AMY BARBER BASLER, .

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Grievant, .

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v. . Docket No. 93-40-215

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PUTNAM COUNTY BOARD OF EDUCATION, .

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Employer. .

D E C I S I O N

Amy Barber Basler (See footnote 1) (hereinafter Grievant) filed this complaint against the Putnam County Board of Education (hereinafter Board) at level one of the Grievance Procedure for education employees, W.Va. Code §18-29-1 et seq., on October 30, 1992, alleging as follows:

> Violation of W.Va. Code §18A-4-7a. (See footnote 2) Grievantbelieves that the selection process used for the 1/2 day Kindergarten job at Poca Elementary which was filed October 12, 1992 was unproper [sic], and that Grievant should have been awarded position.

The complaint was denied on November 16, 1992, and an appeal to level two was submitted December 12, 1992, which was again denied by decision dated May 25, 1993. An appeal to level four was perfected on June 14, 1993, followed by a hearing which was held on December 13, 1993. The case became mature for decision after the submission of briefs which were received on or before January 11, 1993.

After Grievant testified at the level two hearing, the attorney for the Board made a motion to dismiss the grievance on the basis that no evidence had been presented to indicate that the hiring process had been flawed. It was argued that the grievance was only filed to address the selection

process and not to compare the qualifications of the candidates. After this motion was made, Grievant's representative had Robert Hull, the Board's Director of Early Childhood Education, testify as to various aspects of the selection and interviewing process. After Mr. Hull testified, the Board's counsel renewed his motion to dismiss. The level twodecision summarized the facts presented in the case and made the following three findings:

. . .

> 7. There was no testimony offered that the selection process used in the filling of the one-half day position at Poca Elementary was improper or flawed in any degree whatsoever. The issue did not come as a surprise to the Grievant as the Administration made motions several times on this exact point.
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> 8. There was likewise no testimony offered which indicated that Amy Barber Basler was, in any way, more qualified for the one-half day position at Poca Elementary other than the conclusory statement offered by Ms. Basler that she believed that she was more qualified than Connie Graves. It should be noted that implicit in this offer of proof is the averments of the selection process being a proper and unflawed procedure. The gist of Ms. Basler's testimony does not contest the selection process itself but rather by implication asserts that the improper calculations were made using the standards set forth in the selection process. There, of course, was no testimony offered to show that there was an improper calculation in accordance with the professional selection criteria process.
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> 9. There was no testimony or evidence presented that would indicate that there was a violation of WV Code 18A-4-7a in any respect.

. . .

As a result of this analysis, the level two grievance evaluator granted the Board's motion to dismiss.

At level four, counsel for the Board argued that because his motion to dismiss was granted at level two there could be no new evidence taken to support Grievant's claim. It was argued that the only appeal available to Grievant was an appeal of the motion to dismiss and not an appeal on the merits of the case. Grievant disagreed with the Board's assertions both factually and legally.

W.Va. Code §18-29-4(b) states, in pertinent part,

> Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six [§18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision shall affirm, modify or reverse the decision appealed from. (Emphasis added).

Further, Code §18-29-4(c) states "Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four." In this case, Grievant has simply appealed to level four from a level two decision affirming the level one decision to deny the grievance. Nothing within Code §18-29-4(b) or (c) can be interpreted to limit a grievant's right to appeal an adverse grievance decision absent a finding that such appeal was not timely. Further, Code §18-29-6 also states that "the hearing examiner [administrative law judge at level four] shall conduct hearings in an impartial manner and ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved . . ."

Grievant presented evidence at the level two hearing and it was determined that that evidence was insufficient to support a violation of Code §18A-4-7a. This decision was a decision on the merits. Upon a review of the record developed at that hearing, there can be no denying that the testimonial evidence was sparse; however, any failure on behalf of Grievant to establish evidence tosupport her claim can only be viewed as a failure to meet her burden of proof at that point. If a grievant does not clearly set forth the legal argument upon which the case is based, he/she may fail in meeting this burden of persuasion. In civil suits in West Virginia, the concept of notice pleading is followed. This concept allows a complaint to withstand a motion to dismiss if the complaint informs the party of the nature of the claim being asserted. This standard would have to be applied, if not more liberally, at administrative levels throughout the grievance process. In the instant case, assertions that the hiring process was flawed and that the proper applicant was not chosen must be viewed as meeting any pleading requirements. After the testimony was presented at level two, any decision based upon a review of that evidence would necessarily be a decision on the merits which is appealable under the grievance procedure. Once appealed, the parties have another opportunity to prove their claims and defenses pursuant to Code §18-29-6.

The motion made by the Board's counsel at level two is akin to a Motion for a Directed Verdict under Rule 50 of the West Virginia Rules of Civil Procedure. There are various factors which courts

consider concerning the sufficiency of the evidence presented before granting such a motion. However, the grievance procedure is an administrative procedure and the Rules of Civil Procedure do not apply. Moreover, the same evidentiary standards governing motions under the RCP cannot be strictly applied to grievances contested at levels one through three of the grievance procedure because thereis no requirement that an attorney be present, either to represent the parties or to rule on the merits of the claims. It would be contrary to the intent of the grievance procedure to so limit the presentation of claims at the various procedural levels when a number of grievants are not represented by attorneys, and also, when the grievance evaluators themselves would not be familiar with numerous and overwhelming legal standards involved in deciding judicial cases.

It is true that the grievance procedure was meant to be a "simple, expeditious and fair process for resolving problems at the lowest possible administrative level . . ." Code §18-29-1. However, nothing within Code §18-29-1 et seq. can be interpreted to stand for the proposition that level four of the grievance procedure is to be utilized simply as an appellate body to review decisions on motions made at the lower levels under standards which would have to be consistent with those used in civil suits governed by the RCP. There are no established standards for level four administrative law judges to apply in reviewing lower level decisions because the Legislature did not adopt any such standards.

In conclusion, the Grievance Board was established to act independently in deciding cases upon their merits appealed from the lower levels and no deference is given to the decisions at level two or three. (See footnote 3) There is no statutory authority to support theconclusion that this case may not be adjudicated on its merits at level four based upon the findings and conclusions made at level two. Thereupon, The following findings of fact are deduced from the record developed at levels two and four.

Findings of Fact

1. At the time of the hiring decision, Grievant was employed as a substitute teacher.
2. The Board posted a position vacancy for a half-day regular kindergarten teacher on August 25, 1992.
3. Grievant applied for this position but was not the successful applicant.
4. Prior to the posting of this position, the Board had adopted a numerical rating system to be

applied to the seven hiring criteria established in W.Va. Code §18A-4-7a. The system consisted of a 0 to 50 point scale for each of the seven specified qualifications with the scores assessed in multiples of 5. Within this rating system, the "other measures or indicators" criteria was scored based upon the candidates' performance during an interview. The final score derived from this mathematical system was used as the basis for the hiring decision.

5. Each of the candidates was asked to complete a questionnaire describing their respective qualifications. Theinformation on these surveys was used as a basis for the scores assigned to the hiring criteria.

6. The interviews were conducted by Mr. Beaver, Principal at Poca Elementary, and Diana Sova, Faculty Senate representative. Each candidate was asked a series of eight questions and their answers were scored by each interviewer on the scale of 0 to 5. The score attributed to the factor "other measures or indicators" was the sum of the two scores from the interviewers.

7. The following scores were given to the successful applicant and Grievant as a result of the evaluation process:

		Graves	Grievant
1.	Certification	50	50
2.	Experience	1	0
3.	Degree level	25	30
4.	Academic achievement	40	40
5.	Training	50	50
6.	Evaluations	50	50
7.	Other (interview)	70.5 (44)	62.5 (39)
	Totals	286.5 (260)	282.5 (259)

The numbers in the parentheses represent the scores assigned to each applicant converted to a 0 to 50 point scale; i.e., 70.5 is 88% of 80 and 44 is 88% of 50.

