

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

**ALYSSA MICK,**  
**Grievant,**

**v.**

**Docket No. 2022-0038-HanED**

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

## **DECISION**

Grievant, Alyssa Mick, is employed by Respondent, Hancock County Board of Education. On July 19, 2021, Grievant filed this grievance against Respondent, stating:

Grievant Alyssa Lee Mick, Ph.D., was unlawfully denied the position of Director of Personnel for Hancock County Schools. The non selection of Grievant was unlawful; in violation W.Va. Code § 18A-4-7A, the applicable scheme and regulatory scheme, as well as a violation of policies of the Respondent due to favoritism, W.Va. Code §18-29-2 and pre-selection. The Grievant was most qualified for the position. The Grievant was unlawfully denied the position due to pre-selection, age discrimination, failure to conduct a proper interview, failure to follow the hiring matrix, failure to complete the training required in West Virginia Board of Education Policy 5000,<sup>1</sup> failure to provide all interview materials to the Hancock County Board of Education, whose decision was arbitrary and capricious, and an abuse of discretion.

As relief, "Grievant seeks instatement in the position of Director of Personnel for Hancock County Schools, and to be made whole in every appropriate way including, but not limited to back-pay with interest and all appropriate benefits including retirement, leave and attorney fees."

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<sup>1</sup>Policy 5000 is only applicable for hiring of teachers, not administrative positions such as Director of Personnel. As Grievant did not raise this claim at level three, it will not be addressed.

The parties waived to level three on September 23, 2021.<sup>2</sup> A level three hearing was held on December 13 & 14, 2021, before the undersigned at the Grievance Board's Westover office. Grievant appeared in person and was represented by attorney F. Alex Risovich, Risovich Law Offices, PLLC. Respondent appeared by Dawn Petrovich and was represented by attorney Jason Long, Dinsmore & Shohl LLP. This matter became mature for decision on January 28, 2022. Each party submitted written Proposed Findings of Fact and Conclusions of Law.

### **Synopsis**

Respondent, Hancock Board of Education, selected Ms. Parsons over Grievant as Director of Personnel upon nomination of the Superintendent. Grievant claims to be the most qualified of the four candidates interviewed by the Superintendent. Grievant alleges that the Superintendent preselected Ms. Parsons and weighed the W. Va. Code §18A-4-7a selection factors in Ms. Parsons' favor due to their close friendship. Respondent contends it has discretion to attribute weight regardless of friendship. It asserts that the Superintendent and the Board each have exclusive roles in the selection process, with the Superintendent having sole authority to nominate and the Board sole authority to select or reject a nomination. Yet, State Code assigns the Board authority to weigh selection factors. The Superintendent usurped this authority in unilaterally giving more weight to candidate interviews under the "other measures" selection factor. The Superintendent used this most subjective factor to favor Ms. Parsons and justified the weight assigned using ambiguous traits such as "trustworthiness." Grievant proved that

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<sup>2</sup>W. Va. Code § 6C-2-4(a)(4) provides that an employee may proceed directly to level three upon agreement of the parties.

Respondent abused its discretion and played favorites but failed to prove she was the most qualified. Accordingly, the grievance is GRANTED in part and DENIED in part.

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

### **Findings of Fact**

1. Grievant has been employed by Respondent, Hancock County Board of Education (Board), in a professional capacity since she first started as a classroom teacher on August 21, 2002; followed by Assistant Principal at Oak Glen Middle School on August 31, 2011; and as Principal at Oak Glen Middle School since August 7, 2017.

2. In Spring 2021, Respondent posted the professional position of Director of Personnel.

3. The position qualifications from the job description state: 1) Master's degree in educational administration; 2) Experience in school and/or board administration – minimum five years preferred; 3) Knowledge of educational principals, practices, policies, and laws; 4) Capability of developing and promoting a consistent philosophy of education and translating it into instructional purposes, programs, and procedures; 5) Experience with and understanding of Pre-K to Grade 12 curriculum; 6) The ability to understand and interpret personnel law; 7) Understanding of special education, food service program, school transportation, strategic plan, curriculum and technology; 8) Knowledge of state testing; 8) Experience with and understanding of grievance procedure.

