WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

IRENE SMITH

Grievant,

v. Docket No. 06-29-422

MINGO COUNTY BOARD OF EDUCATION

Respondent.

D E C I S I O N

Irene Smith, Grievant, employed by the Mingo County Board of Education ("MCBOE") as a teacher at Kermit K-8, filed a level one grievance on June 6, 2006, challenging her non-selection for the posted position of Reading Mentor Teacher - Kermit K-8. The grievance statement reads:

> The purpose of this grievance is to protest and grieve the recent hiring of the Reading First Mentor Teacher at Kermit K-8 School 2006/2007. I feel that I was more qualified than the candidate who received the position and the criteria used to hire was in non-compliance with W.V. State Code § 18A-4-7a.
>
> Relief Sought:
>
> I want the applications reviewed and I want the position of Reading Mentor awarded to me. I also want to attend all training that relates to the position in case I am awarded the position due to the results of this grievance.

Relief was denied at level one, and Grievant appealed to level two. A level two hearing was held on September 27, 2006. The grievance was denied in a written level two decision dated November 3,

2006. Grievant appealed. Level three proceedings were waived. After a substantial delay caused by legislative changes in the grievance procedure and this agency, a level four hearing was convened in the Public Employees GrievanceBoard's Charleston office on December 20, 2007 (See footnote 1) . At the hearing, Grievant was represented by Dwight Staples, Esquire, of Henderson, Henderson and Staples, and Respondent was represented by Rebecca Tinder, Esquire, of Bowles Rice McDavid Graff & Love LLP. This case became mature for decision on February 11, 2008, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant, a teacher employed by the Mingo County Board of Education, challenged her non-selection for the position of Reading First Mentor Teacher, asserting that she was better qualified than the successful applicant. Grievant and two other candidates applied and interviewed for a newly created Reading Mentor Teacher position at Kermit K-8. Respondent maintains it properly evaluated the candidates, determining that an applicant other than Grievant was more suited for the position. Respondent provided a proper rationale for selecting the successful applicant which included the statutory selection criteria applicable to county boards of education. Grievant failed to establish by a preponderance of the evidence that the selection was arbitrary and capricious or clearly wrong. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact based upon a preponderance of the evidence presented.

Findings of Fact

1 1. Grievant is currently employed as a teacher at Kermit K-8 by the Respondent and was so employed at the time of filing this grievance.

2 2. After the MCBOE was awarded a Reading First Grant from the West Virginia Department of Education, through the federal government, the Board posted Reading First Reading Mentor Teacher (RMT) positions, one at Burch Elementary and one at Kermit K-8.

3 3. The language in the grant stating that “[a] practicing teacher within each school is selected to be the RMT for that school” was amended with the approval of the federal government before MCBOE posted the positions. (See footnote 2)

4 4. The MCBOE posting for the Reading First Reading Mentor Teacher positions, in part,

stated that:

> The Reading Mentor's primary responsibility with [sic] be to provide technical assistance in Reading First school site to every K-3 teacher during the school day and throughout the school year for the duration of the Reading First grant period. The reading mentor teacher will be a practicing teacher at the school that will be released a *minimum of two days per week* to complete RMT duties.

5 5. The RMT position is not a classroom teaching position, but a full time mentor position. This point was clarified after the original posting and before the close of the application period. 6 6. Grievant was sent the clarification of the position by email, and Dora Chafin, a member of the selection committee, spoke with Grievant to inform her of the email.

7 7. The position sought by Grievant was posted in compliance with the grant awarded by the West Virginia Department of Education to the Board, as amended.

8 8. A committee appointed to recommend a candidate for the Kermit K-8 Reading Mentor Teacher position consisted of Dee Cockrille, Assistant Superintendent; Dora Chafin, then Elementary Curriculum Specialist and Project Coordinator; Deanna New, Literacy Coach K-6; Margaret Fletcher, Burch Elementary Principal; and Daniel Dean, then Kermit K-8 Principal. This committee consisted of five individuals, appointed to recommend a candidate to the Superintendent.

9 9. Three (3) complete applications, including Grievant's, were timely received and reviewed in response to the Kermit K-8 RMT posting. The applicants for the position were Linda Diamond, Judy A. Smith, and Grievant.

