

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**LAUREN REBEKAH WERTHAMMER,**  
**Grievant,**

**V.**

**Docket No. 2016-1703-CabED**

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

**TARA COMBS,**  
**Intervenor.**

## **DECISION**

Grievant, Lauren Werthammer, is employed by Respondent, Cabell County Board of Education (“Board”), as a Curriculum Supervisor. By form dated June 1, 2016, Ms. Werthammer filed a grievance directly to level three contesting her non-selection for the position of Director of Career Technology Programs (“CTE Director”). She alleged that she was recommended as the most qualified candidate by the superintendent, the successful applicant lacked administrative experience, the interview process was tainted because a member of the committee prepared the successful applicant with the questions to be asked at the interview and otherwise showed favoritism as well as arbitrary and capricious. Grievant alleged the Board’s action violated WEST VIRGINIA CODE sections: 6C-2-1, *et al.*; 18A-2-1, *et al.*; 18A-3-1, *et al.*; 18A-3-2a(o); and 18A-1-1, *et al.*<sup>1</sup> As relief, Grievant seeks to be placed in the CTE Director position with back pay. By letter dated June 2, 2016, Tara Combs, the successful applicant, notified Assistant Superintendent, Todd Alexander, that she wished to intervene in the grievance.

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<sup>1</sup> The statutes are cited as they appear on the grievance form.

The Chief Administrative Law Judge for the West Virginia Public Employees Grievance Board entered an Order dated June 7, 2016, dismissing the grievance from the level three docket and transferring it to level one and directing the parties to follow all required timelines for processing the grievance at that level.<sup>2</sup> By agreement of the parties, a level one hearing was held on July 26, 2016. Ms. Combs was granted intervenor status for the hearing. Grievant appeared and was represented by Abraham J. Saad, Esquire, the Board appeared through Assistant Superintendent Jeff Smith and was represented by Howard Seuffer Jr. Esquire, and Intervenor appeared and was represented by Benjamin Barkey, Member Advocacy with the WVEA.<sup>3</sup> A level one decision denying the grievance was issued on August 24, 2016.

By form dated September 8, 2016, Grievant appealed to level two. Ms. Combs filed a form to intervene dated October 14, 2016, and an Order was entered granting her intervenor status on October 17, 2016. A mediation session was held on October 26, 2016, and Grievant appealed to level three by form dated November 2, 2016.

Respondent moved without objection from other parties for the level three hearing to be held at the Cabell County Schools Central Office. The motion was granted by Order dated February 17, 2017. Pursuant to that Order, a level three hearing was conducted at the Central Office for Cabell County Schools in Huntington, West Virginia, on March 1 and 2, 2017. Grievant personally appeared and was represented by Mr. Saad. Intervenor personally appeared and was represented by Mr. Barkey. Respondent appeared in

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<sup>2</sup> The allegations in the grievance did not meet the mandatory guidelines to be expedited which are set out in W. VA. CODE § 6C-2-4(a)(4).

<sup>3</sup> West Virginia Education Association.

person by Assistant Superintendent Todd Alexander, and was again represented by Mr. Seufer. This matter became mature for decision on April 12, 2017, upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

### **Synopsis**

Grievant alleges that Respondent's decision to hire Intervenor for the position of CTE Director was arbitrary and capricious. Grievant alleges the interview process was biased, Grievant was the most qualified candidate, and the Board had decided to reject the Superintendent's recommendation of the Grievant prior to the meeting. While there was more than usual rumor and speculation about the hiring process involved in this case, Grievant did not prove by a preponderance of the evidence that the Board's actions violated the law or were arbitrary and capricious.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Grievant, Lauren Werthammer, is presently employed by Respondent, Cabell County Board of Education, as a Multi-School Curriculum Supervisor for Grades Pre-K through 12. She has held that position since July 2014. Her previous professional positions with the Board were: Assistant Principal at Huntington High School (July 2012 – July 2014); Academy Coordinator at Cabell Midland High School (September 2010 – June 2012); and, Freshman Academy English Teacher (February 2008 – September 2010). Grievant holds an MA degree in Leadership, plus forty-five graduate hours.

2. At the relevant time<sup>4</sup>, Grievant had seven years of employment with Cabell County Schools, and four years of experience as an administrator.

3. Intervenor, Tara Combs, is presently employed by Respondent as the Director of Career Technology Programs. She has held that position since it was recently filled. Prior to taking the Director job, Intervenor served as an Academy Coordinator assigned to the Cabell County Career Technology Center (“Career Technology Center”) from 2010 through 2016. Intervenor was employed in Ironton, Ohio at the Lawrence County Alternative School from 2006 through 2009 before coming to work for Respondent. At that school, she taught Math, English, Science and Social Studies as well as counseling the students on self-control and making better choices. She also oversaw the virtual learning program for the school. Intervenor holds a MA degree in Leadership and a BA in Social Studies Education.

