LEO GERALD LAKE,

Grievant,

v.

CABELL COUNTY BOARD

OF EDUCATION, **DOCKET NO. 04-06-282**

Respondent,

and

BRENDA TANNER,

Intervenor.

DECISION

On June 14, 2004, Leo Gerald Lake filed a grievance against his employer, the Cabell County Board of Education, stating, ". . . I am the most qualified candidate for the Cabell County Career Technology Center Assistant Principal's position. Through research and investigation I believe one will find that WV Code [§] 18A-4-7A has been violated. One will also find that retaliatory acts have occurred and the Board of Education as a whole was arbitrary and capricious and portrayed an abuse of discretion in choosing the most qualified candidate."

As relief, Grievant seeks, "Permanent placement @ Cabell County Career Technology Center with all back pay and any other benefits to make whole. Credited with administrative experience as if he [sic] had received the position in June/July 2004."

A level four hearing was held in Huntington at the Cabell County Board of Education offices on October 13 and December 17, 2004. Grievant was represented by counsel,Brent Wolfingbarger. Respondent was represented by counsel, Howard E. Seufer, Jr. Intervenor was represented by Susan Hubbard. The matter became mature for decision January 24, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Based on a preponderance of the evidence adduced at the level four hearing, (See footnote 2) I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as Principal of Barboursville Middle School. During the 2003-2004 school year, Grievant was on approved medical leave and did not work. He returned to his job for the 2004-2005 school year, but was still on leave at the time he applied for the position at issue in this grievance and when the selection for the position at issue was made.

2. Grievant held a permanent K-12 principal certification, with ten years' experience classroom teaching at middle, junior and high school levels and 8 years' administrative experience. He has a Master's +45 degree level, but his grade point average was not placed in evidence. He is a certified vocational teacher with a Master's degree in vocational education. His past evaluations have been good and he has had extensive relevant specialized training. He has worked as a classroom vocational teacher, an assistant principal and as principal.

3. Intervenor is Assistant Principal of Cabell County Career Technology Center (CCCTC), the position Grievant is seeking. 4. Intervenor has permanent administrative certification endorsed for Prinicipal K-12, Superintendent, Supervisor General Instruction and Vocational Administration. She has four years' classroom teaching experience and twenty-four years' administrative experience. She has a Masters +45 degree level with a 3.19 grade point average. She has extensive relevant specialized training and good evaluations. At the time she applied for the position, she was Principal at Cabell County's Alternative School.

5. On April 12, 2004, Respondent posted a position opening for Assistant Principal at CCCTC. One of the important programs at CCCTC is the Career Connections Academy, which focuses on the vocational and academic education of “at risk” students. The position has no classroom teaching component.

6. The ten applicants for the position, including Grievant and Intervenor, were interviewed by a selection committee appointed by Superintendent David Roach. The committee consisted of Administrative Assistant for Secondary Education Kathy Hosaflook, Administrative Assistant for Elementary Education Mike O'Dell, Assistant Superintendent Bill Smith, Assistant Superintendent Dennis Miller and Director of Curriculum Mary Campbell, the usual make-up of the selection

committee for high school administrative positions.

7. The committee was tasked with selecting the top two candidates from all the applicants, and to provide those names to Superintendent Roach, in no particular order.

8. The committee reviewed each application and any supporting materials provided by the candidates, personnel records and writing samples. The committee also interviewed each candidate using a standard set of questions. Superintendent Roach did not give the committee any instructions on how to weight the statutory criteria for selection. 9. The selection committee named Intervenor and Grievant as the “successful applicants.” In its report to Superintendent Roach, the committee noted it had “reviewed all applicants and considered all 7 required criteria.” It further noted,

> The Committee interviewed Brenda Tanner and Leo G. Lake and recommended both candidates to the Superintendent because of the committee's consensus to give more weight to:
>
> **PRIOR ADMINISTRATIVE EXPERIENCE**
>
> Both candidates have been practicing administrators and have held positions that would prepare them for the position.
>
> **Relevant Specialized Training** [sic]
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> Mrs. Tanner and Mr. Lake have similar training because they have both been Principals. Mr. Lake has an advantage in this area because of his vocational educational background.
>
> **OTHER RELEVANT QUALIFICATIONS**
>
> Mrs. Tanner has worked extensively with at-risk students.
>
> Mr. Lake knows the vocational piece.
>
> Both candidates were able to demonstrate good decision making skills and had realistic ideas to improve the school.
>
> Both had good communication and writing skills as demonstrated with their impromptu samples and interview.

10. Although Superintendent Roach did not initially ask for a ranking of the candidates, after he had received the nominations, he met with the committee and asked which they thought was most

qualified, and the members told him they thought Mr. Lake had the advantage due to his Master's degree in Vocational Education and his experience as a vocational teacher. He did no other review of the candidates. He had some personal knowledge of Grievant's vocational experience, and took that into account.

11. At a Board of Education meeting on June 1, 2004, Superintendent Roach recommended that Grievant be awarded the position. Board member Joseph Farrell made a motion to accept the recommendation, but the motion died for want of a second. Superintendent Roach then recommended Intervenor, and the Board voted unanimously to accept the recommendation.

12. Prior to voting on the Superintendent's recommendation, the Board met in executive session with Superintendent Roach and the committee members, and reviewed the executive summaries of the applicants' qualifications and asked questions about them. Board members asked Superintendent Roach about Grievant's leave and whether he would be back, and were told he would be available to work. Grievant and Intervenor have essentially equal qualifications. Grievant had about six years of administrative experience compared to Intervenor's approximately fourteen, however Grievant had more high school administrative experience. Both had the required certifications, and similar degree level, grade point averages, relevant training and past evaluations.

13. Board member Joseph Farrell, Jr. gave no consideration to the comparative qualifications of the candidates. He always voted to accept the Superintendent's recommendation, and never reviewed a candidate's qualifications, usually leaving the room when others discussed them.

14. Board President Ted T. Barr did not consider Grievant's qualifications when he declined to second the motion to accept the recommendation of the superintendent, he just expected someone else to do so, then asked for an alternate when no one did. He testified that he looks beyond the statutory seven criteria and considers other factors he feels are important. He does not agree that the Board must pick the most qualified using just the seven statutory criteria, and believes the members must also consider their own personal feelings. He was suspicious of Grievant's need for medical leave and suspected he was using the time to start a business. He believed Grievant and Intervenor were equally qualified, but the uncertainty over Grievant's leave led him to favor Intervenor. 15. Board member Dr. Gregory D. Borowski did not second Mr. Farrell's motion because he was not confident Grievant could do the work because he had not returned from his previous year's medical leave. He also considered the selection committee to be suspect, since they

were all subordinates of Superintendent Roach. He also gave consideration to the facts that Intervenor had more administrative experience and experience with at-risk students.

16. Board member David W. Stevenson did not believe Grievant was most qualified based on his lesser administrative experience. He considered Grievant's vocational experience to be equivalent to Intervenor's experience with at-risk students.

DISCUSSION

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). "Grievant bears the burden of proving, by a preponderance of the evidence, that [he] should have been selected for a particular position rather than another applicant, by establishing that [he] 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." *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30-495 (June 26, 2003). Grievant argues he was the most qualified, and that the decision of the Board not to accept Superintendent Roach's recommendation to hire him was arbitrary and capricious. Respondent and Intervenor stand on the authority of the Board to make the ultimate hiring decision and assert Intervenor is most qualified based on the Board's weighting of the hiring criteria.

In this case, Superintendent David Roach used an established review panel to screen the applicants for the position, and to provide him with the names of the two mostqualified candidates, but without ranking them. He then met with the panel and asked which of the two they felt was most qualified and why, and took that name to the Board as his recommendation. That person, Grievant, was rejected by the Board, and the Superintendent then recommended the second name provided by the review panel, and the Board accepted this second candidate, the Intervenor. This procedure is consistent with the requirement in W. Va. Code § 18A-2-1 that “[t]he employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent.” That same Code section provides that the superintendent must provide a second nomination if the board rejects the first. "There is no law, policy, or regulation which mandates that a board of education must accept a Superintendent's, or principal's, recommendation in personnel matters." *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

A county board of education must make decisions affecting the hiring of professional administrative personnel on the basis of the applicant with the highest qualifications. In judging qualifications, consideration must be given to each of the following seven factors:

> (1) Appropriate certification, licensure or both;
>
> (2) 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;
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> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
>
> (4) Academic achievement;
>
> (5) Relevant specialized training;
>
> (6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and
>
> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code § 18A-4-7a.

