JANICE GOODWIN,

Grievant,

v. Docket No. 01-30-495

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

DENNIS GALLON,

Intervenor.

D E C I S I O N

Janice Goodwin (Grievant), employed by the Monongalia County Board of Education (MCBE) as an Assistant Principal, filed a level one grievance on August 1, 2001, in which she alleged a violation of W. Va. Code § 18A-4-7 when she was not selected for the principalship at South Middle School. For relief, she requested instatement to the position. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. A level two hearing was conducted on August 22, 2001; however, Grievant and her representative did not appear. Counsel asserted that he had advised MCBE that he was not available on that date, and waived the statutory time lines for the hearing. His request that a full hearing be conducted was denied, and a level two decision denying the grievance was issued. Grievant bypassed consideration at level three, as is permitted by W.Va. Code § 18-29-4(c), and appeal was made to level four on September 4, 2001. After a number of delays, a level four hearing was conducted on October 21, 2002, February 10 and 21, 2003. All parties were represented by counsel, William C. Brewer, for Grievant, Harry M. Rubenstein of Kay Casto & Chaney, P.L.L.C., for MCBE, and Patricia H. Stiller for Intervenor. The matter became mature for decision on June 6, 2003, the due date for final post-hearing submissions. The following facts have been derived from a preponderance of the evidence admitted into the level four record.

Findings of Fact

1. Grievant has been employed by MCBE since 1973, first as a teacher at Sabraton Junior High School from 1973-1980, and then at South Junior High School from 1980-86. Grievant served as Assistant Principal at South Junior High/Middle School from 1986-1998, and has been Assistant Principal at Morgantown High School since 1998. Grievant has a Master's degree in Curriculum and Instruction and is a Reading Specialist. She has completed thirty hours towards a Master's degree in Administration, and holds several administrative certifications, including Principal (K-12).

2. Intervenor was first employed by MCBE as a substitute teacher in 1982, and on a regular basis since 1983. He taught at Brookhaven and North Elementary Schools until 1998, and was assigned to sixth grade at Suncrest Middle School from 1998 until January 2000, when he was appointed Assistant Principal at Cheat Lake Middle School. Intervenor has a Master's degree in Education Administration, plus forty-five hours, and is certified to be a principal (K-12).

3. On or about April 26, 2001, MCBE posted a vacancy for the position of Principal at South Middle School. The qualifications for the position were:

-Master's degree and principal certification, grades 5-8, 5-12, or K-12.

-Participation in professional development opportunities relevant to developmentally appropriate education.

-Knowledge of and evidence of the incorporation of developmentally appropriate practices into the environment.

-Meets the health requirements as set forth by West Virginia Code/Local Policy. -Demonstrates good communication and organizational skills to all publics [sic].

4. Three applications were submitted for the position, including those of Grievant and Intervenor.

5. An interview team was assembled, and included Assistant Superintendents Jacob Mullett and Sharon Harsh, Faculty Senate (teacher) representative Ray Wilson, a Local School Improvement Counsel (parent) representative, and Dr. Michael Vetere, MCBE Superintendent.

6. Interviews were conducted on July 2, 2001. The candidates were asked a number of standardized questions developed to address their leadership/managerial skills, knowledge of curriculum and educational innovations, knowledge of instructional practices, communication

skills, including public/community relations, interpersonal skills, knowledge of student support programs, and knowledge of program/staff development and evaluation.
The candidates were permitted to submit a professional portfolio of their accomplishments for committee consideration.

7. At the conclusion of the interviews, each committee member completed an "Interview Screening Instrument" on which the candidates were ranked from 0 (No Evidence) to 5 (Strong) in the areas of leadership/managerial skills, knowledge of curriculum and educational innovations, knowledge of instructional practices, communication skills, including public/community relations, interpersonal skills, knowledge of student support programs, knowledge of program/staff development and evaluation, and overall presence. 8. A "Rating Form For Principal" was then completed for each candidate. The categories and points awarded to Grievant and Intervenor follow:

	Grievant	Intervenor
Appropriate Certification	10	10
Experience Relevant to the position	10	5
Course Work or Degree Level . . .	5	5
Academic Achievement in Graduate Courses	-	-
Relevant Specialized Training	10	10
Past Performance Evaluations	10	10
Other Measures or Indicators. . .	195	207
-Evaluates Personnel in a Fair, Impartial and Timely Manner	(22)	(20)
-Leadership to Facilitate Change in the School	(19)	(21)
-Willing to Cooperate and Comply with Directives of Supt.	(10)	(10)
-Prior Experiences that Indicate Ability	(20)	(24)

to Work Cooperatively and Effectively
with Others and to Support the position
of the Supt.

-Communication Skills	(20)	(23)
-Knowledge of Curriculum and Instructional practices	(20)	(23)
-Knowledge and support of Student Support programs	(23)	(22)
-Interpersonal skills	(22)	(22)
-Building and personnel management	(19)	(21)
TOTAL	240	247

9. Based upon the total scores, Dr. Vetere recommended, and MCBE approved Intervenor for the position of principal at South Middle School.

