

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK BLACKBURN,

Grievant,

v.

Docket No. 2021-2450-CONS

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

CHRIS HARRIS,

Intervenor.

DECISION

Grievant, Dr. Mark Blackburn, filed this grievance against his employer, Mingo County Board of Education, dated October 6, 2020, stating as follows: "WV § 18a-4-7a; WV § 6c-2-2 Non selection, Discrimination, favoritism, Grievant. Non selection for the Principal at Lenore k-8." As relief sought, "Placement in position, plus backpay and related benefit."

A level one conference was held on an unknown date, and the grievance was denied by a level one decision dated December 10, 2020. Grievant appealed to level two of the grievance procedure on March 8, 2021. By Order entered May 26, 2021, this grievance was consolidated with *Aileen Perry v. Mingo County Board of Education*, Docket No. 2021-1051-MinED and assigned Docket No. 2021-2450-CONS. A level two mediation was conducted on June 17, 2021. Grievant perfected his appeal to level three on July 7, 2021. By Order entered October 21, 2021, Grievant Perry was dismissed from this matter because she withdrew her grievance. By Order entered January 10, 2022, Chris Harris was granted Intervenor Status. A level three hearing was conducted in

person on November 14, 2022, before this administrative law judge at the Grievance Board's Charleston, West Virginia, office.¹ Grievant appeared in person and by his representative, Ben Barkey, West Virginia Education Association. Respondent appeared by its counsel, Leslie K. Tyree, Esquire. Intervenor appeared in person and by his representative, Susan Lattimer Adkins, West Virginia Professional Educators. This matter became mature for decision on January 30, 2021, upon receipt of the last of the parties' post-hearing submissions.

Synopsis

Grievant was regularly employed by Respondent as a classroom teacher. Grievant applied for the Principal position at Lenore PK-8, but he was not selected for the same. Grievant argued that he should have been selected for the position because he was the most qualified applicant. Respondent denies Grievant's claims and asserts that it properly selected the most qualified applicant based upon the factors listed in WEST VIRGINIA CODE§ 18A-4-7a. Grievant proved by a preponderance of the evidence that the selection process used by the interview committee to select the Principal for Lenore PK-8 was flawed, that Intervenor was not the most qualified candidate, and that its decision to select Intervenor was arbitrary and capricious. Further, Grievant proved by a preponderance of the evidence that the interview committee abused its discretion by weighting the single subjective factor more than the other eight objective factors combined which resulted in the selection of a candidate who was not the most qualified

¹This matter was originally scheduled for a level three hearing on November 1, 2021, but was continued numerous times at the request of Respondent and Intervenor, without objection, and for good cause shown. The level three hearing had been scheduled to be held on the following dates before ultimately being held on November 14, 2022: January 18, 2022; April 29, 2022; June 21, 2022; and, August 12, 2022.

for the position. Grievant failed to prove by a preponderance of evidence that he was the most qualified candidate for the principal position at Lenore PK-8. Therefore, the grievance is **GRANTED IN PART, and DENIED IN PART.**

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is regularly employed by Respondent as a classroom teacher at Lenore PK-8, and has been so employed since 2019. Grievant is licensed to teach in West Virginia, holding the following West Virginia Department of Education certificates and endorsements: Professional Certificate; Professional Administrative Certificate, with a Superintendent (PK-AD) endorsement, Supervisor General Instruction (PK-AD) endorsement, and Principal (PK-AD) endorsement; and, a Professional Teaching Certificate, with endorsements in Social Studies (05-09), Multi-Categorical (LD, BD, ID) (05-AD) and (PK-06), and Autism (05-AD) and (PK-06).

2. Before beginning his employment as a licensed teacher with Mingo County Schools, Grievant worked as both a teacher and a school administrator for twenty-seven years in the Commonwealth of Kentucky. Grievant held the administrative positions of principal and superintendent for approximately twenty of these years. Grievant held the appropriate Kentucky certifications and endorsements to hold each of the positions he held. Grievant retired from teaching in Kentucky and returned home to Mingo County in or about 2019, just prior to beginning his employment with Respondent.

3. At the time this grievance was filed, Donald Spence was employed by Respondent as the Superintendent of Mingo County Schools and Dr. Johnny Branch was

employed as the Assistant Superintendent. However, as of the date of the level three hearing, Superintendent Spence had retired, but was doing some substitute teaching in Mingo County Schools, and Dr. Branch was employed as the Superintendent.

4. At the time this grievance was filed, Rocky Hall was the Director of Human Resources for Mingo County Schools. However, as of the date of the level three hearing, Mr. Hall no longer held that position, having accepted the position of Director of Student Services and Attendance about eight months before. Mr. Hall served as the Director of Human Resources for approximately five years.