The hiring committee reviewed the candidates in light of these criteria and found Grievant and Intervenor to be fairly equally qualified. However, when the committee unofficially applied its own weighting to these criteria, judging vocational experience to be superior to administrative experience, it felt Grievant had the edge for this job. The committee made these findings and opinions known to the Superintendent, who used them in making his decision to recommend Grievant to the Board. However, the fact that the committee and the superintendent both felt Grievant was most qualified does not establish that fact, as the weighting of the criteria and comparison in light of that weighting is necessarily the Board's prerogative.

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). Once a county board of education reviews the criteria, it has "wide discretion in choosing administrators . . . ." *Marsh v. Wyoming County Bd. of Educ.*, Docket No. 94-55-022 (Sept. 1, 1994). Because W. Va. Code § 18A-4-7a does not prioritize the first set of factors, and the statute does not mandate that any one area be afforded particular significance, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. *Jenkinson v. Greenbrier County Bd. of Educ.*, Docket No. 95-13-503 (Mar. 31, 1996). Thus, a county board of education may determine that "other measures orindicators" 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 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).

Owen v. Wood County Board of Education, Docket No. 97-54-537 (May 18, 1998).

Grievant met his burden of proving a major flaw in the selection process: most of the Board members gave little to no consideration to the comparative qualifications of the candidates. The Board president openly defied the mandate of the statute and considered factors not intended to be considered. One Board member stated he never considers qualifications, and always votes for the Superintendent's recommendation. Yet another Board member did not trust the Superintendent's screening committee because they were all his subordinates, presumably on the inference that the committee would therefore select the candidate favored by the Superintendent. It was obvious from the tenor of the Board members' testimonies that there existed some conflict, distrust and acrimony between the Board and its Superintendent. The Board was also skeptical of Grievant's availability to perform the job because of his past leave use and uncertainty about his return therefrom. Superintendent Roach testified that this was why he, in a departure from usual practice,asked for two

names from the screening committee, anticipating the Board would reject his first nomination.

Nevertheless, Grievant failed to meet his burden of proving that he would have received the job had the Board acted entirely properly. He relies on an unfounded presumption that the fact he was recommended first means he is most qualified. He also assumes the Board must place more importance on his vocational background than on Intervenor's experience in administration and with at-risk students. The presumptions and assumptions are flawed. There is no statutory duty for the Board to accept the Superintendent's first nomination, and it is the Board's duty and privilege to evaluate the candidates in light of the criteria it deems most important for the position and in the best interests of the schools. Although it is cloaked in the distinct haze of justification by hindsight, the Board as a whole testified that Intervenor's administrative experience and work with at-risk students was more important to the mission of CCCTC than Grievants' education and past teaching experience with vocational programs. This assertion was unrebutted by Grievant, and the comparison clearly falls within the realm of the seventh criteria, “Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.” Even if Grievant had clearly superior qualifications in all other areas, the Board was free to give this comparison such weight that Intervenor would still be entitled to the job.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. "Grievant bears the burden of proving, by a preponderance of the evidence, that [he] should have been selected for a particular position rather than another applicant, by establishing that [he] was the more qualified applicant, or that there was such asubstantial 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 (2004); *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." *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30-495 (June 26, 2003).

2. A county board of education must make decisions affecting the hiring of professional administrative personnel on the basis of the applicant with the highest qualifications. In judging qualifications, consideration must be given to each of the following seven factors:

(1) Appropriate certification, licensure or both;

(2) 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;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) Relevant specialized training;

(6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and

(7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code § 18A-4-7a.

3. 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).

4. Because W. Va. Code § 18A-4-7a does not prioritize the first set of factors, and the statute does not mandate that any one area be afforded particular significance, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. *Jenkinson v. Greenbrier County Bd. of Educ.*, Docket No. 95-13-503 (Mar. 31, 1996); *Fisher v. Marion County Bd. of Educ.*, Docket No. 93-24-042 (Mar. 11, 1993); *Marsh v. Wyoming*

County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). *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). 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).

5.

> 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).

Owen v. Wood County Board of Education, Docket No. 97-54-537 (May 18, 1998).

6. Although Grievant proved a substantial flaw in the selection process, he failed to meet his burden of proving he was most qualified for the position in question.

For the foregoing reasons, this grievance is **DENIED**.

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

Date: February 18, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

No proposals were received from Grievant.

Footnote: 2

Grievant presented no evidence at level one or two.