

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KRYSTAL HOLMES AND SHAWNA SMITH,
Grievants,**

v.

Docket No. 2023-0381-CONS

**CABELL COUNTY BOARD OF EDUCATION,
Respondent.**

and

**CASEY CRAWFORD,
Intervenor.**

DECISION

Grievants, Krystal Holmes and Shawna Smith, are employed by Respondent, Cabell County Board of Education. On September 23, 2022, Grievants individually filed their grievances against Respondent protesting their non-selection for a position¹, alleging the most qualified candidate was not selected and discrimination. Grievant Smith additionally alleged retaliation. For relief, Grievants sought reinstatement into the position, back pay, and any related benefits.

On October 25, 2022, Casey Crawford intervened² and a level one conference was conducted in both grievances. On November 15, 2022, the chief administrator entered an order consolidating the grievances. On November 16, 2022, the chief administrator issued a level one decision denying the consolidated grievance. Grievants appealed to

¹ Grievants did not specify the position for which they had not been selected. At level one, it was revealed that Grievants protested their non-selection for Assistant Principal positions: Grievant Holmes at Cabell Midland High School and Grievant Smith at both Cabell Midland High School and Huntington High School.

² On April 11, 2023, Travis Baker was also granted intervenor status but was dismissed as an intervenor by order entered March 14, 2024, following his withdrawal as intervenor.

level two on November 22, 2022. Following unsuccessful mediation, Grievants appealed to level three of the grievance process on March 3, 2023. A level three hearing was held on September 23, 2024, and September 24, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office.³ Grievant Holmes appeared in person and was represented by Abraham J. Saad, Esquire, GLAZER SAAD ANDERSON L.C. Grievant Smith appeared in person and was represented by William S. Winfrey, II, Esquire. Respondent appeared by its General Counsel, Sherrone Hornbuckle Myers, and was represented by counsel, George "Trey" B. Morrone III, Esquire, Bowles Rice LLP. Intervenor appeared in person and was self-represented. This matter became mature for decision on December 10, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").⁴

Synopsis

Grievants challenge their nonselection for an Assistant Principal position for which Intervenor was the successful candidate. Although Grievants proved there were some flaws in the selection process, those flaws would not have changed the outcome of the decision. Neither Grievant proved she was the most qualified candidate. Accordingly, the grievance is denied.

³ The level three hearing was previously scheduled on four other occasions. Grievants requested continuance of the June 23, 2023, hearing. Grievant Smith requested continuance of the November 1, 2023, and June 6 – 7, 2024, hearings. The Grievance Board continued the February 28 – 29, 2024, hearing on its own motion to address Respondent's motion to compel filed February 21, 2024, and conducted a pre-hearing conference on February 29, 2024, on the motion to compel and other procedural issues.

⁴ At the conclusion of the hearing, the parties requested an extended due date for submission of PFFCL, which was granted and extended to November 15, 2024. On November 12, 2024, the parties requested an additional extension and the time for submission was extended to December 6, 2024. Intervenor declined to submit PFFCL.

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 Holmes is employed by Respondent as a classroom teacher at Milton Middle School.
2. Grievant Smith is employed by Respondent as an assistant principal. At the time of the decision being challenged, Grievant Smith was a classroom teacher at CrossRoads Academy.
3. On August 31, 2022, Respondent posted the position of assistant principal at Cabell Midland High School.
4. Grievants, Intervenor, and seven others applied for the position.
5. A selection committee was formed consisting of Superintendent Ryan Saxe, Executive Director for High Schools Heather Scarberry, Huntington High School Principal Joedy Cunningham, and Cabell Midland High School Principal Lloyd McGuffin. Director Scarberry was the chair of the committee.
6. By statute, for an administrative position, Respondent is required to consider nine factors in identifying the applicant with the highest qualifications.
 - (1) Appropriate certification, licensure or both;
 - (2) Amount of experience relevant to the position; or, in the case of 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) In the case of a principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;
 - (6) Specialized training relevant to perform 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.

7. The job description for high school assistant principal lists numerous qualifications and responsibilities. The following are of particular importance to the grievance. For qualifications: hold an "administrative certification for principal"; high school teaching experience preferred; demonstration of leadership; ability to work cooperatively and effectively with others; effective written and oral communications skills; ability to utilize data to improve instruction; and demonstration of proficient skill in staff relations, community leadership, and education proficiencies. For responsibilities: assist in the supervision and evaluation of the faculty and staff, assist the staff, manage all aspects of athletics, collaborate with the principal to develop the Strategic Plan, and assist with the management and the leadership of the school's assessment programs.

8. The committee discussed the necessary qualifications for the position prior to posting the position and generated interview questions and a prompt relating to the criteria of subsections six and nine of West Virginia Code §18A-4-7a, which the committee believed should be most highly weighted for the selection decision.

9. For subsection six, "specialized training relevant to performing the duties of the job", the hiring committee preferred the following: instructional technology training, including Apple, LMS, or Schoology 1; Turn-it in, Achieve 300, Khan Academy, Aleks 1,

3, 4; Evaluation Training 1, 4; Instructional or Organizational Leadership 1, 2, 3, 4; PLCs 1, 3; and Behavior or Trauma Training 1, 3, 4.

10. For subsection nine, the committee expected of the candidates the following:

Demonstrate communication skills, and being able to articulate a vision for school, parents, family, and community engagement. 1, 3, 5, 6.

Experience working with a diverse population and how to get them involved with the school community. 2

Demonstrate the use of assessment scores for strategic planning and instructional planning.

The ability to articulate and identify appropriate interventions or current adopted programs to support students' behavior, academic, and student social-emotional needs. 2,3,4

Demonstrate ability to work well with other colleagues and show respect for supervisors and other district leaders' decisions and authority 1,5,6

See J-26.

11. Applicants bid for postings on Respondent's online portal. The portal compiles the information from each bid and reports it on the "Administrative Bid Information page." The portal also retains permanently in the system the professional application, which is separate from the bid. Test. Scarberry, JE-19.

12. Hiring committees do not have access to the portal. Director Scarberry pulls all documents available from the portal and puts them in a digital folder for the committees.

13. For this position, Director Scarberry created a list of applicants comparing certifications, degree level, evaluations, experience, and seniority.

14. Applicants who met the minimum qualifications were then invited to submit an Executive Summary. The Executive Summary entailed an online form soliciting a brief statement of skills or qualifications for each of the nine subsections, and a presentation responding to the following prompt:

Improving attendance and decreasing behavior/suspension rate positively impacts course completion leading to an increase in graduation rate. Develop a staff presentation to lead teachers through data analysis, the instructional impact of current data, and interventions to address student achievement and behavior. You may include but are not limited to Zoom data at <https://zoomwv.k12.wv.us/Dashboard/dashboard/28116>.

Prepare a presentation and video of yourself delivering your proposed plan to a group of stakeholders. The video cannot be any longer than five minutes. You are encouraged to use visuals during the video.

JE-20.

15. The Executive Summary form instructed applicants to use an additional sheet to list relevant specialized training. Applicants were also instructed to attach their resume and a list of other relevant qualifications if more space was needed.

16. Mr. Cooke did not include his training on a separate sheet but, rather, included it in a section of his resume.

17. The subsection nine criteria and the subsection nine portion of the Executive Summary did not directly correlate. The hiring committee did not share the list of attributes with the candidates. The section nine of the Executive Summary form asks only for "Other **relative** qualifications. These may be experiences outside an education system such as military or business leadership, etc. It is your responsibility to make us aware of these qualifications."

18. For subsection six, the committee limited consideration of relevant specialized training to training received within the prior five years.

19. The committee selected applicants to interview based on review of the information from the portal, the Executive Summaries, and resumes.

20. The committee considered how thorough, thoughtful, and responsive to the prompt were the presentations and looked for the applicant to include "interventions and strategies" that were "high quality, research-based practices." Test., Saxe.

21. Director Scarberry compiled a matrix to compare the qualifications of each applicant that timely submitted an executive summary. Additional information was added to the matrix following the interviews. Test., Scarberry.

22. None of the applicants possessed a doctorate. Grievants and Carol Ward possessed the highest number of additional credit hours with 45 and Intervenor and Brian Clagg possessing the least with 15. All had completed Praxis testing. All but Intervenor and Robert Cooke had completed evaluation training. No applicant had any administrative experience except for Grievant Smith, who had only 45 days of experience in a summer position. Mr. Cooke had the highest high school teaching experience with 15 years. Grievant Smith had 11 years of experience, Intervenor had four years of experience, and Grievant Holmes had only three years of experience. Intervenor had nine years of experience as a coach and Grievant Holmes had eight years of experience as a coach. Brian Clagg had the highest undergraduate grade point average with 3.84, while Grievant Smith had 3.7, Grievant Holmes had 3.4, and Intervenor had 3.1. Grievant Smith had the most seniority with fourteen years. Grievant Holmes had thirteen years, and Intervenor had five years.

23. The matrix contained multiple errors. The experience of Grievant Smith, Grievant Holmes, Intervenor, and Mr. Muncy were all listed incorrectly. Intervenor's additional credit hours were incorrect. Grievant Holmes and Intervenor's undergraduate grade point averages were incorrect. Grievant Smith's seniority was incorrect. Grievant Holmes' subsection six omitted several relevant trainings that had been included for other applicants.

24. Intervenor's degree level was overstated as a Masters +45 when she possessed only a Masters +15. Her high school teaching experience was overstated as eight years, when she possessed only four, but her three years of middle school teaching experience were omitted. Her grade point average was inflated from a 3.1 to a 3.2.

25. Grievant Holmes' middle and high school experience were combined to state that she had thirteen years of high school experience when she had only three years of high school experience and ten years of middle school experience. Grievant Holmes' eight years of coaching experience was omitted from the matrix. Grievant Holmes was only given credit for the Administrative Apprenticeship program under subsection six when she also had the CPR and I-Ready training that had been included for other candidates.

26. The committee interviewed Grievant Smith, Intervenor, Brian Clagg, Bob Cooke, and Carol Ward. The committee did not interview Grievant Holmes.

27. The committee unanimously agreed that Intervenor was the most qualified candidate.

28. Superintendent Saxe recommended Intervenor for the Cabell Midland position, which was approved by the Board on September 20, 2022.

29. In its recommendation, the hiring committee explained its recommendation of Intervenor as follows:

Ms. Casey Crawford articulated her vision for school improvement through a detailed plan for professional development using the Leader in Me. She shared data used to identify the direct relationship between attendance rate, suspension, and graduation rate along with intervention strategies to support academic, behavior, and social-emotional needs of the students. Her instructional plan focused on building positive relationships and focusing on instructional engagement for educators and students. Ms. Crawford's leadership experience includes coaching, building the Sports Medicine program in a CTE credentialed course, beginning the new Grow Your Own, Building Educators, course, school-based leadership roles, and the completion of the Administrative Apprenticeship course. In her current role, she serves as department chair and leads the weekly PLCs. As a leader, she is able to advocate and work directly with her colleagues to make data driven decisions to support students. Other leadership roles include managing finances for the physical education department, mentoring new teachers, and wellness committee member[.] She clearly articulated the importance of communication with diverse stakeholders and families to create a culture focused on student success and meeting all students where they are. Ms. Crawford's vision included continuing to engage the community through surveys, social media, and meetings while focusing on the school academic goals and celebrating students and school success. As Ms. Crawford is currently enrolled in the CTE administrator's course and has demonstrated that she is vested in modeling the importance of professional growth to better service the students of Cabell County. Ms. Crawford's strong leadership skills, excellent communication skills, focus on students, and evidence of building successful instructional programs demonstrates she has the qualifications, skills and credentials to be the successful candidate for the Assistant Principal at Cabell Midland High School.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievants initially asserted that they had been discriminated against. Grievants were not permitted to present evidence or argument regarding claims of protected class discrimination as the Grievance Board does not have jurisdiction over “[a]ny matter relating to the protected classes set forth in §5-11-1 *et seq.* of this code.” W. Va. Code § 6C-2-2(i)(2)(B) (2023).⁵ Therefore, claims of discrimination were not permitted to be presented during the level three hearing and will not be further addressed. Additionally, in her PFFCL, Grievant Smith asserted she was challenging only the Cabell Midland selection decision. Therefore, this decision does not address the Huntington High selection decision although evidence was presented regarding that selection decision during the hearing. Lastly, Grievant Smith did not argue her claim of retaliation in her PFFCL, so that claim is deemed abandoned will not be further addressed.

Grievant Holmes and Grievant Smith each assert that she was the most qualified candidate. Both argue that the selection process was fatally flawed and arbitrary and capricious, citing inaccuracies in the documentation; the failure to assign specific scores to each category; and the selection of Intervenor, despite her lack of permanent administrative certification. Both allege that former Superintendent Saxe was biased

⁵ West Virginia Code § 5-11-1 *et seq.* was the West Virginia Human Rights Act, which was repealed and recodified as §16B-17-1 *et seq.* effective February 8, 2024.

against them. Grievant Smith argues that Principal McGuffin was biased in favor of Intervenor. Grievant Holmes additionally argued the process was flawed because she was denied an interview. Respondent asserts that the process was proper, that a permanent administrative certificate was not required, and that Intervenor was the most qualified candidate.

“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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000). In 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 Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994). The Grievance Board recognizes selection decisions are largely the prerogative of management, and absent the presence of unlawful, unreasonable, or arbitrary and capricious behavior, such selection decisions will generally not be overturned. *Mihaliak v. Div. of Rehab. Serv.*, Docket No. 98-RS-126 (Aug. 3, 1998). An agency’s decision as to who is the best qualified applicant will be upheld unless shown by the grievant to be arbitrary and capricious or clearly wrong. *Thibault v. Div. of Rehab. Serv.*, Docket No. 93-RS-489 (July 29, 1994).

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).

"[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).

"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...." W. VA. CODE § 18A-4-7a(a).

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...
- (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...
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged....⁶

W. VA. CODE § 18A-4-7a(b). "When filling of 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...." W. VA. CODE § 18A-4-7a(c).

Respondent employs a robust selection process for administrative positions. Prior to even posting a position, a hiring committee is formed to discuss the necessary qualifications and generate interview questions and a prompt to be answered by applicants later in the process. Upon receiving bids, Respondent generates a comparison of the applicants' minimum qualifications. From that, applicants are selected to participate in the next step, the Executive Summary. Selected candidates are given a prompt to answer through a presentation and are required to complete the Executive Summary form, providing a summary of qualification relevant to each statutory criterion. Director

⁶ For clarity, provisions relating only to classroom teaching positions have been omitted.

Scarberry creates a matrix to compare the qualifications of the candidates. The hiring committee then reviews all the Executive Summaries and selects candidates to interview based on its review of the candidates' qualifications and performance on the Executive Summary. After the interviews, the matrix is updated with information from the interviews and the hiring committee again meets to discuss the candidates and make a final recommendation.

Grievants assert the process was arbitrary and capricious because Respondent did not have a scoring system for considering the statutory criteria. Grievants failed to cite any authority that Respondent was required to assign numerical values to "score" the matrix. By statute, Respondent is only required to "consider" each criterion and may "determine the appropriate weight to apply to each." It is only for the selection of classroom teachers that such weighing may be required to be numerical as it mandates that criterion in subdivisions one through nine be "given equal weight" and the criterion in subdivisions ten and eleven "shall each be double weighted." Respondent considered all the statutory criteria but was most concerned with the directly relevant training each applicant possessed and the applicant's suitability, as demonstrated by the presentation and interview, of the qualities the hiring committee sought under the subsection nine criteria. The subsection six and nine criteria are based soundly on the job description, to which the posting referred applicants. It was reasonable and appropriate for the hiring committee to weigh those factors most heavily.

Grievants cite *Emch v. Wetzel Bd. of Educ.*, Docket No. 2023-0172-WetEd (Aug. 3, 2023) in support of the assertion that the hiring committee's evaluation of the applicants' qualifications was arbitrary and capricious. In *Emch*, the hiring committee did

employ a numerical scoring system, which awarded one point to the first eight criteria and a possible five points for each interview question. *Emch* does not mandate that a numerical system be used, and the Grievance Board found that the decision was arbitrary and capricious because three of the four hiring committee members agreed that the selection process did not result in the nomination of the most qualified candidate. The committee had not come to a consensus for how to evaluate the candidates during the interview. The successful candidate was selected based solely on interview performance and, specifically, a scoring system that allowed an unusually high score of one committee member to determine the outcome. That is not the case here where the committee was in consensus regarding the qualifications desired, the candidates were asked to create a presentation in addition to interviews, and the committee unanimously agreed that Intervenor was the most qualified candidate.

Grievants proved there were inaccuracies in the matrix. However, while there were inaccuracies in the matrix, Grievants failed to prove that this rendered the selection decision arbitrary and capricious or resulted in Respondent's failure to consider the required criteria. The inaccuracies do not seem to indicate any bias as the inaccuracies in experience were not just to the benefit of Intervenor but also to Grievant Holmes. Nor did the overstatement of Intervenor's experience result in her being considered the most qualified candidate for that category. As to the exclusion of three years of experience for Grievant Smith and the overstatement of Master's-plus-hours for Intervenor, neither of those factors were determinative in the decision. The committee was most concerned with the criteria in subsection six and nine and the inaccuracies in experience and hours were not of a magnitude to have changed the decision.

As to the alleged omissions of Grievant Smith's resume and application, it is unclear if Grievant's Smith resume was omitted, and the application was of little value. Grievant Smith's resume appears as an exhibit in the packet of resumes for the Huntington High School position. It is unclear if the resume was not properly uploaded to the drive containing the materials for the Cabel Midland hiring decision or was simply omitted from the exhibits at level three by mistake. As to the application, the application was not the bid but was simply a document retained in the portal, presumably from the initial employment with Respondent. The applications for multiple applicants were blank, including for Intervenor. Regardless, the information on the application and resume are already covered by the bid sheet and the Executive Summary and, therefore, would not have harmed Grievant Smith in the selection decision.

As to the certification issue, the job posting required as a qualification that the applicant "[h]old and maintain a West Virginia administrative certificate for principal in appropriate grade levels." There are three levels of certification: provisional, initial, and permanent. W. VA. CODE ST. R. § 126-136-10.8. (2021).⁷ Intervenor held a provisional certification while Grievants held a permanent certification.

Grievants assert that the successful candidate was either required to hold, or that the hiring committee should have preferred, a permanent administrative certificate. However, the rule does not require a permanent certificate: "An individual holding a Provisional Administrative Certificate may be employed as an administrator in a West Virginia public school and is authorized to perform observations with the online Initial ELI

⁷ This is the administrative rule that was in effect at the time of hiring decision. Grievant Smith cited the current version of the rule.

but is not eligible to conduct evaluations until the educator is issued an Initial Professional Administrative Certificate." W. VA. CODE ST. R. § 126-136-10.2.a.1.A. It was well within Respondent's discretion not to place any weight on the type of certification held. That Intervenor later failed to obtain her initial certificate in a timely manner is irrelevant to the hiring decision.

Grievant Holmes argued the process was flawed because she was denied an interview. Grievant Holmes failed to prove she was entitled to an interview. Neither statute nor rule require that all candidates be interviewed, and Grievant Holmes presented no policy of Respondent that would compel the hiring committee to interview her. Superintendent Saxe explained that he viewed the Executive Summary as a first interview and selected candidates for in-person interview whose presentations were thorough, thoughtful, and contained interventions and strategies that were "high quality research based" to demonstrate their ability to utilize their training and skills. Grievant Holmes did not prove that the hiring committee's assessment was incorrect. Comparing Grievant Holmes' presentation to the candidates who received an interview, Grievant Holmes' presentation does not appear to be thorough or thoughtful. Her slideshow contained grammatical and formatting errors, her use of data was minimal, her public speaking skills were lacking, and her discussion of interventions did not appear to be as thorough or thoughtful as the candidates who were selected for interview.

Both Grievants also allege bias. Both assert that former Superintendent Saxe was biased against them, and Grievant Smith alleges that Principal McGuffin was biased for Intervenor. In support, both assert that, despite numerous applications for administrative positions, neither had ever received an interview during Superintendent Saxe's tenure as

superintendent, which Superintendent Saxe disputes. While it is understandable that Grievants would be suspicious after so many applications without interview, Grievant Smith was interviewed for this position and there are many legitimate reasons why an applicant may not be selected for an interview.

It appears Grievants also argue bias due to the selection of Mr. Cooke and Mr. Clagg for interview when they failed to properly complete their Executive Summaries. Mr. Cooke's information was included on his resume, which was a proper part of the packet, and Mr. Clagg did include training on a separate sheet as instructed and was not required to complete section nine as it was to list other qualifications. Further, both submitted presentations that were of very high quality, which would justify their selection for interview.

Grievants provided no reason why they believe Superintendent Saxe might be biased or any other evidence to support the allegation of bias. Likewise, other than the bare fact that Intervenor was a teacher in Principal McGuffin's school, Grievant Smith did not present any evidence to support that Principal McGuffin was biased for Intervenor. Therefore, it does not appear that the decision was influenced by bias.

Neither Grievant proved she was the most qualified candidate. Neither addressed how she met the subsection six and nine criteria better than Intervenor. Neither explained how her training or leadership abilities would have made her more suited to the position than Intervenor. Grievants' arguments centered on what they believed should have been the determinative criteria: experience, education, and the type of administrative certification. However, as discussed above, Respondent has the clear discretion to weigh the six and nine criteria most heavily. Respondent explained in the recommendation and

in the section nine notes on the matrix how Intervenor met those qualities for the position that the hiring committee preferred. She was on the leadership team and had served in leadership roles, including lead PLC and as director of her program. She had created the sports medicine program and had taken on the Grow Your Own, Building Educators course. She had a detailed plan for professional development using the Leader in Me and had demonstrated her own commitment to professional development by beginning the CTE administrator course after completing the administrative apprenticeship to further her administrative qualifications. Even though at the level three hearing Grievants had access to the specific qualities the hiring committee was looking for and Intervenor's executive summary, neither could explain why they were more qualified than Intervenor relating to the criteria of subsection six and nine.

Grievants proved there were errors in the selection process documentation; however, they failed to prove that the errors impacted the outcome. "In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as 'harmless error. (citations omitted)" *DeLauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR326 (Jan. 28, 2009). *Snodgrass v. Dep't of Health and Human Res.*, Docket No. 2019-1691-DHHR (Apr. 19, 2021). Neither Grievant proved they were the most qualified candidate. Therefore, this grievance must be denied.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants has the burden of proving their 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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).
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...." W. VA. CODE § 18A-4-7a(a).

6. 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...
- (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...
- (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).

7. "When filling of 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...." W. VA. CODE § 18A-4-7a(c).

8. "An individual holding a Provisional Administrative Certificate may be employed as an administrator in a West Virginia public school and is authorized to perform observations with the online Initial ELI but is not eligible to conduct evaluations until the educator is issued an Initial Professional Administrative Certificate." W. VA. CODE ST. R. § 126-136-10.2.a.1.A.

9. "In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as 'harmless error. (citations omitted)" *Delauder v. Dep't of Health & Human Res.*, Docket No. 07-HHR326 (Jan. 28, 2009). *Snodgrass v. Dep't of Health and Human Res.*, Docket No. 2019-1691-DHHR (Apr. 19, 2021).

10. Grievants failed to prove that the selection process was arbitrary and capricious.

11. Neither Grievant proved that she was the most qualified candidate.

Accordingly, the grievance is DENIED.

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with §51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2- 5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: January 28, 2025

Billie Thacker Catlett
Chief Administrative Law Judge