CHARLES OXLEY,

Grievant,

v. DOCKET NO. 96-45-124

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievant Charles Oxley against Respondent Summers County Board of Education, alleging a violation of W. Va. Code § 18A-4-7a occurred when Respondent filled the position of assistant principal at Summers Middle School. Grievant asserted he was the most qualified applicant for the posted position, alleging a flaw in the selection process. Grievant requested instatement into the position, backpay, benefits and attorney fees. (See footnote 1)

The following Findings of Fact are made based upon the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by the Summers County Board of Education ("SBOE") as a teacher at Talcott Elementary School. He has been employed by SBOE since 1972, as a teacher and as a principal, with eight of those years teaching at the middle school level, and 12 of those years teaching fifth grade.

2. On November 17, 1995, SBOE posted the position of assistant principal at Summers Middle School. Grades six through eight attend the Middle School.

3. Grievant and three other persons applied for the position. Two applicants were deemed not minimally qualified for the position. Grievant and Stephen Jones met the qualifications for the position. Mr. Jones was a teacher at Summers Middle School. He has been employed by SBOE since 1970.

4. A Selection Committee was formed to evaluate the applicants. The Selection Committee members were Superintendent Charles Rodes, County Supervisor of Curriculum and Instruction

James Irwin, and Sarah Brown, principal of Summers Middle School.

5. Grievant and Mr. Jones were interviewed by the Selection Committee. Each applicant interviewed was asked the same nine questions, three each by each member of the Selection Committee.

6. The questions, and the answers to the questions, had been prepared prior to the interviews, and were similar to questions which had been asked in interviews for other administrative posts. The questions related to the duties of the position, such as attendance problems, scheduling, discipline, evaluations, custodial care, and special education. Eight of the questions required the interviewee to give a list in response. The interviewees received credit for each item listed out ofthe possible items, and the interviewee who listed the most items received a point for the answer. Grievant listed the most items on one of the questions, and also responded correctly to one question which did not involve a list, while Mr. Jones did not know the answer to that question. Grievant received two points on the interview questions, while Mr. Jones received seven points.

7. The Selection Committee rated Grievant and Mr. Jones in the statutory criteria appropriate licensure and certification, amount of experience relevant to administration, amount of course work in administration, degree level, relevant specialized training, and satisfactory performance evaluations. (See footnote 2)

8. Grievant and Mr. Jones received the same amount of credit in licensure and certification, as both possessed a principal's certificate, and the required middle school endorsement.

9. Mr. Jones received credit in experience while Grievant did not, as he had more administrative experience than Grievant. Mr. Jones had served as a principal/teacher at Forest Hill Elementary School four years. Grievant had served two years in an administrative position at the career center.

10. Grievant received credit in amount of course work in administration, while Mr. Jones did not.

11. Grievant and Mr. Jones were both credited in degree level, as both possessed a Master's Degree. In addition, Grievant had completed 45 additional hours, and Mr. Jones had completed 47. 12. Grievant and Mr. Jones were both credited in relevant specialized training and satisfactory performance evaluations.

13. The Selection Committee determined that Mr. Jones scored better than Grievant in the

seven statutory criteria, and recommended him for the position. This recommendation was approved by SBOE, and he was placed in the position.

14. At the beginning of the interview, Superintendent Rodes asked Grievant if he was tape recording the interview. Grievant responded that he was not.

15. Grievant had grieved his non-selection for the position held by Ms. Brown, principal at Summers Middle School. Ms. Brown was not a party to that grievance, and the grievance was dismissed on March 29, 1996.

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). In this case, Grievant bears a heavy burden, as the selection process for filling an administrative position is governed by the "first set of factors" set forth in W. Va. Code § 18A-4-7a, which 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 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, this Code Section permits county boards of education to determine the weight to be applied to each of these factors when filling an administrative position, so long as this does not result in an abuse of discretion. 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).
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> 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.

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. 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 substitute 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 relyon 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).