10 10. Prior to the full review of the applications, the committee determined that interpersonal skills were a paramount concern because the focus of the RMT position was coaching and collaborating with teachers. The Reading Mentor Teacher and participating teachers would be working as peers.

11 11. The committee created interview questions to elicit information that would assist them in selecting which candidate was best suited for the position.

12 12. The committee, while considering all the identified factors of W. Va. Code § 18A-4-7a, (See footnote 3) determined that some indicators were more essential than others in choosingthe most qualified candidate for the Kermit K-8 Reading Mentor Teacher posting. (See footnote 4) Ultimately, factor 7 was weighted most heavily by the committee. (See footnote 5)

13 13. The committee started evaluating the candidates by first examining the applications of

the various candidates. The applications of the candidates were compared prior to the candidate being interviewed. All three candidates, who had fully applied for the position were determined to be qualified. (See footnote 6)

14 14. Grievant's application indicates that she holds the appropriate certification in that she is certified as follows: Elementary Education, 1-6; Developmental Reading, 7-8; remedial Reading, K-12; and Reading Specialist, PK-AD. Additionally, it indicates that she possesses a Masters degree wherein the area of work was Elementary Education/Reading specialist, has twenty seven (27) total years of teaching experience, satisfactory evaluations and ten (10) areas of specialized training.

15 15. The application of the successful applicant, Judy Smith, also indicates that she is appropriately certified as follows: Multi-subjects, K-8; Reading Specialist, PK-AD; and Math 5 - Algebra I, 5- Algebra I. Additionally, it indicates that she possesses a Masters degree, K-AD, wherein the area of work was Reading, has nineteen (19) years of teaching experience, satisfactory evaluations and seven (7) areas of specialized training.

16 16. The application of the remaining candidate indicated that she is properly certified as follows: Business Education, 7-12; English Language Arts, 7-9; ReadingAuthor., K-12; and completed Reading Spec., took Praxis two (2) weeks ago. Additionally, it indicates that she possesses a Masters degree wherein the area of work was Special Education, has twenty five (25) years of teaching experience, three (3) years of administrative experience, and eight (8) areas of specialized training.

17 17. In review of the applications of the candidates, with regard to the first five factors outlined in W. Va. Code § 18A-4-7a, the committee found as to; Factor (1) - Both Grievant and the successful candidate were certified as Reading Specialist PK-Adult; Factor (2) - Grievant had never acted in the capacity of a collaborating teacher but the successful candidate had so worked in reference to teaching experience in the subject area; Factor (3) - Both had Masters degrees. However, Grievant's Masters degree was in Elementary Education whereas the successful candidate's Masters was in Reading (a preference in the posting); and Factors (4), and (5) - In reviewing total teaching experience, academic achievement in terms of awards and honors, and relevant specialized training, Grievant scored 179.5 and the successful candidate scored 168.

18 18. The committee's application comparison of the candidates' credentials prior to interviews indicated that Grievant was the most qualified applicant as her pre-interview score was

179.5 and the successful candidate, Judy Smith's score was 168.

19 19. In addition to the paper review of the individual applicants, the committee also considered the oral report of the supervisor of each of the candidates, who were incidentally members of the committee.

20 20. With regard to factor six, the evaluations of both Grievant and the successful applicant were satisfactory.

21 21. Interviews were conducted by the committee, and all were asked the exact same questions, the results of which were tabulated in the form of a raw interview scoreand a score on the related variables deemed most important to the success of the candidate selected.

22 22. In choosing the most highly qualified candidate, the results of the interviews and related variables were weighted as the most important criteria.

23 23. With regard to the seventh factor, other measures or indicators upon which relative qualifications of applicants may fairly be judged, Grievant scored 6.35 and the successful candidate scored 7.41.

