CHARLES S. OXLEY,

Grievant,

v. DOCKET NO. 98-45-104

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent, and

HARRY KEATON,

Intervenor.

DECISION

This grievance was filed by Charles S. Oxley (Grievant) against Summers County Board of Education (SBOE)(Respondent), alleging that a violation of W. Va. Code § 18A-4-7a occurred when Respondent did not select him as principal of Summers County High School. Grievant believes he is more qualified than the successful candidate, Intervenor Harry Keaton (Keaton)(Intervenor). Grievant requests instatement into the position, back pay, benefits, and attorney fees.

The grievance was denied at Level I by Immediate Supervisor Rhonda Gaye Shaver on April 7, 1997. A Level II hearing was held on July 3, 1997. Grievant was represented by John Feuchtenberger, Esq., and Respondent was represented by Kathryn Bayless, Esq. The grievance was denied at Level II by Delvin D. Elwell, President of SBOE, on July 22, 1997. On March 19, 1998, the Board waived the grievance to Level IV.

A Level IV hearing was held on September 24, 1998, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was again represented by John Feuchtenberger, Esq., and SBOE was again represented by KathrynBayless, Esq. Intervenor Keaton was represented by Jerry A. Wright, Esq. The parties were given until October 24, 1998, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision at that time.

The following Findings of Fact are made based upon a preponderance of the evidence presented at Levels I - IV.

FINDINGS OF FACT

1. Grievant is a teacher employed by Respondent SBOE. Intervenor Keaton was the successful applicant for the position of principal of Summers County High School.

2. On January 21, 1997, SBOE posted a position vacancy for principal of Summers County High School. The position was re-posted on January 30, 1997, because one of the applicable statutory selection factors, academic achievement, had been inadvertently omitted from the original posting. Four persons, including Grievant and Intervenor, applied for the vacancy. (See footnote 1)

3. The selection process was controlled by the first set of factors in W. Va. Code § 18A-4-7a.

4. The minimum qualifications listed in the second posting were a teaching certificate with appropriate endorsements, two years experience as a teacher or administrator in grades seven through twelve, a Masters degree in administration or related field, a principal's certificate for grades seven through twelve, and a vocational administrator's certificate for grades five through adult. The posting also indicated that applicants would have to meet the requirements for principalship imposed by the North Central Association of Colleges and Secondary Schools (North Central).

5. Under factor five, relevant specialized training, the posting listed School to Work/High Schools That Work, attendance, dropout prevention, and testing, block scheduling, and WVEIS scheduling.

6. A hiring committee consisting of Superintendent of Schools Charles Rodes, James Irwin, Robert Mazzella, and Vickie Hinerman interviewed the four candidates and assigned them scores of one or zero in the first seven of the eight factors. (See footnote 2)

7. Since each applicant had appropriate certification, satisfactory evaluations and a Masters degree, each was assigned one point in each of those factors. In the factors of academic achievement, amount of course work in administration, amount of experience relevant to administration, and relevant specialized training, only the mosthighly qualified candidate received a point.

8. In the contested second factor, amount of experience relevant to administration, neither Grievant nor Intervenor was awarded the point.

9. In the contested third factor, amount of course work in administration, both Grievant and

Keaton were awarded a point. (See footnote 3)

10. In the contested fifth factor, academic achievement, neither Grievant nor Intervenor was awarded the point.

11. The eighth factor, other measures or indicators upon which the relative qualifications of the applicant may fairly be judged, consisted of an interview with seven questions. The interview questions were written in advance of the interviews. The first question required a written response.

12. This system accorded factor eight equal weight with the first seven factors. 13. Using this system, a perfect candidate would have scored 14 points.

14. Mr. Oxley does not do well in interviews. Mr. Oxley was awarded no points as a result of the interview process, the lowest number of points awarded to any applicant. Mr. Keaton was awarded three points for his interview.

15. Candidates were permitted to use notes during the interview.

16. Mr. Keaton had a greater amount of relevant specialized training than Mr. Oxley. 17. Grievant scored a total of four points during the selection process, the lowest score of the four candidates. Another candidate scored five points. Candidate Pack scored seven points. Intervenor Keaton scored eight points.

18. Mr. Keaton holds a valid administrative certificate.

19. Summers County High School and Intervenor Keaton meet the accreditation standards set by North Central.

DISCUSSION

Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991).

The parties agree that the selection process is governed by the flexible standards in the “first set of factors” set forth in W. Va. Code § 18A-4-7a. Fitro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Cutlip v. Braxton County Bd. of Educ., Docket No. 92-04-406 (Nov. 30, 1992).

W. Va. Code § 18A-4-7a 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 teachingexperience 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.

While each of these factors must be considered, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson, supra; Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994); See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). 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).

West Virginia Code §18A-4-7a requires that when a decision concerning the hiring of professional personnel is made, Respondent must review the credentials of the candidates in relation to the factors set forth, to determine the applicant with the highest qualifications. However, 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. Because 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. Jenkinson, supra; Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

County boards of education have substantial discretion in matters relating to thehiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986), See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265

(1991). 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 simply substitute his judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper, supra. See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997). This Board's function is to serve as a reviewer of the legal sufficiency of the selection process. Thibault v. Div. of Rehabilitation Serv., Docket No. 93-RS-489 (July 29, 1994). 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).

To obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover, supra; Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990). See Black v.Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990).

Grievant contends that the selection of Intervenor Keaton as principal of Summers County High School was arbitrary, capricious, and flawed. Grievant argues that he was deprived of administrative experience he won in a previous grievance, that Keaton's administrative certification is invalid or inferior to his, that candidate Pack was allowed to use notes during the interview, that Keaton never applied for the re-posted position, and that Keaton did not meet North Central's accreditation standards for high school principals.

Grievant also contends that he should have received the highest ranking in the factors of degree level, course work in administration, academic achievement, and relevant specialized training. However, Grievant lost a point with respect to Intervenor Keaton in only one of these disputed factors, relevant specialized training. In the other three disputed factors, either Grievant and Keaton each received a point for winning that factor, or neither did, so that their scores with respect to each

other were unaffected.

From the record in this grievance, it is clear that the selection of Keaton, instead of Grievant, as the new principal of Summers County High School was not arbitrary, capricious, or flawed. A searching and careful inquiry into the selection process that SBOE chose to apply to the candidates for the position shows that it was legally sufficient.

Grievant contends that he was deprived of administrative experience he won in a previous grievance decision, Oxley v. Summers County Bd. of Educ., Docket No. 95-45- 123 (Feb. 13, 1997). However, this argument has been considered and rejected by this Grievance Board several times. Oxley v. Summers County Bd. of Educ., Docket No. 96- 45-001 (Apr. 30, 1997), Oxley v. Summers County Bd. of Educ., Docket No. 95-45-123 (Feb. 13, 1997), Oxley v. Summers County Bd. of Educ., Docket No. 96-45-124 (May 27,1998). (See footnote 4)

This Grievance Board has recognized the principle that "finality is desirable in the law," and applied it to grievance procedures. Spurlock v. Lincoln County Bd. of Educ., Docket No. 97-22-019 (May 29, 1997), and cases cited therein. Decisions of a grievance evaluator can only be challenged by a party to the action through the statutory appeal process. Teller v. Hancock County Bd. of Educ., Docket No. 96-15-289 (Apr. 18, 1997). Ordinarily, one cannot employ the grievance procedure to attack a final decision rendered in a prior grievance. Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995). The Supreme Court of Appeals of West Virginia has explained the doctrine of stare decisis as follows: “[a] simple statement of this rule will be found in Black's Law Dictionary, 3d Ed., wherein it is stated that it means: 'To stand by decided cases; to uphold precedents; to maintain former adjudications. . . [t]he doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.' Its further purpose is '[t]o adhere to precedents, and not to unsettle things which are established.” In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113 (1947).

The undersigned administrative law judge is bound by this Board's decisions in Grievant's previous grievances. It is clear that neither the West Virginia Supreme Court of Appeals, nor this Board, has granted Grievant administrative experience, which no courtcan manufacture. Rather, he was granted administrative seniority. Because W. Va. Code § 18A-4-7a requires consideration of

administrative experience, not administrative seniority, and because Intervenor Keaton has some 20 years more administrative experience than Grievant, Grievant's argument on this point must fail.

Grievant contends that Keaton's “Taco Bell” administrative certification is invalid or inferior to his. The “Taco Bell” certificate is an all-inclusive administrative certificate which was available between 1990 and 1992. Under this licensing procedure, a certified teacher with five years of classroom teaching experience, a masters degree, and three years of managerial experience could obtain a supervisor's certificate. Because such certification required no training or certification in any particular teaching area, supervisory field, or grade level, it is often compared negatively to the “earned” certificate obtained upon completion of a Masters degree in education administration. However, Barbara Brazeau, Assistant Director of the West Virginia Department of Education's Office of Professional Preparation, testified without contradiction at Level IV that the “Taco Bell” certificate is as valid as an “earned” certificate. Furthermore, this Grievance Board has never held that the “Taco Bell” certificate is invalid or inferior to an “earned” one. See Jones v. Mingo County Bd. of Educ., Docket No. 96-29-042 (May 30, 1996), Furman v. Marion County Bd. of Educ., Docket No. 92-24-458 (Nov. 10, 1993), Robinson v. Hancock County Bd. of Educ., Docket No. 92-15-296 (Nov. 13, 1992). Finally, a previous grievance has found, and the record in this grievance confirms, that Intervenor has a Masters degree in Public School Administration. Oxley v. Summers County Bd. of Educ., Docket No. 96-45-002 (Apr. 30, 1997). For all of these reasons, Grievant's argument on this point must fail.

Grievant contends that, because candidate Pack was allowed to use notes duringthe interview, the interview process was flawed. The record shows that applicant Pack had asked Superintendent Rodes, before the interview, whether he could use notes. Rodes said yes. Pack used notes. Grievant did not ask if he could use notes, but was told by Rodes at the interview that he could. Grievant testified at Level IV that this “threw him,” and at Level II that it was “a slap in the face,” that Superintendent Rodes was inferring that Grievant had hidden notes that he “was going to sneak and use,” that Rodes was being rude, harassing, and intimidating, and that Rodes was implying that Grievant would cheat.

Grievant's performance on the interview was the dispositive factor in his non- selection. In fact, had Grievant bested Keaton in the only one of the first seven factors truly at issue, relevant specialized training, Grievant's interview performance would still cause him to lose to Keaton by two points. The interviews were also dispositive because SBOE chose to weigh the interview portion of

the selection process as one-half of an applicant's total score. Grievant argued at Level IV that SBOE placed too much weight on the interviews. However, as noted above, Respondent was free to weigh the interviews as it saw fit. Baker, supra. The interviews were also very important because the record clearly shows that Grievant does not do well in interviews. In Oxley v. Summers County Bd. of Educ., Docket No. 96-45-124 (May 27, 1998), Grievant became upset and unable to concentrate when Superintendent Rodes asked him if he had a tape recorder, but he did not ask for time to collect himself. In the instant grievance, Grievant was again upset by an occurrence at the interview, yet again did not ask for time to collect himself. There was no indication, in either situation, that Rodes acted in a rude or accusatory manner. Rather, Superintendent Rodes testified credibly at Level IV that he was “extra careful” when speaking to Grievant at the interview, and had no intent to disturb or frustrate him. Grievant testified that he finds interviews very difficult. He stated that the harder he tries in an interview, the worse he does. However, as Administrative Law Judge Gould wrote in Oxley v. Summers County Bd. of Educ., Docket No. 96-45-124 (May 27, 1998),
“[i]t would be inappropriate for a board of education to base its decision to interview or not upon who the applicants were. There is no evidence in this case that SBOE decided to conduct interviews simply because Grievant was an applicant. While it is unfortunate that Grievant does not do well in interviews, it would be unfair to other applicants to dispense with this method of evaluation when Grievant is an applicant, or to add other types of evaluative measures to benefit Grievant when he is an applicant. Grievant should be treated the same as any other applicant. He is well aware that SBOE conducts interviews for administrative positions, and perhaps he could undertake some training to improve his performance.“ Grievant's argument on this point must fail.

Grievant contends that he should have received the highest ranking in the area of degree level. In this factor, each candidate had the requisite Masters degree and each received one point. Grievant has two Masters degrees, and argues that he should have won this factor. However, SBOE has substantial discretion in matters relating to the hiring of school personnel. Dillon, supra. While the undersigned might believe that a candidate with two degrees should be favored over a candidate with one, he is not permitted to substitute his judgment for that of SBOE, particularly when the job posting only requires one Masters degree. Furthermore, this factor was one of the three in which each candidate met SBOE's criteria and was awarded a point, so that Grievant's score of one point did not disadvantage him with respect to any other candidate. Grievant's argument on this point must fail.

Grievant contends that he should have received the highest ranking in the sixth factor, relevant specialized training. Intervenor Keaton won the point for this factor. As noted above, this is the only disputed factor in which Grievant lost a point with respect to Keaton. Under this factor, the posting listed School to Work/High Schools That Work, attendance, dropout prevention, testing, block scheduling, and WVEIS scheduling. The evidence on the issue consists of lists of seminars, classes and trainings on these topics taken by the candidates. The record reflects that both Grievant and Keaton attended numerous seminars, classes and trainings. It is not possible to tell from the titles of the seminars, classes and trainings whether one training session was more advanced than another. The record also shows that Grievant sought to have some of his academic coursework counted as relevant specialized training, which would have had the effect of counting this work twice. Grievant conceded at Level IV that Intervenor Keaton had taken more seminars, classes and trainings than Grievant. It was not unreasonable for the committee to conclude that, in this area, Keaton was more highly qualified than Grievant. There was no error shown in the committee's decision to award the point in that category to Keaton.

Grievant contends that Intervenor Keaton never properly applied for the re-posted position. The position was re-posted on January 30, 1997, because one of the applicable statutory selection factors, academic achievement, had been inadvertently omitted from the original posting. The record reflects that Superintendent Rodes, by memo dated January 30, 1997, informed all candidates that the position was being reposted, and informed them that they need not resubmit their resumes, but should instead submit a list of academic achievements and a transcript. The record is clear that Keaton did so. Grievant's argument on this point must fail.

Finally, Grievant argues that Intervenor Keaton did not meet North Central's accreditation standards for high school principals. However, Grievant did not prove, by a preponderance of the evidence, that Summers County High School and Keaton did not meet the accreditation standards set by North Central.

SBOE was fortunate to have had a very good group of applicants from which to choose. Given the fact that there is only one position as a high school principal available in Summers County, it is apparent that grievances were certain to be filed regardless of SBOE's choice. However, SBOE's selection process was legally sufficient. It was not arbitrary, capricious, or flawed.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. County boards of education have substantial discretion in matters relating to the selection of school personnel, so long as they act reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious. Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986), See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

3. 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 reacheda 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).

4. To obtain relief, a grievant may establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. With regard to the hiring of new professional personnel, boards of education must select the applicant with the highest qualifications. In evaluating qualifications, a board of education must consider each of the seven factors, the “first set of factors,” set forth in W. Va. Code §18A-4-7a: appropriate certification, experience relevant to the position, degree level, course work and degree level in the relevant field, academic achievement, relevant specialized training, past performance evaluations, and other measures or indicators upon which the relative qualifications of the applicants may fairly be judged. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

6. Because 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. Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

7. Respondent's decision to select Intervenor Keaton as principal of Summers County High School was not arbitrary, capricious, or flawed.

Accordingly, the grievance is **DENIED.**

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

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated November 19, 1998

CERTIFICATE OF SERVICE

I, Andrew Maier, Administrative Law Judge for the West Virginia Education and State Employees Grievance Board, do hereby certify that I have this 19th day of November, 1998, served a true copy of the foregoing DECISION upon the following by Certified United States Mail in properly addressed and stamped envelopes to their addresses as follows:

John Feuchtenberger, Esquire

Post Office Box 5726

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Charles R. Rodes, Superintendent

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Harry Keaton, Principal

Summers County High School

HC 74, Box 11-A

Hinton, West Virginia 25951-9103

Furthermore, a true copy of same was serviced by First Class Mail to the following:

Edison Casto, Director

Division of Personnel

Building 6, Room 416

Charleston, West Virginia 25305

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Candidate Stephen R. Pack also grieved his non-selection to the position. Pack v. Summers County Bd. of Educ., Docket No. 98-45-097. By order dated July 7, 1998,Grievant Pack's grievance was consolidated, pursuant to Procedural Rule 156-1-4.3 of the Board, with the instant grievance. The decision in the Pack grievance will be issued separately.***

Footnote: 2 ***SBOE divided the factor "the amount of course work and/or degree level in the relevant field and degree level generally" into two factors.***

Footnote: 3 ***This apparently violates the scoring system adopted by SBOE. In Oxley v. Summers County Bd. of Educ., Docket No. 96-45-001 (Apr. 30, 1997), Administrative Law Judge Jerry A. Wright noted that such inconsistent scoring distorts the selection process. However, because no party raised this issue, and because it does not affect the outcome of this grievance, it will not be discussed further.***

Footnote: 4 ***This decision was appealed to the Circuit Court of Summers County on July 10, 1998, Civil Action No. 98-P-23.***