

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KIMBERLY WILLIAMS,  
Grievant,**

**v.**

**Docket No. 2019-0640-KanED**

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

## **DECISION**

Kimberly Williams, Grievant, filed this grievance against her employer the Kanawha County Board of Education ("KCBE"), Respondent, protesting her non selection for the Principal position at the high school she currently serves as Assistant Principal. The original grievance was filed on November 28, 2018, and the grievance statement provides:

Grievant Kimberly L Williams was unlawfully denied the position of Principal at South Charleston High School. The non selection of Grievant was unlawful; in violation of the applicable scheme and regulatory scheme, and policies of Respondent; and was generally discriminatory as defined by the Public Employees Grievance Act. Additionally, Respondent's non selection of Grievant discriminated against Grievant based on her gender and/or age.

For relief:

Grievant seeks the position of Principal at South Charleston High School and to be made whole in every appropriate way including, but not limited to, back pay with interest and all appropriate benefits including retirement and leave.

A hearing was held at level one on December 19, 2018, and the grievance was denied at that level by written decision dated February 11, 2019. Grievant appealed to level two on February 15, 2019. A mediation session was held on March 19, 2019. Grievant appealed to level three on March 25, 2019. A level three hearing was held

before the undersigned Administrative Law Judge on July 9, 2019, August 28, 2019, and October 3, 2019, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel Jeffrey G. Blaydes of Blaydes Law, PLLC. Respondent was represented by and through its counsel, Michael W. Taylor, Brent D. Benjamin and the law firm of Bailey & Wyant, PLLC. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on or about January 2, 2020, on receipt of the last of these proposals.

### **Synopsis**

This grievance involves the selection of the principal position for South Charleston High School. West Virginia Code § 18A-4-7a sets out specific criteria that a county school board is to use in determining which candidate is the most qualified for a professional position.

While each of the factors listed in West Virginia Code § 18A-4-7a must be considered, this code section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. However, this discretion must be exercised reasonably and in a manner, which is not arbitrary and capricious. It seems readily evident that Respondent relied upon the ambiguity of discretion, to the

point of invalidating the established and recognized selection procedure designed to assist in the identification of the best candidate.

Grievant is unequivocally qualified for the position in discussion. Respondent does not dispute that Grievant scored the highest in the interview and was the number one among the candidate matrix. What Respondent disputes is that Grievant's ranking makes her the most qualified candidate for the position. In the fact pattern of this matter there were notable dealings, some more significant than others but overall the cumulative effect of events tend to represent substantial flaw(s) in the discretion used and/or verification of the most qualified candidate for the position. *Grievant established that Respondent used an ambiguous selection process to identify and confirm the successful applicant for the position in discussion.*

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Grievant has been employed by Respondent for more than thirty-eight years. She served as a classroom teacher for approximately twenty-four years. Grievant has served as an assistant principal for approximately fourteen years. Grievant holds a BA, a MA and a Leadership Degree. Grievant is a seasoned administrator whose experience as a vice principal includes:

- a. Three years – Assistant Principal at East Bank Middle School;
- b. Four years – Assistant Principal at Nitro High School; and
- c. Approx. seven years – Assistant Principal at South Charleston High School

Grievant oversaw disciplinary issues while at East Bank, Nitro, and SCHS. (G Ex. 13; Tr. I, day 1, 5-7; Tr. III, day 3, 8-10) At the time she interviewed for the principal position at SCHS she had served as Assistant Principal over curriculum (“CAP”) CAP for about fifteen months. (Tr. I, day 2, 5-7; Tr. III, day 3, 10-12) It is undisputed that Grievant’s evaluations have been very good over the years. Grievant is a female and is in excess of sixty-one years old.

2. At all times relevant to the instant grievance, Grievant was and remains an assistant principal at South Charleston High School.

3. At the end of 2017-2018 school year the then principal of South Charleston, High School, Mike Arbogast, announced his retirement, resulting in an administrative vacancy.

4. The position of principal of South Charleston High School was posted. In late Spring of 2018, Grievant, along with P.E. McClanahan, Andrew Johnson, and Jim Crawford, Jr. (“Crawford, Jr.”) applied for the position. All four candidates met the minimum qualifications. All four qualified candidates who applied were interviewed.

5. The process to fill the vacancy in discussion is largely controlled by statute, West Virginia Code § 18A-4-7a and, by policy, Kanawha County Board of Education Policy G62, “Administrative Selection.”<sup>1</sup>

6. The candidates were asked five questions by the interview team. (L3 Hr. Trans Day 3 at 71:21-24; 72:1-13.)

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<sup>1</sup> Kanawha County Board of Education Policy G62 expands upon the statutory requirements for selecting administrative positions. This policy, discussed infra, provides a detailed process for filling a school administrator position and establishes the roles of persons involved in the selection process.

7. Candidate Crawford, Jr.'s, father, Jim Crawford, Sr., is a board member of Respondent, Kanawha County Board of Education.

8. Employees of Respondent expressed concern and disagreement with the potential selection of Crawford Jr., for the position. Level three (L3) testimony indicate that there was a "pretty strong outcry against Crawford (Jr.)." Many did not want Crawford, Jr. as principal at SCHS. The potential selection of Crawford, Jr., was not favored and stimulated some uproar. (Tr. III, day 1, 32-36)

9. In order to help rank applicants for administrative positions, Respondent's Human Resources Department has developed a "matrix" in which candidates are evaluated based in the hiring criteria for administrative positions laid out in West Virginia Code § 18A-4-7a. (L1 Hr. Trans Day 1 at 163:1-9.) The matrix is constructed prior to interview with information from the application process and interview scores are later added. (L1 Hr. Trans Day 1 at 168:5-17; L1 Hr. Trans Day 1 at 177:15-24.) Based on this matrix, the top four candidates are given to the Superintendent to review and make the final selection, pursuant to Kanawha County Board of Education Policy G62.

10. After scoring the interviews and adding those scores to the other criteria set forth in the matrix, the Selection Committee submitted the top four candidates to the Superintendent, Dr. Ronald Duerring. (L1 R Ex 2) In this case all four candidates were submitted to Dr. Duerring.

11. Superintendent Duerring initially selected Jim Crawford, Jr., as the successful qualified candidate for this specific position. (L3 Hr. Trans Day 3 at 99:20-22;

100:1-6.) However, Crawford, Jr., withdrew his name from consideration for the SCHS principal's position.<sup>2</sup> (Tr. III, day 1, 33; Tr. III, day 2, 98-100.)

12. In the wake of Crawford, Jr.'s, withdrawal from consideration, Superintendent Duerring recommended P.E. McClanahan for the position to the Kanawha County School Board, Respondent. The Board accepted the recommendation to hire Mr. McClanahan for the position as principal of South Charleston High School. (L3 Hr. Trans Day 3 at 181:12-16.) Mr. McClanahan assumed the role sometime at the end of the 2017-2018 school year or in the summer of 2018.

13. Around August or September of 2018, a few months after assuming the principal role, Mr. McClanahan informed the Superintendent's office that he would be leaving the principal's position at South Charleston High School (SCHS) to take employment in another county. (L3 Hr. Trans Day 1 at 36:20-24.)

14. The position of principal for SCHS was reposted.

15. After the position was posted a second time and before it was filled, Superintendent Duerring and Board Members Tracy White and Crawford, Sr., attended a training seminar in New Orleans in October of 2018.

16. Board Member Tracy White specifically recalled that while she and Board Member Crawford, Sr., were at their hotel, they discussed whom they thought would apply for the position.

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<sup>2</sup>Jim Crawford, Jr. withdrew his name from consideration prior to being recommended to the Board of Education, likely due to public opposition to his selection. (L3 Hr. Trans Day 3 at 99:20-22; 100:1-6.)

