1-funded teachers to “supplant” her school's regular teachers, a procedure approved by WBOE's Title 1 Supervisor, Vernon Short. However, the West Virginia Department of Education disagreed with this aspect of WBOE's use of Title 1 funds at Baileysville and, by letter of June 15, 1998, ordered it to credit its Title 1 account with $4557.24. Grievant was not reprimanded over this review.

The credible testimony of Grievant, Blackwell, Teachers Paulette and Jim Blankenship, Bottsie May Hicks, WBOE President Harless, and Secretary Sheronda Shields, showed that before Grievant

became Principal there, Baileysville Elementary School was a problem school with low test scores, poor discipline, and teachers, particularly certain Title 1 teachers, arriving late and leaving early, to the extent that state intervention was possible. Grievant improved the school, raised test scores, and took steps to get the errant teachers back "on task." Sadly, Grievant's efforts created a backlash of animosity from some teachers at Baileysville, particularly certain Title 1 teachers, who chose the time that Grievant was on leave with her seriously ill son to go to WBOE with their complaints about her, which led to the two reprimands described above. (See footnote 11) However, Grievant did not grieve her reprimands, and their merits cannot be placed in issue now. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); See Stamper v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dep't of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994).

As noted in Finding of Fact 20, on May 23, 2000, WBOE issued a resolution stating that Grievant was not selected as Principal of Road Branch Grade School because of the nature and closeness in time of her two written reprimands and Title 1 review findings. The resolution concluded:

> 8. Candidates for the principal positions in question who had not been subjected to recent disciplinary action and who met the minimum qualifications for the positions in question were available and were worthy of the Superintendent's nomination in accordance with the criteria contained in W. Va. Code § 18A-4-7a.
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> 9. No other factors were considered in the decisions of the Board to disapprove the recommendations of the Superintendent that she be employed as the Principal of Glen Rogers Grade School and that she be employed as the Principal of Road Branch Grade School.

In support of its decision to select Walls as temporary Principal of Road Branch Grade School, WBOE presented the credible testimony of four of its five members. (See footnote 12) WBOE member Margaret Swimm credibly testified that Grievant is a good elementaryschool principal, and that Grievant had been held responsible "to some extent" for the Title 1 findings at Baileysville Elementary School. Ms. Swimm's testimony did not specifically address the selection process for the Road Branch temporary position, nor include any reference to the factors set forth in W. Va. Code § 18A-4-7(a).

WBOE member Riley Brooks credibly testified that he felt that Grievant needed time to get her life

in order after a tragic accident befell her son; that her reprimands and her son's accident were the reasons for the Board's decision; and that Grievant was never disciplined over the Title 1 findings at Baileysville Elementary School. Mr. Brooks' testimony did not specifically address the selection process for the Road Branch temporary position, nor include any reference to the factors set forth in W. Va. Code § 18A-4-7(a). WBOE member Gerald L. Short credibly testified that Grievant's reprimands and the findings of the Title 1 review were too close in time for her to be selected for the position, and that she was possibly the most qualified applicant were it not for her reprimands. Mr. Short's testimony did not specifically address the selection process for the Road Branch temporary position, nor include any reference to the factors set forth in W. Va. Code § 18A-4-7(a).

WBOE President Arnold W. Harless credibly testified that Grievant was qualified to be temporary Principal of Road Branch Grade School and had more administrative experience than Walls; that all of Grievant's administrative experience was in elementary education; that the first two factors of W. Va. Code § 18A-4-7(a) (appropriate certification and/or licensure and amount of experience relevant to the position) were the only two factors that applied to the selection of administrative personnel; that the phrase “most qualified” in W. Va. Code § 18A-4-7(a) trumped the factors; and that he consideredGrievant's two reprimands, but that they didn't fall under either of the two factors he considered.

Mr. Harless also credibly testified that Grievant did a good job as Principal of Baileysville Elementary School, which had problems due to some teachers not being on task, which caused a backlash by some teachers against Grievant; and that he made his decision based in part upon the fact that Grievant had been reprimanded after the Title 1 review findings, although he later acknowledged that she had not.

