JACQUELINE SWITZER

Grievant,

v. **DOCKET NO. 03-20-013**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievant, Jacqueline Switzer, against Respondent, Kanawha County Board of Education ("KBOE"), when she was not selected to fill an Assistant Principal position at Riverside High School in the fall of 2002. As relief she requested instatement into the position. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by KBOE as an Assistant Principal at Hayes Junior High School, a position which she accepted in September 2002. During the spring of 2001, Grievant was Acting Assistant Principal in charge of curriculum at Riverside High School.

2. On September 12, 2002, KBOE posted an Assistant Principal position at Riverside High School. There were five applicants for the position, including Grievant.

3. An interview team was appointed, consisting of Richard Clendenin, Principal at Riverside High School, Dr. Pat Law, Assistant Superintendent of High Schools, William Buchanan, Director of Human Resources, Liz Regal, a teacher, and Duanna Hughes, an administrator.

4. Interviews were conducted by the interview team, and a matrix was completed by Mr. Buchanan. The matrix rated each applicant in the seven statutory criteria. Under the seventh statutory criterion, "other measures or indicators," only the interview was considered.

5. The posting set forth the weight which would be assigned seven listed factors "for evaluating

qualifications of candidates for administrative positions," with "interview" being listed as the seventh factor. These are the factors which were rated on the matrix, and the weight given to each factor on the matrix is the same as is stated on the posting.

6. The interview team determined that the top four applicants, in order, were Gary Cook, Grievant, Brian Eddy, and Pam Reynolds, based upon the matrix scores.

7. Principal Clendenin took the names of the top four applicants to Superintendent Ronald Duerring, and Dr. Duerring was provided with the matrix and the interview scores. Principal Clendenin told Dr. Duerring he did not want Grievant as the Assistant Principal at Riverside High School because of her lack of teamwork, there had been confrontations between Grievant and another member of the administrative team, Grievant had not completed all of her job duties the preceding year, and he questioned her loyalty.

8. Dr. Duerring recommended Mr. Eddy for the position, and KBOE accepted the recommendation. Dr. Duerring did not recommend Grievant due to the concernsexpressed by Principal Clendenin, and because she had just accepted the Assistant Principal position at Hayes Junior High School.

9. Mr. Eddy scored third on the matrix, with a total score of 66.49. Grievant received the second highest score on the matrix, with a total score of 74.97. Mr. Cook scored highest on the matrix, with a total score of 86.70, but he was not an employee of KBOE, and Dr. Duerring preferred a KBOE employee for the position.

10. Grievant holds an administrative certificate, and has approximately nine months of administrative experience, which was more administrative experience than Mr. Eddy had.

11. Grievant has a Master's Degree plus 45 hours, and received 12 points on the matrix for degree level, while Mr. Eddy has a Master's Degree plus 30 hours, and received 9 points in that criterion.

12. Mr. Eddy had 261 hours of relevant training, while Grievant had 132 hours.

13. Mr. Eddy scored 11.2 in the interview, while Grievant scored 10.5.

14. Grievant's undergraduate grade point average was listed incorrectly on the matrix, but was still higher than Mr. Eddy's.

15. Nancy Alexander is the Assistant Principal in charge of curriculum at Riverside High School. Prior to accepting that position she was the Assistant Principal at Riverside High School in

charge of discipline.

16. In the spring of 2001, Ms. Alexander was notified she would be reduced in force, and would lose her position as Assistant Principal in charge of discipline.

17. During the spring of 2001, the position of Assistant Principal in charge of curriculum at Riverside High School, which Grievant held in a temporary capacity, was advertised. Grievant and Ms. Alexander applied for the position. Ms. Alexander was selected for the position. Grievant was not happy that Ms. Alexander had applied and been selected for the position, she felt the position was hers, and she would not talk to Ms.Alexander. Ms. Alexander asked Grievant if they could work through this, and Grievant responded in what Ms. Alexander felt was an angry manner, that Ms. Alexander was not trustworthy, and she felt betrayed. One evening the next school year, Ms. Alexander asked Grievant how she was doing, and Grievant responded that she had no right to ask her that after what she had done to her. Ms. Alexander did not perceive that Grievant's attitude toward her ever changed, and she did not feel they had a good working relationship. Grievant also told Ms. Alexander that Principal Clendenin was not trustworthy, and Ms. Alexander shared this information with Principal Clendenin, as well as some of what Grievant had said about Ms. Alexander.