4. Grievant, Sarah Parsons, David Smith, and Kelly Lawton were the applicants deemed to have met the minimum qualifications. They were interviewed by

Dawn Petrovich, Superintendent of Schools, and Joseph Campinelli, Director of Finance, on June 24, 2021.

5. Superintendent Petrovich has been employed by the Respondent for nearly 40 years, beginning as a classroom teacher, then assistant principal, head principal, central officer administrator, assistant superintendent, and deputy superintendent. She has been the superintendent for about three years.

6. Mr. Campinelli has served as the Director of Finance for approximately 21 years. During this time, he has been involved in various personnel matters including interviewing service and professional/administrative personnel.

7. Superintendent Petrovich and Mr. Campinelli asked each interviewee about their qualifications using the same set of questions. Each took notes on the answers provided and prepared a scoring matrix comparing qualifications under the selection criteria set forth in West Virginia Code § 18A-4-7a. This was supplemented with information from Respondent's personnel files and records.

8. The matrix categories completed by Superintendent Petrovich were "appropriate certification, licensure or both;" "amount of experience relevant to the position;" "the amount of course work, degree level or both in the relevant field and degree level generally;" "academic achievement;" "specialized training relevant to the performance of the duties of the job;" "past performance evaluations conducted pursuant to WV Code 18A-2-12 and 18A-3C-2;" and "seniority." (Respondent's Exhibit 14)

9. Superintendent Petrovich attributed the most weight to candidate interviews. Interviews fall under the selection category of "other measures or indicators

upon which the relative qualifications may fairly be judged.” This category was left blank on the interview matrix.

10. Grievant had more quantifiable qualifications than Ms. Parsons but Ms. Parsons was deemed more “trustworthy” by Superintendent Petrovich based on the interview. (Superintendent Petrovich’s testimony)

11. The interviewees differed under the categories of “amount of experience,” “the amount of course work, degree level or both,” “past performance evaluations,” and “seniority.”

12. Dave Smith had the most experience at 27 years. Both Grievant and Ms. Parsons were attributed the same teaching experience starting in 2002, even though Ms. Parsons was a substitute teacher until 2007. No indication was given of the amount of days Ms. Parsons taught each year as a substitute. Both Grievant and Ms. Parsons were attributed administrative experience. While both Grievant and Ms. Parsons began their administrative experience as assistant principals in 2011, Ms. Parsons became a head principal in 2013, five years prior to Grievant.

13. As for their degree level and course work, Grievant was the only interviewee with a Ph.D. Ms. Parsons’ application appears to indicate that she has three MA’s, described as “2010-2011 M.A. in Superintendent/Supervisor pre-K-adult Wheeling Jesuit University;” “2006-2008 M.A. Special Education Classes Fairmont State College;” and “2005-2007 M.A. Educational Leadership University of Cincinnati.”

14. Yet Ms. Parsons testified that she only had one MA, which was the one in Educational Leadership from the University of Cincinnati, and that she was a few credits short of another.

15. After hearing this testimony, Superintendent Petrovich was concerned by the apparent discrepancy with Ms. Parsons' application. However, this did not change her view of Ms. Parsons' as honest and trustworthy. (Superintendent Petrovich's testimony)

16. Superintendent Petrovich's interview matrix indicates that she attributed Ms. Parsons only with "Master – Ed. Admin +45." The evidence does not indicate whether this "Ed. Admin +45" refers to the MA in "Educational Leadership" from the University of Cincinnati or other coursework. (Respondent's Exhibit 14)

17. Superintendent Petrovich's matrix states that Grievant's Ph.D. and Mr. Smith's MA are both in "Ed. Leadership," creating a distinction with the apparent inaccurate attribution to Ms. Parsons of an MA in "Ed. Admin +45." However, it appears that Superintendent Petrovich treated "Ed. Admin +45" and "Ed. Leadership" the same in determining that all interviewees met the minimum qualifications.