5. At the time this grievance was filed, Drema Dempsey was employed by Respondent as the Director of Student Services and Attendance at Mingo County Schools. She held that position for approximately sixteen years. As of the date of the level three hearing, she was retired from Mingo County Schools. Ms. Dempsey is not an administrator and does not hold a Professional Administrative Certificate.

6. Janet Varney is employed by Respondent as the Special Education Director at Mingo County Schools. She has been employed by Mingo County Schools for approximately twenty-nine years. Ms. Varney is not an administrator and does not hold a Professional Administrative Certificate.

7. At the time this grievance was filed, Lesia Sammons was employed by Respondent as the Coordinator of Counseling for Mingo County Schools, and Sabrinia Runyon was employed as its Director of Early Learning. Neither Ms. Sammons nor Ms. Runyon was called to testify as a witness at the level three hearing in this matter. It is unknown whether they hold Professional Administrative Certificates. There was brief testimony indicating that Ms. Runyon had experience working as a principal; however,

nothing more is known.²

8. At the time of the events leading up to this grievance, Intervenor, Christopher Harris, was employed by Respondent as a classroom teacher at Tug Valley High School where he taught Spanish. Intervenor holds a West Virginia Professional Teaching Certificate, effective August 10, 2012, and endorsed on June 13, 2009, and a Professional Administrative Certificate, effective and endorsed June 10, 2019. It is unclear from the record of this grievance how long Intervenor has been employed by Mingo County Schools.

9. When Intervenor was serving as the Spanish teacher at Tug Valley High School, Doug Ward, the school's Principal, was Intervenor's direct supervisor. Dr. Branch, then the Assistant Superintendent, and Superintendent Spence were Mr. Ward's supervisors.

10. On or about September 16, 2020, Respondent posted a vacancy for the position of Principal at Lenore PK-8. This position remained posted until September 22, 2020.

11. Nine applicants applied for the Lenore PK-8 Principal position, including Grievant and Intervenor. One applicant withdrew her name from consideration. The applicants ultimately considered for the position are as follows: Grievant; Intervenor; Marsha Deskins; Larry Maynard; Krystyn Noe; Aileen Perry; Tammy Salmons; and, Geoffrey Saunders.

12. Ms. Varney, Dr. Runyon, Ms. Sammons, Ms. Dempsey, and Dr. Branch were named to the interview committee for the Lenore PK-8 principal position. Rocky

² See, testimony of Don Spence.

Hall was named moderator for the interview committee. It is unknown who named them to the committee or designated Mr. Hall as the moderator. Each member of the interview committee had served on such committees in the past. However, none are known to have received any official training for the same.

13. Mr. Hall holds a Professional Administrative Certificate and has held administrative positions in the past, such as principal and assistant principal. However, based upon the evidence presented, Dr. Branch was the only member of the interview committee who held a Professional Administrative Certificate and was then serving as a school administrator. It is unclear from the record of this grievance whether Dr. Branch had served as a principal at any time.

14. On September 24, 2020, the committee interviewed each of the eight applicants, during which each was asked the same list of questions, and the committee members took notes about each applicant's responses. Mr. Hall asked the candidates each question and the committee members took notes. Mr. Hall did not take notes regarding the candidates' responses.

15. Even though he was not a member of the committee, Superintendent Spence was present during the applicant interviews as an "observer," but he did not ask the applicants questions.

16. Following the applicant interviews, the interview committee members and Mr. Hall discussed each candidate and evaluated their qualifications using the following nine factors: (1) appropriate certification, licensure, or both; (2) amount of experience relevant to the position; (3) the amount of course work, degree level or both in the relevant field and degree level generally; (4) academic achievement; (5) certification by the

National Board of Professional Teaching Standards; (6) specialized training relevant to the performance of the duties of the job; (7) past performance evaluations conducted pursuant to 18A-12-2 and 18A-2-3c; (8) seniority; and, (9) other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.³

17. The committee members were not provided the candidates' resumes, applications, or any other documentation regarding the candidates' training, education, or other qualifications by Mr. Hall or Mingo County Schools.⁴ Instead, for each candidate, Mr. Hall provided the committee with information regarding their certifications, licensures, experience, amount of course work or degree level or both relevant to the field and degree level generally, academic achievement, and performance evaluations. The record is somewhat murky as to how the committee obtained the candidates' information as to any "specialized training relevant to the performance of the duties of the job," they may have had. It appears that some information was provided by Mr. Hall for Ms. Salmons, at least, but the candidates were also asked about any "specialized training" they may have had in question two during their interviews.⁵

18. The interview committee did not rely on Mr. Hall for any information to evaluate the candidates evaluations for factor nine. The committee evaluated the candidates' interview performances for factor nine.