4. At the relevant time,<sup>5</sup> Intervenor had ten years of total professional experience of which seven was in Cabell County. She did not have any experience as a school administrator until she took the CTE Director position.

5. While working as the Academy Coordinator at the Career Technology Center, Intervenor attended training seminars and took on additional assignments. Included among the trainings were: National Career Technology Education Seminar in 2016; Council on Occupational Education (“COE”) Seminars in 2015 and 2014; Association for Career and Technical Educators (“ACTE”) in 2014 and 2015; Drop-Out Prevention Conference in 2010; as well as other State and National seminars.

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<sup>4</sup> When interviews were conducted for the contested position.

<sup>5</sup> *Id.*

6. COE is an accrediting organization for post-secondary occupational institutions that offer certificate, diploma, or applied associate degree programs. The Career Technology Center's accreditation was up for renewal, the year before Ms. Chenault's retirement as CTE Director. By attending the COE conferences Grievant was able to significantly help in the accreditation process which was complicated by new standards adopted by the COE.

7. Intervenor applied for and received an extra position as the TASC<sup>6</sup> Coordinator. The TASC has taken the place of the GED as an alternative path for students to obtain their high school degree. This path is often utilized by adults taking classes in programs at the Career and Technology Center.

8. The Board posted the position of Director of Career Technology Programs ("CTE Director") on April 4, 2016. (Joint Exhibit 1). The listed qualifications for the position included:

- West Virginia Administrative Certification.
- Skilled in Staff Relations and Community leadership.
- Education proficiencies including; knowledge of curriculum and instructional techniques; student learning styles; student assessment criteria; personnel performance; evaluation skills; and, family issues.
- Administrative skills including organizational; fiscal; public policy; and, total quality management skills and techniques.
- Curriculum and instructional leadership.
- Understanding of management operations.
- Current knowledge of educational research and development to create an environment that allows employees to take risks.
- Vision of needs for 21<sup>st</sup> Century schools in career and technology areas.
- Effective written and oral communication skills.
- Organizational and relational skills.

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<sup>6</sup> Test Assessing Secondary Completion.

- Understanding of the career academy concept and how academies currently in the high schools lead to post-secondary education or careers.<sup>7</sup> (Joint Exhibit 1).

The only statement specifically dealing with administrative skills listed in the job posting or job description states that the applicant must demonstrate:

Administrative skills, including, but not limited to, organizational, fiscal, public policy and total quality management skills and techniques. (Joint Exhibit 1).

Neither the job posting nor the job description stated that administrative experience was required or preferred for the successful applicant. (Joint Exhibit 1).

9. Grievant, Intervenor, and many other people both within and outside Cabell County Schools applied for the posted position. Superintendent of Schools, William Smith, appointed Assistant Superintendent, Jeff Smith<sup>8</sup> to put together an interview committee for selecting the two top candidates for the CTE Director position and forwarding those names to him. Superintendent Smith would then select the candidate he felt was most qualified for the position to recommend to the Board. This has been the common practice for filling administrative positions in Cabell County Schools for some time.

10. Dr. Smith appointed four people to the interview committee:

- Sharon Chenault - The person retiring as the CTE Director;
- Brenda Tanner - A central office administrator who was the CTE Director before Ms. Chenault;
- Lenora Richardson – Director of Curriculum, Instruction, and Assessment; and,
- Rick Brown – Employed by Mountain West Community and Technical College and part of the consortium for Cabell County High Schools.

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<sup>7</sup> The qualifications have been paraphrased herein for the sake of brevity.

<sup>8</sup> Dr. Smith was charged with overseeing the committee because the CTE Director serves under his supervision.

Ms. Chenault and Ms. Tanner were picked because they had served in the position, knew what skills a good applicant would need to be successful, and knew the direction the Board and Administration wished to go with the program. Ms. Richardson was selected because she was involved in guiding the curriculum and assessments for all secondary students, and Mr. Brown was selected because he was familiar with the needs of private sector employers and the programs at Community Colleges where these students might go to further their careers.

11. Ms. Chenault was Intervenor's immediate supervisor when she retired and her position as CTE Director was posted and they worked together closely. Ms. Richardson was Grievant's immediate supervisor when she applied for the CTE Director position. They had worked together since July 2014. Another Central Office Administrator, Kelly Daniels was considered for inclusion on the committee, but she was ultimately excluded because her position dealt mostly with federal grant programs and was unrelated to the CTE Director position. Additionally, she had also been the principal of the school where Grievant was the Academy Coordinator and Dr. Smith felt it was better to exclude her for that reason as well, since she had little or no connection with the posted position.