Discussion

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6.

In this case, Grievant bears a heavy burden, as the selection process for an administrative position is governed by the “first set of factors” set forth in W. Va. Code § 18A-4-7a, which directs county boards of education to hire "professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications." Further, in judging qualifications, consideration shall be given to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position . . .

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 . . . and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school, and are not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). Additionally, a county board of education is free to determine the weight to apply to each of the above-stated factors when assessing an applicant's qualifications for an administrative position, as long as thissubstantial discretion is not abused. 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).

Finally, nothing in the language of W. Va. Code §18A-4-7 restricts the area of measures or indicators, as long as they are factors "upon which the relative qualifications of the applicant may fairly be judged." Indeed, W. Va. Code §18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55-183 (Sept. 30, 1993). The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998)(citing Tenny v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990)); See Deadrick v. Marion County Bd. of Educ., Docket No. 90-23-071(Jan. 30, 1991) . This is especially true in the selection for an administrative position. Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

The standard of review in cases brought by unsuccessful candidates for administrative posts generally entails an inquiry into whether the criteria set forth in W. Va. Code § 18A-4-7a were accurately assessed for each applicant; whether favoritism and/or discrimination played a role in the selection process; and whether flaws in the process were so significant that the outcome might reasonably have been different. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). See Mills v. Wayne County Bd. of Educ., Docket No. 99-

50-016 (Feb. 22, 1999). Ultimately, it must be decided whether the Board abused its considerable discretion in personnel matters, or if its decisionwas arbitrary and capricious. See Dillon, supra; Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-85 (Aug. 28, 1998); Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 168 W. Va.162, 286 S.E.2d 276, (1982)." Trimboli, supra.

Grievant argues that MCBE acted in an arbitrary and capricious manner when it utilized a selection process in this case which was significantly flawed, and a properevaluation might reasonably have resulted in a different outcome. MCBE asserts that the most qualified applicant was properly selected for the position.

Grievant argues that MCBE erred in redrafting the rating form. Specifically, the category “experience relating to the position,” was amended to award 10 points for 10-45 years of experience, 5 points for 1-9 years experience, and allowed 5 points for other administrative experience in educational settings. Several month earlier, MCBE had used a rating form which utilized a more finite breakdown of points, allowing 2 points for 0-3 years of experience, 4 points for 4-6 years, 6 points for 7-10 years, 8 points for 11-15 years, and 10 points for 15 or

more years. Had the same standards been applied in the present matter, Grievant would have received 8 points, and Intervenor would have received only 2 points, a difference of 6 points. The form used by MCBE resulted in a difference of 5 points with Grievant receiving 10 points, and Intervenor 5 points. Grievant argues that the change in this category worked to her detriment, and lacking any rational explanation, the change was arbitrary and capricious.

Dr. Harsh testified at level four that she had changed the form prior to interviews being scheduled in this matter, with input from other administrators, as part of an ongoing process to maintain compliance. No specific explanation was offered as to why the method of scoring administrative experience had been revised.

In Keatley v. Mercer County Board of Education, 200 W. Va. 487, 490 S.E.2d 306 (1997), the board used an "all or nothing" method for awarding "experience" points. That is, if an applicant had assistant principal experience of any length, the applicant received all five points. If an applicant had no experience as an assistant principal, the applicant received zero points. The result in that matter was that both Mr. Keatley, with 12 years ofexperience, and the successful applicant, with one year of experience, received the full 5 points. Upon appeal, the Court the West Virginia Supreme Court of Appeals held that "[u]nder W. Va. Code § 18A-4-7a (1993) county boards of education are required to utilize a fair method of awarding credit for experience when filling professional personnel positions; such a method must establish a system that will differentiate experience among the applicants." The Court went on to hold that the statute clearly requires a board to consider the "amount" of experience of each applicant, not merely the "existence" of experience, and that the Board's method of awarding points did not comply with the statute's requirement to consider the "amount" of experience. Id. While no specific formula exists, it is clear that discretion must be appropriately used in creating point systems that make fair and reasonable adjustments for greater experience.

In the present matter, it is debatable whether using only two categories adequately constitutes fair and reasonable adjustments for greater experience. However, while the system used by MCBE does not follow the example provided by the Court in Keatley, neither is it as severe as the “all or nothing” approach applied by the board in that case. Therefore, MCBE's method of scoring the criteria "amount of experience relevant to the position" is determined not to be arbitrary or capricious.

Grievant next argues that MCBE erred when it failed to review academic achievement, one of the factors listed in W. Va. Code § 18A-4-7a. MCBE asserts that the factor was considered, as evidenced by the fact that it was included on the rating form, but was given no weight.

MCBE's rating form lists all seven statutory criteria which are to be considered, including "Academic Achievement in Graduate Courses." The category is allocated 10points, with an average of 3.0-3.5 receiving 5 points, and 3.5-4.0 worth the full 10 points. Dr. Vetere testified that the interview committee did not award points in this category because both applicants were long-standing employees, and were known to be competent and capable.