24 24. In tabulating the final results, Grievant and the successful candidate were tied in factors (1) and (6); Grievant prevailed in factors (4) and (5); and the successful candidate prevailed in factors (2), (3), and (7). See illustrative chart, below;

FACTORS COMPARISON CHART

	Irene Smith		Judy Smith	
1. Certification	.	Reading Specialist PK-Adult	.	Reading Specialist PK-Adult
2. Teaching Experience in the Subject Area		*Total 27 - never in a collaborating teacher role	.	*Total 19 - collaborating teacher
3. Degree Level (Masters in Reading Preferred)		Masters in Elem. Ed.	.	Masters in Reading
4.*Academic Achievement Awards and Honors	*Included in paper review scores.			
5. *Rel. Spec. Training	. 179.5 168			
6. Evaluations Pursuant to §18A-2-12	.	satisfactory	.	satisfactory
7. Other - Interview and Related Variables		6.350	.	7.491

(Most Heavily Weighted)				
Candidate Selection			X	

25 25. The committee determined prior to interviewing the candidates that the weight of "other measures and indicators" was to be more heavily weighted (i.e., factor 7) and further, the committee, individually and collectively, determined that suitability for the position ("best fit") was a component of qualifications.

26 26. To assess other measures or indicators, the committee examined the content of the interview answers and how each response fit with the requirements of the position.

27 27. Grievant portrayed herself as an authoritarian, more of a top down leader, a director (would tell them what to do) rather than a collaborator or coach. Further, she admitted that she is not a good listener and would need to learn to listen.

28 28. The successful candidate indicated that she would get in the trenches with the teachers. She portrayed herself as someone who would not come across as the heavy; rather she would work to build bridges and motivate teachers. She described herself as cooperative; truly a collaborator or coach.

29 29. The RMT position at K-8 was not a supervisory position, the ability to work with and get along with other adults was believed to be a paramount concern for the success of the reading grant program by Committee members.

30 30. The committee was appointed to recommend a candidate for the Kermit K-8 Reading Mentor Teacher position to the Superintendent, who nominates candidates for consideration of the county board of education. (See footnote 7) 31 31. After reviewing all the qualifications of the applicants, including the information gleaned from the interview process, the successful candidate, Judy Smith was deemed the most qualified candidate and was recommended for the position.

Discussion

In that this is not a disciplinary case, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Board. *156 C.S.R. 1 § 3 (2008); Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997)*; Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88- 130 (Aug. 19, 1988). Grievant challenges her non-selection for the posted position of Reading Mentor Teacher - Kermit K-8. Of

dispute is whether best fit can be identified and assessed as a qualification which would, or could, lawfully catapult one applicant to be determined as more qualified than another qualified applicant.

In a selection case, a 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. *Baisden v. Cabell County Bd. of Educ.*, Docket No. 06-06-077 (Oct. 22, 2007); *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30-495 (June 26, 2003). Further, with regard to a selection case, the grievance procedure is not intended to be a "super interview," but rather, allows a review of the legal sufficiency of the selection process. *Thibault v. Div. of Rehabilitation Serv.*, Docket No. 93-RS-489 (July 29, 1994). All the candidates were qualified for the position. However, the applicable statute provides that the best or most qualified individual be selected. The qualifications of the candidates, for the position at issue, are to be assessed by the factors outlined in W. Va. Code § 18A-4-7a. In relevant part W. Va. Code §18A-4-7a states as follows:

> (a) 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.
>
> (b) The county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications.
>
> (c) In judging qualifications for hiring employees pursuant to subsections (a) and (b) of this section, consideration shall be given to each of the following:
>
> (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 [§18A-2-12], article two of this chapter; and

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

It is the duty of the superintendent to nominate candidates for the consideration of the county board of education after he has considered all the factors identified in W. Va. Code § 18A-4-7a. *See* W. Va. Code § 18A-2-1. It is the duty of the county board of education to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind. The acceptance or rejection of the recommended or nominated candidate, should not be arbitrary and capricious or demonstrate an abuse of discretion. *See Stinn v. Calhoun County Bd. of Educ.*, Docket No. 98-07-085 (Aug. 28, 1998).

Grievant's Counsel maintains Grievant should have been selected as the most qualified candidate in that she scored higher than the successful applicant pursuant to point tabulations as assigned to the various factors of W. Va. Code § 18A-4-7a. Counsel specifically avers that;

> A comparison of the qualifications of the candidates clearly establishes that the grievant was the most qualified applicant. The grievant had a master's degree plus forty-five (45) hours in elementary education/reading specialist. The grievant had twenty-seven (27) years experience teaching reading and the selected candidate had only nineteen (19) years of teaching experience. Moreover, the grievant had specialized training in the areas of presentation skills, state mentor teacher and WVDE/WVRA staff development presenter. The selected candidate did not hold these areas of specialized training. The grievant had received more awards and honors than the selected candidate. * * * The grievant scored substantially higher on the Matrix Based Upon Reading First Mentor Teacher Application.