18. As for past performance evaluations, Superintendent Petrovich's interview matrix states "yes" for each interviewee and adds "satisfactory or above few distinguished" for Ms. Parsons. Mr. Campinelli's matrix shows "all good" for Ms. Lawton and Grievant, "good" for Mr. Smith, and "all good; some distinguished" for Ms. Parsons. Neither indicates the period covered. Since assuming her current position, Superintendent Petrovich has been responsible for evaluating the interviewees every year. She never evaluated Grievant and, at best, only intermittently evaluated the others. She failed to note that, in the years they overlapped as principals, Grievant outperformed Ms. Parsons in the SchoolDigger rankings for school performance.

19. As for seniority, Mr. Smith was attributed the most at 27 years and Ms. Lawton the least at 4 years. Grievant and Ms. Parsons were each attributed 19 years, having both started in 2002. However, Grievant started as a full-time teacher and Ms. Parsons as a substitute for the first 5 years. Superintendent Petrovich could not indicate an average amount of teaching days per year during this period or even the frequency with which Ms. Parsons substituted but considered substitute and full-time teacher to be the same for purposes of seniority.

20. West Virginia Code § 18A-4-7a(g) defines seniority as follows:

(g) With the exception of guidance counselors, the seniority of classroom teachers, as defined in section one, article one of this chapter, shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and shall be granted in all areas that the employee is certified, licensed or both.

(i) Upon completion of 133 days of employment in any one school year, substitute teachers, except retired teachers and other retired professional educators employed as substitutes, shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee. One hundred thirty-three days or more of said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher.

21. After the interviews, Superintendent Petrovich and Mr. Campinelli discussed interviewee responses and the quality of their answers. Superintendent Petrovich and Mr. Campinelli agreed that Ms. Parsons provided the best responses and that she was thus the most qualified for the position of Director of Personnel.

22. Superintendent Petrovich weighed the relevant statutory factors in determining that all interviewees met the minimum qualifications but attributed the most weight to interviews in determining that Ms. Parsons was the most qualified applicant.

23. Superintendent Petrovich and Mr. Campinelli found that Ms. Parsons' interview responses demonstrated the most desirable qualities for the personnel director position. These qualities were trustworthiness, being a team player, working well with others, and following law and policy.

24. Although Grievant and other applicants surpassed Ms. Parsons in other criteria on the matrix, the interview process was the pivotal factor that Superintendent Petrovich weighed most heavily in selecting a nominee for approval by the Hancock County Board of Education.

25. It is unclear how much weight Superintendent Petrovich gave to each selection factor in deeming Ms. Parsons the most qualified.

26. The Board does not have a policy applicable to the hiring criteria, interviews, or the weight to be attributed to each factor.

27. The non-selected interviewees were not ranked, and no matrix or interview scores were assigned to any candidate.

28. Superintendent Petrovich considers Ms. Parsons to be one of her closest friends if not best friend.

29. Superintendent Petrovich and Ms. Parsons have known each other since Ms. Parsons was a student teacher at Weir Middle School 15 years ago when Superintendent Petrovich was the principal.

30. Their close friendship has manifested itself in many ways, including at least two trips together to New York City years ago and another where they met at the beach. About 15 years ago, Ms. Parsons twice purchased a purse for Superintendent Petrovich at her request. The two continue to dine out together and have done so at least 50 to



100 times. For the past 5 years, they have had a standing appointment each Tuesday to travel together to Starbucks with their dogs. Ms. Parsons once dog sat for Superintendent Petrovich's sister 15 years ago. Superintendent Petrovich has done the same for Ms. Parsons. Ms. Parsons has purchased gifts for Superintendent Petrovich every year for Christmas and her birthday, generally in the form of gift cards valued at between 25 to 50 dollars. The closeness of their friendship is embodied in Ms. Parsons being Superintendent Petrovich's emergency contact with the Board office.

31. Yet, Superintendent Petrovich testified that she did not think to recuse herself because she has never done so and feels comfortable relying on the same set of questions for all applicants to a position.

32. Mr. Campinelli also has a family friendship with Ms. Parsons. His wife is close to Ms. Parsons, having served as Ms. Parsons' secretary at Weir Middle School at the time of their interview. His daughter and Ms. Parsons have a close friendship and have taken multiple trips together.