17. Grievant applied again for the principal job, as did three (3) other candidates including the other assistant principal at South Charleston High School and a twenty-nine (29) year old male who had served briefly as an assistant principal at Riverside High School after serving at Scott High in Boone County. All four (4) candidates met the minimum qualifications. (G Exs 2 and 3) The four candidates were Gabriel (Gabe) King; Grievant; Andrew Johnson, and Chadrick Campbell. (L3 Ex 11)

18. Mr. King and Mr. Campbell did not previously interview during the first selection. Additionally, both candidates held jobs at schools other than South Charleston High School, unlike Grievant and Mr. Johnson.

19. The four candidates were set to be interviewed by an Interview Team. The Interview Team for this round of interviews consisted of Ron Reedy, Principal of Sissonville High School; Mark Milam, Assistant Superintendent for High Schools and Career Technical Education; and Carol Hamric, Director of Human Resources. (L3 Hr. Trans. Day 2 at 90:2-5)

20. Mark Milam created the interview questions. (L1 Hr. Trans Day 1 at pgs. 12-13.) The interviewees were to be asked seven questions. (L3 G Ex 10) Five of the questions were the same as the previous interview questions. (L3 Hr. Trans. Day 3 at 71:21-24; 72:1-12.) The two additional questions related to a general knowledge of West Virginia Department of Education's Balanced Scorecard school scoring system and to a specific finding under the Balanced Scorecard as it relates to South Charleston High School. (G Ex 10)

21. After the interviews, there is no dispute that Grievant scored the highest collectively on the interview by the Interview Team. Specifically, her total interview score was an 86. (G Ex 11 (scoring matrix))

22. With respect to scoring of the newly added questions six and seven: On question six, a question regarding an applicant's understanding of the Balanced Scorecard as a whole, Mr. King scored a five out of five by each questioner, while Grievant scored a four out of five by each questioner. (G Ex 10) As it relates to question seven, a question designed to understand an applicant's approach to correcting two specific areas of concern at South Charleston High School, Grievant scored a five out of five by each questioner, while Mr. King scored a four out of five by each questioner. (G Ex 10) Cumulatively, the score for the final two questions were the same for the Grievant and Mr. King.

23. Carol Hamric created a matrix that consisted of scores from the Interview Team. She assigned the applicable scores for the criteria required to be scored by Policy G62.<sup>3</sup> (L1 Hr. Trans. Day 1 at pgs. 156, 174.)

24. After the scores were calculated, the scores were verified by members of the Selection Committee, including a faculty senate representative, Kimi Estep. (See L3 Hr. Trans. Day 2 at 254:17-22.)

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<sup>3</sup> While Policy G62 requires the scores be on a scale of 0 to 100, Ms. Hamric failed to average the interview scores, but rather used the gross score. (L3 G Ex 11 (scoring matrix); see *a/so* L1 Hr. Trans. Day 1 at pg. 174.) This resulted in the scores being proportionally inflated. However, even with inflated scores, Grievant still had the highest collective score and the ranking was the same once the scores were properly weighted. (L3 G Ex 11 (scoring matrix))



25. All four of the candidates' names were submitted to Superintendent Duerring for him to evaluate the criteria, as required by the West Virginia Code and Policy G62 to make his selection of the most qualified<sup>4</sup> candidate. (L1 KCS Ex. 2 at 62.09; see a/so L1 Hr. Trans. Day 1 at pg. 177.)

26. At some point prior to the nomination and recommendation of Gabriel (Gabe) King to the Board of Education, testimony has been adduced that Jim Crawford, Sr., an elected Board of Education Board Member made comments to another elected Board Member, Tracy White, regarding his personal opinions of Grievant. Specifically, Board Members Tracy White and Jim Crawford, Sr. were discussing whether his son, Jim Crawford Jr., would apply for the South Charleston High School position again as a result of the vacancy created when Mr. McClanahan left the position. (Tr. III, day 1, 37, 39-40, 42) During the conversation, Jim Crawford brought up that Grievant was a lesbian and also stated that he could not support her.<sup>5</sup> (L3 Hr. Trans. Day 1 at 42:19-22.)

27. Respondent's Board Member White opined that Board Member Crawford, Sr., was "upset," "concerned" and "hurt" by the way his son had been treated the first time

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<sup>4</sup> The meaning of "most qualified" is disputed by the parties. Grievant maintains the meaning is the individual with the superior qualification via identified and established criteria as specified by West Virginia Code § 18A-4-7a. While Respondent debates a definition which **also** encompasses a meaning akin to "best suited" for the position (needs of the school). Thus, the instant grievance.

<sup>5</sup> It is presented that these statements occurred at the conference in October of 2018. The fact that statements of this nature were exchanged isn't necessarily disputed. What is in dispute is whether Superintendent Duerring was aware or knew of these comments prior to his recommended candidate to the School Board. It was presented that during the conversation in New Orleans, Tracy White indicated to Crawford, Sr. that she believed the two vice principals at SCHS – including Grievant – would apply for the position again. Crawford, Sr., stated, "Well, you know the problem that Jim (Jr.) and Kim had in the past." Tracy White shrugged and Crawford, Sr., continued: 'Well, you know [referring to Grievant] she's a *lesbian* . . . Well, I can – I can never support her.' Tracy White responded by saying, "I don't think it makes a difference." (Tr. III, day 1, 41-43.)

the position was posted. (L3 Hr. Trans. Day 1 at 45-47.) White testified that Crawford, Sr.'s only stated reason for not supporting Grievant was that she was a "lesbian." (Tr. III, day 1, 47.)

28. After the position was posted the second time and before it was filled, Grievant periodically checked with Carol Hamric, Respondent's Executive Director of Human Resources, to determine who had applied for the position.<sup>6</sup> Hamric informed Grievant that two people had initially reapplied for the position – Grievant and Johnson. However, she also indicated to Grievant that Tom Williams, Deputy Superintendent of Schools, had checked on the number of applicants and, upon learning of the two applicants, asked that the job be re-advertised. (Tr. III, day 3, 18-20.) Up to this point, the successful applicant, Gabe King, was not an applicant for this position.

29. Tom Williams, Deputy Superintendent of Schools requested that Respondent's Executive Director of Human Resources Hamric re-advertise the position. (Tr. III, Day 3, 18-24.) Subsequently, the successful applicant Gabe King applied for the position.<sup>7</sup>

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<sup>6</sup> It was not uncommon for Respondent's employees to contact HR Director Hamric with regard to employment matters – including posted positions. (Tr. III, day 3, 69-70.)

<sup>7</sup> Deputy Superintendent Williams testified that he had known King since King was a student at St. Albans High School where Williams was principal. He then served on a doctoral committee for King. Williams and Superintendent Duerring served as references for King on his application. When asked if he was friends with King, Deputy Superintendent Williams indicated that he did not know how to answer the question. He then stated they were not. Deputy Superintendent Williams raised the issue of the opening at SCHS in a phone call with King, telling him that there was an opening there for principal. At that time, King had not applied for the position. Williams acknowledges that he had called Hamric to check on the pool size, or the number of applicants for the position. Williams conceded that he was not involved with the hiring process, but that he reached out to King to advise him of the opening and checked on the applicant pool with Hamric. (Tr. III, Day 2, 224-228; G Ex 13)

30. Human Resources Director Hamric reviewed all applications for the position and determined which ones met the minimum qualifications. In total, there were four applicants and each one met the minimum qualifications. The applicants to be interviewed were: Grievant, Johnson, Campbell, and King.

31. The Interview Team included; Ron Reedy, Principal of Sissonville High School; Assistant Superintendent Milam; and Human Resources Director Hamric. The Interview Team was comprised of individuals with substantive knowledge regarding the filling of a high school principal position. All four applicants interviewed on the same day. Each applicant was asked the same seven questions in order.<sup>8</sup>

32. The interviews for this posting occurred on November 8, 2018. Mark Milam, Assistant Superintendent of Schools for Secondary and Career and Technical Education, drafted the interview questions.

33. This time, the interviewees were to be asked seven questions. (L3 G Ex 10) Five of the questions were the same as the previous interview questions. The two additional questions related to a general knowledge of West Virginia Department of Education's Balanced Scorecard school scoring system and to a specific finding under the Balanced Scorecard as it relates to South Charleston High School.

