KATHLEEN BARRETT,

Grievant,

v. **DOCKET NO. 96-15-512**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Kathleen Barrett, initiated this proceeding pursuant to the provisions of W. Va. Code §§18-29-1, et seq., challenging her non-selection for a classroom teaching position by the Hancock County Board of Education ("Board"). She seeks instatement to the position, effective October 16, 1996, with back pay. The grievance was denied at level one by Grievant's immediate supervisor on November 6, 1996. A level two hearing was conducted on November 20, 1996, followed by a written decision denying the grievance dated November 26, 1996. Consideration at level three was waived, and the matter was appealed to level four on December 3, 1996. A level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on May 15, 1997. Proposed findings of fact and conclusions of law were submitted by June 17, 1997. This matter was reassigned for administrative reasons to the undersigned administrative law judge on December 9, 1997.

The following findings of fact are made from a preponderance of the credible evidence submitted at the level two and level four hearings.

Findings of Fact

1. On September 10, 1996, the Board posted a vacancy notice for various teaching positions, including a third grade teacher at Allison Elementary School. 2. At the time of the posting, Grievant had been employed as a substitute teacher by the Board for three years, with certification in K-8, multisubjects. She had never previously been employed as a regular classroom teacher.

3. Thirteen candidates, including Grievant, were deemed to be eligible for the position. None of

the applicants were regularly employed classroom teachers.

4. Interviews were conducted by Linda Robinson, principal of Allison Elementary. She recommended to the superintendent that Grievant be placed in the third grade teaching position.

5. After the initial interviews, Ms. Robinson considered Grievant and one other applicant, Debra Myers, to be “equal” in all criteria. She, therefore, recommended Grievant based upon her personal observations of Grievant while she substituted at Allison Elementary, and her corresponding belief that Grievant would have the best interaction with the staff and students in the school.

6. When she recommended Grievant, Ms. Robinson was unaware that Debra Myers had five years of full-time teaching experience with the Board, had taught third grade, and had attended more seminars pertinent to the position than Grievant had.

7. Grievant was informed by the superintendent that she would be recommended for the Allison Elementary position at the Board's meeting on September 30, 1996. However, the superintendent withdrew all personnel recommendations prior to Board vote at that meeting.

8. Grievant was again recommended for placement in the position by the superintendent at the Board's October 14, 1996, meeting. A majority of the Board voted not to accept the superintendent's recommendation. In an executive session, the Board directed the superintendent to reassess the candidates, but gave no reason for their rejection of Grievant. 9. Pursuant to the Board's directive, the superintendent, assistant superintendent, and Ms. Robinson again interviewed the top two candidates, Grievant and Ms. Myers. They then agreed that Ms. Myers was the superior candidate, due to her full-time teaching experience, experience teaching third grade, superior certification, academic achievement, and superior seminars within the appropriate field. Ms. Robinson admitted that she did not consider these factors when she conducted the initial interviews.

10. On October 28, 1996, the Board voted to place Ms. Myers into the third grade teaching position at Allison Elementary.

11. When questioned by Grievant after she was rejected for the position, two Board members expressed concern that the principal alone had interviewed the candidates, and another Board member stated that she believed Grievant was not the most qualified candidate.

12. Grievant did not challenge Ms. Myers' qualifications, nor did she compare her qualifications to those of Ms. Myers.

Discussion

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. State ex rel. Melchiori v. Board of Educ., 425 S.E.2d 251 (W.Va. 1992); See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W.Va. 1991). The hiring of professional personnel and new classroom teachers is governed by the "first set of factors" set forth in W. Va. Code §18A- 4-7a, which provides:

> Further, the county board shall make decisions affecting the hiring of new classroomteachers 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/or licensure; amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations conducted pursuant to section twelve, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

Unlike the portions of the statute governing the selection of applicants when regularly employed personnel apply, (See footnote 1) these provisions afford county boards of education considerable latitude in determining the weight to be given to each of the criteria in assessing candidates' qualifications. Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1991). Although the "arbitrary and capricious" standard requires a searching and careful inquiry into the facts, the undersigned may not substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W.Va. 1982). Moreover, the Grievance Board cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Hopkins v. Fayette County Bd. of Educ., Docket No. 95-10-486 (March 15, 1996); 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). In cases similar to the instant one, it has been determined that a board of education's action was arbitrary and capricious when the grievant proved that no meaningful review of all of the candidates and their qualifications for the position was performed pursuant to W. Va. Code §18A-4-7a. Baird/Hawley v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996); Goodwin v. Kanawha County Bd. of Educ., Docket No. 93-

20-260 (March 14, 1994).