Further, it is alleged that committee members did not properly review the personnel evaluations of the candidates; and as a result of unsubstantiated negative comments regarding Grievant, some members arbitrarily scored Grievant low in related categories. (See footnote 8) Grievant's argument at

its essence is that the only category Grievant did not outscore theselected candidate was in the area of “Related Variables,” and it is unlawful for Respondent to subsequently determine said candidate the most qualified applicant. (See footnote 9)

The argument presented by Respondent is that the factors of W. Va. Code §18A-4-7a were properly assessed with the seventh factor being a more heavily weighted indicator. The standard of review is to assess whether the employer abused its discretion in the selection or acted in an arbitrary or capricious manner.

A five person committee was established to recommend a candidate for the Kermit K-8 Reading Mentor Teacher position. The committee, individually and collectively, determined that suitability for the position (“best fit”) was a component of qualifications upon which applicants' for the RMT position at K-8, would be judged. This concern is not one of the factors specifically identified in W. Va. Code § 18A-4-7a; however, this issue can reasonably be identified as a concern generically included as "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged."

The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. Additionally, 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." *Stinn v. Calhoun County Board of Education*, Docket No. 98-07-085 (August 28, 1998). Indeed, W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the qualifications of theapplicants. *Stinn, supra., 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). Arguably, this is especially true in the selection for a professional position.

Testimony of committee members confirms that the committee was “looking for the person who was qualified and the best fit.” In looking for the person who could lead the project to goal attainment, in the minds of the committee members, “best fit” was a component of qualifications. Testimony of Cockrille, Chaffin, New and Dean. Suitability, for a particular set of duties (a position), can effect a

successful candidate's performance of the position's duties, it is a legitimate concern of a prospective employer. The undersigned finds that qualifications of an applicant may properly encompass suitability for the position. A matter of concern is what weight, or degree of finality, can be assigned to this factor. The question becomes, was it reasonable, in the facts of this case, for the committee to deem Judy Smith the most qualified candidate as a result of her perceived suitability for the position over Grievant.

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. 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. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). "Generally, an actionis 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.2d1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16., 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the board of education. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982); *Trimboli*, supra.

Much discussion has been presented regarding the various qualifications of Grievant and the successful candidate, Judy Smith. Both Grievant and Respondent proclaim their methodology of factor comparison indicates the applicant who is truly the most qualified. (See footnote 10) Comparison of the candidates' credentials prior to interviews initially indicated that Grievant was the most qualified applicant. Yet, subsequent to further data and inclusion of additional qualifications of applicants, including the information gleaned from the interview process, Judy Smith, not Grievant, was deemed the most qualified candidate. This is exemplified by committee member, Cockrille's testimony:

Q: And did your opinion change as to [Grievant] during the process?

A:

Based on the interview responses I did change my opinion, yes. About who I thought was the most qualified for the position

Q:

And how did your opinion change?

A:

I was looking for a fit based on the interview questions. On paper [Grievant] was the most highly qualified. In the interview there were answers that led me to believe that she would not be the most suitable person to move others to goal attainment. Was my mind changing event.

. . .

A:

In a coaching position you really need to help people move to the next level without being overbearing, or bossy, or - you do have to be directive at times. And my original thought during the interview was that being directive in some positions is really an outstanding quality. For instance, if you were the principle you want to be directive. But when you're a coach you really want to be able to move people to the next level. And you have to be an excellent listener. You really need to know what's going on. So I was changing my opinion a bit about the candidates, and who may be successful . . . .

Level 2 Transcript pgs., 33-34.

Testimony of the various committee members establishes that determining the most qualified applicant was not an easy decision. Yet, in the final analysis, all confirm that they concurred as to who was the best qualified applicant for the position. Committee members' Level 2 & Level 4 Testimony. Respondent maintains this is proper, and not unlawful, in that the interview and related variables were weighted, as the most important criteria, in choosing the most highly qualified candidate. It is unrefuted that factor 7 was designated to be weighted most heavily by the committee before the selection process commenced.