This is the second time Grievant has applied for this particular position, and not been successful in his application. In Oxley v. Summers County Board of Education, Docket Nos. 96-45-001/002/003/448 (April 30, 1997), this position had been posted on January 24, 1994. Ms. Brown, Mr. Irwin and Mr. Rodes were also the members of the Selection Committee in that instance, and the applicants were asked six open-ended questions relevant to management of a middle school, and were ranked on their answers. Several of the arguments raised by Grievant in this grievance were addressed in that Decision.

Grievant challenged the composition of the Selection Committee. He first indicated Ms. Brown was biased against him, because he had filed a grievance over her selection for the principal position at the Middle School. Ms. Brown was not a party to that grievance, nor was there any evidence that she was even aware of the grievance. Grievant presented no evidence of animosity on Ms. Brown's part, or that she had unfairly rated him in his responses to questions. Grievant also alleged Mr. Irwin had decided before the interview that he would not select Grievant, as evidenced by Mr. Irwin's comment when Grievant appeared for his interview, "Oh, it's you again." No evidence of bias on Mr. Irwin's part was presented other than this off-hand, inappropriate comment.

The interview questions did not require the interviewers to grade the interviewees on their opinions. Inasmuch as the answers to all questions had been developed in advance of the interview, and the interviewers merely checked off when the interviewee gave the correct response, the effectof

any possible bias was severely limited. Grievant presented no evidence that the questions themselves were inappropriate or unfair, that the answers developed by the members of the Selection Committee were wrong or unfair, or that the members of the Committee scored his answers or those of Mr. Jones incorrectly.

Grievant further believed he was not given a fair interview, because when Superintendent Rodes asked him at the beginning of the interview if he had a recorder, it upset him and he was not able to concentrate after that. Grievant did not indicate to the Selection Committee at the time of the interview, however, that this upset him, and did not ask for a few moments to collect himself. Superintendent Rodes asked Grievant this question because Grievant's wife was known to have taped a conversation, Grievant was slumped in his chair, was speaking toward his shoulder, and had gone to the restroom just prior to his interview. Superintendent Rodes testified he had asked other candidates the same question in an interview. He wanted to know if the interview was being recorded so he could also record it, or obtain a tape of the interview from Grievant.

There is no indication that Superintendent Rodes asked the question in a rude or accusatory manner, that he chastised Grievant in any way, or that he did not believe Grievant when he responded that he was not taping the interview. It was a simple question, requiring a simple answer. Unless Grievant was, in fact, taping the interview and had gotten caught, there really was no reason for Grievant to become so upset that he could not listen to the interview questions and respond appropriately if he knew the answers. The undersigned cannot conclude that asking this question flawed the interview process.

Grievant argued his "licensures and certifications greatly outweighed" those of Mr. Jones. The undersigned is not sure what this means, as an administrative certificate was required for theposition, and both Grievant and Mr. Jones possessed an administrative certificate. Regardless of the point Grievant is trying to make, he did not prove SBOE violated any statute, policy, rule or regulation in assessing the statutory criteria in a quantitative, rather than a qualitative manner, or that this was an arbitrary or capricious act. See Saunders v. Cabell County Bd. of Educ., Docket No. 97- 06-149 (Dec. 29, 1997); Oxley, supra. To the contrary, the statute requires the evaluation of the "appropriate certification." Likewise, to the extent Grievant challenged this same method of evaluating the criteria degree level, relevant specialized training, and satisfactory evaluations (and it is somewhat unclear whether he did), he failed to prove a violation of any statute, policy, rule or regulation.

As to Grievant's challenge to the method of evaluating the criterion degree level, the issue of whether Grievant should have received more credit because of his additional graduate hours was likewise addressed, and his argument rejected, in Oxley, supra. In this case, had SBOE accepted Grievant's argument, Mr. Jones would have prevailed in this category, as he had acquired more post-graduate credit hours than Grievant.