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<sup>8</sup> Grievant highlights that during the interview of candidates, King was asked question one, like every other applicant, which involved a Five-Year Strategic Plan for SCHS. Rather than answer this question, King immediately began talking about the Balanced Scorecard (which had not been asked about yet and would not be addressed until the last two questions (6 and 7). Representatives of Respondent denied that King had been informed about the addition of the Balanced Scorecard questions prior to the interview. Nonetheless, King discussed the Balanced Scorecard - - upon which Milam and Duerring would place great weight - - at the outset of the interview in response to a question unrelated to this topic. Grievant's counsel insinuates during his case that candidate King was primed for the interview. Notably, Milam would later conclude that King was his selection for the position based upon his response to the Balanced Scorecard question, number 6.

34. Assistant Superintendent Milam added two questions – questions 6 and 7 – addressing the Balanced Scorecard.

a. Question 6 stated as follows:

On the WVDE Balanced Scorecard, please explain the new accountability standards required for South Charleston High School.

b. Question 7 stated as follows:

On the WVDE Balanced Scorecard, South Charleston scored Red in Math and On Track for Graduation. What are your plans to improve these two areas?

35. Once the interviews were complete, Director Hamric tallied the interview scores in the presence of Milam and Reedy. The scores were as follows:

First:	Grievant	86
Second:	Andrew Johnson	68
Third:	Gabriel King	66
Fourth:	Chadrick Campbell	56

Grievant had the highest interview score; her score was eighteen points higher than Johnson, the second-place finisher. Grievant's interview score exceeded King – the successful applicant – by twenty points.

36. Director Hamric completed a matrix that included the categories that county boards of education are required to consider pursuant to West Virginia Code § 18A-4-7a. This provision compels county boards of education to select professional positions based upon the person with the “highest qualifications.”

37. Director Hamric's matrix also included the interview scores. The matrix scoring for the position was as follows:

First:	Grievant	144
Second:	Andrew Johnson	121
Third:	Gabriel King	118
Fourth:	Chadrick Campbell	103

Grievant scored twenty-three points higher than the second place finisher (by twenty-

three points), and twenty-six points higher than King, the successful applicant.

38. All three interviewers scored Grievant highest. Following the interviews and while the Interview Team met, Hamric and Reedy concluded that Grievant was the most qualified applicant. Although Assistant Superintendent Milam scored Grievant as the highest applicant, Milam did not state his opinion at this time.

39. Assistant Superintendent Milam testified that both Reedy and Hamric recommended Grievant for the SCHS principal position when the Interview Team interviews were complete. However, Milam indicated that he “didn’t say a word. I didn’t say yes or no.” He explained his silence by stating that it “wasn’t the appropriate time to make a decision.” (Tr. I, day 1)

40. Interviewer Reedy, who has served as a principal for approximately eight years, indicated that the questions asked were relevant to determining an applicant’s “readiness to be principal.”

41. Kimi Estep is a teacher at SCHS with over thirty years’ experience. She served as the Faculty Senate President at SCHS and had been on the faculty there for fifteen of her thirty years. In detail, Estep described why the Faculty Senate viewed Grievant as the most qualified applicant.

42. Assistant Superintendent Milam did not recommend Grievant to Superintendent Duerring. Milam testified that there was nothing about Grievant’s scores or years of experience that caused him not to recommend her. He also admitted that he recommended King even though Grievant had been at SCHS for years as an administrator; that King had never worked under his supervision in Kanawha County as an administrator other than thirty or so days at Riverside High School; and that he was

uncertain whether King had taught in Kanawha County, though he “believed” that he did. (Tr. I, day 1, 57-58.) Milam admitted that Grievant had more years of experience as an administrator and that he was not critical of her experience. (Tr. I, day 1, 64.)

43. Assistant Superintendent Milam met one-on-one with Superintendent Duerring either that or the following day and recommended King for the position. Milam indicated that all he conveyed to Duerring was that he recommended King. Superintendent Duerring confirms that Milam recommended King to him for the position.

44. Superintendent Duerring understands that he is required to hire the applicant with the highest qualifications pursuant to West Virginia Code § 18A-4-7a and the needs of the school. The Superintendent conceded that West Virginia Code § 18A-4-7a is the “ultimate authority” as to what constitutes the most qualified applicant. He further noted that the matrix utilized by Respondent follows the qualifications set forth in West Virginia Code § 18A-4-7a. (Tr. III, day 2, 81-91.)

45. Superintendent Duerring indicated that he did not look at the interview questions or answers in making his determination that King should be placed in the position.

46. Superintendent Duerring decided against hiring the top two candidates on matrix, including Grievant. (L3 Hr. Trans Day 2 at 195:15-18.)

47. Superintendent Duerring testified that he became involved with the selection process when Assistant Superintendent Milam brought four names to him from the interview process. He discussed with Milam the belief that SCHS was on the decline as it related to math and on track to graduate. Duerring testified that he had told former Principal McClanahan about his concerns regarding SCHS at the start of the 2018-2019

school year, but did not communicate them with the remainder of the staff. (Tr. III, day 2, 137.)

48. Superintendent Duerring confirms that Assistant Superintendent Milam recommended King to him for the position. When asked how Grievant's very high scores on the matrix could be ignored, Duerring indicated that because Grievant was a "part of that administration at the time," and that he wanted someone else in the position with a "new set of eyes." (Tr. III, day 2, 96-98.)

49. As it related to candidate King, Superintendent Duerring was unsure of King's responsibilities in his short, thirty-day stint as an assistant principal at Riverside. (Tr. III, day 2, 116-117) Respondent offered no evidence that King had any experience as a CAP or with high school curriculum in any manner.

50. Superintendent Duerring presented his recommendation of Gabriel King to the Kanawha County Board of Education. To assist in his reasoning for the selection, Dr. Duerring asked Assistant Superintendent Milam to provide comments regarding candidate King. After some discussion regarding the questions from the Board of Education, the Board of Education unanimously approved Mr. King as principal of South Charleston High School.

51. Superintendent Duerring was referred to by the Kanawha County Board members as the "CEO" for Respondent. Board members indicated that the decision on who to hire was Duerring's and that they trusted his judgment.

52. When asked why he – as CEO – deferred to Assistant Superintendent Milam on this important hiring questions, Duerring offered no explanation other than to say that it was "not unusual." (Tr. III, day 2, 141-148)

53. There are five members of the Kanawha County Board of Education. Three Board members testified at the level three hearing. The remaining Board members – Becky Jordan and Crawford Sr. did not testify at the level three hearing.

54. Board Members Tracy White, Ric Cavender, and its president, Ryan White, indicated that they were not provided with the score sheet that showed Grievant to be the high scorer by twenty-six points.<sup>11</sup> Board members testified that they had not received it or was unaware they had reviewed the score sheets. Tracy White recalled with specificity that she had requested it and did not get it. Cavender clearly recalled that he had never seen it before. Ryan White ultimately concluded that he could not conclude when he received it.

55. At the November 15, 2018, meeting of the Board, Board member Tracy White engaged in the following colloquy:

**Tracy White [to Duerring]:** Can you go over how you came to the decision of recommending Mr. King at South Charleston High?

**Duerring:** We had interviews and the top four were sent to me they recommended Gabriel King. *Mr. Milam will go over that with you.*

**Milam:** There were a couple of reasons *why I recommended Mr. King.* He understands the new WV State Department Balanced Scorecard very well. He has a solid plan to raise the academic standards at SCHS. He has a vision to improve SCHS on the Balanced Scorecard components. He has administrative experience at the high school level and most of all *he answered all the interview questions that I asked according to my expectations so that is why I recommend him to you.*

**Duerring:** We concur with that recommendation.

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<sup>11</sup>Board members are typically provided with the scorecards prior to making a hiring decision. However, in this case, Board members were not provided with the scorecard prior to the hiring of King. In fact, Tracy White testified that she was out of town for this meeting, wanted this data, and texted Ryan White for it. She never received it. Duerring claimed that Milam had given the Board members the scorecard. Milam offered no testimony in this regard. Board Members Tracy White and Cavender unequivocally testified that they did not receive it. Ryan White ultimately concluded that he had seen it, but could not recall when.