While each of the factors listed in W. Va. Code § 18A-4-7a must be considered, the *Code* Section permits county boards of education to determine the weight to be applied to each factor when filling a professional position, so long as this does not result in an abuseof discretion. *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *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). Thus, a county board of education may determine that "other measures or indicators" are the most important factor. *Stinn*, *supra*; *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 a professional 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.

Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing *Harper v. Mingo County Bd. of Educ*., Docket No. 93-29-064 (Sept. 27, 1993)).

Grievant's difficulty in this case is that she is up against the legal standards described above, which gives an appointing authority wide latitude in selecting among job applicants. The record is void of sufficient evidence that demonstrates the hiring process which the appointing authority used in this case was arbitrary and capricious, or that its selection decision was clearly wrong. The decision reached was plausible. While “best fit” is not one of the factors specifically identified in W. Va. Code § 18A-4-7a, the concern was included as "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged." Suitability does have a great deal to do with a successfulcandidates performance of a position's duties. This ability (fit) can reasonably be assessed and judged as a qualification. Ultimately, it is not unreasonable, in the facts of this case, for the committee to deem Judy Smith the most qualified candidate as a result of her suitability for the position.

Respondent followed the law in filling the position of Reading Mentor Teacher Kermit K-8. In arriving at its recommendation, the committee considered information about the applicants falling into each of the seven qualification categories identified in W. Va. Code § 18A-4-7a(c): appropriate certification, licensure or both; amount of experience relevant to the position; the amount of course work, degree level or both in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to W. Va. Code §18A-2-12; and other measures or indicators upon which the relative qualifications of the applicant

may fairly be judged. The decision reached was not so implausible that it cannot be ascribed to as a difference of opinion.

Grievant has failed to prove by a preponderance of the evidence that the selection process was significantly flawed, legally insufficient, or that the selection of the successful applicant, Judy Smith, was unlawful, unreasonable or arbitrary and capricious. Grievant has failed to show by a preponderance of the evidence that she was better qualified than the successful candidate for the position, that the Board acted arbitrarily in filling the position or that it committed an error of law entitling her to the relief sought. Accordingly, this grievance must be denied.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1 1. As this grievance does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. *Procedural Rule of the W. Va. Public Employees Grievance Bd.* 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.,* Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988).

2 2. In a selection case, a 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. *Baisden v. Cabell County Bd. of Educ.*, Docket No. 06-06-077 (Oct. 22, 2007); *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30-495 (June 26, 2003).

3 3. A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying; [this] determines the weight of the testimony. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997). "The preponderance standard generally requires proof that a reasonable personwould accept as sufficient that a contested fact is more likely true than not."

Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

4 4. In a selection case, the grievance process is not intended as a "super interview," but merely an analysis of the legal sufficiency of the selection process at the time it occurred. *Sparks v. Mingo County Bd. of Educ.,* Docket No. 96-29-447 (Feb. 18, 1997)*; Thibault v. Div. of Rehab. Serv.,* Docket No. 93-RS-489 (July 29, 1994)*; Stover v. Kanawha County Bd. of Educ.*, Docket No. 89- 20-75 (June 26, 1989).

5 5. It is the duty of the superintendent to nominate candidates for the consideration of the county board of education after considering all the factors identified in W. Va. Code § 18A-4-7a. *See* W. Va. Code *§ 18A-2-1*.

6 6. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The discretion must be reasonably exercised in the best interest of the schools and not arbitrarily and capriciously. See *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming,* 177 W.Va 145, 351 S.E.2d 58 (1986).

7 7. 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). A county board ofeducation 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).

8 8. While each of the factors must be considered, the Code permits county boards of education to determine the weight to be applied to each factor when filling a position in accordance with the first set of hiring factors, so long as this does not result in an abuse of discretion*. Elkins v. Boone County Bd. of Educ.,* Docket No. 95-03-415 (Dec. 28, 1995)*; Hughes v. Lincoln County Bd. of Educ.,* Docket No. 94-22-543 (Jan. 27, 1995)*; Harper v. Mingo County Bd. of Educ.,* Docket No. 93-29-064 (Sept. 27, 1993)*; Blair v. Lincoln County Bd. of Educ.,* Docket No. 92-22-009 (July 31, 1992). Once a review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance, unless this assessment is arbitrary and capricious. *Owen v. Wood County Bd. of Educ.,* Docket No. 97-54-537 (May 18, 1998) *(citing Harper v. Mingo County Bd. of*

Educ., Docket No. 93-29-064 (Sept. 27, 1993)).