Grievant credibly testified that she had six years experience as an elementary school principal; (See footnote 13) that she had attended the Principals' Academy; that Baileysville Elementary School had a poor reputation, lax discipline, low test scores, and Title 1 teachers who were not “on task” and who came and went as they pleased; that she implemented a plan to improve the school, which resulted in test scores above the fiftieth percentile for the first time; and that she felt that she was the most qualified candidate for the position of temporary and permanent Principal at Road Branch Grade School.

Superintendent Blackwell credibly testified that he applied the “first set of factors” set forth in W.

Va. Code § 18A-4-7(a) to his selection process and constructed two matrices to compare the candidates; that Grievant was the most qualified candidate for the Road Branch temporary position after consideration of all of the factors, including "other measures or indicators," and considering her two reprimands; and that Grievant is an excellent educator and administrator, respected by her peers and the subject of many favorable parent comments. Blackwell also credibly testified that WBOE has a policy ofrequiring elementary certification for elementary administrators and secondary certification for secondary administrators; (See footnote 14) that all of Grievant's experience is in elementary education; and that Grievant had been an elementary school principal for six years and done a very good job.

As noted above, Blackwell recommended that WBOE select Grievant for the Road Branch temporary position. WBOE did not accept Blackwell's recommendation of Grievant. At its October 5, 1998, meeting, WBOE selected Walls for the position.

The undersigned concludes that Blackwell, as he compared the candidates in order to recommend the most qualified, clearly applied the "first set of factors" set forth in W. Va. Code § 18A-4-7(a). Unfortunately, it is equally clear that the members of WBOE did not. Their credible testimony about their decision making process at the time they made the decision to reject Blackwell's recommendation of Grievant, and select Walls, shows that only Mr. Harless gave any thought to the factors they were required by law to apply, and even then applied only two of them. It appears instead that something else was going on, which included the sort of political favor trading more fully discussed in Houck v. Wyoming County Bd. of Educ., Docket No. 99-55-289 (Mar. 1, 2001), some reliance on disciplinary actions which had not been imposed on Grievant, and a certain degree of paternalism. WBOE failed its legal duty to apply the "first set of factors" set forth in W. Va. Code § 18A- 4-7(a), Baker, supra, and to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind, and to ensure that the rejection of the recommended candidate is not arbitrary andcapricious or an abuse of discretion. Stinn, supra. As a result, the most qualified candidate was not selected, in violation of W. Va. Code § 18A-4-7(a).

In reaching this conclusion, the undersigned is mindful of WBOE's resolution, referred to in Finding of Fact 20, purporting to explain the reasoning behind its selection decision. It is noted that this resolution was issued some 20 months after WBOE's decision. However, given the credible

testimony of the WBOE members, set forth above, as to their decision making process at the time of their decision, their subsequent resolution appears to be nothing more than a post-hoc rationalization of their flawed decision making process.

Accordingly, Grievant has established that WBOE did not properly rely on the “first set of factors” set forth in W. Va. Code § 18A-4-7(a), which it was legally mandated to follow, 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 the selection process that WBOE chose to apply to the candidates for the position shows that it was not legally sufficient. Thibault, supra. WBOE failed to rely on factors that were intended to be considered (the “first set of factors” set forth in W. Va. Code § 18A-4-7(a)); entirely ignored important aspects of the problem, and explained its decision in a manner contrary to the evidence before it. Bedford County Memorial Hosp., supra. The testimony of Blackwell and Grievant, as well as the documentary evidence, showing that Grievant's qualifications were superior to Walls', was not substantially contradicted by the members of WBOE. Indeed, and as noted above, their testimony hardly addressed the issue of which candidate was more qualified. Grievant proved, bya preponderance of the evidence, that she was the most qualified applicant for the Road Branch temporary position.

