BRENDA GRAY,

Grievant,

v. DOCKET NO. 98-41-024

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Brenda Gray (Grievant) against Raleigh County Board of Education (Respondent), alleging a violation of W. Va. Code § 18A-4-7a occurred when Respondent did not select her for an available permanent sixth-grade teaching position. Grievant believes she is more qualified than the successful applicant, Ronda Brakefield (Brakefield). The grievance was denied at Level I by Principal's Designee Denise Abrams on October 31, 1997. A Level II hearing was held on January 13, 1998. Grievant was represented by John O'Neal and Steve Angel of the West Virginia Federation of Teachers, and Respondent was represented by Emily Meadows, Ed.D. The grievance was denied at Level II by Erwin L. Conrad on January 22, 1998. No proceedings occurred at Level III. This matter was submitted for decision on the lower level record on January 27, 1998. The parties were invited to submit proposed findings of fact and conclusions of law at Level IV, and Grievant did so. This case became mature for decision on March 18, 1998. (See footnote 1)

The following Findings of Fact are made based upon a preponderance of theevidence presented at Level II.

FINDINGS OF FACT

1. In September, 1997, Grievant, a substitute teacher, applied for a permanent position as a sixth grade teacher.

2. Six qualified applicants applied for the position and were interviewed by Principal Gary Rumberg (Rumberg).

3. Because no permanently employed instructional personnel applied for the position,

Rumberg completed a matrix utilizing the first set of factors in W. Va. Code § 18A- 4-7a. (See footnote 2)

4. Rumberg assigned scores to applicants for each of the seven factors. Because there were six applicants, he assigned a score of six to the candidate with the highest qualifications within each factor, five to the next most qualified, and so on down to one point for the least qualified.

5. Using this system, a perfect candidate would have scored six points in each of the seven factors, for a total of forty-two points.

6. This system accorded each factor equal weight.

7. When the two criteria of past performance evaluations and appropriate certification were evaluated, because all applicants had essentially equal qualifications, Rumberg awarded each applicant three and one-half points. He arrived at this number by adding six, five, four, three, two, and one and dividing the sum by the number of applicants. 8. Rumberg had never applied the first set of factors before, and conceded thathe may have made mistakes applying it.

9. Rumberg awarded Grievant thirty points, and Brakefield twenty-five and one- half. No other applicant received more than twenty-five points.

10. On October 8, 1997, Rumberg completed a personnel recommendation form recommending Grievant for the position.

11. Shortly after submitting this recommendation, Rumberg became concerned that he had not applied the first set of factors correctly. Rumberg met with Assistant Superintendent Shupe (Shupe) and Superintendent Dials to discuss his application of the factors.

12. Rumberg then re-evaluated the applicants, created a second matrix, and changed the scores on three of the seven factors.

13. Rumberg changed the scores for the second factor, amount of teaching experience in the subject area. On the first matrix Grievant was awarded two points, and Brakefield received three and one-half points. On the second matrix, Grievant's score was decreased to one and one-half points and Brakefield's score was increased to four points. For Grievant, this resulted in a loss of one point with respect to Brakefield. On the second matrix, Grievant was given the same score as another applicant, Lisa Lawrence, who had less teaching experience than Grievant.

14. Rumberg changed the scores for the third factor, amount of course work and/or degree level in the relevant field and degree level generally. On the first matrix Grievant tied for second place

and was awarded four and one-half points, (See footnote 3) and Brakefieldreceived three points. On the second matrix, all applicants were given the average score of three and one-half points, although their course work and degree levels varied from a Bachelor's degree with no additional course work to a Bachelor's degree with twenty-seven additional course work hours. For Grievant, this resulted in a loss of one and one-half points with respect to Brakefield.

15. Rumberg changed the scores for the fourth factor, academic achievement. Grievant had the highest grade point average and Brakefield had the third highest, with a difference of twenty-two hundredths of a point after approximately one hundred and thirty hours of course work. This was scored on the first matrix as six points for Grievant and four for Brakefield. On the second matrix, Grievant and Brakefield tied with four and one- half points each. For Grievant, this resulted in a loss of two points with respect to Brakefield.

16. Each change lowered Grievant's score with respect to Brakefield's, leaving them tied with twenty-seven points each.

17. Rumberg and Shupe then made additional calls to the applicants' references in an attempt to break the tie. When this failed, they applied Raleigh County Board of Education Policy GBEA-R to break the tie.

18. The GBEA-R Policy breaks ties by selecting the applicant with the greatest amount of experience in the required certification area. If the applicants remain tied after consideration of this factor, the applicant with the greatest amount of specialized training as stated in the job description is selected. If the applicants remain tied after considerationof this factor, the applicant with the greatest amount of county seniority is selected. If the applicants remain tied after consideration of this factor, the applicants draw slips of paper, marked “yes” or “no,” until an applicant draws a “yes” slip.

19. The GBEA-R Policy is designed to break ties occurring under the second set of factors in W. Va. Code § 18A-4-7a. (See footnote 4)

20. After using the GBEA-R policy to break the tie, Rumberg recommended Brakefield for the position, and Respondent accepted his recommendation.

21. Rumberg failed to apply his scoring system accurately and consistently. In the second factor, amount of teaching experience in the subject area, Grievant placed fifth but was given just one and one-half points, a loss of one-half point with respect to Brakefield. In the third factor, amount of course work and/or degree level in the relevant field and degree level generally, Grievant tied for

second place, but was given just three and one-half points, a loss of one and one-half points with respect to Brakefield. In the fourth factor, academic achievement, Grievant placed first but was given just four and one half points on the second matrix, a loss of one and one-half points with respect to Brakefield.

22. When Rumberg's scoring system is applied accurately and consistently, Grievant scores thirty points and Brakefield scores twenty-six.

23. When compared directly to Brakefield, Grievant had the highest qualifications in four of the seven factors, tied two factors, and lost one.

24. Rumberg acknowledged Grievant "won" more factors than Brakefield. 25. Grievant had the highest qualifications of any applicant in two of the factors, and Brakefield did not have the highest qualifications in any factor.

DISCUSSION

Grievant bears the burden of proving each element of her 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).

When, as here, no "permanently employed instructional personnel" apply for a teaching vacancy, the county board is authorized to apply the more 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:

> [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/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 specializedtraining; (See footnote 5) 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. (See footnote 6)

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 a new classroom teacher is made, Respondent must review the credentials of the candidates in relation to the seven 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 the hiring 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, 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. 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 processsufficient 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).

From the record in this grievance, it is clear that the selection of Brakefield as the new permanent sixth grade teacher, instead of Grievant, was arbitrary, capricious, and flawed. A searching and careful inquiry into the scoring system that Principal Rumberg chose to apply to his two matrices reveals that he did not apply his scoring system consistently and accurately. This resulted in the selection of a candidate who, while qualified for the position, was not the applicant with the highest qualifications.

As noted above, Rumberg assigned scores to applicants in each of the seven factors. Because there were six applicants, he assigned a score of six to the most qualified applicant in each factor, five to the second most qualified, and so on down to one point for the least qualified. This system accorded each factor equal weight. When the two factors of past performance evaluations and appropriate certification were evaluated, because all applicants had essentially equal qualifications, Rumberg awarded each applicant three and one-half points. He arrived at this number by adding six, five, four, three, two, and one and dividing the sum by the number of applicants.

In the second factor, amount of teaching experience in the subject area, Rumberg chose to consider the number of years experience of each applicant, and added a “plus” to any applicant with an additional fraction of a year. Brakefield placed third on the first matrix but was given just three and one-half points, a loss of one-half point with respect to Grievant. This first matrix score, which was changed on the second matrix, is the onlyinstance in which Rumberg's inconsistent application of his scoring system favored Grievant. In this factor on the second matrix, Grievant placed fifth but was

given just one and one-half points, a loss of one-half point with respect to Brakefield. An accurate application of Rumberg's scoring system would have yielded two points for Grievant and four points for Brakefield. On the second matrix, Grievant was given the same score as another applicant, Lisa Lawrence, who had less teaching experience than Grievant.

In the third factor, amount of course work and/or degree level in the relevant field and degree level generally, Rumberg chose to consider each applicant's degree level and number of additional hours of courseware. Grievant had a Bachelor's degree plus 15 hours of course work. Brakefield had a Bachelor's degree plus 9 hours of course work. In the first matrix, Rumberg correctly assigned Grievant four and one-half points for this factor, and Brakefield three points. On the second matrix, each candidate received three and one-half points. For Grievant, this resulted in a loss of one and one-half points with respect to Brakefield.

In the fourth factor, academic achievement, Rumberg chose to consider each applicant's grade point average, calculated to one-hundredth of one point. Grievant placed first and Brakefield placed third. Grievant was correctly given six points on the first matrix, but was given just four and one half points on the second matrix, a loss of two points with respect to Brakefield.

When Rumberg's scoring system is applied consistently and accurately, Grievant scores thirty points and Brakefield scores twenty-six.

That Grievant is the applicant with the highest qualifications is also apparent when she and Brakefield are compared head-to-head. When compared directly to Brakefield,Grievant had the highest qualifications in four of the seven factors, tied two factors, and lost one. Grievant also had the highest qualifications of any applicant in two of the factors, and Brakefield did not have the highest qualifications in any factor.

The undersigned notes that, in each of the three factors where Rumberg changed the scores of Grievant and Brakefield, the change benefitted Brakefield at Grievant's expense. Two of these changes are particularly troubling. In these two factors Rumberg chose to re-evaluate Grievant's and Brakefield's qualifications by placing them within broad “bands.” This “banding” had the effect of equalizing, for the purpose of assigning points, Grievant's superior qualifications with Brakefield's lesser ones.

In the third factor, amount of course work and/or degree level in the relevant field and degree level generally, Rumberg chose to consider each applicant's degree level and number of additional hours

of courseware. Grievant had a Bachelor's degree plus 15 hours of course work. Brakefield had a Bachelor's degree plus 9 hours of course work. In the first matrix, Rumberg correctly assigned Grievant four and one-half points for this factor, and Brakefield three points. In the second matrix, each candidate received three and one-half points. For Grievant, this resulted in a loss of one and one-half points with respect to Brakefield.

In the fourth factor, academic achievement, Rumberg chose to consider each applicant's grade point average, calculated to one-hundredth of one point. Grievant had a three point three five grade point average, the highest of any applicant. Brakefield had a three point one three grade point average. (See footnote 7) In the first matrix, Rumberg correctlyassigned Grievant six points, the highest possible score, and Brakefield four points. In the second matrix, each candidate received four and one-half points. For Grievant, this resulted in a loss of two points with respect to Brakefield.

The undersigned finds that this “banding” acted to obscure significant differences in the academic records of Grievant and Brakefield. A difference of twenty-two hundredths of a point in grade point average, particularly after more than one hundred hours of course work, is a significant one. It reflects a level of effort and achievement that was sustained over many years. Academic honors have been awarded based upon differences far smaller than this.

Similarly, the six hour difference in course work between Grievant and Brakefield is significant. Undertaking graduate course work while employed is difficult, and a difference of six hours could easily represent a year's effort. The obscuring effect of Rumberg's “banding” policy is seen, perhaps most clearly, in this factor. The six applicants ranged in course work and degree level from a Bachelor's degree plus twenty seven hours (almost a Master's degree) to a Bachelor's degree with no additional course work. On the first matrix, they were assigned scores ranging from one to six. On the second matrix, however, each received a score of three and one-half. This had the effect of erasing the substantial twenty-seven course hour difference between the most qualified and the least qualified applicant, and in scores that did not accurately reflect the applicants' respective credentials. An extreme “all or nothing” example of banding, in which applicants with any amount of experience were given the same number of points, thus obscuring the difference between an applicant with twelve years of experience and an applicant with one year of experience, was found to be arbitrary by the West Virginia Supreme Court of Appeals. Keatley v. Mercer County Bd. of Educ., 490 S.E.2d 306 (1997).

The undersigned notes that “bands,” depending on how they are set, can always be used to obscure the differences between candidates with different qualifications. For example, a candidate with a perfect four point zero grade point average can be assigned the same score as one with a three point zero average simply by placing them in a band ranging from three to four. In this case, more discerning bands of one-quarter of a grade point would have differentiated Grievant and Brakefield. However, because the application of the scoring system was flawed, it is not necessary to decide at this time whether Respondent's “banding” resulted in an arbitrary and capricious result.

As noted above, Respondent had broad latitude to determine the weight to be assigned to each of the seven factors. It could have given the greatest weight to the only factor in which Brakefield outscored Grievant, amount of teaching experience in the subject area, or any other factor or combination of factors. However, Respondent chose to weigh the factors equally, with a maximum of six points available for each of the seven factors, using the point scoring system established by Rumberg. Having done so, it has an obligation to apply the system consistently and accurately. It did not. In failing to do so, Respondent failed to properly rely on factors that were intended to be considered, and explained its decision in a manner contrary to the evidence before it. Rumberg intended to assign a score of six to the candidate with the highest qualifications within each factor,five to the next most qualified, and so on down to one point for the least qualified. He did not. This resulted in the selection of a candidate who was not the most highly qualified, and in a decision that was arbitrary, capricious, and flawed.

The undersigned sympathizes with Principal Rumberg who, while fortunate to have had a very good group of applicants from which to choose, had to apply a complicated set of factors with which he had never before worked. The Level II transcript reflects that a grievance was certain to be filed regardless of his choice. However, the inaccurate and inconsistent application of the scoring system, and perhaps the application of banding to two of the criteria, resulted in second-matrix scores that did not accurately reflect the credentials of Grievant and Brakefield. When the scoring system Mr. Rumberg chose to use is applied accurately and consistently, Grievant scores thirty points and Brakefield scores twenty-six. Grievant was the applicant with the highest qualifications.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving each element of her 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 onfactors 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).

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 a new classroom teacher, 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. The scoring system used by Respondent accorded each factor equal weight.

8. Respondent failed to apply its scoring system accurately and consistently tothe applicants, resulting in a decision that was arbitrary, capricious, and flawed.

9. When Respondent's scoring system is applied accurately and consistently, Grievant scores thirty points and Brakefield scores twenty-six.

10. Grievant was the most highly qualified applicant.

Accordingly, the grievance is **GRANTED**, and Respondent is **ORDERED** to instate Grievant to the sixth grade teacher position at the beginning of the 1998 - 1999 school year, and award her all back pay, benefits, and interest, if any, with appropriate set-off for her service as a substitute teacher, and seniority, effective the date Brakefield was awarded the position, to which she would have been entitled as a sixth grade teacher.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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 July 2, 1998

Footnote: 1 *For administrative reasons, this grievance was reassigned to the undersigned administrative law judge on March 18, 1998.*

Footnote: 2 *Grievant and Respondent agreed that the first set of factors controlled the selection process.*

Footnote: 3 *When two applicants had identical qualifications within a factor, Rumberg's system "split the difference" between the two rankings. This rarely occurred and did notaffect the outcome of the scoring.*

Footnote: 4 *Because of the result set forth below, it is not necessary to address Grievant's contention that this policy was wrongly applied to the first set of factors.*

Footnote: 5 *In this factor, Grievant was correctly awarded six points, and Brakefield was correctly awarded five points. Because this scoring was not changed on the second matrix, this factor is not discussed in the body of this Decision.*

Footnote: 6 *In this factor, Grievant was awarded four and one-half points, and Brakefield was awarded three points. Because this scoring was not changed on the second matrix, this factor is not discussed in the body of this Decision.*

Footnote: 7 *While there was brief mention in the record of the possibility that Rumberg might have weighted these grade point averages differently based upon the different colleges attended by the applicants, there is insufficient evidence for the undersigned to conclude that this occurred. There is also no mention of different colleges on either matrix.*