33. Grievant has never traveled with, given gifts to, or dined with Superintendent Petrovich.

34. At all times relevant to this grievance, Grievant was and remains the principal at Oak Glen Middle School.

35. At the time of the interview process, Ms. Parsons was the principal at Weir Middle School.

36. Test scores and statistics for Oak Glen Middle School were higher than those at Weir Middle School during the Grievant's and Ms. Parsons' tenures.

37. Grievant submitted a binder of relevant coursework and other pertinent information during the interview.

38. Ms. Parsons testified that she did not submit any documents or notes to the interviewers. Superintendent Petrovich testified to the contrary.

39. Fifteen years ago, Superintendent Petrovich helped Ms. Parsons with her interviewing skills due to inadequacy in that area.

40. Ms. Parsons hates interviewing and feels she is bad at it.

41. Superintendent Petrovich determined that Ms. Parsons was the best interview and thus the most qualified candidate.

42. On June 28, 2021, Superintendent Petrovich appeared before an executive session of the Board and nominated Ms. Parsons for the position of Director of Personnel.

43. The Board simply considered whether to approve or reject the nominee. It was not given the opportunity to review or consider interview notes or matrix factors even after Board member Michelle Chappell requested these. (Ms. Chappell's testimony)

44. The Board approved the nomination of Ms. Parsons by a 4 - 1 vote.

45. Board member Michelle Chappell voted against the nomination because Superintendent Petrovich failed to provide matrix and interview notes when requested even though previous superintendents had routinely provided them. (Ms. Chappell's testimony at recording position 2:33:50)

46. Superintendent Petrovich did not review applicant qualifications with the Board under any of the W. Va. Code §18A-4-7a matrix factors. (Board member Larry Shaw's testimony)

47. The Board members were not able to determine for themselves which applicant was most qualified but simply relied on what Superintendent Petrovich told them. (Mr. Shaw's testimony)

48. The Board voted up or down on the nomination of Ms. Parsons based on Superintendent Petrovich's representation that Ms. Parsons was the most qualified. (Mr. Shaw's testimony)

49. Under current practice, the Board does not look directly at the qualifications of a nominee but simply relies on what it is told by the Superintendent.

50. Before Superintendent Petrovich assumed the position, the Board looked directly at the qualifications of candidates nominated by the superintendent, including interview notes and matrixes.

51. Superintendent Petrovich never gave the Board any indication as to how close she was to Ms. Parsons. (Testimony of Mr. Shaw and Ms. Chappell)

52. Superintendent Petrovich testified that Ms. Parsons was the best candidate for the position based on her "trustworthy" nature and on the need for someone she could trust as Director of Personnel.

53. There was no indication if the Board had ever voted against one of Superintendent Petrovich's nominees, let alone the approval rate for her nominees.

### **Discussion**

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not."

*Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant alleges that Superintendent Petrovich preselected Ms. Parsons and weighed the West Virginia § 18-A-4-7a selection factors in her favor due to their close friendship, rendering the selection process flawed. Grievant contends that she is the most qualified candidate for the Director of Personnel position. Respondent agrees that Ms. Parsons is friends with Superintendent Petrovich but contends it has discretion to weigh selection factors as it chooses. It asserts that the Superintendent and Board each have exclusive roles in the selection process, with the Superintendent having sole authority to nominate and the Board sole authority to select or reject a nomination.

It should be noted that the respective duties of the Superintendent and the Board are set forth in West Virginia Code § 18A-2-1, which states, in relevant part:

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

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

W. VA. CODE § 18A-2-1(a)(4).

It is clear that the Superintendent has the duty to nominate a qualified candidate and the Board to vote for or against the nomination. If the Board rejects a nomination, it may then direct the superintendent to provide another nomination. The Grievance Board has previously elaborated on this division of duties, stating:

"W. Va. Code § 18A-2-1 prohibits a county board from participating in the evaluation process by which the superintendent reaches a decision to nominate a particular candidate, not through the use of specific language[,] but by explicitly establishing a bifurcated appointment procedure." *Gore, supra.* . .