With respect to the remedy to be granted Grievant, the record is silent as to whether Grievant would have enjoyed a higher salary had she been selected. However, because WBOE has a policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators, Grievant may be disadvantaged in future selection processes if she is deprived of the elementary administrative seniority she would have earned had WBOE conducted a legally sufficient selection process. Therefore, WBOE will be ordered to credit Grievant with the elementary administrative seniority she would have earned had she been selected as temporary Principal of Road Branch Grade School, and to pay her any difference in salary, with interest, between that position and the position or positions she has held for the period of time between October 5, 1998, the date of her non-selection as temporary Principal of Road Branch Grade School, and July 29, 1999, the date of Walls' selection as permanent Principal of Road Branch Grade School.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. As these grievances do not involve disciplinary matters, Grievant has the burden of proving them by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. 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 asa whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

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-4-7(a): appropriate certification, experience relevant to the position, degree level, course work and degree level in the relevant field, academicachievement, 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. It is the duty of the county board of education to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind. The rejection of the recommended or nominated candidate must not be arbitrary and capricious or demonstrate an abuse of discretion. Stinn v. Calhoun County Bd. Of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

7. WBOE failed its legal duty to apply the "first set of factors" set forth in W. Va. Code § 18A-4-7(a).

8. Grievant proved, by a preponderance of the evidence, that she was the most qualified applicant for the position.

Accordingly, the grievance is **GRANTED**, and Respondent WBOE is **ORDERED** to credit Grievant with the elementary administrative seniority she would have earned had she been selected as temporary Principal of Road Branch Grade School, and to pay her any difference in salary, with interest, between that position and the position or positions she has held for the period of time between October 5, 1998, the date of her non-selection as temporary Principal of Road Branch Grade School, and July 29, 1999, the date of Walls' selection as permanent Principal of Road Branch Grade School. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming County. Any 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.

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ANDREW MAIER

Administrative Law Judge

Dated: March 9, 2001

Footnote: 1

WBOE had previously been represented in Grievant's three grievances by Kathryn Bayless, Esq.

Footnote: 2

Mr. Brown apparently withdrew his name from consideration.

Footnote: 3 *This grievance was granted in Houck v. Wyoming County Bd. of Educ., Docket No. 99-55-289 (Mar. 1, 2001), which is incorporated herein by reference.*

Footnote: 4 *The "relief requested" portions of these two grievances were apparently transposed upon filing at Level IV.*

Footnote: 5 *As relief in this grievance, Grievant sought to be instated into the Glen Rogers Grade School position.*

Footnote: 6 *Attorney fees are not awarded by this Grievance Board. Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).*

Footnote: 7 *It is noted that the record contains little evidence concerning the Road Branch permanent grievance.*

Footnote: 8 *The record does not reflect that Grievant's Road Branch temporary grievance ever received a decision at Level I.*

Footnote: 9 *By letter of April 1, 1999, attorney Staton informed Superintendent Blackwell that Grievant "hereby waive[s] the two grievances she has pending over principal assignments to level four."*

Footnote: 10 *A search of the more than 4,000 Grievance Board decisions did not reveal that attorney Staton has ever appeared before this Board.*

Footnote: 11 *The record does not reflect any previous discipline of Grievant in her 23 year career with WBOE.*

Footnote: 12 *WBOE member Don Nuckols did not testify because he had been indicted on a felony charge of unlawfully buying or selling a vote and a misdemeanor charge of unlawfully promising employment in exchange for political support for allegedly promising Richard Davidson the Glen Rogers Grade School Principal position in exchange for his support in the May, 1998, school board election. The charges against Mr. Nuckols were dismissed on or about July 15, 2000. However, Mr. Nuckols still asserted his right not to testify after that date because he felt his re-indictment was possible.*

Footnote: 13 *The record does not reflect why the matrix prepared by Blackwell reflects only four years of administrative seniority.*

Footnote: 14 *It is not arbitrary and capricious for a board to require secondary school experience for a secondary*

school position. Baker v. Lincoln County Bd. of Educ., Docket No. 00-22-081 (June 28, 2000).