Discussion

Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). In this case, Grievant bears a heavy burden, as the selection process for filling an administrative position is governed by the "first set of factors" set forth in W. Va. Code § 18A-4-7a, which provides:

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

While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position,

so long as this does not result in an abuse of discretion. Thus, a county board of education may determine that "other measures or indicators" is the mostimportant factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

> All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 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. Harper, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Grievant made several arguments. She argued she was not given proper credit in the category academic achievement, and her staff development hours were incorrect. The undersigned finds no evidence in the record to support a finding that Grievant's staff development hours were incorrect. As to Grievant's undergraduate grade point average, while Respondent's witnesses admitted that Grievant's grade point average was incorrectly listed on the matrix, the record does not clearly reflect what Grievant's grade point average should have been.

Even if Grievant's grade point average and her staff development hours were corrected to her satisfaction, these corrections would not affect the outcome. Grievant already had a higher score than Mr. Eddy on the matrix. However, she was not selected by Superintendent Duerring because Principal Clendenin did not want her at his school due to his concerns that she would not be a team player, and because she had just accepted a position at another school. Grievant argued Superintendent Duerring could not base his selection on these two reasons, as the posting listed the weight to be accorded each statutory factor, it listed “interview” under the seventh factor (“other measures or indicators upon which the relative qualifications of the applicant may fairly be judged”), and these percentages added up to 100%. Consideration of anything else would exceed 100%. She also argued that Grievant's ability to get along with Ms. Alexander and Principal Clendenin could not be a consideration in the selection because this was not a qualification which could “fairly be judged.”

KBOE's policy on Administrative Selection states at § 62.02.2, under posting procedures, that “[a] numerical weight shall be assigned to each of the criteria to be considered. However, no more than 15% of the total weight may be attributed to interview results.” The policy provides at § 62.10 that a selection committee, which in this case apparently was also the interview team, “will award credit in each of the criteria to be considered for each candidate. The selection committee shall incorporate the results ofthe interview and rank each candidate in ascending order. The names of the top 4 candidates shall be provided to the Superintendent.” The policy then states at § 62.11, Superintendent's Recommendation:

> The Superintendent shall consider the qualifications of the candidates for administrative positions based upon the criteria set forth in W. Va. Code § 18A-4-7a. Such consideration may include, under the criteria other measures or indicators upon which the qualifications may fairly be judged: the results of a structured interview; input from the supervisors or other administrators who are familiar with the job performance of any candidate; successful completion of a leadership internship; and, interviews that may be conducted by the Superintendent. The Superintendent shall select a candidate from the pool provided by the selection committee. In the event the Superintendent elects not to recommend a candidate from the pool, the position shall be readvertised and the qualification or qualifications found lacking in the pool shall be included in the new job posting.

KBOE's policy was followed in this case. The posting set forth the weight which would be assigned seven listed factors “for evaluating qualifications of candidates for administrative positions,” with “interview” being listed as the seventh factor. These are the factors which were rated on the matrix, and the weight given to each factor on the matrix follows the information on the posting. Thus,

the candidates were rated as is set forth in the posting, and Grievant was one of the top four candidates. The top four candidates' names were then provided to the Superintendent, he spoke with Principal Clendenin, and made the decision to recommend Mr. Eddy, all in accordance with the policy. The posting does not state that it will supercede KBOE's policy, or that the Superintendent will consider only the interview as the “other measures and indicators.”