9 9. "An agency's decision by 'appropriate personnel as to which candidate is the most qualified for a position vacancy will be upheld unless shown to be arbitrary or capricious or clearly wrong.' *Sloane v. West Virginia Univ., Docket No. BOR-88-108 (Sept. 30, 1988),* as cited in *Bourgeois v. BOT/Marshall Univ.*, Docket No. 93-BOT-268A (Mar. 29, 1994)." *Wingrove v. W. Va. Univ.*, Docket No. 04-HE-230 (Sep. 30, 2004); *Reynolds v. Higher Educ. Policy Comm'n/W. Va. Univ. Institute of Tech.*, Docket No. 03-HEPC-294 (Jan. 16, 2004); *Burchell v. Higher Educ. Policy Comm'n/Marshall Univ.*, Docket No. 02- HEPC-139 (Sept. 30, 2002); *Rumer v. Bd. of Trustees/Marshall Univ.*, Docket No. 95-BOT- 064 (May 31, 1995). 10 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 Resources,* Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

11 11. 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 his judgment for that of the board of education. *Trimboli v. Dep't of Health and Human Resources,* Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

12 12. The actions of the Board in selecting the successful applicant for the position in question were not arbitrary and capricious as the decision was based on criteria intended to be considered, the Board did not reach a decision contrary to the evidence, and the decision reached was not so implausible that it could not be ascribed to a difference of opinion. 13 13. County boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. 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. *Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).*

14 14. The selection decision at issue was based upon reasonable justifications, was not arbitrary and capricious, and was not an abuse of Respondent's discretion in such matters.

15 15. Grievant has failed to establish by a preponderance of the evidence that Respondent violated any statute, rule or policy, abused its discretion, or acted in an arbitrary and capricious manner.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. See Footnote 1, supra. 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 certified record can be prepared and properly transmitted to the appropriate circuit court.

Date:

September 17, 2008

_____

Landon R. Brown

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the West Virginia Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29- 6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

The language in the grant stating that "[t]he reading mentor teacher will be a practicing teacher at the school" does

not mean that the selection for the position is limited to teacher applicants currently employed at Kermit K-8, rather it means that the teacher selected would be assigned full time to Kermit K-8. Respondent's Exhibit 4, Testimony of Superintendent Beverly Kingery.

Footnote: 3

W. Va. Code § 18A-4-7a(c) identifies seven qualification categories or indicators upon which the relative qualifications of applicants may fairly be judged.

Footnote: 4

"We were looking for the person who could lead the project to goal attainment". The committee was "looking for the person who was qualified and the best fit." Level 3, testimony of committee member Dee Cockrille.

Footnote: 5

See factor comparison chart on page seven.

Footnote: 6

One additional applicant did not complete the application process and was not interviewed for the position.

Footnote: 7

As a result of the intervention into the operation of Mingo County Schools by the West Virginia Board of Education pursuant to W. Va. Code §18-2E-5, the State Board approves all personnel actions and the local board is informed of those actions at their scheduled board meetings.

Footnote: 8

Grievant contends that during the interview process, the selection committee was improperly influenced by statements made regarding teachers calling inquiring about whether Grievant would be the selected candidate. Grievant argues this conduct tainted the selection process. The undersigned disagrees. The committee considered the oral report of each of the candidates' supervisors, see Finding of Fact No. 19.

Footnote: 9

Specifically Grievant maintained, "The committee did not follow the criteria outlined by the relevant selection statute W. Va. Code § 18A-4-7a." "To the extent that the statute was followed, Grievant's qualifications were superior."

Footnote: 10

In reviewing total teaching experience, academic achievement in terms of awards and honors, and relevant specialized training, Grievant scored 179.5 and the successful candidate scored 168. In tabulating factors, Grievant and the successful candidate were tied in factors (1) and (6); Grievant prevailed in factors (4) and (5); and the successful candidate prevailed in factors (2), (3), and (7). See factors comparison chart illustrated, supra., pg. 7.