19. The interview committee assigned factors one through eight the maximum score of one point each. However, the committee divided factor nine into nine subparts,

³ See, Grievant's Exhibit 2, Interview Committee Hiring Matrix.

⁴ See, testimony of Janet Varney.

⁵ See, testimony of Janet Varney; testimony of Drema Dempsey; testimony of Rocky Hall; testimony of Don Spence.

one subpart for each interview question, six through thirteen only, (eight questions), and for the one essay question.⁶ The committee assigned the maximum score of one point each to these eight interview questions and the essay question. Accordingly, factor nine, in its entirety, was worth a possible maximum score of nine points.⁷ Therefore, the nine factors were not scored equally.

20. In evaluating the candidates, the interview committee scored the candidates for each of the nine factors and recorded the same on a matrix form. This matrix lists the nine factors considered, including the nine subparts of factor nine, the scores the committee awarded the candidates for each, and the candidates' total scores. The design of the matrix allows a side-by-side comparison of the candidates' scores.

21. After the interviews, the committee members discussed each candidate and decided how to score the candidates for each of the nine factors. Mr. Hall participated in these discussions. The scores were then recorded on the matrix form. The individual committee members did not attempt to score the candidates on their own or to complete their own, individual matrices. The committee members and Mr. Hall, as a group, discussed and decided how to award each score to the candidates on the nine factors,

⁶ Despite the matrix identifying the questions used to evaluate factor nine as interview questions five through twelve, Respondent has asserted, and certain witness testimony suggests, that there are typographical errors on the matrix form in the factor nine subparts. Respondent and these witnesses have asserted that the committee instead used interview questions six through thirteen to evaluate the candidates for factor nine. This has not been disputed by Grievant, and a review of the interview questions and the factors listed on the matrix suggest that such typographical error exists and that Respondent and the witnesses are correct. Therefore, this ALJ acknowledges the typographical errors in the numbering of the interview questions referenced in the factor nine subparts and will hereafter refer to the correct interview questions and numbers, six through thirteen, used to evaluate factor nine, and not those appearing on the matrix.

⁷ See, Grievant's Exhibit 2, Matrix.

then recorded the scores for each candidate on a single matrix form.

22. It was possible for each candidate to receive a point for each factor/factor subpart. The maximum possible overall score was seventeen.

23. Factors one through eight, as listed on the interview committee's matrix, address objective qualifications such as certification, degree level, performance evaluations, and seniority. However, for factor nine, the committee members evaluated the candidates' responses to interview questions six through thirteen and the essay question and assigned the scores they deemed appropriate for each. Therefore, the committee's evaluation of factor nine was entirely subjective.

24. Given how the nine factors were weighed, the subjective part of the committee's evaluation of each candidate was worth more total points than the objective parts. The objective part of the evaluation was worth a total of eight points, but the subjective part was worth a total of nine.

25. All of the eight candidates considered for the principal position at Lenore PK-8 held the required Professional Administrative Certificate.

26. At the time the candidates applied for the Lenore PK-8 principal position, candidate Tammy Salmons was serving in that position in an acting capacity. Prior to that, Ms. Salmons was employed by Respondent as the Assistant Principal at Lenore PK-8 for five years. Ms. Salmons' training attendance record was not presented as evidence in this grievance.

27. At the time of the selection, Ms. Salmons was the only candidate who had held an administrator position at Mingo County Schools.

28. Based upon the interview committee's notes from the candidate interviews,

at the time of the selection, the candidates' teaching and/or administrator experience was, approximately, as follows: 1) Ms. Salmons, twelve years of teaching experience and five years experience as an assistant principal; 2) Grievant, twenty years experience as an administrator (Commonwealth of Kentucky) and eight years teaching experience (seven years in KY and one year in Mingo County); 3) Dr. Maynard, twenty years teaching/coaching experience; 4) Mr. Saunders, twenty years teaching experience; 5) Ms. Perry, twenty-nine years teaching/coaching experience; 6) Ms. Deskins, fifteen years teaching experience; 7) Ms. Noe, total years teaching experience is unknown, but she was the 2014 Teacher of the Year; and, 8) Intervenor, while the notes indicate he was in his fifteenth year of teaching, his Professional Teaching Certificate indicates that he became a licensed teacher in 2009, which would be fewer than fifteen years.⁸ Intervenor is not known to have worked as a teacher or administrator in any other state or county. Further, no additional evidence was presented relating to Intervenor's and Ms. Noe's teaching experience.