"This [Code] language effectively divides the power to hire equally between the superintendent and the county board. No person may be appointed to a professional position until both have exercised their authority under the statute. Implicit in the statute is that the respective roles in the hiring process must be distinct, i.e., that the superintendent must exercise his statutory duty to nominate independent of the county board and that the board, in fulfilling its obligations under the statute, must reject or accept without undue influence from the superintendent. Otherwise, the division of authority is rendered meaningless." *Rakes v. Raleigh County Bd. of Educ.*, Docket No. 93-41-448 (Mar. 17, 199[4]). Because the prohibition against undue interference by either party is an implied and not explicit part of the statute, it is not possible to adopt a rule applicable to all situations in which a violation of that prohibition is alleged. *Gore, supra.* Each case must be decided on its own merits. ....

*Oldham v. Cabell County Bd. of Educ.*, Docket No. 03-06-269 (Feb. 27, 2004).

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

An examination of the statutes controlling the hiring of administrators by boards of education is necessary to determine if the selection process was arbitrary and capricious.

West Virginia Code § 18A-4-7a provides, in pertinent part:

(a) A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications: Provided, That the county superintendent shall be hired under separate criteria pursuant to section two, article four, chapter eighteen of this code.

(b) In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

- (1) Appropriate certification, licensure or both;
- (2) Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;
- (3) The amount of course work, degree level or both in the relevant field and degree level generally;
- (4) Academic achievement;
- (5) In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;
- (6) Specialized training relevant to the performance of the duties of the job;
- (7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;
- (8) Seniority;
- (9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

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

(c) In considering the filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications: Provided, That if one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, each criterion under subsection (b) of this section shall be given equal weight except that the criterion in subdivisions (10) and (11) shall each be double weighted.

*Id.* This statute specifies that criteria ten and eleven are only considered in filling classroom teaching positions, and criterion five is only used for classroom teaching and principal positions. Since the position in question is neither a classroom teaching nor principal position, these three criteria may not be considered. Additionally, subsection (c) establishes that the Board is entitled to determine the weight to be applied to each factor when filling professional non-classroom teaching positions.

As a general rule, when selecting candidates for professional positions other than classroom teachers, a county board of education must consider each applicable criterion listed in the section. However, the statute permits a board to determine the weight to be applied to each factor, so long as the weighting does not result in an abuse of discretion. *Elkins v. Boone County Bd. of Educ.*, Docket No. 95-03-415 (Dec. 28, 1995); *Hughes v. Lincoln County Bd. of Educ.*, Docket No. 94-22-543 (Jan. 27, 1995); *Blair v. Lincoln County Bd. of Educ.*, Docket No. 92-22-009 (Apr. 10, 1992); *Komorowski v. Marshall*

*County Bd. of Educ.*, Docket No. 08-25-007 (Mar. 23, 2009).<sup>3</sup> "The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the administrative law judge may not substitute her judgment for that of the board of education. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). An administrative law judge cannot perform the role of a 'super-interviewer' in matters relating to the selection of candidates for vacant positions. *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993)]; *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989); *Barnett, et al. v. Cabell County Bd. of Educ.*, and *McMillian*, Docket No. 2015-1762-CONS (May 31, 2016).

At the heart of this grievance is Grievant's position that she is the most qualified candidate for the position and that Ms. Parson was only selected due to favoritism resulting from her friendship with Superintendent Petrovich. Ultimately, the undersigned must decide whether Respondent abused its considerable discretion and if the selection process was significantly flawed to render the selection of Ms. Parsons as arbitrary and capricious.