**Tracy White:** How long was he at Riverside?

**Milam:** *He's been there about 30 days.*

**Tracy White:** Where was he before that?

**Milam:** He was in Boone County at Scott High School as the Assistant Principal.

**Duerring:** Before that he was a teacher here at GW.

**Tracy White:** That is all the questions that I have.

**Crawford, Sr.:** Dr. Duerring are you recommending him?

**Duerring:** Yes, that's why it is on the agenda.

(Emphasis supplied) (G Ex. 9; Tr. I, day 1, 65-66.)

56. Prior to the November 15, 2018, Board meeting, Board Member Tracy White recalled that she had received communications (calls, texts, and emails) from teachers and service personnel in support of Grievant. She recalled that it was a large number.<sup>9</sup>

57. Board Member Tracy White indicated that upon approaching Duerring to ask, "Why not Kim?" He mentioned an alleged a letter from the first posting and test scores at SCHS. Tracy White knew that SCHS was ranked 11<sup>th</sup> or 12<sup>th</sup> in the state as a high school by Niche. She further indicated that she was aware that Grievant had only been over curriculum for one year. As a relatively new board member, Tracy White contacted Board Members, Ryan White and Cavender, about the hiring decision. Board President Ryan White advised her that the board does not get involved in hiring; "that's up to Doctor Duerring." (Tr. III, day 1, 48-53.)

58. Board Member Cavender recalled that the Board members had not received the matrix scorecard before the vote on this position and that they typically do. He

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<sup>9</sup> G Ex 5-7 and 14 demonstrate staff and Faculty Senate support for Grievant.

testified that he would have liked to have had this information before he voted. Board Member Cavender specifically indicated that he would have liked to have been aware of the twenty-six point disparity between Grievant and King. When presented with Grievant's Exhibit 11 – the matrix scorecard – at the level three hearing, Cavender indicated that it was the first time he had seen it. (Tr. III, day 1, 142-47.)

59. Board Member Cavender indicated that he learned that Crawford Sr., had referred to Grievant as a “lesbian” and was angered and concerned about it. He brought it to the attention of Board President Ryan White. (Tr. III, day 1, 151-152)

60. Board Member Cavender did not know if Reedy, Hamric, or Milam (the Interview Team) had scored Grievant the highest on the interview and qualifications matrix. He learned at the level three hearing, for the first time, that Grievant was rated first by all three and that King was rated third. Board Member Cavender indicated that he would have liked to have known this when he voted.<sup>10</sup> (Tr. III, day 1, 173-176)

61. Board President Ryan White testified at the level three hearing. Ryan White is of the belief that it was not his responsibility as a Board member to determine who the most qualified person is. Rather, the Superintendent is charged with this and the Board only votes “yay” or “nay” on that single person. (Tr. III, day 1, 227-229)

62. Superintendent Duerring has discretion to make a decision as to whom he recommends to the Board. The discretion has limitations.

63. Board President White agrees that the Board should hire the most qualified person, but is of the belief that the Board can only vote on the candidate presented by

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<sup>10</sup> Board Member Cavender also indicated that he would not have changed his vote unless King posed a safety risk to students or had a bad track record. (Tr. III, day 1.)

Duerring. White testified that he has never voted against a candidate recommended by Duerring. (L3 day 1)

64. The motion to hire Gabriel King as South Charleston High School principal carried 5-0.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, [t]he 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, a party has not met its burden of proof. *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). In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a

particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. *Black v. Cabell County Bd. of Educ.*, Docket No. 89-06-707 (Mar. 23, 1990); *Lilly v. Summers County Bd. of Educ.*, Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). "The grievance procedure . . . allows for an analysis of legal sufficiency of the selection process at the time it occurred." *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989).

The process to fill the vacancy in discussion is largely controlled by statute, West Virginia Code § 18A-4-7a and Kanawha County Board of Education Policy G62, "Administrative Selection." Grievant has raised a number of issues with regard to her non-selection as Principal of South Charleston High School. Grievant asserts the actions of Respondent were arbitrary and capricious, unreasonable, inconsistent with the evidence before it and arose from a misapplication of applicable regulations. Grievant proports that in the circumstances of this matter Respondent's selection process was flawed; and that the process was tainted with either age, gender or sexual orientation, discrimination and/or favoritism.

At the heart of this grievance is Grievant's position that she believes she is the most qualified candidate for the position. She scored the highest in the interview and was ranked the highest on the matrix. Respondent does not dispute that Grievant scored the highest in the interview and was the number one candidate given to Superintendent Duerring. What Respondent disputes is that Grievant's ranking makes her the most qualified candidate for the position to be Principal of South Charleston High

School. Ultimately, it must be decided whether Respondent, in the instant circumstance(s), abused its considerable discretion in personnel matters, or if its decision is recognized as significantly flawed to the degree that the decision is recognized as arbitrary and capricious.

“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)).

### **Credibility**

In reaching a decision in one or more of the issues associated with the parties, herein, it is prudent to address debatable information, including a determination of reasonable conduct, in the circumstances of this case. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dept. of Health & Human Resources*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dept. of Health & Human Resources*, 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). It is deemed prudent to address the reliability and due weight that is most readily applicable to the witnesses, who testified and provided information in the course of this grievance. The undersigned Administrative Law Judge had an opportunity to observe the demeanor of the witnesses, and to assess their words and actions during their testimony.<sup>11</sup> Credibility assessments herein were made from direct observations as well as review of the record.

The parties tend to agree on a majority of facts but disagree on the relevance and impact of notable information and events. The parties truly disagree on several element which tend to sway the analysis and direction of this grievance. The undersigned will attempt to discuss views expressed and rationally set forth the determinations reached regarding the combating issues. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration. See footnote 11, below. It is also noted in review of all the testimonies that there is a difference between established fact and opinion.<sup>12</sup> The weight of an opinion is analyzed in review of the

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<sup>11</sup> This 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's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

<sup>12</sup> More than one witness's testimony gave the undersigned, reason to pause. Plausible response to questions asked in search of truth is pertinent. Evasive responses do not devalue

collaborating information, circumstances and actions, while noting the degree of knowledge and understanding the witness has regarding the issue being discussed. The validity of a fact and the appropriate weight due an opinion are not necessarily symbiotic (codependent).

Superintendent of Kanawha County Schools, Dr. Ronald Duerring, testified at the level three hearing of this grievance. Dr. Duerring demonstrated appropriate respect and cooperation with the instant grievance process. There are a diverse number of facts, events and issues, in discussion during the course of this grievance. The Superintendent seemed genuinely concerned for Grievant and sympathetic to Grievant's plight. The gravity of this dilemma was not lost to Superintendent Duerring.

Dr. Duerring testified that he became involved with the instant selection process when Assistant Superintendent Milam brought four names to him from the interview process. This comes across as a convenient response, Superintendent Duerring attention would have been directed to this matter at the resignation of P.E. McClanahan, the individual he had recently selected for the position in the wake of Crawford, Jr.'s, withdrawal from consideration. While this point isn't anywhere near crucial, it is indicative to many of Respondent's convenient explanations regarding events within the facts of this matter. Superintendent Duerring is a recognized professional who has been the superintendent for Kanawha County schools in excess of twenty-two (22) years. Around August or September of 2018, a few months after assuming the principal role,

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the question or eliminate suspicion. Directly acknowledging lack of knowledge regarding a subject matter is preferable to a stream of consciousness or narrative that goes beyond the scope of the question, dredging up various petty slights and/or irrelevant information.

McClanahan informed the Superintendent's office that he would be leaving the principal's position at South Charleston High School (SCHS) to take employment in another county. Superintendent Duerring was uniquely aware of the vacancy in discussion. His attention to this position was not incidental or an impromptu selection.

