KAREN OLDHAM,

Grievant,

v. **DOCKET NO. 04-06-280**

CABELL COUNTY BOARD

OF EDUCATION,

Respondent,

and

GREGORY T. WEBB and THERESA GRANT,

Intervenors.

DECISION

On June 9, 2004, Grievant Karen Oldham filed a grievance against her employer, Respondent Cabell County Board of Education (CCBOE) (See footnote 1) , stating in part, “I am the most qualified candidate for the Cabell Midland High School Principal's Position. Through research and investigation I believe that 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, Ms. Oldham seeks “Placement @ Cabell Midland High School Principal's Position with all back pay and any other benefits to make her whole. Credited with administrative experience as if she had received the position inJune/July 2004.” On June 16, 2004, Ms. Oldham filed a second grievance alleging “retaliatory acts have occurred since I won a state level grievance,” and seeking disciplinary action for those responsible (See footnote 2) and for the acts to cease. The grievances were consolidated at level two.

Gregory T. Webb, the successful applicant for the position in contention, intervened at level two. Theresa Grant alleged at level four that her interests could be adversely affected by the outcome of the grievance, and was permitted to intervene on that basis, against Grievant's objection, although she was not an applicant for the position in question.

A level four hearing was held in Huntington at the Cabell County Board of Education offices on September 29, 2004, November 30, 2004, December 16, 2004, February 1, 2005 and March 14, 2005. Grievant was represented by counsel, Brent Wolfingbarger. Respondent was represented by counsel, Howard E. Seufer, Jr. Intervenor Gregory T. Webb was represented by counsel, Chad S. Lovejoy, and WVEA representative, Susan Hubbard. Intervenor Theresa Grant was represented by WVEA representative, Susan Hubbard. The matter became mature for decision May 2, 2005, the deadline for mailing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

At issue is whether CCBOE hired the most qualified applicant for the Cabell Midland High School Principal's position, or whether it failed to hire the most qualified candidate in retaliation for her prior grievance activity. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Respondent posted, on May 3, 2004, a position opening for Principal of Cabell Midland High School (CMHS). Ms. Oldham, Mr. Webb, David Tackett, and three others were applicants for the position.

2. Ms. Oldham is currently Principal of Huntington High School, a position she bid on and obtained after this grievance was filed. At the time of the posting, Ms. Oldham was an Assistant Principal at CMHS.

3. Mr. Webb is currently Principal at CMHS, having been awarded the position in contention, and at the time of the posting he was employed by Respondent as Principal at Enslow Middle School.

4. Theresa Grant is a classroom teacher at CMHS, and is the daughter of Board President Ted T. Barr. Ms. Oldham believes Ms. Grant is hostile toward her because when Ms. Oldham started working in Cabell County, she refused Ms. Grant's offer of influence with her father in return for special treatment, and also because Ms. Grant is friends with Mr. Webb.

5. The qualified applicants for the position, including Ms. Oldham, Mr. Webb, and Mr. Tackett, were interviewed by an interview 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. This was the usual make-up of the interviewcommittee for high school administrative positions, and all of whom were appointed by Superintendent Roach and were his subordinates.

6. Superintendent Roach, deviating from the interview committee's usual practice of providing a list of candidates in no particular order, instructed the committee to rank the candidates for this position and provide a ranked list. The usual process utilized by the interview committee was to provide a list of candidate recommendations with no order of ranking.

7. 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, which individual interviews lasted ten to twenty minutes. The interview committee was not instructed how to weight the statutory criteria for selection, but arrived at a consensus to give more weight to Prior Administrative Experience, Other Relevant Qualifications and Relevant Specialized Training.

8. At the conclusion of the interview process, the interview committee generated written Conclusions, which were provided to Superintendent Roach. These Conclusions ranked Grievant first, David Tackett second, and Intervenor Webb third.

9. Superintendent Roach accepted the Conclusions of the interview committee, and nominated Grievant for the subject position at the June 1, 2004, Regular Meeting of Respondent Cabell County Board of Education. Board Member Dr. Gregory Borowski moved to table the posting at the Board's request, due to the large volume of information that was available regarding the candidates' qualifications. The Board members then secured the actual Executive Summaries of the candidates for a more in-depthconsideration of the candidates' qualifications. Each Executive Summary set forth the data for each candidate in terms of the seven factors of West Virginia Code section 18A-4-7a.

10. Board Member Joe Farrell voted “no” on the motion and further moved to accept the Superintendent's recommendation of Grievant. Mr. Farrell always accepted the recommendations of the Superintendent regarding selection of personnel. Mr. Farrell's Motion died for want of a second.

11. On June 8, 2004, a special meeting of the Respondent Cabell County Board of Education was held, and Superintendent Roach again recommended Grievant for the subject position. Mr. Farrell moved to accept the Superintendent's recommendation, which Motion died for want of a

second. During this meeting, in executive session, the Board discussed the materials they had reviewed and asked questions of Superintendent Roach and the Interview Committee members.

12. Board President Ted Barr asked the Superintendent for an alternate recommendation, which recommendation was David Tackett. A motion to accept the Superintendent's recommendation was again made by Board Member Farrell and again died for want of a second.

13. President Barr asked for another alternate recommendation from the Superintendent, which elicited a recommendation of Intervenor Webb. A motion was made by Board Member Bessie Holley to accept the Superintendent's recommendation of Intervenor Webb, which motion was seconded by Board Member David Stevenson. The vote was four (4) to one (1) in favor of the motion. Accordingly, Intervenor Webb was selected for the subject position as Principal of Cabell Midland High School. 14. Mr. Farrell voted against the motion to select Mr. Webb, again because he deferred to Superintendent Roach's judgment in making his first recommendation.

15. Board Member Bessie Holley felt Intervenor Webb was more qualified for the position, based on her review of the relative qualifications. She noted that Intervenor Webb had more administrative experience, as well as having prior experience as a high school principal. Board Member Holley also testified that she considered Intervenor Webb's successes as Principal of Enslow Middle School, specifically that under Intervenor Webb's leadership, school test scores improved, writing assessments increased and that the “overall climate was improved.” Although Ms. Holley had not voted to promote Mr. Webb to a high school principal's position in the past, she felt that he had since “proven himself,” while she had observed “conflicts and strife” at CMHS while Ms. Oldham was there.

16. Ms. Holley disregarded the relative grade point averages of the candidates, because she thought they did not matter. Likewise, she disregarded Ms. Oldham's doctorate because she felt it was not relevant. She believed it was not her responsibility to compare the candidates based on the seven factors. Ms. Holley's testimony was characterized by an evasive and defensive demeanor, and her answers to questions were often non-responsive and illogical. She did not believe Ms. Oldham received better performance evaluations, in direct contradiction to the evidence. Ms. Holley's testimony was largely based on notes about the relative qualifications she prepared after the fact and in preparation for the level four hearing.

17. Ms. Holley is also accused of personally retaliating against Ms. Oldham through her actions

in presenting a story in the classroom of Ms. Oldham's third-grade son. 18. Board Member David Stevenson testified that prior experience was a key issue for his consideration. Mr. Stevenson testified that he particularly noted that Superintendent Roach made a number of positive comments about Mr. Webb's “results” at Enslow Middle School, in both reading skills improvement and overall academic improvement.

19. Board Member Dr. Greg Borowski made the initial motion to table the selection for this position in order to better review the candidates' credentials. He reviewed and considered the candidates' Executive Summaries, and data provided therein, the Interview Committee's report, and the candidates' written interview question answers. He felt that Intervenor Webb was the most qualified candidate for the subject position. He did not agree with the weighting of the factors used by the Interview Committee. He did not consider continuity of leadership to be a valid reason to choose Ms. Oldham, because of the ruling in her prior grievance. He gave more weight to the experience factor, noting that Mr. Webb had more actual experience and had been a high school principal before bidding for the subject position.

20. Board President Ted Barr is the father of Ms. Grant. He considered Mr. Webb's high school principalship experience to be a decisive factor, because it meant he had greater, and more relevant, experience than Ms. Oldham. However, he chose not to recognize Ms. Oldham's court-ordered experience, (See footnote 3) because it was “theoretical, not practical.” Mr. Barr also considered Mr. Webb's experience at Enslow to be a “Baptism under fire,” because it was a troubled school, and he believed Mr. Webb did well there. 21. Mr. Barr also considered comments he had heard from community members, because he felt those types of things would not be revealed to the Superintendent. He considered Mr. Webb's time “in the county,” but relied on his experience outside the state.

22. Ms. Oldham and Mr. Webb both met the certification requirements for the position.

23. Ms. Oldham, at the time of the posting, claimed one year of administrative experience for service as an Alternative School Specialist for Kanawha County, one year of experience as Assistant Principal at East Bank High School, one year as Assistant Principal of Stonewall Jackson Junior High School, one year as Principal of Belville Elementary School, two years as Assistant Principal of Cabell Midland High School, and one year as Principal Status _ Court Ordered for Barboursville Middle School, for a total of seven years administrative experience. Grievant had not served as a

Principal of a high school, which was the position being sought, at the time of the filing of her grievance

24. Mr. Webb had previously served two years as Principal of Enslow Middle School, one year as Principal of South Point (Ohio) High School, four years as Assistant Principal at Huntington High School and three months as Acting Assistant Principal at Huntington High School, for a total of approximately seven years, three months of administrative experience.

25. Ms. Oldham has a Doctoral Degree; Mr. Webb has a Master's Degree plus forty-five hours.

26. Ms. Oldham's graduate-level grade point average of 4.0 is calculated based on six graduate level courses taken from 1994 through 1999. Grades for 114 credits of the 124 credit hours required for her degree were not utilized in the calculation of her gradepoint average and are not in evidence. Mr. Webb's graduate-level grade point average is 3.9.

27. Mr. Webb listed twenty-two different training programs he had attended. Ms. Oldham listed 75.

28. Mr. Webb's executive summary lists two evaluations, one “exceeds.” Ms. Oldham had listed over 16, most of them rated as “exemplary” and one “exceeds.”

29. The Board provided no guidance to the Superintendent or the Interview Committee on what other measures or indicators they felt were important for this position. The Interview Committee required each candidate to provide written responses to two questions, (See footnote 4) and the candidates' responses were evaluated and compared. These written responses were provided to the Board members after the June 1 meeting. In addition, the Committee's Conclusions provided the Board with a little detail about how the candidates performed in the interviews and answered three standard interview questions, (See footnote 5) most notably by stating that Mr. Webb's interview was “lackluster.” The committee also considered each candidates' personnel records and any information they submitted for review, such as their résumés or portfolios. In addition, part of the application was a required essay detailing the two most important priorities or goals the candidate would pursue during his or her first year at CMHS. 30. None of the Board members mentioned giving any particular consideration to the quality of the content of the candidates' answers on the written interview questions, the application essay, or the interview questions. (See footnote 6) The Board did take note of the fact that Ms. Oldham used more than the allotted space, when the directions stated the answers should be written “using only the space provided.”

31. The Board members inexplicably placed particular emphasis on the Interview Committee's description of Mr. Webb's interview as “lackluster by comparison.” None of the Board members saw this as a negative, however, against Mr. Webb, but as evidence they could not trust the recommendations of the Committee. It appears the Board believed that comment was a personal attack, rather than an accurate description of Mr. Webb's conduct during the interview compared to the other interviewees. The Committee reported to the Board that this conclusion was reached because Mr. Webb “was unable to demonstrate the creativity and leadership to the same degree as the other candidates.”

32. In 2003, Ms. Oldham filed a grievance against Respondent challenging her non-selection for another position. In that case, *Oldham v. Cabell County Bd. of Educ.*, Docket 03-06-269 (Feb. 27, 2004), Ms. Oldham successfully proved Respondent had arbitrarily and capriciously failed to hire her for the position. The Grievance Board decision granting the grievance was appealed by Respondent to Cabell County Circuit Court, where it was upheld by decision dated September 14, 2004. Respondent did not appeal the Circuit Court decision.

Discussion

Although the selection issues of whether Ms. Oldham would have been selected but for the retaliatory motives of the Board and whether Ms. Oldham was the best-qualified candidate for the position based on statutory selection criteria are closely intertwined, retaliatory intent can only be inferred if Ms. Oldham should have been selected based on the criteria.

Selection

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. (See footnote 7) However, 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 for administrative positions, 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.

In other word's the Board's discretion does not extend to hiring any qualified candidate, but it must hire the most highly qualified candidate within the statutory framework. The discretion relates to the fact that, because the factors are not prioritized, 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. (See footnote 8) Thus, a county board of education may, in its discretion, determine that "other measures or indicators" is the most important factor. (See footnote 9) "However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious." (See footnote 10)

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 footnote 11) An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." (See footnote 12) "While a searching inquiry into the facts is required todetermine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply

substitute [his] judgment for that of a board of education." (See footnote 13)

The interview committee's participation in the process, and Superintendent Roach's instructions to the committee to deviate from past practice in making a recommendation to him, are largely irrelevant in this matter. The statutory selection scheme makes no mention of the interview process followed by Cabell County, and in practice it only served to weed out the unqualified candidates and to provide Superintendent Roach with a list of names from which he could choose to make a recommendation to the Board. The decisions made by the committee do not have a bearing on the status of the parties in this case, and no rights are conferred to any candidate by virtue of the fact that these subordinates of the Superintendent had part of the selection process delegated to them.

The duty to make the selection, from the candidates recommended by the Superintendent, falls solely on the Board. Both Ms. Oldham and Mr. Webb were recommended by Superintendent Roach. The method used by the Board in making its choice from these recommended candidates, and its motivations for choosing between them, is the real issue. That the Board tabled the matter at the June 1 meeting, in order to better review and compare the qualifications of the candidates, indicates an attempt to carry out its duties in a supportable manner.

Mr. Farrell testified that his usual practice is to always accept the recommendations of the Superintendent regarding selection of personnel, as a matter of institutionalcompetency given the position of Superintendent. Given the Board's duty to make a decision based on qualifications, Mr. Farrell's blind acceptance of the Superintendent's recommendation without review and consideration was *per se* arbitrary and capricious. he made no mention of considering whether the Superintendent's decision was based on a legitimate comparison of the candidates, or whether the Interview Committee weighted the factors in the way he, as a Board member, felt they should be weighted.

Dr. Borowski made his decision based on a subjective comparison of the seven factors, and gave experience greater weight, noting Mr. Webb had more experience and was the only candidate with high school principal experience. Other than her pending grievance, Ms. Oldham offered no evidence of retaliatory motive on the part of Dr. Borowski, and indeed, he did refer to that grievance, but only in order to comply with the findings of the decision ruling out continuity of leadership as a valid consideration. It is notable, however, that at the same time he was disregarding that consideration, he (and the rest of the Board) were arguing that it was a valid consideration, through their appeal of Ms. Oldham's prior grievance. Ms. Oldham has not met her burden of proving Dr. Borowski improperly

chose Mr. Webb over her.

Ms. Holley's testimony as to her reasoning is unreliable. Although she testified that she weighted Mr. Webb's experience as a high school principal the greatest and made that a deciding factor, her overall testimony was characterized by an evasive and defensive demeanor, and her answers to questions were often non-responsive and illogical. For example, she stated that she does not think it is her job to analyze the seven criteria, but that that is the job of the committee. Then she discounted everything the committee said about its analysis. Further, she refused to believe the Committee ranked the candidates,in spite of all the evidence to the contrary, instead holding to the belief they were merely listed alphabetically. She admitted to making her comparative analysis after the fact, and it is impossible to tell if, at the time, she even knew Mr. Webb had high school experience. Further, she stated she completely disregarded some of the criteria. Although a Board is free to give the seven factors the comparative weight it sees fit, it does not, by extension, have the right to completely disregard factors by giving them *no* weight. Ms. Holley did not “rely on criteria intended to be considered,” and so her decision must be deemed arbitrary.

Mr. Barr's testimony was much like Ms. Holley's, in that it appeared to be based on hindsight. Mr. Barr freely admitted that he believed factors outside the statutory seven should be considered, and that in other cases, he had made decisions, even about Ms. Oldham, based on such considerations as public comments about a candidate or school and on a candidates roots in the community. (See footnote 14) As the proverb goes, a leopard cannot change its spots. It is untenable to maintain that Mr. Barr did not also factor in impermissible elements in this decision. There was no evidence, however, that Ms. Grant had any influence on his decision.

Mr. Stephenson credibly testified that he considered Mr. Webb more experienced and that he believed Mr. Webb's experience as a high school principal was determinative. Other than her pending grievance, Ms. Oldham offered no evidence of retaliatory motive on the part of Mr. Stevenson.

Of the five Board members, the votes of three did not rely on criteria intended to be considered and were without consideration of, and in disregard of, the relevant andmaterial facts and circumstances of the case, i.e., the relative qualifications of the applicants in light of established and reasonable criteria. Two Board members relied on legitimate criteria and valid evaluations of those criteria, but fell short in making a decision based on an evaluative and comparative review of all of

the information available. In addition, the Board as a whole failed to reach a consensus on how to apply the seven statutory selection standards, or how much weight to give any of them. The Board never decided to give any criteria any particular weight, although all the members independently decided Mr. Webb's one year of high school principal experience in Ohio should outweigh all other considerations. Some gave “relevant experience” the deciding factor, but only by giving, in effect, all other factors essentially no weight.

Finally, the Board members that gave Mr. Webb's stint as a high school principal such importance really had no other information about that experience than that it existed. Mr. Webb was principal of a high school in Ohio, where he resides, and left after one year to accept a job in a middle school in Cabell County. No reference checking was done to learn how his performance there was, and no performance evaluations for that time were submitted by Mr. Webb.

Given that the majority of the voting Board members reached their decisions in an arbitrary and capricious manner, the decision to select Mr. Webb as a whole was arbitrary and capricious.

However, even if the board reached its decision through arbitrary means and the board members' reasons for their votes are specious, Grievant is not automatically entitled to the position. If Respondent accidentally hired the most qualified candidate, then it has accidentally done the right thing. An objective comparison of Ms. Oldham and Mr. Webb shows the following facts:

Criterion	Ms. Oldham	Mr. Webb	Comparison
(1)Certification and licensure	Social Studies 5-12 Multi subject K-8 Behavior disorders K-12 Learning Disabilities K-12 Mentally impaired K-12 Superintendent K-12 Principal K-12 Assistant Principal K-12 Supervisor of Instruction K-12 Vocational Administration 5-12	W. Va. teaching certificate W. Va. Administrative Certificate Ohio Principal certification	Both possess the minimum required certification, Ms. Oldham's credentials in this area evidence a broader qualification.
(2)Experience relevant to the position;	3 years high school assistant principal, 1 year alterative school specialist, 1 year junior high school principal, 1 year elementary school principal, 1 year middle school principal, (See	2 years middle school principal, 1 year high school principal, 4.25 years middle school	Mr. Webb has 7.25 years administrative experience; Ms. Oldham has 7 years. 1 year of Mr. Webb's experience was as high school principal. Mr. Webb has more teaching experience and more experience as a principal. Ms. Oldham has more overall high school experience. Mr.

	footnote 15) six years teaching.	assistant principal, eight years teaching.	Webb is superior in this category.
(3)Course work and degree level	Doctorate	Master's plus 45	Ms. Oldham's doctorate is the superior credential.
(4)Academic achievement;	4.0, but many courses not average in.	3.9	Not significantly different.
(5)Relevant specialized training;	Executive summary lists 75 different training programs.	Résumé lists 22 different training programs.	Ms. Oldham's extensive training gives her the edge in this category.
(6)Past performance evaluations;	No prior discipline, positive evaluations. None actually in evidence, but more “exceeds” and “exemplary” ratings.	No prior discipline, positive evaluations. None actually in evidence, fewer high ratings than Ms. Oldham.	Ms. Oldham has had better performance evaluations than Mr. Webb.
(7a)Interview performance	Demonstrated creativity and initiative.	“Lackluster in comparison” to other candidates.	Ms. Oldham presented herself better during the interview.
(7b)Written interview questions	Responsive to question.	Responsive to question.	Equal.
(7c)Application essay	Responsive to question.	Responsive to question.	Equal.
(7d)Past performance	No significant examples of past performance in evidence, except reported exemplary ratings.	Enslow Middle School made significant progress attributable to Mr. Webb during his leadership there.	Mr. Webb presented a greater weight of evidence relating to his past good performance.

In essence, Respondent contends Mr. Webb was most qualified because he had spent one year as a high school principal, and Ms. Oldham contends she is most qualified because she holds a doctorate. Giving all the seven factors equal weight, Ms. Oldham's qualifications excel Mr. Webb's. Although Mr. Webb has spent more time as an administrator, the evidence suggests Ms. Oldham has

packed more experience into her time, and she has presented it better. Her application included an extensive portfolio of all her work accomplishments, while Mr. Webb only included a brief résumé. In addition, she apparently made a better impression on the Interview Committee through her energy and responsiveness to their questions.

Another factor that is evident is that this Board had considered both Ms. Oldham and Mr. Webb for posted positions several times in the recent past, and the Board members were already familiar with them and their qualifications. However, every board member who testified that they relied on Mr. Webb's time as a principal in Ohio as their deciding factor, overlooked the fact that they had no information about that time other thanthe brief blurb about it on Mr. Webb's résumé. No references were checked for either candidate.

Retaliation

West Virginia Code section 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

> (1) that he engaged in protected activity, e.g., filing a grievance;
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> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment. (See footnote 16)

Ms. Oldham testified at level two about certain actions taken by Ms. Grant that she considered to be retaliatory, or at least hostile. It is presumably on the basis of this testimony and Ms. Oldham's request that the perpetrator be disciplined that motivated Ms. Grant to intervene. No evidence was provided at level four that mentioned Ms. Grant. In any case, Ms. Grant was, at the time, Ms.

Oldham's subordinate, not her employer, and any actions she took adverse to Ms. Oldham could not be a basis for a reprisal claim.

With respect toward the selection decision by the Board, Ms. Oldham has established the first three elements of the above test, given her prior grievance, which was ongoing at the time of the selection in this matter, and the adverse treatment of beingpassed over for the position at issue. An inference of retaliatory intent is usually established by largely circumstantial evidence, and in this case Grievant has attempted to show other evidence of bias against her by members of the decision-making body, the Board of Education. There was a clearly perceptible, though unacknowledged, undercurrent to the evidence presented that suggests the Board was, in part, denying Superintendent Roach's recommendation because it disliked him. Nevertheless, the timing of its hiring decision with Ms. Oldham's pending grievance, the Board's disingenuous explanation of its decision and the weight of the evidence that supports Ms. Oldham's high qualifications, the inference points to the causal connection between Ms. Oldham's defense of her prior grievance and the Board's decision not to hire her in this position. Ms. Oldham has established, by a preponderance of the evidence, that the Board, as a body, retaliated against her for her pending grievance.

Ms. Oldham's attempt to show that Ms. Holley was biased against her, as evidenced by the story-telling incident, did not succeed. The incident itself was not reprisal, as no adverse action befell Ms. Oldham, despite her indignation over what she perceived as maltreatment of her son. Ms. Oldham was not present when the incident occurred. Ms. Oldham contends that Ms. Holley “humiliated” her child in an effort to upset her. The evidence does not support Ms. Holley's, Ms. Oldham's or her son's version of these events, but no ulterior motive is apparent in the incident. While neither the account of Ms. Holley nor the account of Ms. Oldham's son is completely credible, two other witnesses, Lora and Stacy Morgan, who are teachers at the school and have no apparent interest in these proceedings, provided consistent versions of the events they witnessed, and their version recounts an innocuous event. Here is what happened: Ms. Holley has for years regularly volunteered in Milton Elementary School, where she used to work as a teacher. She reads and sings to classes, often stories or songs she has made up, on a weekly basis. Ms. Oldham's son was, at the time, a third-grade student at the school in Ms. Morgan's class. On February 20, 2004, Ms. Holley was at the school for a function, and came to Ms. Morgan's room, with the principal and assistant principal, to watch a presentation being made by a fifth-grade class. After the presentation was over and the other

class left, one of the principals asked Ms. Morgan if Ms. Holley could stay and read or tell a story to the class. Ms. Morgan consented because she had seen Ms. Holley tell the story, Honey Bear, before, and the children enjoyed it. Ms. Holley had never read in Ms. Morgan's room before, though. The event was not premeditated; Ms. Holley was there because the fifth-grade teacher, Ms. Rice, invited her to come see the presentation. Ms. Holley testified, quite contrary to reality, that she did not have an encounter with C.J. Oldham and did not say a word to him. She testified she did not know his name.

After the presentation, Master Oldham left the group to go work on a computer, and Ms. Morgan called him over to rejoin the group. The story was engaging and the students appeared to enjoy it. After the story, Ms. Holley had a song she sang and called several students, including Master Oldham, to the front of the room to participate. A couple of the students, of the four or five, were facing the wrong way, including Oldham, and Ms. Holley turned them around to face the class. As she sang, she mentioned several animals, such as a donkey, pig, or monkey. As she sang about each animal, she held her hand over one of the students. When she sang about the pig, she held her hand over Master Oldham. Ms. Morgan testified that Ms. Holley did not ask or direct any of the children to do anything except stand there. The children were not told to make animal noises or to get down on their hands and knees. She further testified that no children looked embarrassed and none complained afterward to her. She saw nothing to indicate any of the children were upset.

Master Oldham, on the other hand, testified Ms. Holley called him by name up to the front of the class, and asked him to act like a pig while she did a story she made up, and did not make anyone else do so. He claimed it made him “scared and embarrassed.” He knew who Ms. Holley was because he had seen her when he attended another of his mother's grievance hearings. Ms. Holley recalled him being in the waiting room at the grievance board while she was waiting there.

While Ms. Holley's version of the incident is accurate and consistent with Ms. Morgan's, her testimony that she did not know who Master Oldham was is not credible, and his testimony that he was made to act like a pig, and was embarrassed, is not credible. However, rather than some nefarious motive to deceive, I find it is most likely Ms. Holley was just being defensive and evasive, as most of her testimony tended to be, and Master Oldham was most likely told by his mother that he was humiliated by her “enemy.” In any event, this event really had no bearing on the events related to this grievance, was not reprisal, and is not a reliable indicator of any bias against Ms. Oldham by Ms.

Holley.

The following conclusions of law support this discussion:

Conclusions of Law

1. 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).

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;
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> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
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> (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. Because the factors are not prioritized, 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).

4. "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 (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).

5. "W. Va. Code section 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the qualifications of the applicants." *Oldham v. Cabell County Bd. of Educ.*, Docket No. 03-06- 269, *aff'd* Cir. Ct. of Cabell County, Sept. 14, 2004.

6. "[T]he fact that the [selection] committee and the superintendent both felt Grievant was most qualified does not establish the fact, as the weighting of the criteria and comparison in light of that weighting is necessarily the Board's prerogative." *Lake v. Cabell County Bd. of Educ.*, Docket No. 04-06-282 (February 18, 2005). 7. 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. *Lake, supra.*

8. "However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Cowen, et al. v.*

Harrison County Bd. of Educ., 195 W. Va. 377, 456 S.E.2d 648 (1995)." *Duncan v. McDowell County Bd. of Educ.*, Docket No. 96-33-231 (1997).

10. 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 Res.*, Docket No. 93-HHR-322 (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. *Seegenerally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (2001).

11. Respondent's selection for the CMHS position was the result of an arbitrary and capricious decision. Grievant met her burden of proving she should have been selected for the position rather than Intervenor, by establishing that she was the more qualified applicant, and 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.

12. West Virginia Code section18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that she engaged in protected activity, e.g., filing a grievance;

(2) that she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Crookshanks v. Wood County Bd. of Educ., Docket No. 02-54-289 (2002)*; Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT- 088 (1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (1989). 13. Grievant presented sufficient evidence to support an inference that Respondent's failure to select her for the position in question was a result of reprisal for her grievance activity.

For the foregoing reasons, this grievance is hereby **GRANTED**. Respondent is **ORDERED** to instate Grievant into the Cabell Midland High School Principal's position, and to credit her with experience, seniority, and other attendant benefits, and to pay her back wages, plus interest, from the date Intervenor began the job.

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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

June 23, 2005

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The Board members were: Ted T. Barr, President, Dr. Gregory D. Borowski, Joseph M. Farrell, Jr., Bessie A. Holley, and David W. Stevenson. Mr. Farrell no longer serves on the Board.

Footnote: 2

The Grievance Board is without authority to order that disciplinary action be taken against another employee. Coster v. W. Va. Div. of Corrections, Docket No. 98-CORR-506 (Feb. 24, 1999). Accordingly, that issue will not be discussed further.

Footnote: 3

The level four decision in Ms. Oldham's prior grievance ordered that "Grievant is to be credited with administrative experience as if she had received the position in August 2003."

Footnote: 4

"What is the biggest mistake you've made in your career and how did you deal with it?" and "How would you build the team at Cabell Midland High School."

Footnote: 5

By providing examples, convince us that you can adapt to a wide variety of people, situations and environments;" "Give us a specific example of a time when you used good judgment and logic in solving a problem;" and "Tell us why you are seeking the position of Principal at Cabell Midland and why we should hire you."

Footnote: 6

Although the Board was not present for the interviews, among the materials it reviewed prior to making its decision were the Interview Committee's notes on the answers given by the candidates to the verbal interview questions.

Footnote: 7

Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

Footnote: 8

Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (1996).

Footnote: 9

Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (1998).

Footnote: 10

Duncan v. McDowell County Bd. of Educ., Docket No. 96-33-231 (1997).

Footnote: 11

Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (1997).

Footnote: 12

State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Footnote: 13

Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (2001).

Footnote: 14

Given that Mr. Webb lives in Ohio, the "community roots" bias is a nullity in this case.

Footnote: 15

Credited as a result of prior grievance.

Footnote: 16

Crookshanks v. Wood County Bd. of Educ., Docket No. 02-54-289 (2002).