As previously mentioned, the Superintendent and the Board each have a distinct role to play in the selection process specified in the Code. West Virginia Code § 18A-2-1 discusses the responsibilities of the superintendent and the board in these situations,

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<sup>3</sup> These cases were decided prior to the amendment of W. Va. Code § 18A-4-7a in 2013. However, the criteria for filling professional positions other than classroom teachers and principals remained essentially the same. So these decisions are still applicable. See *Berry v. Boone County Bd. of Educ.*, Docket No. 2014-0450-BooED (Sept. 29, 2014), for a discussion of the effects of the 2013 amendment on filling these positions.



providing that the board hires professional personnel "upon nomination and recommendation of the superintendent." "Clearly, the nomination of persons qualified to fill vacancies is a statutory duty of the superintendent and not a responsibility which arises by virtue of his or her employment with the county board." *Gore v. Monroe County Bd. of Educ.*, Docket No. 93-31-532 (April 26, 1994). In the case of professional personnel, the superintendent's duty to nominate necessarily entails the duty to adhere to the provisions of West Virginia Code § 18A-4-7a. "It appears well-settled that the chief executive officer of a county school system may not delegate the duties of the post to others." *Gore, supra*. This runs counter to Grievant's suggestion that the Superintendent should have recused herself from the selection process due to her close relationship with Ms. Parsons.

Similarly, the Board cannot delegate its bifurcated share of selection duties to the Superintendent and the Superintendent cannot usurp duties that are statutorily assigned to the Board. The role of determining the weight to be applied to each selection factor belongs to the Board rather than the Superintendent. West Virginia Code § 18A-4-7a(c) clearly assigns this duty to the Board, stating:

In considering the filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications ...

Even if the Superintendent had not exceeded her statutory duties by determining weight, she still had to validate that her need for someone she could trust was a legitimate consideration and warranted the assigned weight. If a superintendent can justify this need and weight using a formula that lends itself to fair judgment of candidates, she is warranted in choosing a close friend who is the most qualified under the weighted criteria.

Respondent relies on its broad leeway to attribute weight to any factor it chooses, citing the following:

[N]othing 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.' Indeed, W. Va. Code §18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. *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). The selection of candidates for educational positions is not simply a 'mechanical or mathematical process.' *Hoffman v. Mingo County Bd. of Educ.*, Docket No. 97-29-266 (June 15, 1998)(citing *Tenny v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990)); See *Deadrick v. Marion County Bd. of Educ.*, Docket No. 90-23-071(Jan. 30, 1991). This is especially true in the selection for an administrative position.

*Komorowski, supra.*

Respondent contends that Superintendent Petrovich determined that Ms. Parsons displayed a more positive and complete impression than any other candidate. This certainly sounds like the laudable trait for any nominee. Yet, a subjective and ambiguous conclusion of this sort can easily mask favoritism. It is not improper for a superintendent to select a friend for a position of great responsibility. However, where a superintendent is close friends with the candidate she is selecting, it behooves her to take precautions to avoid the appearance of impropriety.

"There is no doubt that it is permissible to base a selection decision on a determination that a particular applicant would be the 'best fit' for the position in question. However, the individuals making such a determination should be able to explain how they came to the conclusion that the successful applicant was, indeed, the best fit. *Spears v.*

*Dep't of Health & Human Res.*, Docket No. 04-HHR-284 (July 27, 2005)." *Underwood v.Div. of Health & Humans Ser.*, Docket No. 2012-0237-DHHR (Dec. 6, 2017).

Superintendent Petrovich relied on the most subjective category of "other measures" to promote Ms. Parsons' selection and ignored the fact that Ms. Parsons seemed to lag in the more measurable objective categories. In so doing, the weight she assigned to this subjective factor had to make sense in a quantifiable way. Superintendent Petrovich's rationale of "trustworthiness" for the selection of her close friend is the sort of rationale that would be expected for the selection of a close friend or family member. It is not the measured justification that would be expected from a criteria laden selection process for an administrative position.

While there is no requirement that a value be assigned to each selection factor, to reiterate *Oldham*, "[e]ach case must be decided on its own merits." As highlighted numerous times, even though a board is free to give whatever weight it deems proper to various selection criteria, there must be transparency in the process. Especially where a close relationship is at issue. Superintendent Petrovich could have instilled some transparency to the ambiguity of her considerations by establishing a formula and explaining the weight assigned to each factor. She could have also complied with a Board member's request to see the matrix and interview notes.

Superintendent Petrovich did not connect the "qualifications" on which she had placed special weight to any of the position qualifications listed in the job description for Director of Personnel. Neither did she give any indication as to how much weight she assigned to each factor under W. Va. Code § 18A-4-7a. Further, her analysis of some of the factors, including "education," "performance evaluations," and "seniority," was flawed.