Superintendent Duerring's knowledge regarding the specific needs of South Charleston High School is not lost on the undersigned trier of fact. Dr. Duerring testified that he was looking for a candidate who had a good understanding of the Balanced Scorecard and who had a fresh set of eyes to take on the declining performance of the school in terms of academic achievement and graduation rates. (L3 Day 2 at 114:12-21; 197:1-21.) Superintendent Duerring discussed with Assistant Superintendent Milam the belief that SCHS was on the decline as it related to math and on track to graduate. It was noted that students were being referred to the alternative school at a higher rate. All of the identified factors are recognized as proper for a Superintendent to consider when attempting to reverse the direction of a school. However it can also be perceived as arbitrary to attribute the short falling of the school upon Grievant. Grievant testified in great detail with regard to her successful efforts to shore up SCHS academically when she became CAP.<sup>13</sup>

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<sup>13</sup> When Grievant took over as CAP in the 2017-2018 school year, Superintendent Duerring admitted that he did not know how many long-term subs were in the math department at SCHS or that Grievant attempted (and ultimately succeeded) in hiring all certified teachers in the math department. Duerring agreed that this was a "smart move." He further admitted that the lack of certified teachers in math when Grievant took over as CAP was not her fault and that the presence of non-certified and/or long-term substitutes in the math department could affect student performance. (Tr. III, day 2, 110-112.) Superintendent Duerring conceded that the CAP position at SCHS "could be a revolving door" because "they switch so often." He admitted that the revolving door of CAPs at SCHS could impact academic scores. (Tr. III, day 2, 107-109.) It is implausible, unfair, and arbitrary and capricious to saddle Grievant with the whole of math and on track to graduate shortcomings.



Duerring indicated that he did not look at the interview questions or answers in making his determination that Gabriel (Gabe) King should be placed in the position. “The Superintendent shall consider the qualifications of the candidates for administrative positions based upon the criteria set forth in W. Va. Code §18A-4-7a.” See KCBE Policy G62. Superintendent Duerring has discretion to make a decision as to whom he recommends to the Board, nevertheless he isn’t authorized to disregard relevant factors.

Superintendent Duerring’s testimony provided insight into his actions and the various input he took into consideration. The plausibility of the information this witness provided fluctuates with subject matter and demonstrative facts. Assistant Superintendent Milam was an intricate facet of Duerring’s analysis regarding which candidate was the best suited applicant. The Kanawha County Board of Education is a complex organization with several interactive components intended to facilitate the needs and duties of the agency.<sup>14</sup> This witness is motivated to justify his actions and those of the agency as a whole. Superintendent Duerring’s opinion and state of mind was examined through direct and cross examination. The distinction between procedure, independent analysis and bureaucracy is an aspect of this selection decision. Superintendent Duerring’s testimony is perplexing. The Superintendent’s statements must be balanced against the plausibility of events and credible evidence of record.

Ryan White testified at the level three hearing of this grievance. Ryan White, who is a licensed attorney, currently serves as President of Kanawha County Board of Education. With due acknowledgment to his role in this matter, the witness responded to

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<sup>14</sup> The Kanawha County Board of Education is a quasi-public corporation created by statute for the management and control of the public schools of Kanawha County, West Virginia.

queries posed and sought to explain his and the Board's conduct and analysis of events that transpired throughout the course of relevant events. President White agrees that the Board strives to hire the most qualified person, but that the Board can only vote on the candidate presented by Superintendent Duerring. He testified that he has never voted against a candidate recommended by Duerring. (Tr. III, day 1, 206-208.) Board President White appeared calm and professional. He did not appear evasive in response to questions posed.<sup>15</sup> Superintendent Duerring is referred to by Kanawha County Board members as the "CEO" for Respondent. It was confirmed to a reasonable amount of clarity that the Board members are of the opinion that the decision on who to hire is/was Dr. Duerring's and that they trusted his judgment.<sup>16</sup> This witness did not present as bias against Grievant.

Assistant Superintendent Milam<sup>17</sup> testified during level one of this matter. The weight of this witness's actions and opinion should **not** be underestimated. He was stationed in a pivotal position throughout the entirety of this selection process (drafting of interview questions, on the interview team, advisor to Superintendent, communicator to the Board). The presence or absence of bias, and/or undue motive by Assistant Superintendent Milam has a weighted effect on the objectivity of the instant non-selection. It is not clear why Assistant Superintendent Milam did not testify at the level three hearing.

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<sup>15</sup> Board President Ryan White testified that he anticipated that the hiring of the principal at SCHS in the fall of 2018 would be controversial. (Tr. III, day 1, 200-201.) Further Ryan White was aware that there had been a statement by Crawford Sr. referring to Grievant as a "lesbian." He took no action in this regard as Board President, asserting that he did not believe that it had an impact on the recommendation to hire King.

<sup>16</sup> See testimony of Board Members Tracy White, Ric Cavender, and its President Ryan White.

<sup>17</sup> Assistant Superintendent for Secondary and Career Technical Education

The level one transcript is a part of the file, the undersigned reviewed the transcript in its entirety.

Assistant Superintendent Milam testified it was question no.6 that was his real deciding question and he explained the selection of Gabriel (Gabe) King as the most qualified to the Board at the direction of Dr. Duerring. (R Ex 3; G Ex 2. TR I at 95-122.)<sup>18</sup> When asked if there was an answer to an interview question that placed King ahead of Grievant, Milam relied primarily upon question number six, which asked each applicant to explain the new accountability standards for SCHS. Milam was asked “what it was that King told you that you liked and made you weight that so heavily?” Milam responded; “I liked all of his answers that I put on the interview questions.” (Tr. I, day 1, 45-46.) When Milam was asked to specifically state “in his own words what it was about King’s answers to [question 6] that made you think he was the best candidate,” he responded: “Well, he hit all the listen [fors] that I had there with the checkmark. He

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<sup>18</sup> At the November 15, 2018, meeting of the Board, Board member Tracy White engaged in the following colloquy:

**Tracy White [to Duerring]:** Can you go over how you came to the decision of recommending Mr. King at South Charleston High?

**Duerring:** We had interviews and the top four were sent to me they recommended Gabriel King. *Mr. Milam will go over that with you.*

**Milam:** There were a couple of reasons *why I recommended Mr. King.* He understands the new WV State Department Balanced Scorecard very well. He has a solid plan to raise the academic standards at SCHS. He has a vision to improve SCHS on the Balanced Scorecard components. He has administrative experience at the high school level and most of all *he answered all the interview questions that I asked according to my expectations so that is why I recommend him to you.*

**Duerring:** We concur with that recommendation.  
(Emphasis supplied) (G Ex 9; Tr. I, day 1, 65-66.)

elaborated on those to my satisfaction.”(Tr. I, day 1, 48.) Although Milam repeatedly stated that he scored question 6 “heavy,” he offered little to no meaningful specifics as to why King’s answer to this question was so definitive. Ultimately, Milam awarded King a 5 for this answer and Grievant a 4. Milam admitted that Grievant had missed only two listen fors – “English” and “postsecondary achievement” – and that if she had mentioned those she would have also received a 5. Milam indicated that he was aware that Grievant’s score was 26 points higher than King’s, but that this did not have any impact on his recommendation to Duerring. (Tr. I, day 1, 51.)

In contrast to the recommendations of the other interviewers Milam recommended King to Superintendent Duerring. Two of the three interviewers, both Reedy and Hamric, voiced the opinion and recommended Grievant for the SCHS principal position when the Interview Team interviews were complete. Nevertheless, Assistant Superintendent Milam recommended King to Superintendent Duerring this is undisputed, what is convoluted is “other measures or indicators” in the mind of Assistant Superintendent Milam.<sup>19</sup>

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<sup>19</sup> Milam testified that there was nothing about Grievant’s scores or years of experience that caused him not to recommend her. He also admitted that he recommended King even though Grievant had been at SCHS for years as an administrator; that King had never worked under his supervision in Kanawha County as an administrator other than thirty or so days at Riverside High School; and that he was uncertain whether King had taught in Kanawha County, though he “believed” that he did. (Tr. I, day 1, 57-58.) Milam admitted that Grievant had more years of experience as an administrator and that he was not critical of her experience. (Tr. I, day 1, 64) Milam was unaware whether the SCHS Faculty Senate supported Grievant or King for the position. Nor did he think it was important. (Tr. I, day 1, 67-68.) Milam admitted that there was no Faculty Senate representative on the Faculty Selection Committee. He conceded that he did not know the difference between the Interview Team and Selection Committees.