12. Dr. Smith reviewed all the applicants and recommended several of them to be interviewed. Intervenor Combs was not in his initial suggested group because she did not have administrative experience. When the interview committee reviewed the applicants, they generally agreed with Dr. Smith's initial suggestions, but decided to invite Intervenor Combs as well because she was a CTE Academy Coordinator and had experience in the program.

13. Each candidate prepared and submitted a document entitled “Executive Summary for Administrative Position, Cabell County Schools.”<sup>9</sup> The Executive Summary first asks candidates to list their qualifications in relation to the list of qualifications set out in WEST VIRGINIA CODE § 18A-4-7a(b). In that regard, candidates are encouraged to provide any specialized training which they have received that is relevant to the position and “other relative qualification” which may include “experiences outside an educational system such as military or business leadership, etc.” Candidates are asked to submit a resume as part of the Summary and written answers to specific questions related to the position to be filled.

14. With the guidance of Dr. Smith, the committee came up with a series of questions which were asked of each candidate interviewed. Following the interviews, the committee collaborated in filling out a form entitled “SB 359 Matrix: Professional Positions Other Than Classroom Teacher Positions.”<sup>10</sup> The form lists the candidates in a column down the left side and the statutory qualifications across the top. The candidates’ relative qualifications and a category entitled “Comments from the Committee Members, are listed in a row beside their names. No specific weight was assigned to any criterion.<sup>11</sup> All committee members were encouraged to make comments regarding their impressions of each candidate and Dr. Smith recorded and summarized the comments to be placed on the matrix. All the interview committee members acted appropriately during the interview process. No member of the committee members attempted to exert undue influence for

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<sup>9</sup> See Grievant Exhibit 2, for Grievant’s Executive Summary and Respondent Exhibit 2 for Intervenor’s Executive Summary.

<sup>10</sup> Grievant Exhibit 1.

<sup>11</sup> This does not mean that each criterion was given equal weight. Rather, it appears there was simply no discussion concerning weighting of the criteria in the committee.



the selection of any candidate. The consensus of the committee was that the two names put forth were the best candidates for the job.<sup>12</sup>

15. The committee members were asked to list their top two choices without ranking them one or two. The committee members came to a consensus that Grievant and Intervenor were the top two candidates and should be recommended to Superintendent Smith. The committee prepared a report for Superintendent Smith summarizing the qualifications of each candidate as well as listing all the applicants and identifying those who had been interviewed. (Respondent Exhibit 1).

16. Superintendent Smith reviewed all the materials submitted to the committee as well as the files of the employees and decided to recommend Grievant for the position. He felt she was the most qualified applicant because she had administrative experience. He told Grievant that he was going to recommend her selection at the next Board meeting.

17. Superintendent Smith provided the Board members with copies of the agenda and materials for discussion and action several days before the Board meetings. He followed the same procedure of providing the Board members with meeting information packets prior to the meeting where the CTE Director position was to be filled. In that packet, Superintendent Smith included the "Review Committee Report to Superintendent" as well as Grievant's Executive Summary which she had provided to the interview committee.

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<sup>12</sup> Testimony of Lenora Richardson. Ms. Richardson said that she was satisfied with the candidates put forward by the committee.

18. Board members Rhonda Smalley and Mary Neely were concerned that Superintendent Smith did not provide the Executive Summary submitted by Intervenor or the comparison matrix with the materials he provided to the Board. Ms. Smalley stated that she and Ms. Neely requested this information from the Superintendent's office but did not receive it. Ms. Smalley obtained the information regarding Intervenor from someone at the Career and Technology Center and provided it to the other Board members at the Board meeting.<sup>13</sup>

19. Prior to the Board meeting, some faculty members and other citizens sent e-mails or text messages to Board members in support of Intervenor and Grievant. Most of those messages came from the staff at the Career Technology Center where Intervenor had worked and were supportive of her candidacy. Additionally, individuals representing private organizations Intervenor worked with sent supportive messages to Board members.<sup>14</sup>

20. Board member, Rhonda Smalley, has known Ms. Chenault for a long time. She called Ms. Chenault after the interviews, but before the Board meeting, and was asking her about the candidates. Ms. Chenault did not comment on the candidates and indicated it would be inappropriate for her to do so.<sup>15</sup>

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<sup>13</sup> Nobody asked Ms. Smalley the identity of the person who provided her with Intervenor's Executive Summary.

<sup>14</sup> Board member Susan Oxley testified that she had received a lot of outside input about Tara Combs' candidacy. Ms. Oxley testified to the Board on July 1, 2016.

<sup>15</sup> Board member Smalley originally denied calling Ms. Chenault but during examination by the parties' representatives she conceded that she may have spoken with Ms. Chenault before the Board meeting. Given the comparative demeanors of the witnesses and the fact that Ms. Chenault had no stake in this matter now that she is retired, it is more likely than not that this telephone occurred as described by Ms. Chenault.