Evidence showing that Ms. Parsons misrepresented her education on her application was concerning. Superintendent Petrovich voiced concern after Ms. Parsons' testimony revealed she had one MA instead of the three she apparently listed on her application. Respondent argues that two of these simply show that Ms. Parsons had taken classes towards other MA degrees. However, this is not apparent on the application. Of the three MA entries on Ms. Parsons' application, only one mentions classes. Even if this was a miscommunication by Ms. Parsons, Superintendent Petrovich testified that she had deep concerns about the discrepancy between Ms. Parsons' testimony and her application but that she still saw Ms. Parsons as "honest" and "trustworthy." The understanding exhibited by Superintendent Petrovich in the face of her own concerns is the sort of understanding that would be expected from a close friend.

As for performance evaluations, Superintendent Petrovich provided "yes" on her matrix for each interviewee. However, since assuming her role, Superintendent Petrovich never satisfied her obligation of performing a yearly evaluation of Grievant and, at best, intermittently evaluated other interviewees. Also, the matrix did not account for the fact that Grievant's school performance rankings outpaced those of Ms. Parsons.

Further, Superintendent Petrovich assigned Grievant and Ms. Parsons the same 19 years of seniority, even though, unlike Grievant, Ms. Parsons was just a substitute teacher for the first five of these years. West Virginia Code § 18A-4-7a(g) defines seniority as follows:

(g) With the exception of guidance counselors, the seniority of classroom teachers, as defined in section one, article one of this chapter, shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county

board of education and shall be granted in all areas that the employee is certified, licensed or both.

(i) Upon completion of 133 days of employment in any one school year, substitute teachers, except retired teachers and other retired professional educators employed as substitutes, shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee. One hundred thirty-three days or more of said employment shall be prorated and shall vest as a fraction of the school year worked by the permanent, full-time teacher.

Substitute seniority is only used for obtaining the first permanent professional position.

Ms. Petrovich had no idea how many days Ms. Parsons taught each of the years she was a substitute. Thus, Superintendent Petrovich did not know whether Ms. Parsons had worked for more than 133 days in any of those five years. Clearly, Grievant and Ms. Parsons were not tied on seniority. Superintendent Petrovich reasonably should have known this, leading to the conclusion that she either intentionally fudged the numbers to benefit her friend or did not competently assess the criteria. Either way, it led to an arbitrary and capricious process.

Respondent argues that the Board acted independent of Superintendent Petrovich and could have voted against her choice if it was concerned. It is revealing that one board member did vote against the nomination because of the lack of transparency. She asked Superintendent Petrovich for her interview notes but was denied. Unfortunately, there was no evidence regarding the frequency with which the Board voted for Superintendent Petrovich's nominations to show whether it had ever exercised independent judgement towards them. Even if there had been evidence that the Board could act independent of Superintendent Petrovich, evidence presented reveals that the Board did not know the closeness of her friendship with Ms. Parsons. If this had been revealed, the Board may

have scrutinized the nomination more carefully. Even the Board member who testified in favor of the selection revealed his surprise to learn of the close friendship during his testimony. The checks and balances set forth by statute to guard against impropriety in the selection process failed to uncover the extent of the friendship. This is an indication that the Board was not diligent in its duty to counterbalance the Superintendent in the selection process, rendering the selection process flawed. Superintendent Petrovich hindered the Board in the performance of its selection duties and exercised undue influence over it by refusing to provide it with the interviewee matrix when requested by a Board member. Grievant proved the selection process was arbitrary and capricious.