With regard to candidate King, Milam admitted that he did not know King's age or experience. He conceded that he did not know how long he had been a teacher. He indicated that he knew that King had been an assistant principal at Scott High School in Boone County for one year. Milam revealed that he did not know if this was King's only type of administrative experience. (Tr. I, day 1, 42-44) Despite scoring Grievant as the most qualified applicant, Milam did not recommend Grievant to Superintendent Duerring.<sup>20</sup>

The weight of this witness's opinion should not be overlooked. His opinion and actions might be characterized as paramount to the gateway or the bar of Grievant's selection. Significant portions of this testimony, in review, appeared credible, while explanations seem incomplete and contrary to the natural order of operations. The extent of information exchanged between Superintendent Duerring and Assistant Superintendent Milam is of particular importance. The information he did or did not communicate with Superintendent Duerring is a moving target. There is a disconnect between the information Assistant Superintendent Milam indicates he communicated and the information Superintendent Duerring recognizes as receiving from him. Pursuant to Assistant Superintendent Milam's testimony, he conveniently neglected to inform the Superintendent of vital information that any responsible decision maker would want to know. Portions of this testimony is devoid of trustworthiness.

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<sup>20</sup> Notably, Assistant Superintendent Milam awarded Grievant an overall score of 28 on her interview responses. Milam awarded King a score of 22 for his interview responses. G Ex 10

Grievant, Kimberly Williams, testified at the level three hearing of this grievance. The undersigned observed Grievant during her testimony and to a degree throughout the duration of the hearing process. Grievant's attitude, demeanor and deeds were in review. In assessing the trustworthiness of the information provided by Grievant, the undersigned was mindful of third party interest, consistency of statements and the plausibility of the witness's information.

Grievant addressed a variety of facts, combating opinions and overall issues in discussion. Grievant appeared calm and otherwise demonstrated the appropriate demeanor. Grievant has an interest in this matter as she is seeking the Principalship at South Charleston High School however upon examination and cross she answered the questions asked of her with honor and due respect of the process. Grievant testified in detail with regard to her successful efforts to shore up SCHS academically when she became CAP (i.e., or the administrator over curriculum).<sup>21</sup> SCHS is now one of the only schools overseen by Respondent with a fully certified math department. (Tr. III, Day 3, 41.) Grievant recounts that she has approximately thirty-eight years' experience as a teacher and administrator for Respondent: twenty-four years in the classroom and fourteen years as an assistant principal. She has acted as an assistant principal for three years at East Bank Middle School, four years at Nitro High School, and approximately seven years at SCHS. Grievant has held both the disciplinary and CAP assistant

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<sup>21</sup> Kimi Estep confirmed that there had been a "revolving door" of CAPs at SCHS recounting that Ashley Clay, Tricia Peterson, and Jason Redman had held the position in the years immediately before Grievant did. (Tr. III, day 1, 273.) SCHS had four CAPS in six years. (Tr. III, Day 3, 42-44.) Estep testified that Grievant did her best to keep kids at school. Resisting moving kids in and out of the school to the alternative schools (something complained about by Duerring). (Tr. III, day 1, 274-275.)

principal positions on the high school level. It is undisputed that she has received very good evaluations throughout her tenure with Respondent. Grievant emphasizes that she has the support of the SCHS Faculty Senate and the Dunbar and South Charleston communities for the SCHS principal position.

Grievant provided her opinion as to how she believed various facts interacted to produce the current non-selection situation. The distinction between established facts and Grievant's opinion is specifically recognized. This finder of fact is of the belief that Grievant was providing testimony in a forthright manner and was highlighting information which was reasonably interpreted as relevant and probative. Grievant's testimony is perceived to be trustworthy. It is Grievant's opinion that Respondent's professed rational for its actions are pretextual.

### **Discrimination/Favoritism**

This Grievance Board is authorized by statute to provide relief to employees for discrimination, and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007); *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

Specifically, Grievant, in her level one testimony stated that she has never felt as though Dr. Duerring, personally had any discriminatory animus towards her. (L1 Hr. Trans. Day 2 at pg. 42.) Clarity, it is not argued that Superintendent Duerring is predisposed against Grievant. It is however highlighted that the liberties taken by various agents of Respondent, including Superintendent Duerring, in the selection and approval of Gabe King as Principal at South Charleston High School are cumulative. Among other points, Grievant argues that hers non-selection (Respondent's actions) can be characterized as an abuse of discretion, tainted by discrimination in association with her age, gender, and/or sexual orientation.

Grievant highlights that at some point prior to the nomination and recommendation of Gabe King to the Board of Education, Jim Crawford, Sr., an elected Board of Education Board Member made comments to another elected Board Member, Tracy White, regarding his personal opinion of Grievant. The comments were discriminatory in nature. This is problematic. It is unsettled when Superintendent Duerring became aware of Crawford, Sr's comments regarding Grievant. It is not established that these comments



would, if known, would have had a measurable effect on the Superintendent's selection for the principalship at South Charleston High School. Nevertheless, the comments are troubling. Board President White concedes that there had been an issue between Grievant and Board Member Crawford, Sr.<sup>22</sup> Grievant's counsel enquired of Superintendent Duerring, "would it ever be relevant for the board of education members to discuss the sexual orientation of an applicant for a job?" Superintendent Duerring indicated it is inappropriate, but he isn't in control of Board Members' personal conversations. See Duerring testimony. (Tr. III, day 2, 102-104.)

Grievant also infers favoritism was a contributory element in the circumstances of this selection. Grievant calls attention to the circumstances of King's candidacy and his relationship with Deputy Superintendent Williams. Superintendent Duerring and Deputy Superintendent Williams served as references for King on his application. Grievant questions whether candidate King was primed for the interview. See fn 8, supra. Deputy Superintendent Williams testified that he played no role in the selection of Gabriel (Gabe) King other than telling Mr. King that the position was open.

It is highlighted that during the interview process when candidate King, was asked question one, King immediately began talking about the Balanced Scorecard which had not been asked about yet (and would not be addressed until the last two newly added questions).<sup>23</sup> Nonetheless, King inexplicably discussed the Balanced Scorecard - - upon

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<sup>22</sup> It was known to Board Member Tracy White, Superintendent Duerring, and others that Crawford, Sr., had a problem with Grievant.

<sup>23</sup> Question one and question six are "two total different questions." Explicitly acknowledged by Assistant Superintendent Milam. (L1 Hr. Trans. at pg. 102-103.)

which Milam and Duerring would place great weight. Representatives of Respondent denied that King had been informed about the addition of the Balanced Scorecard questions prior to the interview. Notably, Assistant Superintendent Milam would later conclude that King was his selection for the position based upon his response to the Balanced Scorecard question. There is information of record which can be viewed and rationally perceived as tentacles of favoritism.

It is prudent for the instant trier of fact to consider the potential weight of discrimination and favoritism as viable issues of concern in the circumstances of this selection decision. The precise amount of influence one or both may have had on the final determination and approval of Gabe King as the most suited candidate is not readily known. However given the numerous facts and information pregnant with bias it is more likely, than not, that either or both did contribute to this non-selection situation. It is questioned whether being a “new set of eyes” from outside of the school (conveniently unique to King) was a valid criteria or a pretext to eliminate a more qualified candidate.<sup>24</sup> For reasons discussed in this decision, the undersigned tends to concur that Respondent’s professed rational for its actions are pretextual. The weight of influence applicable to favoritism and/or discrimination in the facts of this matter is not simply answered. Some difference of opinion is inevitable.