29. Even though he was not a member of the interview committee, Mr. Hall was present during the committee's discussions about the candidates, scoring, and selection, he participated therein, and gave input to the committee members regarding selection and scoring. Further, during these discussions, Mr. Hall assisted the interview committee in deciding to award Tammy Salmons one point for factor six, "specialized training relevant to the performance of the duties of the job." Ms. Salmons was the only candidate who received a point for this factor.⁹

⁸ See, Grievant's Exhibits 1, 3, and 5, Committee Member Interview Notes.

⁹ See, testimony of Janey Varney; testimony of Drema Depsey; testimony of Rocky Hall; testimony of Don Spence; Grievant's Exhibits 1, 3, and 5, Dempsey, Varney, and Branch

30. Despite Grievant having a Doctorate in Education Leadership and his years of experience and professional development and/or trainings in leadership as a superintendent and principal, the interview committee did not award him a point for having “specialized training.”

31. The interview committee awarded Grievant and the rest of the candidates one point for factor one, “appropriate certification, licensure, or both,” factor four, “academic achievement,” and factor seven, “past performance evaluations conducted pursuant to 18A-12-2 and 18A-2-3c.” The committee awarded none of the applicants points for factor five, “certification by the National Board for Professional Teaching Standards,” because none held such certification.

32. Grievant and Tammy Salmons were the only two candidates to whom the interview committee awarded a point for factor two, “amount of experience relevant to the position,” which was addressed by interview question three, because both had held administrative positions. Grievant had served as both a principal and a superintendent, and Ms. Salmons had held the position of Assistant Principal at Lenore PK-8 and was then serving as the acting principal at Lenore PK-8, the position for which all the candidates were applying.

33. Other than awarding Grievant the point for “amount of experience relevant to the position,” it does not appear that Grievant received any other credit from the interview committee for his twenty-seven years of training and experience as a principal, superintendent, and teaching in the Commonwealth of Kentucky.

34. Grievant and Larry Maynard were the only applicants the interview

committee awarded a point for factor three, “the amount of course work, degree level or both in the relevant field and degree level generally.” They were the only applicants who held doctoral degrees. They were the only candidates to receive a point for this factor. It is unclear why the committee did not give credit to any other applicant for this factor.

35. Tammy Salmons was the only applicant to be awarded a point for factor eight, “seniority.” It appears that the committee awarded Ms. Salmons the point for this factor because she was serving in the principal position at issue in an acting capacity at the time of the selection.

36. Before considering the factor nine scores, for factors one through eight, Tammy Salmons received a total of six points, Grievant, five points, Larry Maynard, four points, and Marsha Deskins, Intervenor, Krystyn Noe, Aileen Perry, and Geoffrey Saunders, three points each. Therefore, Ms. Salmons had the highest score, Grievant, the second highest score, and Dr. Maynard, the third highest. Intervenor was tied with Ms. Noe, Ms. Deskins, Ms. Perry, and Mr. Saunders having the lowest scores.

37. The interview committee awarded the candidates the following scores for factor nine, including all nine of its subparts: Grievant, one; Intervenor, six; Krystyn Noe, four; Tammy Salmons, two; Geoffrey Saunders, two; Aileen Perry, two; Marsha Deskins, one; and, Larry Maynard, zero.

38. Candidates who had actual administrator experience, the highest degree levels, and the most years of experience in teaching and working in the field of education, such as Grievant, Ms. Salmons, Dr. Maynard, Mr. Saunders, Ms. Perry, and Ms. Deskins, received the lowest scores on factor nine.

39. The interview committee awarded Intervenor the highest overall score of

nine points. The remaining candidates' overall scores are as follows: Tammy Salmons, 8; Krystyn Noe, 7; Grievant, 6; Aileen Perry, 5; Geoffrey Saunders, 5; Marsha Deskins, 4; and, Larry Maynard, 4.

40. Based upon their scoring, the interview committee deemed Intervenor the most qualified candidate and submitted Intervenor's name to Superintendent Spence for recommendation to the Board to fill the position of Principal at Lenore PK-8.

41. The three members of the interview committee who testified at the level three hearing, Ms. Dempsey, Ms. Varney, and Dr. Branch, have not been trained on hiring school personnel or serving on an interview, or hiring, committee.

42. The interview committee did not score Grievant high enough to be one of the top three candidates.

43. While the date of the meeting is unknown, Superintendent Spence recommended to the Board that Intervenor be hired as the Principal of Lenore PK-8 at a regular meeting of the Mingo County Board of Education sometime after September 24, 2020. Thereafter, the Board went into executive session to discuss the recommendation.¹⁰ Superintendent Spence and Mr. Hall were present with the board members during the executive session.

44. During the executive session, at least two of the board members, John Preece and Sabrina Grace, questioned Superintendent Spence and Mr. Hall about how Intervenor came to be recommended for the position. Superintendent Spence and Mr. Hall did not welcome their questioning, and were not very forthcoming with answers to such questions. This discussion became heated at times.

¹⁰ No party presented the minutes of this board meeting, or otherwise provided the date.

45. Ms. Grace was one of the only board members, if not the only board member, who had not served as a school administrator. She was not familiar with Grievant or Intervenor. She also did not know who had applied for the position; however, based on comments made, she learned that some of the board members had such knowledge.

46. During the executive session, board members discussed Grievant and that he had applied for the position. Ms. Grace then learned from comments made by Board Member Tom Slone that Grievant had previously worked as a county school superintendent in Kentucky. Mr. Slone also made comments implying that Grievant had been in trouble with his employing board of education while serving in that capacity, and/or implying that Grievant had done something improper. While Mr. Slone's exact statements are unknown, they reflected poorly on Grievant and the Board was advised that they could not consider those comments when making their decision on Superintendent Spence's recommendation.¹¹

47. Ms. Grace, Mr. Preece, and/or another unnamed board member asked to see either the interview committee's the matrix, or their questions and/or notes, to try to understand why Intervenor was recommended for the position, but such were not provided. Eventually, Superintendent Spence and/or Mr. Hall stated that Intervenor was selected for his recommendation because of how he answered the interview committee's questions during his interview.¹²

48. John Preece knew Grievant, had some experience working with him

¹¹ See, testimony of John Preece; testimony of Sabrina Grace.

¹² See, testimony of John Preece; testimony of Sabrina Grace.

through Marshall University, and knew that he had applied for the position. Mr. Preece was also aware of some of Grievant's qualifications. During executive session, Mr. Preece adamantly expressed his opinion that Grievant was more qualified than Intervenor and should be selected for the position.

49. When the board left executive session and returned to the public portion of their meeting, the board members voted on Superintendent Spence's recommendation of Intervenor. Mr. Preece voted against Superintendent Spence's recommendation that Intervenor be hired for the principal position. It is unclear from the record of this grievance how Ms. Grace voted on Intervenor's recommendation. Nonetheless, the majority of the board members voted in favor of Superintendent Spence's recommendation and Intervenor was awarded the position of Principal of Lenore PK-8. Intervenor began in that position soon after the September 24, 2020, board meeting.

50. None of the parties called Tammy Salmons, or any of the other candidates for the Lenore PK-8 principal position, including Intervenor, to testify. None of the parties suggested that Ms. Salmons, Ms. Perry, Ms. Deskins, Ms. Noe, Dr. Maynard, or Mr. Saunders were unavailable to testify.

51. None of the parties called Lesia Sammons or Sabrina Runyon who also served on the interview committee. As such, little, if anything, is known about their certifications or their work experience. Further, any notes they may have made during the candidate interviews were not presented as evidence in this matter. None of the parties suggested that Ms. Sammons and Ms. Runyon were unavailable to testify.

52. No evidence was presented concerning the trainings offered through the Principal's Academy. It is unknown what trainings are offered through this program,

whether such are required trainings, who, if anyone, is required to attend them, or when they are offered. Further, no documentation of any such trainings, their subject matter, or Ms. Salmons' attendance at the same was presented as evidence, and Ms. Salmons was not called to testify in this matter.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant argues that given his education and experience, he should have been selected for the position of Principal at Lenore PK-8 because he was the most qualified candidate for the position. Grievant further asserts that the selection process Respondent used to select the successful candidate was flawed because subjective criteria was assigned more weight than objective criteria which resulted in the selection of a candidate who had no experience being an administrator over candidates who had years of experience as administrators. Grievant argues that the interview committee, Superintendent Spence, and/or Respondent discriminated against him because he had not resided, or worked, in Mingo County throughout his career and considered him an outsider. Grievant further argues that other applicants were favored over him for this same reason. Respondent denies Grievant's claims and argues that Intervenor was

properly selected to fill the position pursuant to the requirements of WEST VIRGINIA CODE § 18A-4-7a because Intervenor was the most qualified candidate. Intervenor concurs with Respondent's position.

WEST VIRGINIA CODE § 18A-2-1 states, in part, as follows:

(a) The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent, subject to the following:

. . . (5) All personnel so nominated and recommended for employment and for subsequent assignment shall meet the certification, licensing, training, and other eligibility classifications as may be required by provisions of this chapter and by state board rule. . . .

W. VA. CODE § 18A-2-1(a). Further, “[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). However, boards of education must consider the following criteria set forth in WEST VIRGINIA CODE § 18A-4-7a when hiring professional personnel, such as principals:

(a) A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications; *Provided*, That the county superintendent shall be hired under separate criteria . . .

(b) In judging qualifications for the filling of vacancies of professional positions of employment, 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 required certification area;

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

(4) Academic achievement;

(5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;

(6) Specialized training relevant to performing the duties of the job;

(7) Past performance evaluations conducted pursuant to §18A-2-12 and § 18A-3C-2 of this code or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;

(8) Seniority;

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

(c) When filling a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications

Id. As a general rule, when selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in W. VA. CODE § 18A-4-7a, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. See W. VA. CODE § 18A-4-7a(c). See also *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 (Apr. 10, 1992); *Komorowski v. Marshall County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009).

Therefore, a county board of education must select the most qualified candidate for the position pursuant to the statutory criteria, and the selection must be reasonable, in the best interest of the schools, and not arbitrary and capricious. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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 & 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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). 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.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

“The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of

review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a ‘super-interviewer’ in matters relating to the selection of candidates for vacant positions. *Harper [v. Mingo County Bd. of Educ.]*, Docket No. 93-29-064 (Sept. 27, 1993); *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). Generally, a board of education’s action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health & Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).” *Berry v. Boone County Bd. of Educ.*, Docket No. 2014-0450-BooED (Sept. 29, 2014); *Zago v. Brooke County Bd. of Educ.*, Docket No. 2010-1299-BroED (April 18, 2011). “Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken.” *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)).

Based upon the evidence presented, it is undisputed that the interview committee assigned factors one through eight the maximum score of one point each, and these eight factors dealt with what should be considered objective criteria. It is also undisputed that the interview committee assigned factor nine, “other measures or indicators upon which the relative qualifications of the applicant may fairly be judged,” a maximum possible score of nine points, and that that the interview committee members evaluated factor nine

based upon their opinions of the candidates' responses to interview questions six through thirteen and the essay question, and that this was entirely subjective. The evidence presented also demonstrates that the interview committee was not entirely consistent on how it awarded points for the nine factors, or the criteria they would accept to award a point for all the nine factors.

Ms. Dempsey, Ms. Varney, Mr. Hall, and Superintendent Spence explained during their testimonies that Intervenor's performance in his interview was superior to all other applicants, and that such is reflected in the high scores they awarded him in the factor nine subparts. Dr. Branch was not asked about this during his brief testimony. However, he testified that Intervenor's response to the essay question was superior to those of the other candidates, which is why the committee awarded Intervenor a point and the others did not. It was Intervenor's extremely high total score on factor nine, six out of nine points possible, that secured him the position. Adding these six points to his scores for factors one through eight, Intervenor's total score was nine. In contrast, out of the nine points possible for factor nine, Grievant was awarded only one point. The interview committee awarded the other applicants the following scores for factor nine: Krystyn Noe, four; Tammy Salmons, two; Geoffrey Saunders, two; Aileen Perry, two; Marsha Deskins, one; and, Larry Maynard, zero. In overall scores, the interview committee awarded the other candidates the following scores: Grievant, six; Tammy Salmons, eight; Krystyn Noe, seven; Aileen Perry, five; Geoffrey Saunders, five; Marsha Deskins, four; and, Larry Maynard, four.

It is undisputed that Intervenor had no experience working as a principal or any other administrative position, no known supervisory experience, and had only held his

Professional Administrative Certificate for about one year when he was selected. Intervenor also had significantly less teaching experience than many of the other candidates, and at least two candidates, Grievant and Dr. Maynard, held higher degrees than he. Intervenor also had no “specialized training relevant to the performance of the duties of the job.” Notably, out of the eight candidates considered for the position, Grievant and Ms. Salmons were the only ones to have ever held administrative positions, and both had served as principals. Grievant had even served as a superintendent. Ms. Salmons had served as the Assistant Principal at Lenore PK-8 and was serving as its acting Principal, the very position at issue in this grievance, at the time of the interviews and selection of Intervenor.

The only factor in which Intervenor surpassed the scores of Ms. Salmons, Dr. Maynard, and Grievant was factor nine. Ms. Dempsey, Ms. Varney, Mr. Hall, and Superintendent Spence stated very plainly that Intervenor was selected because of how he answered the interview questions. However, none of them could articulate exactly how Intervenor’s responses were so much better than all the other candidates, except to say that his answers were more “substantial,” “detailed,” and had more “substance.” Dr. Branch was not asked about this during his brief testimony. The interview committee scored Intervenor high enough on this one factor for him to surpass Ms. Salmons’ overall score by one point, making him the candidate with the overall highest score. Ms. Noe was assigned the next highest score of four on factor nine. The rest of the candidates received either two, one, or zero points for their interview performance and their essay question response.