This situation is somewhat similar to that in Snyder v. Preston County Board of Education., Docket No. 98-39-509 (May 26, 1999), in which PCBE asserted that the statutory criterion of academic achievement was "considered," but was not assessed due to insufficient information. Just as in the present matter, none of the applicants were awarded points in that area. The Grievance Board determined that PCBE's conduct was insufficient to comply with the requirements of W. Va. Code § 18A-4-7a, and remanded the grievance for review.

It does not appear that MCBE's claim that no weight was given to the "Academic Achievement" factor is correct. It is included on the rating form with a designated point factor. Factors 1-6 were each allocated a possible 10 points. Factor 7, "Other Measures or Indicators," was worth a possible total of 250 points. Thus, it seems that all the factors were weighted by the number of points they were assigned on the rating form. However, even if MCBE properly determined that "Academic Achievement" would receive no weight, it was not relieved of the statutory duty to consider the factor. Therefore, Grievant has proven that MCBE failed to comply with the requirements of W. Va. Code § 18A-4-7a.

Grievant additionally argues that MCBE erred when it placed a parent on the selection committee and allowed the individual to rate the applicants on an equal basis with the remaining members. Grievant asserts that the parent lacked the professional expertise necessary to fairly evaluate the applicants in nearly all of the subcategories included in the"Other Measures or Indicators ..." factor. MCBE argues that parental involvement in public education matters is encouraged, as evidenced by the legislative creation of Local School Improvement Councils, and that inclusion of parents/community members in the hiring

process is regularly practiced throughout the state.

MCBE is correct that parents/community members may serve on school personnel screening and interview committees. However, Grievant is equally correct in asserting her right to be evaluated fairly on factors which require a specific expertise. While a layperson's participation may be valuable, and should be considered, unless evidence is presented to the contrary, they are simply not competent to make hiring decisions. This case illustrates that fact very well. The scoring of factor seven by the educators was consistent. Grievant received 46, 45, 39,and 36 points from the committee members while Intervenor received 47, 44, 39, and 34 points. Using only these scores, Grievant was awarded 166 points, and Intervenor 164 points. However, the parent rated Grievant at 29 points and Intervenor 43 points. Had Dr. Vetere considered the committee's review, and then made an independent determination as to which applicant was the best qualified, the scoring would not have created a significant flaw in the process. See Snyder v. Preston County Bd. of Educ., Docket No. 98-39-509 (May 26, 1999); 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). However, the Superintendent did not conduct an independent review, as is evidenced by the following testimony:

Mr. Brewer: And the recommendation that you made to the Board in this case was based upon the numerical scores that were developed through the interview process. Is that correct?

Dr. Vetere: That's correct.

(Level four transcript, page 7).

Because the position was awarded to the applicant with the most points, the assessment of professional qualifications by an individual with no education or training in that area is not appropriate to determine which applicant was best qualified. Therefore, the points awarded by the LSIC representative must be eliminated from the total point scores.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position

rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6.

2. W. Va. Code § 18A-4-7a sets forth the criteria to be used in filling administrative positions. to hire "professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications." consideration shall be given to each of the following: Appropriate certification and/or licensure; amount of experience relevant to the position . . . the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; pastperformance evaluations . . . and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

3. It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school, and are not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if

an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra. 5. A county board of education is free to determine the weight to apply to each of the above-stated factors when assessing an applicant's qualifications for an administrative position, as long as this substantial discretion is not abused. 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). Once a county board of education reviews the criteria, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994).

6. The standard of review in cases brought by unsuccessful candidates for administrative posts generally entails an inquiry into whether the criteria set forth in W. Va. Code § 18A-4-7a were accurately assessed for each applicant; whether favoritism and/or discrimination played a role in the selection process; and whether flaws in the process were so significant that the outcome might reasonably have been different. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Ultimately, it must be decided whether the Board abused its considerable discretion in personnel matters. See Dillon, supra; Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-85 (Aug. 28, 1998); Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995).

7. Grievant has proven by a preponderance of the evidence that the selection criteria of W. Va. Code § 18A-4-7a were not utilized and considered, rendering the decision to award the position to Intevenor arbitrary and capricious.

8. Grievant has also established the selection process was so flawed by the inclusion, and equal weighting, of points assigned to factor seven by a lay person, that the outcome might reasonably have been different. Stover, supra. Accordingly, this grievance is GRANTED to the extent that MCBE is ORDERED to review Grievant and Intervenor's "Academic Achievement in Graduate Courses," and award the appropriate points for that factor. The points in factor seven are to be revised so that Grievant has 166, and Intervenor has 164 points. If Grievant's point total exceeds that of Intervenor, then she shall be instated

to the position of Principal at South Middle School, with all back pay, interest and benefits to which she is entitled.

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

DATE: JUNE 26, 2003

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE