LARRY STINN,

Grievant,

v. **Docket No. 98-07-085**

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent.

and

JANE LYNCH,

Intervenor.

D E C I S I O N

Grievant, Larry Stinn, grieves his non-selection for the position of principal at the Calhoun County Middle School ("CCMS") and states:

> It seems that on the basis of the criteria in 18A-4-7a I had the highest qualifications for the position of Calhoun County Middle School principal. I request that I be given the reasons why I was not the most qualified, or if I did have the highest qualifications, placed in that position. (See footnote 1)

Levels I and II were waived by the parties, and a Level III hearing was held on March 11, 1998, before the Calhoun County Board of Education ("CCBOE" or "Board"). A decision denying the grievance was issued on March 16, 1998, and Grievant appealed to Level IV on March 23, 1998. A Level IV hearing was held on July 7, 1998, and this case became mature for decision on July 21, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. In December 1997, CCBOE posted a notice of vacancy for a principal at the new CCMS. CCMS was the result of the consolidation of multiple schools in the county. Other administrative positions were posted at the same time, as there would be a need for a principal at the new high school as well as a facilities director for the complex.

2. There were multiple applicants for these positions. After an initial review of the candidates, Superintendent Ron Blankenship found twelve applicants were well qualified, and basically equal, under the first six factors listed in W. Va. Code § 18A-4-7a, and recommended that these twelve be interviewed for the three available positions.

3. Superintendent Blankenship formed an Interview Committee and directed the members to compile a list of questions and to interview all twelve candidates for the positions. (See footnote 3)

4. The Interview Committee consisted of four central office administrators and two high school teachers. One of the members of the Interview Committee was listed as a reference for Grievant on his application. (See footnote 4) These educators formulated a list of 22 questions relating to facilities, federal programs, curriculum and instruction, and finance. 5. Superintendent Blankenship decided the interview would represent the seventh factor listed in W. Va. Code § 18A-4-7a, "other measures and indicators upon which the relative qualifications of the applicant may fairly be judged." (See footnote 5) He also determined that the interview would represent approximately 85 percent, or conclusive weight, in the selection process. Superintendent Blankenship did not discuss this decision with CCBOE.

6. The Interview Committee interviewed the candidates over a two day period in December 1997. All candidates were asked the 22 questions. Some candidates were asked additional questions if the Interview Committee did not possess much knowledge about their professional background and history. These questions did not relate, in any way, to the first six factors identified in W. Va. Code § 18A-4-7a, as the purpose of the Interview Committee was to determine who performed the best in the interview situation.

7. The Interview Committee recommended Grievant as the candidate for the CCMS position. They did not identify a second choice for either this position or the other two position for which they were interviewing.

8. During the executive session of the December 15, 1997 CCBOE meeting, Superintendent Blankenship told the Board who he was planning to recommend for each of the three positions. He

informed the Board that he would recommend Grievant for the CCMS position.

9. CCBOE accepted the other two recommendations, but told Superintendent Blankenship the Board was not in favor of Grievant for the CCMS position. 10. The Board explained that Grievant's past failure to follow Board policy caused them to question his selection for the CCMS position.

11. One prior problem, which resulted in an unsatisfactory performance evaluation, was Grievant's chronic failure to complete teacher evaluations in a timely manner. This failure was tied to Job Responsibility Area 17.4, "Enhance quality of the total school organization," and finally resulted in Grievant being placed on an Improvement Plan for the 1993-1994 school year. This Improvement Plan was initiated after the then Superintendent, John Hager, had verbally warned Grievant in 1991 and 1992 about his failure to complete evaluations in a timely manner.

12. Grievant successfully completed this Improvement Plan and received a satisfactory evaluation on September 29, 1994. However, on July 15, 1996, Grievant received a letter from then Superintendent Skip Hackworth, noting that Grievant's 1995- 1996 personnel evaluations had not been received. Pursuant to CCBOE policy, these evaluations are due in the Board office no later than June 1. Superintendent Hackworth noted Grievant had not complied with CCBOE policy, and that this was "not a new problem." Grievant was directed to identify this problem area as one of his own evaluation goals for the 1996-1997 school year. Resp. Ex. 7.

13. Grievant also failed to follow CCBOE policy as it relates to school visitors, especially parents. During the 1996-1997 school year, a controversy arose between Grievant and parents at his school, Pleasant Hill Elementary School ("PHES"). Parents wished to accompany their young children to the classroom and stay for a while until the school day began. Grievant felt this action was not appropriate and did not want the parents in the building during the school day. The parents and Grievant went to the schoolBoard, and Grievant encouraged CCBOE to draft a policy to resolve the problem. On March 6, 1997, CCBOE enacted a policy which directed visitors to report to the office on entering the building and to make prior arrangement with the principal when visiting the school during instructional time. Visitation during non-instructional time was allowed, as CCBOE wanted to encourage parental involvement. Thus, parents could accompany their children to class before 8: 20 a.m., the beginning of the instructional day at PHES. After CCBOE's enactment of this policy, Grievant informed parents at PHES that the beginning of the instructional day was now 8:00 a.m.

The beginning of the instructional day had not been changed. Angry parents returned to CCBOE to complain about Grievant's action.

14. CCBOE was upset by what they viewed as a clear failure to follow Board Policy and directed Superintendent Blankenship to inform Grievant of their displeasure.
The Board especially did not appreciate these actions as Grievant had requested CCBOE to act to resolve the problem at his school. Grievant knew his actions were in violation of the Board's policy and were taken to circumvent the policy.

15. Superintendent Blankenship believes that all of Grievant's evaluations have been satisfactory even though he was placed on an Improvement Plan. This assessment is incorrect as Grievant received an unsatisfactory evaluation for the 1992-1993 school year and was subsequently placed on an Improvement Plan. An employee cannot be placed on an Improvement Plan unless his performance is unsatisfactory. See W. Va. Code § 18A-2-12. (See footnote 6)

16. Superintendent Blankenship did not nominate Grievant for the position at CCMS on December 15, 1997.

17. During executive session at the January 12, 1998 Board meeting, the Board and Superintendent Blankenship again discussed the placement for CCMS. The Board accepted Superintendent Blankenship's statement that the applicants were equally qualified on the first six factors, but the Board members were concerned that so much emphasis had been placed on the interview. The Board again indicated the recommendation of Grievant was unacceptable and why. The Board requested Superintendent Blankenship make another recommendation. Superintendent Blankenship then informed the Board he would recommend Intervenor Jane Lynch as his second choice. The Board indicated this choice was acceptable.

18. Upon return from executive session, Superintendent Blankenship nominated Ms. Lynch, and the Board unanimously approved this selection.

19. The Board did not involve itself in the evaluation of the candidates, but only responded to the recommendations of Superintendent Blankenship.

20. The Board had not had any difficulties with Intervenor, during her tenure with the Calhoun School System. (See footnote 7)

Issues

Grievant agrees that school boards have broad discretion in the selection of administrative

personnel, but argues, that in this incidence, CCBOE has exceeded its discretion. (See footnote 8) Grievant also maintains CCBOE was required to conduct its own independent evaluation after it rejected his potential nomination, before it approved another candidate. (See footnote 9) Respondent avers the Board's decision was proper, in the best interest of the school system, and not arbitrary and capricious. Respondent also argues Grievant's prior failures to follow Board policies was an appropriate factor to consider in deciding to reject Superintendent Blankenship's potential nomination of Grievant. Additionally, Respondent notes Grievant was never nominated for the position, it was within the Board's discretion to request Superintendent Blankenship to nominate another qualified candidate, and such a request was not arbitrary and capricious.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. LoganCounty Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-2-1 describes the respective duties of the superintendent and the board of education in the employment process and states, in pertinent part:

> The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent. In case the board refuses to employ any or all of the persons nominated, the superintendent shall nominate others and submit the same to the board at such time as the board may direct. All personnel so nominated and recommended for employment and for subsequent assignment shall meet the certification, licensing, training, and other eligibility classifications as may be required by provisions of this chapter and state board regulation. (See footnote 10)

The West Virginia Supreme Court has generally addressed the role of a county superintendent and held that persons holding the position are not merely employees, but "officers" of the county board with "a multitude of powers and duties independent of the board." State ex rel. Rogers v. Bd. of Educ. of Lewis County, 125 W. Va. 579, 25 S.E.2d 537, 540 (1943). "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 (Apr. 26, 1994). In the case of professional personnel, the

superintendent's duty to nominate necessarily entails the duty to adhere to the provisions of W. Va. Code §18A-4-7a, which set forth the criteria to be used in assessing the qualifications of theapplicants. In employing administrative personnel the first set of factors is applied. (See footnote 11) 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; See, 78 C.J.S. Schools and School Districts §171 (1952). It follows that others may not take actions which have the effect of impeding or usurping the exercise of those duties. "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.

County school boards in West Virginia also draw their powers from statute and can only exercise such authority as is expressly given them or arises by necessary implication. Evans v. Hutchinson, 158 W. Va. 356, 214 S.E.2d 453 (1975). W. Va. Code §18A-2-1 explicitly confers upon a board the ultimate authority to accept or reject the Superintendent's recommendation, and to direct the Superintendent to nominate an additional qualified candidate if the first nomination is rejected. Thus, any interpretationof the statutory language at issue must take into account the respective duties of the board and the superintendent under W. Va. Code §18A-2-1.

"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, 1995). 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.

It is well settled that 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. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W.Va 145, 351 S.E.2d 58 (1986). As previously stated, when selecting an administrator the first set of factors listed in W. Va. Code § 18A-4-7a are utilized. While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Elkins v.Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). Once a board reviews the criteria required by W. Va. Code § 18A-4-7a, it has "wide discretion in choosing administrators . . .". March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

> All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993)). (See footnote 12)

The standard of review for a county board of education's decision is whether it was arbitrary and capricious or an abuse of discretion. 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 undersigned may notsubstitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Harper, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is 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 the 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).

Additionally, nothing in the language of W. Va. Code § 18A-4-7a restricts the area of measures or indicators, as long as they are factors "upon which the relative qualifications of the applicant may fairly be judged." 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). 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.

"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." Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997). However,Grievant has cited a past Grievance Board decision in support of the proposition that when a candidate is recommended to a board of education by a superintendent, the board is required to accept the recommendation or conduct its own independent evaluation. See Milam v. Kanawha County Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988). In Milam the Administrative law judge, with limited discussion of W. Va. Code § 18A-2-1, made the following Conclusion of Law:

> A county board of education is obligated to base its decisions on promotions primarily on qualifications[,] and when it does not directly participate in the evaluation process and delegates the responsibility for a determination of the most qualified applicant to the superintendent of schools, it must either accept that determination or conduct a reasonable and rational evaluation of all applicants for said position.

The evidence in Milam indicated the superintendent had not done an appropriate evaluation of the candidates for the administrative position.

This same administrative law judge later partially retracted this Conclusion of Law and stated in Gore, supra (See footnote 13) that Milam stood for the proposition that "if a county board of education exercises its authority to reject a superintendent's nomination, it must base its decision on the relative

qualifications of the applicants for a particular position." The need for a board of education to conduct an independent "reasonable and rational evaluation" no longer appeared to be a requirement.

This Grievance Board adheres to the doctrine of stare decisis in adjudicating the grievances that come before it. Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-345 (Apr. 27, 1995). See Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996); Chafin v. W. Va. Dept. of Health and Human Resources, Docket No. 92- HHR-132 (July 24, 1992) (citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 160 (1974)). This adherence is founded upon a determination that the employees and employers need a system that provides for predictability, while retaining the discretion necessary to effectuate the purpose of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decisions are clearly in error.

It is obvious from a review of the Grievance Board case law that there is a conflict in the statements of this Board. Thus, it is important to reexamine our prior rulings to assure the above-stated Code Sections are followed, and that our case law does not deviate from the statutory law.

A review of W. Va. Code § 18A-2-1 reveals no requirement for a board of education to conduct an independent review when it rejects the recommendation of a superintendent. This Code Section states a board of education may "refuse to employ the person nominated" and the superintendent "shall nominate others." Of course the requirement of W. Va. Code § 18A-4-7a, to select the candidate with the highest qualifications, is still in effect. There is no indication that a board of education cannot reject a candidate for valid reasons, and then ask a superintendent for the name of another qualified candidate who does not possess the problems noted by the board. Barrett, supra. To the extent that this decision is in disagreement with this Grievance Board's prior decisions dealing with therequirement that a county board of education conduct an independent review of the candidates either before or after rejection of the superintendent's recommendation, such as in Milam, supra, and Gore, supra, those decisions are specifically overruled.

Clearly, both Intervenor and Grievant are qualified for the position as they possess multiple degrees, have excellent academic records, and prior administrative experience. When choosing between two such qualified candidates for an administrative position, it is necessary to go beyond "the mathematical process," and assess the applicants' relative qualifications. Given that the Board

believed Superintendent Blankenship when he stated that all the candidates met the criteria identified in the first set of factors it was not unreasonable for CCBOE to request another nominee when Superintendent Blankenship's potential, first recommendation had clearly, and with some frequency, disregarded the Board's policy.

In the present case, it is clear the Board's actions are within its statutory mandate. It rejected Superintendent Blankenship's first recommendation, not nomination, based on good and sufficient reasons, and then asked him to recommend another candidate. The Board did not choose the second candidate, but requested that Superintendent Blankenship supply the name of another qualified candidate. It must be remembered that Superintendent Blankenship testified that the candidates were equally qualified on the first six factors. (See footnote 14) The Board's consideration of an applicant's willingness to follow its policiesunder the criteria of "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged," was appropriate as the position at issue was an important one and cooperation with the Board would be essential.

In examining whether the Board's action was arbitrary and capricious, the undersigned Administrative Law Judge must examine the Bedford factors. First, the Board relied on factors that should be considered, i.e., Grievant's repeated failure to follow Board policies. CCBOE had clear evidence of this failure, and Grievant was aware of the Board's displeasure. Second, the Board did not ignore important aspects of the decision or reach an implausible decision. Given this state of affairs the undersigned Administrative Law Judge cannot find that the decision-making process was fatally flawed, or that CCBOE overstepped its broad discretion as described in W. Va. Code § 18A-2-1.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v.McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. It is the duty of the superintendent to nominate candidates for the consideration of the

county board of education after he has considered all the factors identified in W. Va. Code § 18A-4-7a. See W. Va. Code § 18A-2-1.

3 It is the duty of the county board of education to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind. The rejection of the recommended or nominated candidate, must not be arbitrary and capricious or demonstrate an abuse of discretion.

4. W. Va. Code §18A-2-1 provides that a county board of education and its superintendent must share equally in hiring decisions. The respective roles of each should remain distinct and it is contrary to the intent of the statute for either to take actions designed to influence or interfere with the other's decision as to which candidate should be appointed to a particular post.

5. A board of education need not make a detailed, independent review of the other available candidates, if it instead asks the county superintendent, who has reviewed the candidates, to recommend another qualified applicant. See Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997). Compare Gore v. Monroe County Bd. of Educ., Docket No. 93-31-532 (Apr. 26, 1994). Cf. Milam v. Kanawha County Bd. of Educ., Docket No. 20-87-270-1 (May 2, 1988).

6. To the extent that this decision is in disagreement with this Grievance Board's prior decisions dealing with the requirement that a county board of education conduct an independent review of the candidates either before or after rejection of thesuperintendent's recommendation, such as in Milam, supra, and Gore, supra, those decisions are specifically overruled.

7. 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 schools and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W.Va 145, 351 S.E.2d 58 (1986).

8. Once a board reviews the W. Va. Code § 18A-4-7a criteria it must consider, it has "wide discretion in choosing administrators . . .". March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994).

9. While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543

(Jan. 27, 1995);Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

10. 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 undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 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, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

11. Generally, a board of education's action is 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 the 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).

12. The Board's decision to consider Grievant's failure to follow Board policy in making its decision on a key administrative position is not arbitrary and capricious or an abuse of discretion.

13. The selection of Intervenor for the position was properly executed, and the Board did not overstep the limits described in W. Va. Code § 18A-2-1.

14. The selection process for the principal's position at CCMS was not "fatally flawed" so as to require a reassessment of the candidates.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Calhoun 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 ofthe intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 28, 1998

Footnote: 1

Grievant asked to be given a list of reasons for his non-selection. W. Va. Code § 18A-4-7a requires that a list of reasons, with suggestions for improving qualifications, be given to the most senior candidate. Grievant did not demonstrate he was entitled to this list as he did not demonstrate he was the most senior of the multiple candidates for the position, even though he was reminded by the undersigned Administrative Law Judge of the seniority requirement and the failure to demonstrate seniority in the hearing below.

Footnote: 2

Grievant was represented by Attorney William Richardson, Intervenor by Attorney Andrew Katz, and Respondent by Attorney Howard Seufer.

Footnote: 3

Because many applicants applied for more than one of the three posted positions all candidates for all the positions were interviewed at the same time.

Footnote: 4

Gore v. Monroe Board of Education, Docket No. 93-31-532 (Apr. 26, 1994), notes that an individual listed as recommending an applicant is a "poor choice" to serve on an Interview Committee as it gives "the appearance of impropriety."

Footnote: 5

See n. 11 infra.

Footnote: 6

It was confusing to the undersigned Administrative Law Judge why Superintendent Blankenship continued to say that all of Grievant's evaluations had been satisfactory when it was clear he had been placed on an Improvement Plan for unsatisfactory performance. It must be noted that the first set of factors listed in W. Va. Code § 18a-4-7a does not havea time limit on satisfactory evaluations as does the second set of factors. The first set of factors only says "past performance evaluations" while the second set of factors says "an overall rating of satisfactory in evaluations over the previous two years."

Footnote: 7

At one point a teacher complained to CCBOE because Intervenor required her to write "long" lesson plans. The Board did not see this as a problem because lesson plans are required of all teachers.

Footnote: 8

Grievant also argued he was unaware of CCBOE's concern about his failure to follow Board policies, and thus, he cannot be held accountable for or effected negatively by a correctable problem he has not had an opportunity to address or correct. See Deadrick v. Marion County Bd. of Educ., Docket No. 90-24-071 (Jan. 30, 1991). The argument is without merit as the above-cited Findings of Fact clearly reveal his prior knowledge. This argument was made by Grievant's attorney, but Grievant did not testify on this issue; thus, there is no data to support Grievant's lack of knowledge. See Conley v. Kanawha County Bd. of Educ., Docket No. 97-20-323 (Oct. 17, 1997).

Footnote: 9

Intervenor argues the grievance was untimely filed. As this argument was not raised at the lower levels, it cannot be considered at Level IV, even though Intervenor had not chosen to intervene at that time. See W. Va. Code § 18-29-3 (a). Additionally, Intervenor did not meet her burden of proof on this issue.

Footnote: 10

Code §§18-4-10(2) and 18A-2-9 also address the manner in which persons are employed by a county board of education. Their language essentially mirrors that of Code §18A-2-1, the more general statute. For the purposes of this decision, reference is made only to the latter.

Footnote: 11

The pertinent part of the statute provides,

> *A county board of education shall make decisions affecting the hiring of professional personnel other than 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/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 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 fairly be judged.*

Footnote: 12

It has already been determined by this Board that an applicant's greater experience in education administration does not necessarily entitle him to an administrative position. March, supra.

Footnote: 13

It was noted in Gore, supra, that a board of education is not to participate directly in the evaluation process prior to the superintendent's nomination of a candidate. This holding, while correct, is in direct contradiction with the above-cited Conclusion of Law in Milam.

Footnote: 14

The testimony was unclear whether these qualifications were that equal. Apparently, Intervenor had multiple administrative experiences that Grievant did not have, both with the middle school concept and in high school education. The high school administrative position gave her experience in many areas pertinent to a middle school setting. These

experience areas were: scheduling and managing athletes and athletic events, scheduling and overseeing extracurricular activities, disciplining of older students,and working with vocational and technical training. While Grievant does possess a Ph.D., this degree is in theology, and Superintendent Blankenship indicated he gave this degree no weight in the evaluative process as it did not relate to the position. Apparently both candidates had a Masters' plus 90. Additionally, while Grievant had more years of administrative experience, Intervenor had more years of educational experience. Further, Grievant's teaching degree is in Elementary Education, 1-6, while Intervenor's teaching degree is from Early Childhood Education - 8, which includes middle school students. Given the results of this decision, it is not necessary to examine this issue at length.