Grievant argued the criterion experience had to be assessed in the same fashion as certification, that is, either the applicant has it or he does not, and it was arbitrary and capricious to compare who had the most administrative experience in scoring this category. "The statute clearly requires the Board to consider the `amount' of experience of each applicant, not merely the `existence' of experience." Keatley v. Mercer County Bd. of Educ., 200 W. Va. 487, 490 S.E.2d 306 (1997). Although the ruling on this issue in Keatley was prospective only, in this case, the Keatley ruling would not disturb SBOE's methodology. Further, this Grievance Board had previously addressed the use in the statute of the word "existence," rather than "amount," in the context ofapplication of the second set of factors, and found the word "existence" not to be quantitative, whereas the word "amount" would be quantitative. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996), citing Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41- 363 (May 27, 1993). Thus, this is a quantitative evaluation.

Grievant also argued SBOE improperly assessed his administrative experience, arguing he should have been credited with two additional years of administrative experience for the time he would have served in an administrative position, had it been awarded to him, citing the opinion of the Supreme Court of Appeals of West Virginia in Oxley v. Board of Education of the County of Summers, 190 W. Va. 422, 438 S.E.2d 602 (1993), which ruled he should have been awarded the position instead of the successful applicant. If Grievant were credited with these two years of experience, his administrative experience would exceed that of Mr. Jones, and Grievant would "win" the experience category.

Importantly, neither the Supreme Court of Appeals, nor this Grievance Board, has granted Grievant administrative experience as relief in any of his grievances. He has, however, been specifically granted administrative seniority. The issue of whether Grievant should have been credited with administrative experience for a period when he had been improperly removed from a position, was addressed and rejected in Oxley v. Summers County Board of Education, Docket Nos. 96-45-

001/002/003/448 (April 30, 1997). The Administrative Law Judge stated in that case,

> The pertinent portion of W.Va. Code §18A-4-7a requires consideration of administrative experience but not administrative seniority. It is clear that the grievant understood the distinction when he filed the complaints.

The undersigned declines to revisit this issue. Grievant may only receive experience credit for that period he actually performed in an administrative position. Grievant challenged the interview process as biased against him, as Respondent is aware Grievant does not do well in interviews. Interview responses are valid "other" indicators of qualifications. Oxley, Docket Nos. 96-45-001/002/003/448. It 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 failed to establish that his qualifications were so superior to those of Mr. Jones that SBOE's failure to select him for the assistant principal position was an abuse of the considerable discretion extended county boards of education when making such professional determinations.

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 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. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). 3. With regard to the hiring for an administrative position, boards of education must select the applicant with the highest qualifications. In evaluating qualifications, a board of education must consider each of the seven "qualifying 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 be fairly judged. The appropriate weight to be given each factor is within the discretion of the board of education. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

4. Grievant failed to prove by a preponderance of the evidence that the selection process was flawed, that he was more qualified than Mr. Jones to fill the posted position, or that it was arbitrary and capricious for the Summers County Board of Education to place Mr. Jones in the position as the most qualified candidate.

Accordingly, this 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: May 27, 1998

Footnote: 1

This grievance was filed on or about January 29, 1996. Grievant's supervisor responded on January 29, 1996, that she had no authority to hire personnel, and Grievant appealed to Level II. The grievance was denied at Level II on February 23, 1996, following a hearing held on February 19, 1996. Grievant appealed the Level II Decision to Level III. The Summers County Board of Education waived consideration at Level III on March 8, 1996, and Grievant appealed to Level IV on March 20, 1996. This matter was placed in abeyance for approximately one year, pending the outcome of other grievances. Thereafter a Level IV hearing was scheduled and continued for good cause several times. The Level IV hearing was convened on January 23, 1998, in this Grievance Board's office in Beckley, West Virginia. Grievant was represented by John W. Feuchtenberger, Esquire, and Respondent was represented by Kathryn Reed Bayless, Esquire. This case became mature for decision on February 26, 1998, upon receipt of the last of the parties' written arguments.

Footnote: 2

The Selection Committee did not evaluate the candidates in academic achievement, no evidence was presented on any of the candidates' academic achievement other than course work, and Grievant did not allege the Committee's failure to consider academic achievement, as required by W. Va. Code § 18A-4-7a constituted a flaw in the selection process. Accordingly, this issue will not be addressed.