Lastly, Grievant argues that the selection process was flawed due to favoritism motivated by a close friendship between the successful applicant and Superintendent Petrovich. For the purposes of the grievance, "[f]avoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). In the case of *Frymier v. Higher Educ. Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007), the West Virginia Supreme Court of Appeals wrote:

While our case law is replete with examples of discrimination cases, the issue of favoritism is not well distinguished. The analysis for the two types of cases has been commingled in many circumstances. Thus, we find it appropriate to look to the analysis available in discrimination cases for the guidance on the favoritism issue that is now before us. *Id.* 655 S.E.2d 52 at 59. Accordingly, in order to establish a 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'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007);  
*Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In the current matter, Grievant and Ms. Parsons applied for Director of Personnel and met the qualifications for the position. Thus, they were similarly situated. The difference in treatment occurred when Superintendent Petrovich nominated Ms. Parsons instead of Grievant due to a close friendship with Ms. Parsons. This friendship provided Superintendent Petrovich a reason to trust Ms. Parsons and to include “trust” as a factor under the subjective category of “other measures.” The difference in treatment was not related to the actual job responsibilities and was not agreed to in writing.

It is telling that Ms. Parsons did not surpass Grievant on most of the more objective selection criteria, just on subjective criteria that Superintendent Petrovich chose to include under “other measures or indicators.” This category lent itself to the inclusion of any additional criteria chosen by Superintendent Petrovich and could be made up of ambiguous and subjective measures such as “trustworthiness,” “being a team player,” “working well with others,” and “following law and policy.” Superintendent Petrovich subjectively determined that Ms. Parsons’ interview showcased these traits and that she was therefore the best candidate. Yet, Superintendent Petrovich could give no examples of how Ms. Parsons was more trustworthy than Grievant, leading to the obvious conclusion that she found Ms. Parsons more trustworthy before the interviews took place due to their close friendship. Grievant proved that it is more likely than not that Ms. Parsons was given favorable treatment for reasons unrelated to the job responsibilities of

the position at issue. Grievant proved by a preponderance of the evidence that she was subjected to favoritism as defined by W. Va. Code § 6C-2-2(h).

This raises the question of an appropriate remedy. Grievant did not prove she was the most qualified candidate. It is the prerogative of the Board, not the undersigned, to assign weight. The non-selected interviewees were not ranked, and no matrix or interview scores were assigned to any candidate. Thus, the relief of instatement into the posted position is inappropriate due to the lack of evidence regarding weight for each selection factor. "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)." *Forsythe v. Dep't of Admin/Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009).

Accordingly, the grievance is GRANTED in part and DENIED in part.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

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



2. “County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are 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. “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).

5. Grievant established that the flaws in selection process were so significant that the outcome might reasonably have been different.

6. Grievant proved by a preponderance of the evidence that the selection process was unreasonably tainted by arbitrary and capricious actions.

7. West Virginia Code § 18A-2-1 requires that the employment of professional personnel shall be made by the board only upon nomination and recommendation of the Superintendent.

8. "In considering the filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an applicant's qualifications ... ." W. VA. CODE § 18A-4-7a(c).

9. "This [Code] language effectively divides the power to hire equally between the superintendent and the county board. No person may be appointed to a professional position until both have exercised their authority under the statute." *Rakes v. Raleigh County Bd. of Educ.*, Docket No. 93-41-448 (Mar. 17, 1994).

10. The Superintendent usurped the Board's authority by determining the weight for each selection factor.

11. 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 2S.E.2d 52 (2007); *See Bd. of Educ. V. White*, 216 West Virginia 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

12. Grievant proved by a preponderance of the evidence that favoritism contributed to the selection of Ms. Parsons.

13. "Where the selection process is proven to be arbitrary and capricious, but the Grievant failed to prove that he should have been selected for the position, the position should be reposted and a new selection process undertaken. *Neely v. Dep't of Transp./Div. of Highways*, Docket No. 2008-0632-DOT (Apr. 23, 2009)." *Forsythe v. Dep't of Admin/Div. of Personnel*, Docket No. 2009-0144-DOA (May 20, 2009).

14. Grievant failed to prove by a preponderance of the evidence that she was the most qualified applicant for the position of Director of Personnel.

Accordingly, this grievance is GRANTED in part and DENIED in part. Respondent is ORDERED to repost the position of Director of Personnel within thirty (30) days of the receipt of this Decision and select the most qualified applicant for the position, pursuant applicable criteria.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

Date: March 4, 2022

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Joshua S. Fraenkel  
Administrative Law Judge