8. Grievant has a Bachelor's Degree in Education with a specialization in Early Childhood Development and a Master's Degree in Early Childhood Development. She is certified by the State Board of Education to teach multi-subjects, Kindergarten through 8, and Early Childhood Pre-kindergarten to Kindergarten. All of Grievant's paid teaching experience, which amounts to 189 days,

has been as a substitute.

9. The successful applicant has a Bachelor's Degree plus fifteen additional hours of study beyond that degree.

10. The Board was concerned with finding applicants for the position who had experience with the concepts of Whole Language and Writing to Read as those concepts are applied to the teaching of kindergarten students. The successful applicant was awarded a higher score by the interviewers because she had received training in these concepts as a result of having taught as a substitute in first grade for the biggest part of one school year. Grievant had not received any formal training in either of the previously mentioned concepts; therefore, she received a lower score corresponding to the two questions asked of her during the interview concerning these two subjects.

11. The successful applicant received a score of 1 in the area of "experience" because she had substituted as a first grade teacher for more than 133 days in a school year. (See footnote 4) Grievant received a score of 0 because she had not taught more than 133 days during a single school year.

12. No regularly employed teachers applied for the position in question.

13. Although the Board was not required to do so, it attempted to develop and implement a mathematical system which would give equal weight to each of the seven factors.

14. Grievant had never received an official employee performance evaluation during her tenure as a substitute.

15. Both Grievant and the successful applicant were awarded a score of 40 in the area of "academic achievement" because their undergraduate degree grade point averages fell between 3.5 and 3.9. There was no consideration of the degree area given.

16. The successful applicant and Grievant were both given a score of 50 under the category of "training" based upon the information from the questionnaires.

Discussion

In essence, Grievant contends that the selection process was flawed because the Board misapplied and misinterpreted Code §18A-4-7a, in its attempt to judge and score the qualifications of the candidates in relation to the established seven criteria. She maintains that if a proper review of her credentials had been performed, she would have been determined to be the most qualified applicant. In particular, Grievant maintains that the Board erred in evaluating the applicants in the

areas of "experience," "relevant specialized training," and during the interview. The Board contends that the Grievant has not established any facts to indicate that the selection process was flawed or that she was more qualified for the position than the successful applicant.

County boards of education have substantial discretion in matters relating to the hiring of school personnel and they must exercise that discretion only within the best interests of the schools and in a manner which is neither arbitrary nor capricious. See, Hyre v. Upshur County. Bd. of Educ., 412 S.E.2d 265 (W.Va. 1991). With regard to the hiring of professional personnel, boards of education must exercise their discretionary authority by considering the "qualifying factors" contained in W.Va. Code §18A-4-7a (1992). It is recognized that the various county boards of education throughout the state have the expertise to interpret the provisions of Code §18A-4-7a, and the evidence supporting their interpretations should normally be given much weight. See generally, Princeton Community Hospital v. State Health Planning, 328 S.E.2d 164 (W.Va. 1985). An individual's mere disagreement with that interpretation is not sufficient to show an abuse of discretion. Finally, boards of education are free to determine the weight which is to be applied to each of the first set of factors listed in section 7a in assessing candidates' qualifications. See, Blair v. Lincoln Co. Bd. of Educ., Docket No. 92-22-009 (July 31, 1991).

Although the arbitrary and capricious standard of review of county boards of education decisions requires a searching and careful inquiry into the facts, the ultimate scope of review is narrow, and the undersigned may not substitute his judgment for that of the Board. See generally, Harrison v. Ginsberg, __ W.Va. __, 286 S.E.2d 276. The Grievance Board cannot perform the role ofa "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha Co. Bd. of Educ., Docket No. 89-20-75 (Jun. 26, 1989); Harper v. Mingo Co. Bd. of Educ., Docket No. 93-29-064 (Sep. 27, 1993). Generally, a [board's] action can be determined to be arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

In the instant case, the Board recognized that it was free to assign whatever weight it deemed appropriate to their assessment of the seven factors listed in the first portion of Code §18A-4-7a. (See footnote 5) In making such a determination, it decided that all of the seven factors should be

considered equally, thereafter, a mathematical system was developed toward that end. Because the Board decided to take this approach, even though it was not initially required to do so, it then became bound to follow its stated objective and to establish a procedure which would ensure that its goal would be accomplished. Although the Board strongly argued that Grievant had not presented enough facts to support any of her claims, a cursory review of the chart which contains the respective scores of thecandidates (Joint Exhibit 3), on its face, establishes a flaw in the Board's assessment of the two candidates' qualifications.

It is recognized that the process by which a professional is hired necessarily involves a subjective evaluation of the applicants' credentials. However, what the Board has attempted to do in this case (and probably other instances) is to come up with a mathematical formula to compare qualifications, thus allowing the hiring decision to be made as the result of an objective analysis. This approach is not inherently inconsistent with the duty imposed upon the Board by Code §18A-4-7a, although it is challenging to create such a system which weighs all seven of the factors evenly. (See footnote 6) The system at issue is based upon a 350-point scale which is divided into seven areas. In order for each of the factors to be assigned equal weight, each factor must account for 1/7th or 14.29% of the total score. A candidate must also be able to receive a score of 50 in each category of consideration in order for all factors to be weighted equally. If he/she does not receive 50 points, then his/her percentage of total points awarded for thatfactor would be (X . 350) x 100; X being the number of points actually awarded. Based upon the simple fact that it would be virtually impossible to receive a score of 50 in the category of "experience" according to the Board's method of calculating the score for this factor, it is impossible under the Board's system for all factors to be weighed equally. The Board's system greatly undervalues the experience factor, and therefore, is flawed.

In practical terms, the Board has chosen to give little if any importance to the fact that the successful applicant worked a total of 292 schools days in a period of three years. Grievant received absolutely no credit for having worked 189 days in any of the factors judged. The undersigned is familiar with the statutory provision awarding substitute teachers credit toward employment based upon their days worked; however, it is doubtful that the Legislature intended this provision to be interpreted so as to devalue substitute teachers' "experience" in this context. On Joint Exhibit 3, the Board concluded that the successful applicant had the "top score plus most seniority." Therefore, it can be assumed that the Board attempted to equate the "experience" factor with the knowledge and

skills acquired during the time taught and not to a quantitative factor such as seniority. Related thereto, if "experience" was sought to be rewarded, then Grievant's score of 0 is completely unfounded. Obviously Grievant has learned something as a result of substitute teaching for 189 days.

There are some additional points which need to be made concerning the rating of the applicants by the Board. Notice istaken that most boards of education look at the "certification" qualification as a minimum requirement; either candidates are fully certified to teach in the field of the vacant position or they are not. (See footnote 7) In most instances, the candidates are judged to be equal in this category. The same is often true concerning evaluations as candidates who have received evaluations in the "meets standards" range or better usually are considered to be tied in that factor. These two factors are typically viewed as quantitative rather than qualitative; in other words, no significance is read into the applicant's particular certifications or specific evaluation scores. Here, both applicants received the highest score of fifty in these two categories because it was determined that both met the minimum qualifications

However, the factors of "training" and "academic achievement" are usually not judged to be "minimum qualifications." The Legislature in passing Code §18A-4-7a, really did nothing more than require county boards of education to hire professional employees by considering the same factors that any typical administrator would review: education, experience and prior performance evaluations. In this case, the Board did not have any candidates who had been full-time, regular teachers; therefore, the experience of the candidates was severely limited. Also, the Board appeared to give no weight to the subject area supporting the candidates' educational degree. As Grievant correctly points out, according tothe mathematical matrix, only her grade point average and degree level was considered important by the Board. No consideration was given to the substance or type of classes either applicant had taken. This is surprising given that there apparently were no candidates who had any meaningful experience teaching kindergarten. The undersigned finds it difficult to comprehend how such an important aspect of the candidates' qualifications was overlooked under the circumstances.