21. Intervenor often met with Ms. Chenault to talk about specific matters related to their jobs. During the period when the candidates were preparing their executive summaries to be submitted with their applications for the CTE Director position, Intervenor was also working on a grant proposal to fund a CTE summer camp to expose fifth grade students to positive aspects of career and technical training. Grievant met with Ms. Chenault to go over this grant proposal and get suggestions on how it could be improved. Ms. Spurlock, a secretary at the Career and Technical Center at that time, participated in this discussion as well. They met in Ms. Chenault's office with the door open and made no attempt to hide their actions.

22. A secretary at the Career and Technical Center, Cindy Malone, saw Intervenor, Ms. Chenault and Ms. Spurlock meeting together in Ms. Chenault's office going over a document. She did not know what the document was. During a telephone call with the secretary of Huntington High School, Jerry Black regarding school business, Ms. Black asked Ms. Malone who she thought would get the CTE Director position. Ms. Malone said she thought Ms. Chenault was pulling for Intervenor.<sup>16</sup> She mentioned that she had seen Intervenor and Ms. Chenault talking in her office and Ms. Black got Principal Gregg Webb on the line so Ms. Malone could tell him what she saw.

23. Ms. Malone did not tell Principal Webb<sup>17</sup> that she had seen Intervenor discussing her Executive Summary or interview questions with Ms. Chenault. Mr. Webb became very upset and was shouting during the conversation.

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<sup>16</sup> Ms. Malone testified that Ms. Chenault had never said she was pulling for Intervenor. She simply inferred that Ms. Chenault favored Intervenor because they worked together and got along well.

<sup>17</sup> Mr. Webb has since been promoted to the position of Director of Buildings and Grounds.

24. Subsequently, Greg Webb talked with David Tackett, Administrative Assistant for Secondary Education. Mr. Webb told Mr. Tackett that he thought the “fix was in” for Tara Combs and that Ms. Chenault was coaching her. Mr. Webb also called Kelly Daniels and told her that he had been called by another person and told that Ms. Chenault was coaching Tara Combs for the interview. Mr. Webb told her he got the information from his secretary who got it from Ms. Malone. Ms. Daniels was concerned about this and reported the conversation to Dr. Jeff Smith.

25. After hearing this report, Dr. Smith went to the Career and Technical Center and investigated the allegation. After interviewing Ms. Chenault and speaking with Assistant Superintendent Alexander, Dr. Smith was satisfied that allegations of coaching Intervenor were unfounded. No one testified that they saw Ms. Chenault coaching Ms. Combs on the interview questions or what to put in her Executive Summary. It is more likely than not that the meeting Ms. Colburn saw was about the Summer Program grant proposal.

26. The Board convened a regular meeting on May 17, 2016. The recommendation to fill the CTE director position was on the meeting agenda. (Respondent Exhibit 3). Because Superintendent Smith had told Grievant Werthammer that he was recommending her for the position she attended the Board meeting.

27. A motion was made to go into executive session to discuss the CTE Director position and for update on any legal actions. The motion passed and the board went into executive session at 7:16 p.m. Then Board President Oxley started the discussion in the executive session by noting that she felt Intervenor would be the best candidate because she had more experience in the CTE Program and had extensive training which would be

beneficial for the Director. A discussion ensued regarding the comparative qualifications of the candidates with each Board member expressing their opinion about who should be hired. Superintendent Smith stated that he had recommended Ms. Werthammer because she had administrative experience, but he would be comfortable with either candidate in the position.

28. After some discussion, Superintendent Smith felt that his recommendation was not going to be accepted and he asked Dr. Smith to leave the session and let Grievant know how things were going so she could leave the meeting if she thought she might be embarrassed by the Board's action. Grievant elected to stay.

29. There was conflicting testimony as to how long the executive session had been going on when Superintendent Smith sent Dr. Smith out to talk to Grievant. No one looked at the time when this occurred. Witnesses made estimates varying from five minutes to twenty minutes or longer, all with the caveat that they were guessing several months after the fact. There is no dispute that the session went on for a while after Dr. Smith left and the discussion continued and lasted a total of forty-seven minutes. The Board came out of executive session at 8:03 p.m.

30. When the Board was back in session Superintendent Smith recommended that the Board approve the agenda item related to the CTE Director position as written.<sup>18</sup> No motion was made. Thereafter, a motion was made and seconded that Superintendent Smith put forth a different recommendation for the CTE Director position. The motion passed unanimously.

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<sup>18</sup> This action would have accepted the recommendation that Lauren Werthammer, Grievant, be hired.

31. Pursuant to the motion, Superintendent Smith recommended that the Board employ Tara Combs, Intervenor, as CTE Director. A motion was made and seconded to accept Superintendent Smith's recommendation. The motion passed unanimously and Intervenor became the CTE Director.

32. Following the Board meeting, Jerry Lake, Cabell County Manager for Service Personnel, surreptitiously accessed Intervenor's personnel file and obtained a copy of the number of days of training she had taken as an Academy Coordinator. He then provided those dates to Grievant inferring that Intervenor had received special treatment. Mr. Lake also called at least one Board member and told the member that the Board had made a mistake in not hiring Grievant.

33. Over the course of her employment as an Academy Coordinator, Intervenor had attended sixteen training seminars at least half of which were in West Virginia. She attended COE seminars so she could assist with the recertification process for the Career and Technical Center. Dr. Smith approved all these trainings and stated that they were all related to Intervenor's work. There was no evidence how many training seminars other Academy Coordinators attended, but there is no dispute that Intervenor attended more than others. Dr. Smith stated that was due mostly to Intervenor requesting to attend the meetings while others did not.<sup>19</sup>

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the

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<sup>19</sup> It is possible that Intervenor was aware of more of the training opportunities because she was the only Academy Coordinator assigned to the Career and Technical Center.

evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

"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).

Grievant asserts that the Board's selection of Intervenor, instead of following the Superintendent's recommendation, was arbitrary and capricious for three main reasons. First, Grievant argues Intervenor received the unfair advantage of being prepared for the interview process by her immediate supervisor, Ms. Chenault, who also served on the interview committee. Grievant asserts that this assistance and the fact that both Ms. Chenault and Ms. Tanner had supervised Intervenor rendered the interview process tainted and unfair. She argues that this unfair process was exacerbated by the fact that Intervenor was allowed to attend a number of CTE trainings with Ms. Chenault which other Academy Coordinators were not offered. Second, Grievant alleges that she was the most qualified candidate as shown by the fact that she was recommended as such by Superintendent Smith. She asserts that Intervenor's lack of administrative experience renders her unqualified for the position. Finally, Grievant asserts that the Board had

improperly determined who would be hired for the CTE Director position prior to the Board meeting.

“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.” *Trimboli v. Dep’t of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). “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 administrative law judge 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). An administrative law judge 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); *Barnett, et al. v. Cabell County Bd. of Educ.*, and *McMillian*, Docket No. 2015-1762-CONS (May 31, 2016).

Grievant did not provide credible evidence that the interview process was tainted. Mr. Webb passed on rumors to the effect that Ms. Chenault was helping Intervenor with



her Executive Summary. There were even rumors that Ms. Chenault had provided the interview questions to Intervenor and was coaching her on how she should answer. There was no evidence to support any of these rumors. Mr. Webb testified that CTE Secretary Malone told him that she saw Intervenor in Ms. Chenault's office going over Grievant's Executive Summary and discussing the interview. Ms. Malone denied that she said that to Mr. Webb or his secretary. She said that she saw Intervenor meeting with Ms. Chenault in her office. However, it was not unusual for them to meet and they were making no effort to hide their activities. She stated that Mr. Webb became very upset when she told him this and apparently assumed things that she had not said. It is just as likely that Ms. Malone saw Intervenor discussing the summer program grant application she was working on with Ms. Chenault. Nobody could provide any evidence that they actually saw or heard Ms. Chenault coaching Intervenor regarding the interviews.

CTE Secretary, Terry Spurlock testified that Intervenor Combs had shown her materials she had prepared for her application but she could not say that Ms. Chenault was present when that happened and did not state that Ms. Chenault commented on the material even if she was present. The rank nature of the hearsay surrounding this process is demonstrated by the testimony of Federal Programs Director Kelly Daniels who stated that she received a telephone call from Mr. Webb telling Ms. Daniels that he had received a telephone call from someone else that Ms. Chenault was coaching Intervenor.

An administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a proceeding. *Warner v. Dep't of Health and Human Resources*, Docket No. 07-HHR-409 (Nov. 18, 2008); *Miller v. W. Va. Dep't of Health and Human Resources*, Docket No. 96-HHR-501 (Sept. 30, 1997); *Harry v. Marion County Bd. of*

*Educ.*, Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996). That means that hearsay evidence, while generally admissible, will be subject to scrutiny because of its inherent susceptibility to being untrustworthy. *Lunsford and Kelly v. Reg. Jail and Corr. Facility Auth.*, Docket No. 2016-1388-CONS (Sept. 28, 2016).

In applying that scrutiny, administrative law judges apply the following factors in assessing hearsay testimony: 1) the availability of persons with first-hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. *See, Kennedy v. Dep't of Health and Human Resources*, Docket No. 2009-1443-DHHR (March 11, 2010) (affirmed by the Circuit Court of Kanawha County, WV, June 9, 2011).

In this case, the hearsay testimony of Mr. Webb, Mr. Tackett and Ms. Daniels that Ms. Chenault was coaching Intervenor is given no weight. It was based upon what Mr. Webb said he was told by Ms. Malone in a telephone call that Ms. Malone had originally made to Mr. Webb's secretary, Ms. Black. However, Ms. Malone, the person who actually saw the events testified credibly that she could not say that such coaching was going on and she did not tell Mr. Webb that it had. Ms. Black did not testify.

The testimony of Mr. Webb and Ms. Malone are at odds. Where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.*, Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.*, Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Ms. Malone appeared to be a little nervous but her demeanor while testifying was appropriate. She maintained eye contact while answering questions and did not hesitate or hedge in her responses. She had nothing to gain from answering one way or the other

because everyone involved in this matter was a manager and she would not gain an advantage regardless of how she replied. Her testimony was credible.

Mr. Webb seemed to be haughty, but generally cooperative while he testified. He was convinced that there was malice afoot in the hiring process and seemed to have a personal agenda at seeing that it was stopped. His testimony had inconsistencies. He had been an applicant for the CTE Director position when Ms. Chenault was hired into that job. He asserted that he was the best qualified candidate and should have been selected. Nevertheless, he testified that he was not particularly upset about not getting the position and did not consider filing a grievance. However, David Tackett, who was Mr. Webb's supervisor at the time, testified credibly that Mr. Webb was very upset and stated that he was considering filing a grievance over the CTE Director position. Additionally, Mr. Webb stated that he was standing behind Ms. Chenault in line at a crowded and noisy reception when he specifically heard her tell someone that she was going to do all she could to make sure that Tara Combes got the CTE Director Job. Ms. Chenault had her back to him at the time. Yet, in a quiet hearing room, Mr. Webb told Intervenor's representative to look at him when asking questions because he had hearing problems and could not understand his questions. While Mr. Webb may have inferred misdeeds were taking place based upon what Ms. Malone told him, Ms. Malone's version of the conversation is much more credible. Additionally, Dr. Smith investigated these allegations and decided they were unfounded.

Likewise, Mr. Webb testified that Mr. Bowman told him that Tara Combs was going to trainings for adult education long before she applied for the CTE Director position in preparation for applying when Ms. Chenault retired. Mr. Lake went so far as to improperly

access Intervenor's personnel records to show that she had attended more trainings than other Academy Coordinators. The inference was that there was something nefarious about her attendance of so many trainings. However, neither Mr. Webb nor Mr. Lake had anything to do with approving these training nor knew specifically what they were about. All the training dealt with Career Technical Education. Dr. Smith approved all of the activities and said he likely would have approved attendance for other Academy Coordinators, subject to available funding, but no one else applied. He and Director Chenault testified credibly that every training was related to Intervenor's job and some of the training related to Intervenor's assisting with COS recertification which was additional work she took on without seeking additional compensation. While much ado was made about the trainings Intervenor attended, nothing was shown to be improper in Intervenor's efforts to learn more about the program in which she worked. Certainly, this training did not taint the hiring process or prove she was preselected for the CTE Director position.

Grievant points to the fact that Ms. Chenault and Ms. Tanner had both previously supervised Intervenor and were placed on the interview committee, but Ms. Daniels who previously supervised Grievant was not. Dr. Smith explained that both Ms. Chenault and Ms. Tanner had held the CTE Director position and had first-hand knowledge of the attributes an applicant would need to succeed in the job while Ms. Daniels program area was unrelated to the position. Additionally, Lenora Richardson who has been Grievant's supervisor for more than two years was on the committee because her program was integrally related to all high school credit.

Ultimately, the actions of the committee did not indicate bias for any candidate. Ms. Richardson testified that all committee members behaved appropriately and no

member attempted to exert undue pressure for any candidate. After review of credentials and the interviews all of the members of the committee reached a consensus that Ms. Werthammer and Ms. Combs were the best candidates. This sentiment was repeated in Dr. Smith's testimony as well. The fact that Grievant was one of the two candidates recommended demonstrates that the committee was not biased against her and there was no credible evidence that the committee was biased toward Intervenor.

Grievant's next allegation is that she was more qualified for the position than Intervenor. An examination of the statutes controlling the hiring of administrators by Boards of Education is necessary to decide this issue. WEST VIRGINIA CODE § 18A-4-7a provides, in pertinent part:

(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 pursuant to section two, article four, chapter eighteen of this code.

(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 classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;

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

(7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter 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;

(10) In the case of a classroom teaching position, the recommendation of the principal of the school at which the applicant will be performing a majority of his or her duties; and

(11) In the case of a classroom teaching position, the recommendation, if any, resulting from the process established pursuant to the provisions of section five, article five-a, chapter eighteen of this code by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

(c) In considering the 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: *Provided*, That if one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, each criterion under subsection (b) of this section shall be given equal weight except that the criterion in subdivisions (10) and (11) shall each be double weighted.