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<sup>24</sup> Grievant was part of the administration at South Charleston High School, as was the individual ranked second on the matrix.

## **MERITS**

Grievant carries a high burden to establish that the selection of Gabriel (Gabe) King was arbitrary and capricious. Further Respondent is fast to point out that as long as Superintendent Duerring's decision and School Board approved choice was not arbitrary and capricious, it should not be disturbed, as this Board is not to act as a "super-interviewer" to re-evaluate the credentials of the applicant. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989) In order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. *Hopkins v. Monroe County Bd. of Educ.*, Docket No. 95-31-477 (Feb. 21, 1996); *Stover, supra*. The standard to use in this review is the arbitrary and capricious standard.<sup>25</sup> The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. *Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Jan. 28, 1997). See *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

The process to fill the vacancy in discussion is largely controlled by statute, West

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<sup>25</sup> "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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Virginia Code § 18A-4-7a and Kanawha County Board of Education Policy G62, “Administrative Selection.” The polar star of West Virginia Code § 18A-4-7a is that a board of education is hire the most qualified applicant suited to perform the task(s) needed. It is argued that Superintendent Duerring focused his assessment on the criterion “other measures or indicators upon which the relative qualifications of the candidate may fairly be judged.” W. Va. Code § 18A-4-7a(b)(9). Dr. Duerring testified that the “other measures or indicators” he was looking for in a candidate was that the candidate had a good understanding of the Balanced Scorecard and he wanted a candidate who had a fresh set of eyes to take on the declining performance of the school in terms of academic achievement and graduation rates. (L3 Hr. Trans Day 2 at 114:12-21; 197:1-21.) Respondent maintains Dr. Duerring exercised his wide discretion related to “other measures or indicators” and chose a candidate from the candidates who were provided to him, in accordance with policy. Grievant contends, in the circumstance of this selection this is pretext for discriminatory conduct and/or a product of arbitrary and capricious behavior.

Grievant credibly argues that she was the most qualified person for the principal’s position at South Charleston High School (SCHS).<sup>26</sup> Respondent disputes that Grievant’s ranking makes her the most qualified/suited candidate for the position.

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<sup>26</sup> Highlighting being the highest scorer on the matrix scorecard, which included the interview and the categories that a board of education is required to consider to determine the most qualified candidate: certification, relevant experience, degree level, academic achievement, national board certification, specialized training relevant to the position, and past performance evaluations. Further, Grievant testified about what she had done to address the deficiencies at South Charleston High and that she understood the new accountability standards.

Respondent cites the selection of candidates for educational positions is not simply a mathematical process. *Shute v. Brooke County Bd of Educ.*, Docket No. 07-05-402 (Sept. 26, 2008); *Hoffman v. Mingo County Bd of Educ.*, Docket No. 97-29266 (June 15, 1998); *Santer v. Kanawha County Bd of Educ.*, Docket No. 01-20-557 (Aug. 14, 2003). The selection of the most qualified candidate is not a mathematical equation, but is governed by statute, policy and the case law interpreting the same. See *Hoffman v. Mingo County Bd. of Educ.*, Docket No. 97-29- 266 (June 15, 1998)(citing *Tenny v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990)).

Kanawha County Schools' Policy *Administrative Selection Series G62.08*<sup>27</sup> describes the interview process and how each response to the questions are to be scored. The team compiled each candidate's interview scores appropriately and timely reported the scores to Superintendent Duerring. Grievant had the highest score on the interview with an 86; the other candidates scored 68, 66 and 56 with the successful candidate scoring the second lowest score (66). On the total scores as reported to the Superintendent by the team, Grievant again scored the highest with a 144; the other candidates scored 121, 118 and 103 with the successful candidate again scoring the second lowest score (103). (G Ex 2.) The policy expressly directs the Interview Team to not evaluate the qualifications of the candidates upon other criteria to be considered by the Superintendent which is outlined in Kanawha County Schools' Policy *Administrative*

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<sup>27</sup> Kanawha County Board of Education Policy G62 expands upon the statutory requirements for selecting administrative positions. This policy provides a detailed process for filling a school administrator position and establishes the roles of persons involved in the selection process. See *generally* Kanawha County Board of Education Policy G62 – Administrative Selection, L1 R Ex 2.

*Selection Series G62.1 O.*

Kanawha County Schools' Policy *Administrative Selection Series G62.09* defines the next step in the process as the Selection Committee review. This committee is to include a supervisor of the next level of administration, a representative of the Human Resources Office and in the case of the school position, a representative of the school's faculty senate. This committee is to consider all the criteria, rank the candidates and provide the names of the top four (4) candidates to the Superintendent. It is debatable whether this policy was properly followed.<sup>28</sup> It appears from the evidence that the Interview Team was conflated with the Selection Committee minus the Faculty Senate representative and the results of the four (4) candidates scoring were then sent to the Superintendent. The Faculty Senate representative was shown the results, according to the Human Resources Director but did not participate as a member of the Selection Committee. (TR I at 205-13.)

Superintendent Duerring had an acknowledged statutory duty to nominate the most qualified candidate to the board. Respondent leans heavily on the discretion of what constitutes the most qualified candidate. Superintendent Duerring choose a candidate from the four (4) candidates provided.<sup>29</sup> The Superintendent is permitted to

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<sup>28</sup> Policy G62 requires that Respondent convene a "Selection Committee". Respondent violated policy 62.09 when it failed to convene a Selection Committee. In this instance, the Interview Team also acted as the Selection Committee. A Faculty Senate representative, Kimi Estep, observed the scores for each applicant. However, the record indicates that she – as a Faculty Senate representative – was not included in a Selection Committee as contemplated by Respondents Policy 62.09. See Level 1 Decision, Finding of Fact 10. Grievant by Counsel highlights this and characterize it as an additional procedural deficiencies or improper procedure.

<sup>29</sup> The interview questions were calculated to measure the qualifications of each candidate as required by West Virginia Code § 18A-4-7a and Respondent's policy.

consider many things including input from "any supervisors or other administrators who are familiar with the job performance of any candidate . . . " Kanawha County Schools' Policy *Administrative Selection Series 062.10* The evidence reflected that Assistant Superintendent Mark Milam was consulted by Superintendent Duerring. Assistant Superintendent Milam recommended the second lowest scoring candidate be chosen, the candidate he wanted (over the recommendations of the other interviewers), despite the criteria evaluation, because he was so impressed by how the candidate answered Question No.6 which involved the state's new accountability standards. Assistant Superintendent Milam expression of what constituted relevant evaluation criteria or "other measures or indicators" is convoluted. It is not recognized that everything considered was properly intended to be considered when selecting an administrative position for a high school.

West Virginia Code § 18A-4-7a sets forth the factors for which a professional personnel candidate is to be judged. West Virginia Code § 18A-4-7a provides, in relevant parts:

(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 §18-4-2 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 principal or classroom teaching position, certification by the National Board for Professional Teaching Standards;

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

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

(8) Seniority;

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

. . .

(c) When filling 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 . . . .

Emphasis added.

It is well settled that, county boards of education in review of the criteria required by West Virginia Code § 18A-4-7a, has substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. *See Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Nothing in the language of W. VA. CODE § 18A-4-7a restricts the area of measures or indicators, as long as they are factors 'upon which the relative qualifications of the applicant may fairly be judged. *Anderson v. Wyoming County Bd. of Educ.*, Docket No. 93-55-183 (Sept. 30, 1993); *English v. Logan County Bd. of Educ.*, Docket No. 03-23-307 (Feb. 27, 2004). While each of the factors must be



considered, county boards of education are permitted to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *Hughes v. Lincoln County Bd. of Educ.*, Docket No. 94-22-543 (Jan. 27, 1995); *Blair v. Lincoln County Bd. of Educ.*, Docket No. 92-22-009 (July 31, 1992).