Further, no explanation of the score for the "training" factor was given. On its face, it seems improbable that the two applicants who were relatively new to the school system could be judged equal in terms of training when that factor was not defined to include any educational achievements. In addition, the Board could not have considered the training relating to the "writing to read" or "whole

language" concepts within this factor or the successful applicant would have been scored higher than Grievant because of the emphasis placed on knowledge of these concepts at the interview. The undersigned suspects that there really was no scale upon which the candidates' credentials were based with respect to this factor but that the score was derived arbitrarily. The Board must have had some rational basis for each score given in the matrix. This rational basis would necessarily include a standard for both low and high scores to have been awarded within the complete 0 to 50 point range for all factors, any other method would be arbitrary.

On Grievant's questionnaire, she listed that she had attended three workshops during the 1990-1991 school year. Two of these workshops directly related to the teaching of kindergarten students. The record is devoid of any evidence of the successful applicant's relevant specialized training. Unless the successful applicant had attended the same training workshops as Grievant, it is difficult to imagine how they both could have been given the same score for this factor. Further, it is hardly likely that an employee's attendance at three workshops would entitle them to the maximum score on a scale of 0 to 50 in the area of training. A meaningful evaluation of the candidates' credentials in this factor must have been made based upon the fact that neither of the two had any experience teaching kindergarten other than as substitutes.

The foregoing discussion of the facts of the case and of the law applicable to those facts is hereby supplemented by the following appropriate conclusion of law.

Conclusion of Law

Grievant has demonstrated by a preponderance of the evidence that the Board misapplied Code §18A-4-7a in regard to the hiring decision at issue in this case. The Board's attempt to use a mathematical scale to judge the qualifications of the candidates, while not inherently an arbitrary act, was so flawed and inconsistent that it resulted in an arbitrary and capricious decision based upon the scores assigned to the seven areas of credentials evaluated.

Therefore, this grievance is hereby **GRANTED IN PART**. The Board of Education is **ORDERED** to perform a reevaluation of the two candidates' credentials which were at issue in this case pursuant to the discussion heretofore. The Board must develop and implement a system under which it is demonstrated that a meaningful review of the candidates' qualifications can be fairly judged. Further, each of the seven "factors" contained in W.Va. Code §18A-4-7a is to be given equal weight in

influencing the final decision.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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ALBERT C. DUNN, JR.

Administrative Law Judge

April 27, 1994

Footnote: 1*Grievant filed this complaint with her supervisor under her maiden name of Barber.*

Footnote: 2*Code §18A-4-7a, states, in pertinent part,*

> *[t]he county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications. In judging qualifications, consideration shall be given to each of the following: Appropriate certification and/orlicensure; . . . the amount of teaching experience in the subject area; the amount of course work and/or degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.*

Footnote: 3*This is not to say that a party may not choose to rely upon the evidence presented at a lower level in support of their claim or that an administrative law judge may not, after an independent review of the record, adopt findings made at a lower level as theproper findings or conclusions at level four. In any event, a grievant cannot be limited at level four to the evidence he/she had presented at levels two or three.*

Footnote: 4*Code §18A-4-7a, reads, in pertinent part,*

> *Upon completion of one hundred thirty-three days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee.*

Footnote: 5*When county boards of education are bound to hire teachers under the "second set" of factors contained in 7a, it must give each factor the same weight of consideration.*

Footnote: 6*Mathematically speaking, it is improbable any expert in the field of statistics would consider the Board's rating system even close to ideal for making meaningful comparisons of job applicant's qualifications. Out of fourteen applicants, the top four were only separated by 5 points on a 350-point scale. This means statistically, that the successful applicant's credentials were determined to be only 1.43% better than anyone within the top 28.58% of the applicants. Given this analysis, it is difficult to support a conclusion that she was the "most qualified" applicant. This analysis is also based upon the total score before the interview score was changed to correlate to a 50 point scale. It is very likely that all of the applicants' final scores were even closer given the corrected score. Tellingly, Grievant only lost in the comparison by 1/350th of a percent.*

Footnote: 7It is also recognized that one may teach as a result of obtaining a permit.