*Id.* The statute specifies that criteria ten and eleven are only considered in filling classroom teaching positions, and criterion five is only used for classroom teaching and principal positions. Since the position in question is neither a classroom teaching nor principal position, these three criteria may not be considered.

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 the section, 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. *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).<sup>20</sup>

The committee prepared a matrix comparing the candidates using the statutory criteria. (Grievant Exhibit 1). Grievant and Intervenor were tied in the following four criteria: 1) Appropriate certification; 3) Degree Level<sup>21</sup>; 7) Past Performance Evaluations; and, 8) Seniority. In the criterion 4) Academic Achievement, Intervenor had a perfect 4.0 grade point average in her graduate work while Grievant held a very respectable 3.92. Grievant also has forty-five hours of course work in addition to her MA degree.

Related to the criterion 6) Specialized Training Relevant Duties of the Job, both the committee and the Board were impressed with the accomplishments of Intervenor. The Committee noted that Intervenor had three certifications from the Council on Occupation Education and had attended all the COE conferences. This training allowed her to assist with gaining COE certification for the Career and Technology Center and

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<sup>20</sup> These cases were decided prior to the amendment of W. VA. CODE § 18A-4-7a in 2013. However, the criteria for filling professional positions other than classroom teachers and principals remained essentially the same so these decisions are still applicable. See *Berry v. Boone County Bd. of Educ.*, Docket No. 2014-0450-BooED (Sept. 29, 2014), for a discussion of the effects of the 2013 amendment on filling these positions.

<sup>21</sup> Both have a Master's degree. Grievant has 45 additional hours but this does not amount to a different degree.



would allow her to keep the program in compliance. She had also attended many other programs at both the state and national level to keep current on developments in Career and Technology Education including the Academies of Nashville, Florida Career Academy Showcases and three National Academy Coalition conferences.<sup>22</sup> Grievant has also had specialized training but not as extensive and in-depth in the CTE area as Intervenor.

The remaining criterion is “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.” Grievant has more administrative experience than Intervenor. She has served as an assistant principal and her present position is administrative. Intervenor has no administrative experience. Grievant urges an interpretation that administrative experience is the only experience relevant to the position since it requires an administrative certification. However, the statute only limits experience to the required certification area for classroom teaching positions. With other professional positions the board may consider any experience which is reasonable and relevant to the job.

Other experience held by Intervenor considered by the committee and Board were six years as the Academy Coordinator at the Career and Technology Center where she was heavily involved in COE certification. Intervenor was also the TASC coordinator and administrator for the County, authored “three self-studies for the district’s accreditation for the Adult Education programs, and served as the SkillsUSA Advisor for the Career and Technology Center “where several students moved on to the national competition.”<sup>23</sup>

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<sup>22</sup> Respondent Exhibit 1, “Review Committee Report to the Superintendent.”

<sup>23</sup> *Id.*

These experiences relate to areas of responsibility of the CTE Director which are additional to overseeing the County Career Academy.

Grievant had administrative experience and two years of serving as the first Academy Coordinator at Cabell Midland High School, but lacked experience that Intervenor had in the other areas of responsibility for the position. The Board members testified that they put the greatest weight on the criteria of training and experience and they felt Intervenor's credentials in these areas were superior to Grievants. One Board member also noted, without contradiction that administrative experience was not going to be as important for the CTE Director as it had been in the past because there would be a Principal at the Career Technology Center who would handle many of the administrative responsibilities.

The Board members described both Grievant and Intervenor as "rising stars" in the Cabell County School System and both were excellent candidates. However, they believe Intervenor was the best candidate for the position based upon her superior training and experience. The evidence supports that the Board considered all the criteria set out in WEST VIRGINIA CODE § 18A-4-7a and gave more weight to specific criteria felt to be essential to the job. This action is consistent with the statutory requirements. Grievant did not demonstrate that the Board's action in determining that Intervenor was the most qualified candidate was arbitrary or capricious.

Finally, Grievant argues that the process was skewed for the Intervenor because the Board had predetermined the outcome before the meeting. She points to the facts that Board Member Smalley contacted a committee member prior to the meeting, there were rumors that Grievant was not going to be selected, the Board's rejection of the

Superintendent's recommendation and the length of executive session as evidence of the predetermination.

The Board's unique procedure of having interview committees present two names to the Superintendent for consideration may have beneficial qualities and it does place the final recommendation in the hands of the superintendent. However, it also lends itself to second guessing the superintendent's choice between the two. *See, e.g., Barnett, et al., v. Cabell County Bd. of Educ., and McMillian*, Docket No. 2015-1762-CONS (May 31, 2016), and the two cases cited therein, *Oldham v. Cabell County Bd. of Educ.*, Docket No. 04-06-280 (June 23, 2005) and *Lake v. Cabell County Bd. of Educ.*, Docket No. 04-06-282 (Feb. 18, 2005), which suggest that discussing more than one candidate during executive session when only one has been nominated is permissible.

This case is not different. The "Review Committee Report to Superintendent" describes two very capable applicants naturally raises the question of why the superintendent picked the one he did. The Board also received unsolicited recommendations from outside sources which also seemed to stir the Board members' curiosity about the second choice. However, in these cases the Board's active role has not been found to violate statutes or policies. The respective duties of the superintendent and the Board are set out in statute 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:

. . . (4) In case the board refuses to employ any of the persons nominated, the superintendent shall nominate others and submit the same to the board at such time as the board may direct;

W. Va. Code § 18A-2-1(a)(4).

As noted in *Barnett, et al., v. Cabell County Bd. of Educ., and McMillian, supra*, the statute contemplates that the Board may reject the superintendent's initial recommendation and still hire a different person recommended by the superintendent if it reasonably believes that person to be the most qualified. That is what occurred in this case.

The action of a Board member calling a committee member prior to the meeting was described by all the Board, including Ms. Smalley, in their testimony as inappropriate. So too is getting Intervenor's Executive Summary from sources other than the superintendent. However, there is no proof that these activities affected the decision of the other Board members or the outcome of the vote. The Board members articulated reasonable and appropriate reasons for their selection which were related to the candidates' qualifications compared to the required criteria and did not appear to be influenced by these activities. In fact, the other Board members appeared to be oblivious to Ms. Smalley's conversation with Ms. Chenault prior to being asked about it at the hearing.

There is certainly no prohibition against Board members contemplating the candidates prior to the Board meeting which could have impacted the length need to reach a decision in executive session. In this case, Superintendent Smith sent Dr. Smith out of the session to inform Grievant that his recommendation might not be accepted after a relative short period of time, but the testimony indicated that the discussion continued for nearly forty minutes. The only thing that might be inferred by this is that the Board members had thought about the issue before they came to the meeting. There is no evidence that the Board, in whole or in part, met previous to the meeting to decide or

discuss the hiring of either candidate. Additionally, the fact that a message was left on Grievant's phone suggesting that she consider not attending the meeting because the Board might not follow the superintendent's recommendation only shows the extent to which people outside the hiring process participated in rampant rumor and speculation.<sup>24</sup> It does not prove by a preponderance of the evidence that the Board had determined who would be hired prior to the meeting.

This particular hiring situation was undoubtedly not Cabell County School System's finest hour. But that is not due to the behavior of the review committee, the Superintendent, or the majority of the Board members. Rather, it was due to the spreading of unfounded rumors which cast doubt on the process. This is truly unfortunate because it takes away from the excellent credentials of both these candidates who are, by all accounts, stellar employees and appeared to carry themselves with dignity throughout the process.

Grievant did not prove by a preponderance of the evidence that the decision of the Board to hire Intervenor was in violation of law or arbitrary and capricious. Accordingly, the grievance is DENIED.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a

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<sup>24</sup> This message was left by a failed candidate for the Board who did not appear to testify in spite of several attempts to contact him.

contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "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)).

4. 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 administrative law judge 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). An administrative law judge 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); *Barnett, et al. v. Cabell County Bd. of Educ.*, and *McMillian*, Docket No. 2015-1762-CONS (May 31, 2016).

5. WEST VIRGINIA CODE § 18A-4-7a sets out specific criteria the Board must use in determining which candidate for a professional is the qualified for a particular position. When selecting a candidate for a professional position other than a classroom teacher, a county board of education must consider each applicable criterion listed in the section, 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. *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).

6. Grievant did not prove by a preponderance of the evidence that the review committee process or the Board's hiring decision were biased, in violation of WEST VIRGINIA CODE § 18A-4-7a, or arbitrary and capricious.

7. W. Va. Code § 18A-2-1, require that the employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent. However, "in case the board refuses to employ any of the persons nominated, the superintendent shall nominate others and submit the same to the board at such time as the board may direct" *Id.* at subsection (a) (4). The statute contemplates that the Board may reject the superintendent's initial recommendation and still hire a

different person recommended by the superintendent as long as it reasonable believes that person to be the most qualified. *See, Barnett, et al., v. Cabell County Bd. of Educ., and McMillian*, Docket No. 2015-1762-CONS (May 31, 2016).

8. Grievant did not prove by a preponderance of the evidence that the Board's rejection of Superintendent Smith's initial recommendation violated W. Va. Code § 18A-2-1, or was arbitrary and capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* 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 so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**DATE: May 30, 2017.**

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**WILLIAM B. MCGINLEY**  
**ADMINISTRATIVE LAW JUDGE**