The evidence also demonstrates that the committee was inconsistent on how it

awarded scores to the candidates. For some of the questions, the committee relied strictly on what the candidates said during the interviews, and for others, the committee considered additional information of which they had personal knowledge, even if the candidates did not mention it during their interviews. Also, it appears that the committee members did not award points for objective criteria the candidates may have mentioned during their interview of which Mr. Hall had no record. These inconsistencies are best demonstrated by how the committee evaluated factor six, “specialized training relevant to the performance of the duties of the job.” This was one of the objective factors, but the committee also asked the candidates about their specialized training in interview question two.

Ms. Salmons was the only candidate to be awarded a point for this factor. The interview committee witnesses and Mr. Hall did not appear to agree on how the committee came to make the decision to award Ms. Salmons the point. Ms. Dempsey claimed that the committee awarded the point to Ms. Salmons because she was the only candidate currently serving as a principal at that time. Ms. Varney testified that she could not remember why Ms. Salmons was awarded that point. However, both testified that they could not recall the discussion about scoring interview question number two which addressed this factor. Also, neither Ms. Dempsey nor Ms. Varney indicated that Mr. Hall helped determine that the committee should award Ms. Salmons the point for specialized training. Neither mentioned anything about any trainings Ms. Salmons had attended, or received, and none are noted in their interview notes for question two. However, Mr. Hall testified that Ms. Salmons was awarded the point for specialized training because, as a principal and assistant principal, she had attended the “Principals Academy,” and that

while Ms. Salmons did not mention it during her interview, the committee members were aware she had received that training and awarded her the point for it. As to how Mr. Hall knew the committee members were aware of Ms. Salmons attending the Principals Academy, he surmised that it was because some of the committee members had attended the same training themselves. There was no testimony or other evidence to establish the types of training that would be counted as “specialized training,” except that “specialized training” is not the same as experience working as a principal.

Ms. Varney’s, Ms. Dempsey’s, and Dr. Branch’s interview notes for Ms. Salmons’ interview show that in response to interview question number 2, “[w]hat types of specialized trainings do you have that would help with your duties as a Principal of a PK-8 [s]chool. . . ,” they noted only some of the various duties of Ms. Salmons’ job, such as “disciplines,” “work ballgames,” “contact parents,” “stay after school for bus duty,” “absences,” “conferences with teachers,” and “sub[stitute] teachers.” Their interview notes for Ms. Salmons were consistent and contained the same, or substantially similar, list of duties. None of these interviewers noted anything about any trainings she had received or the Principal’s Academy.

With respect to Grievant’s interview, Ms. Dempsey’s interview notes for interview question number two regarding “specialized trainings” state, “lots of prof. devel/leadership.” Ms. Varney’s notes state, “Doctorate in Leadership[,] Many trainings in Leadership.” Dr. Branch’s notes on this question state, “Doctorate of Ed. Leadership[,] Many hours of Leadership training.”¹³ When Mr. Hall was asked about this, he first

¹³ See, Grievant’s Exhibit 1, Dempsey Interview Notes; Grievant’s Exhibit 3, Varney Interview Notes; Grievant’s Exhibit 5, Branch Interview Notes.

suggested that Grievant did not elaborate enough about the trainings he had attended, or received, during his interview to be awarded the point, noting that he knew nothing about the trainings Kentucky offers. However, the committee members had noted his specialized training. Mr. Hall then stated that he knew the trainings offered through the Principals Academy in Mingo County and that they met the definition of specialized training, so Ms. Salmons was awarded the point. Mr. Hall made no effort to check the trainings Grievant received in Kentucky or the requirements for his Doctorate. Accordingly, despite Grievant having a Doctorate in Education Leadership and his twenty years of experience, professional development, and/or trainings in leadership he attended as a superintendent and principal, the interview committee did not award him a point for having “specialized training relevant to the performance of the duties of the job” of Principal of Lenore PK-8. Looking at the interview notes for the other candidates for interview question two, the committee members noted trainings, not their job duties, or the duties of any other jobs they may have held. Ms. Salmons was the only candidate whose job duties were noted by the interview committee, and not any trainings.

Whether an applicant has specialized training is an objective factor. An applicant either has it, or does not. The evidence is clear that Grievant had specialized training relevant to the position because he holds a Doctorate in Education Leadership, served as a principal or superintendent for twenty years, and attended twenty years of trainings and professional development in leadership and for those positions. The committee members noted the same in their notes for question two during Grievant’s interview. However, the committee and Mr. Hall simply did not find the same sufficient to award Grievant the point.