Nevertheless, a school board superintendent is not granted *carte blanche* in hiring decisions. There are established and recognized criteria's, rules and procedure in place to assist in the selection of the appropriate candidate. Grievant has highlighted several issues regarding Respondent's conduct of a dubious nature, including but not necessarily limited to ambiguous impartiality, incomplete procedure, alleged abuse of discretion, bias and lack of true school board analysis, which she has persuasively established as significant flaw in the instant selection process, sufficient to suggest that the outcome, without the flaw(s) might reasonably have been different.

It is clear that the Superintendent has the duty to nominate a qualified candidate to the Board.<sup>30</sup> The school board then votes on that nomination. However, in the circumstances of this matter, it is more likely than not the elected Board members demonstrated a limited understanding of their role in hiring administrators: as they describe it, once the superintendent recommends a candidate, they are essentially powerless to question this recommendation. This is not completely accurate, citing *Barrett v. Hancock County Bd.*

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<sup>30</sup> It is the responsibility of the superintendent, not the board of education, to evaluate the candidates, review the statutory criteria, and make a recommendation to the board of education. A board of education is not required to independently rank the applicants and compare their qualifications based upon the statutory criteria when the superintendent has already done such a comparison prior to making his recommendation. *Switzer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-013 (April 11, 2003)

of *Educ.*, Docket No. 96-15-512 (Dec. 31, 1997), there is no law, policy, or regulation which mandates that a board of education must accept a Superintendent's recommendation in personnel matters. Also see W. Va. Code § 18A-2-1(a)(4) and 1(a)(5).

Although the Kanawha County Board of Education, members, claim not to be a "rubber stamp," with regard to hiring decisions, that is precisely what they seem to see as their role (have done). Moreover, the Board was clearly under-informed in this case, as they were almost completely unaware of the qualifications of the candidate(s), did not receive the matrix scorecard, and learned of substantial facts at, or in preparation for, the instant grievance proceedings. Indeed, Superintendent Duerring or his staff did not share or effectively communicate information with the entirety of the KCBE and the Board voted (almost) blindly on the candidate put before them relying on the limited statement of Assistant Superintendent Milam and Superintendent Duerring. There is no statutory duty for the Board to accept the Superintendent's first nomination, and it is the Board's duty and privilege to evaluate the candidate in light of the criteria it deems most important for the position and in the best interests of the schools *Lake v. Cabell County Bd. of Educ.*, Docket No. 04-06-282 (February 18, 2005); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

It is envisioned that a school board would install the most qualified candidate for administrative position, pursuant to the statutory criteria.<sup>31</sup> The record offers scant evidence as to why King would be more qualified than Grievant.<sup>32</sup> This is a non-selection

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<sup>31</sup> A county school board is a complex organization with several interactive components intended to facilitate the needs and duties of the agency.

<sup>32</sup>There is no dispute that on the question dealing with a general understanding of the

case. Of particular importance to this case is the longstanding principle that, when selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion. *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).

In assessing the actions of Respondent, it is important to note that the explanations for why King was selected belie the weaknesses of their argument. First, as noted above, Respondent has selected a reason for selecting King that allows them to ignore Grievant's impressive qualifications – because he was a new set of eyes from outside the school. Second, the asserted failures of the prior CAPs are imposed upon Grievant – who has a stellar record at SCHS and has improved the school in the areas where it is needed. Third, Assistant Superintendent Milam asserts that King scored better on one Balanced Scorecard question and ignores the fact the Grievant scored better on the one most salient to the alleged needs of the school. The specious reasoning underlying this hiring decision in this case is disturbing. The undersigned is persuaded that Respondent has proceeded in an arbitrary and capricious manner.

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Balanced Scorecard, Gabe King had a higher cumulative score. However, there is also no dispute that Grievant scored higher on a specific question related to addressing the deficiencies at South Charleston High School. See G Ex 10: also see related testimony Tr. I, day 1, 107-108; 116. Substantial discretion isn't defined as identifying just any qualified candidate. Respondent's definition of "other measures or indicators" is arbitrary and tends to be a moving target.

Professional/Administrative selection must be reasonable in the best interest of the schools, and not arbitrary and capricious. Grievant has established identifiable short falls of Respondent and its agent to the point that the credibility of the selection and confirmation of the selection is capricious. A preponderance standard is not insurmountable, Grievant has met her burden. There was procedural error.<sup>33</sup> A preponderance of the evidence indicates that the actions of Respondent were inconsistent with the evidence and influenced by bias. The instant matter is not generally a dispute of a factual event but a difference in the interpretation, intent and analysis of situations (including the application of applicable criteria). It is the undersigned belief that Respondent relied too heavily upon the ambiguity of discretion, to the point of invalidating the established and recognized selection procedure designed to assist in the identification of the best candidate. The cumulative effect of the numerous abnormalities, short cuts, coincidences and potential bias has undermined the reliability of the instant selection. Highlighted flaw in the instant selection process are sufficiently established to suggest that the outcome might reasonably have been different.

The following conclusions of law are appropriate in this matter:

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<sup>33</sup> Respondent tends to acknowledge *de minimis* procedural flaw, but argues no substantive flaw, in this process. Nevertheless, Respondent violated its own policy when it utilized an improper scoring method. Moreover, it failed to properly assemble a Selection Committee as defined by Policy G62. Specifically, it failed to include a representative of the Faculty Senate with the Selection Committee to award credit for “each of the criteria to be considered for each candidate” and to incorporate the results of the interview and “rank each candidate in ascending order” as contemplated by the Policy. R Ex 2

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

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

3. West Virginia Code § 18A-4-7a sets out specific criteria the Board must use in determining which candidate is the most qualified for a particular professional 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).

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

5. “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)).

6. The process to fill the vacancy in discussion is largely controlled by statute, West Virginia Code § 18A-4-7a and Kanawha County Board of Education Policy G62, “Administrative Selection.” The selection process utilized in the circumstances of this matter did not comply with Respondent’s Administrative Selection Policy.

7. The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. *Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Jan. 28, 1997). See *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

8. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) that he or she has been treated differently from one or more similarly-situated employee(s);
- (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) that the difference in treatment was not agreed to in writing by the employee.

*Frymier v. Higher Education Policy Comm.*, 655 S.E.2d 52 (2007); See *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

9. It is more likely, than not, that either or both bias, favoritism or discrimination contributed to this non-selection situation.

10. The standard for review in grievances brought by unsuccessful candidates for administrative positions generally involves an inquiry into whether the criteria for hiring school administrators as contained in West Virginia Code § 18A-4-7a and in the instant matter coupled with Kanawha County Schools Policy G62 *Administrative Selection* were accurately assessed for each applicant, whether favoritism and/or discrimination played a role in the selection process and whether flaws in the process were so significant that the outcome might reasonably have been different. *Santer v. Kanawha County Bd of Educ.*, Docket No. 01-20-557 (Aug. 14, 2003); *Stover v. Kanawha County Bd of Educ.*, Docket No. 89-20-75 (June 26, 1989)

11. Grievant established flaw in the instant selection process. The flaws in the selection process for the position of Principal South Charleston High School were so significant that the outcome might reasonably have been different.

12. Grievant met her burden, establishing that the selection process for the position of Principal of South Charleston High School was unreasonably tainted by arbitrary and capricious actions.

13. Grievant established by a preponderance of the record that the actions of Respondent were inconsistent and arose from misapplication of applicable rule, regulation or statute to the point of arbitrary and capricious conduct.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. Respondent is **ORDERED** to repost the position of Principal at South Charleston High



School within thirty (30) days of the receipt of this Decision, and, employing a selection panel that, where feasible, should not include any person who participated in the interview process involved in the instant grievance, selecting the most qualified applicant for the position, pursuant applicable criteria. Grievant's request for reinstatement in to the position is **DENIED**. Respondent shall repost the position and apply a selection process that evaluates candidates on the basis of West Virginia Code § 18A-4-7a and Kanawha County Board of Education Policy G62 administered in an unbiased and equitable manner.

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 (2018).

**DATE: April 24, 2020**

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**Landon R. Brown**  
**Administrative Law Judge**