As stated above, Grievant has not compared her own qualifications to those of Ms. Myers, nor has she challenged the determination that Ms. Myers was the most qualified applicant. Rather, Grievant's focus is on the Board's rejection of her at its October 14 meeting and the directive that the candidates be reassessed. In that regard, Grievant argues that she has been subject to discrimination and/or favoritism, because hers was the only personnel recommendation that was rejected by the Board at that particular meeting. Accordingly, she believes that she was “singled out” by the Board, which seemingly accepted the superintendent's other recommendations without question.

W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” Similarly, “favoritism” is defined in Code § 18-29-2(o) and refers to “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§18-29-2(m) and (o), a grievant must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
>
> (c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/311 (Jan. 28, 1991); Steele v. WayneCounty Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Applying this standard to the instant situation results in the conclusion that Grievant has not established a prima facie case of discriminatory or favorable treatment. Although it may be true that other employees, including teachers, were recommended and approved for hiring at the October 14 meeting, there is absolutely no information of record concerning those other employees. It is

unknown what process led to their recommendations, what their relative qualifications were as compared to other applicants, or whether there was any reason whatsoever for the Board to question their qualifications. Therefore, it is impossible for Grievant to compare herself with those individuals in order to establish disparate treatment.

There is no law, policy or regulation which mandates that a board of education must accept a superintendent's, or principal's, recommendation in personnel matters. Grievant has cited past Grievance Board decisions in support of the proposition that, when candidate selection is delegated by a board to its superintendent, it is required to accept such recommendation or conduct its own independent evaluation of all the applicants for the position. See Milam v. Kanawha County Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988); Deadrick v. Marion County Bd. of Educ., Docket No. 90-24-071 (Jan. 30, 1991). However, both Milam and Deadrick involved situations where there was no evidence of an appropriate evaluation of the candidates' credentials, either by the board or the superintendent. Such is not the case here. There is no evidence that any inappropriate factors came into consideration when Grievant was evaluated, such as personal bias or past behavior, as was found in Deadrick. Similarly, there is no indication here that the Board rejected Grievant in lieu of its own favored candidate, and, in fact, it ordered that the candidates be reassessed. There was nothing improper in the Board's actions. Moreover, as Grievant has tacitly admitted, the second evaluation, which was conducted properly under the statutory requirements, revealed that Ms. Myers' qualifications were, in fact, superior. The assistant superintendent testified that, when Ms. Robinson conducted the initial interviews, she failed to consider Ms. Myers' prior teaching experience, which is required to be considered by statute. A board of education should certainly not be discouraged from rectifying an improper evaluation prior to the time a hiring decision is made. This is undoubtedly preferable to having a board approve an improperly evaluated candidate for employment, and then having to rectify the situation after a grievance has been filed, processed and decided.

In addition to the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, the grievant has the burden of proving each element of her

claim by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-164 (Apr. 30, 1997).

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. State ex rel. Melchiori v. Board of Educ., 425 S.E.2d 251 (W.Va. 1992); See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W.Va. 1991).

3. The hiring of new classroom teachers is governed by the "first set of factors" contained in W. Va. Code §18A-4-7a, and boards of education have considerable latitude indetermining the weight to be given to each of the criteria in assessing candidates' qualifications. Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1991). 4. In order to establish a prima facie case of discrimination or favoritism under W. Va. Code §§18-29-2(m) and (o), a grievant must demonstrate the following:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded her; and,
>
> (c) that the difference in treatment has caused a substantial inequity to her, and that there is no known or apparent justification for this difference.

McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). See Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/296/311 (Jan. 28, 1991); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant failed to prove a prima facie case of favoritism or discrimination.

6. The Board's decision not to place Grievant in the classroom teaching position at Allison Elementary was not arbitrary and capricious or improper in any respect.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hancock 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.

DATE: December 31, 1997 _____ **V. DENISE MANNING**

Administrative Law Judge

Footnote: 1

The statute provides that, when one or more regularly employed personnel applies for a classroom teaching position, a different set of criteria is used, and each criterion must be given equal weight (emphasis added).