Based upon the evidence presented, it appears more likely than not that Mr. Hall or someone else decided that Grievant's degree, trainings attended, and experience as both a principal and superintendent for twenty years did not count as "specialized experience," but that Ms. Salmons' daily duties and experience as both a principal and assistant principal did, and that the decision to award this point to Ms. Salmons had nothing to do with the Principals Academy. Mr. Hall admittedly advised the committee to award Ms. Salmons the point for "specialized experience." There is no mention of trainings or the Principals Academy in the committee members' notes on Ms. Salmons' responses to interview question two, and she was the only candidate whose job duties were listed there instead. There was no evidence presented to even explain what the Principals Academy is or what training it offers. Even if the Principals Academy training were to be considered "specialized training," it seems hard to believe that it is more extensive and specialized than a Doctorate in Education Leadership plus twenty years working as a principal and superintendent and attending professional development and leadership trainings required for the same. The committee's failure to consistently evaluate and score the candidates' qualifications and performance was an abuse of discretion and it is a flaw in the selection process.

The interview committee's decision to weigh factor nine at nine points based upon an entirely subjective criteria, while the weighing the other eight objective factors at only one point each, also constitutes an abuse of discretion because it resulted in the selection of a candidate who was not the most qualified. The interview committee has admitted that the reason Intervenor wound up being selected to be the Principal of Lenore PK-8 is that they preferred his answers to interview questions six through thirteen and the essay

question over the other candidates' answers. This was entirely subjective and no one could explain how Intervenor's answers were so superior. The scoring on factor nine is overtly skewed in favor of Intervenor. The interview committee gave Dr. Maynard zero points for his responses to the interview questions and the essay question, Grievant, one, Ms. Deskins, one, Ms. Salmons, Ms. Perry, Mr. Saunders, two each, Ms. Noe, four, and Intervenor, six. The interview committee's decision to award six of the candidates two points or less out of nine, and award only one applicant more than four points seems suspect, especially given all the candidates' experience, education, tenure, and demonstrated abilities. This is not a situation where any of the applicants failed to attend their interview or submit an answer to the essay question.

For the reasons set forth herein, the Grievant has proved by a preponderance of the evidence that the selection process used by the interview committee to select the Principal for Lenore PK-8 was flawed, that its decision to select Intervenor was arbitrary and capricious, and that Intervenor was not the most qualified candidate. However, Grievant has failed to prove by a preponderance of the evidence that he was the most qualified candidate for the position. Grievant did not call any of the other candidates as witnesses or two of the members of the interview committee to testify at level three. Grievant did not present any evidence of the other candidate's qualifications and it is not clear whether the committee scored them correctly on the objective factors either. "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken." *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-

DOT (Apr. 23, 2009). Accordingly, there is no need to address Grievant's claims of discrimination and favoritism.

Therefore, this grievance should be GRANTED IN PART and DENIED IN PART.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. “[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. “A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications; Provided, That the county superintendent shall be hired under separate criteria” W. VA. CODE § 18A-4-7a(a).

8. “In judging qualifications for the filling of vacancies of professional positions of employment, 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 required certification area;
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;
- (5) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to performing the duties of the job;
- (7) Past performance evaluations conducted pursuant to §18A-2-12 and § 18A-3C-2 of this code or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged “

W. VA. CODE § 18A-4-7a(b).

9. When selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in WEST VIRGINIA CODE § 18A-4-7a, but the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. See WEST VIRGINIA CODE § 18A-4-7a(c). See also *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 (Apr. 10, 1992); *Komorowski v. Marshall County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009).

10. “Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken.” *Forsythe v. Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009) (citing *Neely v. Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)).

11. Grievant proved by a preponderance of the evidence that the selection process used by the interview committee to select the Principal for Lenore PK-8 was flawed, that Intervenor was not the most qualified candidate, and that its decision to select Intervenor was arbitrary and capricious. Further, Grievant proved by a preponderance of the evidence that the interview committee abused its discretion by weighting the single subjective factor more than the other eight objective factors combined which resulted in the selection of a candidate who was not the most qualified for the position.

12. Grievant failed to prove by a preponderance of evidence that he was the most qualified candidate for the principal position at Lenore PK-8.

Accordingly, this Grievance is **GRANTED IN PART, and DENIED IN PART**.

It is hereby **ORDERED** that Respondent repost the position of Principal at Lenore PK-8 within thirty days of the receipt of this decision, conduct a selection process consistent with W. VA. CODE § 18A-4-7a, and select the most qualified applicant for the position. Grievant’s request for reinstatement into the position of Principal of Lenore PK-8, plus back pay, and benefits is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.¹ Any

such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. Va. Code § 29A-5-4(b).

DATE: March 16, 2023.

Carrie H. LeFevre
Administrative Law Judge

¹ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over “[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]” W. Va. Code § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. Va. Code § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.