Grievant challenged KBOE's policy of sending the top four candidates to the Superintendent, pointing to a report of the Office of Education Performance Audits, West Virginia Board of Education, dated January 2003. This report is part of the accreditation process, and was prepared by a team that visited Kanawha County schools. That report states:

> Review of files on two administrative postings indicated that the most qualified candidate (according to rating scale) was not employed. The Director of Personnel stated that the interview team sends the top fourcandidates to the superintendent and the superintendent chooses the successful candidate. This appeared to be arbitrary and may not result in the most qualified applicant being chosen.

Although KBOE challenged this conclusion, it was not changed, and the 231+ page report was approved by the State Department of Education.

Grievant presented nothing which would lead the undersigned to conclude that the report of the Office of Education Performance Audits is binding upon the Grievance Board, or that it should be given any weight whatsoever by the undersigned in this grievance. It is not an opinion of the State Superintendent of Schools, which would be entitled to great weight unless shown to be clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Leach v. Greenbrier County Bd. of Educ., Docket No. 97-13-480 (Jan. 30, 1998). Further, the report simply says KBOE's policy of sending the top four names to the Superintendent appeared to be arbitrary, and may not result in the most qualified applicant being chosen. It does not conclude that the policy is invalid or illegal, or that KBOE's decision in this case was arbitrary and capricious. In this case, under the criterion “other measures or indicators,” the interview/selection team considered only the interview score. Certainly, W. Va. Code § 18A-4-7a does not limit a superintendent or board of education to considering only the interview under this criterion in evaluating the qualifications of the candidates.

> nothing in the language of W. Va. Code § 18A-4-7a 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 undersigned finds nothing contrary to law or arbitrary and capricious in the procedure used here.

As to Grievant's argument that Superintendent Duerring could not consider whether Grievant could work well with other administrators at Riverside High School, it would be difficult to rate each applicant's abilities in this area, however, it certainly is something that can fairly be judged in this case; and an individual's ability to work as part of a team is certainly an important part of that individual's qualifications for an administrative position. Although Grievant disputed Ms. Alexander's testimony to some extent, Grievant admitted she had told Ms. Alexander that she felt she had betrayed her, and that she could not trust her or Principal Clendenin. Grievant acknowledged that it is important that administrators in a school trust one another. When asked if she now trusts Principal Clendenin and Ms. Alexander, she responded, “Absolutely.” Grievant did not explain how she had been able to reestablish her trust in Principal Clendenin and Ms. Alexander, and the undersigned finds her testimony on this point to be contrived. It is obvious that Grievant could not be an effective member of the administrative team if she did not trust Principal Clendenin and Ms. Alexander. Further, it would not be in the best interests of the schools to return Grievant to Riverside High School as an Assistant Principal under these circumstances.

Finally, Grievant argued the selection process was flawed because the board of education was not told Grievant scored higher on the matrix than Mr. Eddy, the board members were not given the matrix scores, and the board members did not consider the statutory criteria. Respondent correctly pointed out that it is the responsibility of the superintendent, not the board of education, to evaluate the candidates, review the statutory criteria, and make a recommendation to the board of education. A board of education is not required to independently rank the applicants and compare their qualifications basedupon the statutory criteria when the superintendent has already done such a comparison prior to making his recommendation.

W. Va. Code § 18A-2-1 describes the respective duties of the superintendent and

the board of education in the employment process and states, in pertinent part:

The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent. In case the board refuses to employ any or all of the persons nominated, the superintendent shall nominate others and submit the same to the board at such time as the board may direct. All personnel so nominated and recommended for employment and for subsequent assignment shall meet the certification, licensing, training, and other eligibility classifications as may be required by provisions of this chapter and state board regulation.

The West Virginia Supreme Court has generally addressed the role of a county superintendent and held that persons holding the position are not merely employees, but "officers" of the county board with "a multitude of powers and duties independent of the board." State ex rel. Rogers v. Bd. of Educ. of Lewis County, 125 W. Va. 579, 25 S.E.2d 537, 540 (1943). "Clearly, the nomination of persons qualified to fill vacancies is a statutory duty of the superintendent and not a responsibility which arises by virtue of his or her employment with the county board." Gore v. Monroe County Bd. of Educ., Docket No. 93-31-532 (Apr. 26, 1994). In the case of professional personnel, the superintendent's duty to nominate necessarily entails the duty to adhere to the provisions of W. Va. Code §18A-4-7a, which set forth the criteria to be used in assessing the qualifications of the applicants. In employing administrative personnel the first set of factors is applied. It appears well-settled that the chief executive officer of a county school system may not delegate the duties of the post to others. Gore, supra; See, 78 C.J.S. Schools and School Districts §171 (1952). It follows that others may not take actions which have the effect of impeding or usurping the exercise of those duties. "W.Va Code §18A-2-1 prohibits a county board from participating in the evaluation process by which the superintendent reaches a decision to nominate a particular candidate not through the use of specific language[,] but by explicitly establishing a bifurcated appointment procedure." Gore, supra.

County school boards in West Virginia also draw their powers from statute and can only exercise such authority as is expressly given them or arises by necessary implication. Evans v. Hutchinson, 158 W. Va. 356, 214 S.E.2d 453 (1975). W. Va. Code §18A-2-1 explicitly confers upon a board the ultimate authority to accept or reject the Superintendent's recommendation, and to direct the Superintendent to nominate an additional qualified candidate if the first nomination is rejected. Thus, any interpretation of the statutory language at issue must take into account the respective duties of the board and the superintendent under W. Va. Code §18A-2-1.

"This [Code] language effectively divides the power to hire equally between the superintendent and the county board. No person may beappointed to a professional position until both have exercised their authority under the statute. Implicit in the statute is that the respective roles in the hiring process must be distinct, i.e., that the superintendent must exercise his statutory duty to nominate independent of the county board and that the board, in fulfilling its obligations under the statute, must reject or accept without undue influence from the superintendent. Otherwise, the division of authority is rendered meaningless." Rakes v. Raleigh County Bd. of Educ., Docket No. 93-41-448 (Mar. 17, 1995). Because the prohibition against undue interference by

> either party is an implied and not explicit part of the statute, it is not possible to adopt a rule applicable to all situations in which a violation of that prohibition is alleged. Gore, supra. Each case must be decided on its own merits.

Stinn, supra (footnotes omitted).

Grievant has not demonstrated Superintendent Duerring's decision to recommend Mr. Eddy for the Assistant Principal position at Riverside High School, rather than Grievant, and KBOE's approval of that recommendation, was arbitrary and capricious.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996).

2. While each of the factors listed in W. Va. Code § 18A-4-7a must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

> All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one ofthe 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).

3. 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).

4. 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, 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. 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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)).

5. It is the responsibility of the superintendent, not the board of education, to evaluate the candidates, review the statutory criteria, and make a recommendation to the board of education. A board of education is not required to independently rank theapplicants and compare their qualifications based upon the statutory criteria when the superintendent has already done such a comparison prior to making his recommendation. Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

6. Grievant has not demonstrated Superintendent Duerring's decision to recommend Mr. Eddy for the Assistant Principal position at Riverside High School, rather than Grievant, and KBOE's approval of that recommendation, was arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha 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 Grievance Board with the civil action number so

that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 11, 2003

Footnote: 1

This grievance was filed on October 21, 2002, and was denied at Level I on October 28, 2002. Grievant appealed to Level II, and a hearing was held at Level II on November 21, 2002. The grievance was denied at Level II on December 9, 2002, and Grievant appealed to Level III. The Kanawha County Board of Education declined to hear the grievance at Level III, and Grievant appealed to Level IV on January 16, 2003. A Level IV hearing was held on February 26, 2003. Grievant was represented by Cynthia Evans, Esq., and Respondent was represented by James W. Withrow, Esq. This case became mature for decision on April 7, 2003, upon receipt of the parties' written arguments.