CHARLES S. OXLEY,

Grievant,

v v.

DOCKET NO. 00-45-399

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On March 18, 1999, Administrative Law Judge Andrew Maier rendered a decision styled Oxley v. Summers County Board of Education, Docket No. 98-45-134, which granted the grievance in part, and ordered the Summers County Board of Education ("Board") to reassess the qualifications of Grievant, Charles S. Oxley, and the intervenor in that grievance, Garnette Lynn Crowder, for the position of assistant principal of Summers County High School. As a result of that reassessment, Grievant filed the instant grievance against the Board on or about June 28, 1999, again protesting his non-selection for the position of assistant principal of Summers County High School. (See footnote 1) As relief, he is seeking instatement to the position along with backpay, all rights, seniority and attorney fees. (See footnote 2) The grievance was denied at level one on June 1, 1999, by Rhonda Gaye Shaver, Principal of Talcott School, and appealed to level two on July 2,1999. Following a lengthycontinuance, during which the first grievance (Oxley I) was appealed to the Circuit Court and the West Virginia Supreme Court of Appeals, a level two hearing was held on October 4, 2000. The grievance was again denied by Superintendent Charles R. Rodes on October 30, 2000, and the Board voted to waive participation at level three in accordance with W. Va. Code § 18-29-4(c), after which Grievant appealed to level four on December 21, 2000. A level four hearing was held in the Grievance Board's Beckley, West Virginia, office on March 19, 2001, and this case became mature for decision on May 15, 2001, the deadline for the parties' submission of proposed findings of fact

and conclusions of law. Grievant was represented by John W. Feuchtenberger, Esq., and the Board was represented by its counsel, Kathryn Reed Bayless, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Hiring Committee Score Sheet for Assistant Principal-SCHS, May 12, 1997.

Ex. 2 -

Reassessment Qualification Score Sheet for Assistant Principal-SCHS, April 15, 1999.

Ex. 3 -

Chart depicting classes taken for masters degrees for Grievant and Ms. Crowder.

Ex. 4 -

March 30, 1999 statement of Vicki S. Hinerman re: classes taken by Grievant and Ms. Crowder.

Ex. 5 -

August 9, 1999 memorandum from Michael H. Underwood, Assistant to the Dean, Marshall University Graduate College.

Ex. 6 -

November 21, 1997 memorandum from Michael Underwood, Certification Officer, Marshall University Graduate College.

Board Exhibits

Ex. 1 -

March 30, 1999 statement of Vicki S. Hinerman re: classes taken by Grievant and Ms. Crowder with attached list of classes and transcripts.

Ex. 2 -

May 2, 1997 Summers County Schools Position Advertisement for Assistant Principal of Summers County High School.

Ex. 3 -

April 15, 1999 Board minutes.Ex. 4 -
Receipt for certified mail and return receipts dated February 14, 1998, July 7, 1997, and April 13, 1998.

Ex. 5 -

State Department of Education Certificates for Grievant.

Ex. 6 -

State Department of Education Certificates for Ms. Crowder.

Ex. 7 -

Teaching Experience Record for Grievant.

Ex. 8 -

Teaching Experience Record for Ms. Crowder.

Ex. 9 -

May 5, 1997 letter from Garnette Crowder to Charles R. Rodes, with attached resume.

Ex. 10 -

May 7, 1997 letter from Grievant to Charles R. Rodes, with attached resume.

Ex. 11 -

March 24, 2000 Summers County Schools Position Advertisement for Principal of Hinton Area Elementary.

Ex. 12 -

September 8, 1999 Summers County Schools Position Advertisement for Principal of Summers Middle School.

Ex. 13 -

March 16, 2001 letter from Charles R. Rodes to Dr. Leonard J. Deutsch.

Ex. 14 -

March 16, 2001 letter from Leonard J. Deutsch to Charles R. Rodes.

Ex. 15 -

Chart depicting classes taken for masters for Grievant and Ms. Crowder.

Testimony

Grievant testified in his own behalf, and presented the testimony of Charles R. Rodes, Vicki Hinerman, and Garnett Lynn Crowder. The Board presented the testimony of Billy Joe Kessler.

FINDINGS OF FACT

1. Grievant has been employed by the Board at all times relevant to this grievance.

2. Lynn Crowder is employed as an assistant principal at Summers County High School ("SCHS"). Ms. Crowder and Grievant applied when the vacancy for the assistant principal's position was posted, and Grievant filed a grievance when the position was awarded to Ms. Crowder.

3. In that previous grievance, Administrative Law Judge Andrew Maier issued a decision which granted the grievance in part, and remanded the grievance to the Board for a reassessment of the qualifications of Grievant and Ms. Crowder for the position ofassistant principal at SCHS. Oxley v. Summers County Bd. of Educ., Docket No. 98-45- 134 (Mar. 18, 1999)(Oxley I).

4. The Board reassessed the qualifications of Grievant and Ms. Crowder, and Ms. Crowder was again found to be the most qualified applicant.

5. In reassessing the candidates, the Board employed a new method of scoring, utilizing the "first" set of criteria set forth in W. Va. Code § 18A-4-7a for selection of an administrative position. Each candidate received one point for certification. Ms. Crowder was awarded five (5) points and Grievant two (2) points for "amount of experience" (this criterion was determined by the number of years of administrative experience possessed by each). Both candidates received one point for degree level (each has a masters degree). In the criteria of academic achievement, Ms. Crowder received one point and Grievant received no points. In the criteria of relevant specialized training, Ms. Crowder received one point and Grievant received no points. Each received one point for past performance evaluations. Thus, Ms. Crowder "outscored" Grievant by five (5) points.

6. In the criteria of academic achievement, grade point averages were calculated for the course work the applicant was required to complete to earn his or her masters degree. At the level four hearing in Oxley I, Mr. Rodes was unable to testify as to how the grade point average (GPA) calculations had been made since Vicki Hinerman, Director of Student Services, had performed those calculations. The initial calculations reflected that Ms. Crowder had a slightly higher GPA. Ms. Hinerman was not called to testify in Oxley I, and ALJ Maier was unable to make any conclusions with respect to this criteria without further evidence. 7. In the instant grievance, rather than relying on the information she had available at the time Ms. Crowder was first awarded the position, Ms. Hinerman testified she contacted Marshall University to find out which courses taken by each candidate were required for the masters degree in education administration. She then took the grades for those courses and calculated the average for each, with Ms. Crowder receiving a 3.583, and Grievant receiving a 3.416. (See footnote 3) G. Exs. 3, 4; Board Ex. 1.

8. Michael Underwood, Assistant to the Dean at Marshall University Graduate College, provided documentation at Grievant's request reflecting that Grievant's GPA for educational administration courses was 3.53; his overall GPA was 3.50, and his GPA for education administration courses needed for a masters degree was 3.66. G. Ex. 5.

9. For the criterion of relevant specialized training, Ms. Hinerman and Billy Joe Kessler, Business Manager, reviewed the information set forth in the resumes provided by the candidates, and concluded that Ms. Crowder possessed more relevant specialized training. Ms. Hinerman testified she determined the relevance of the course work on the resumes from the course titles, but had no knowledge regarding the content of the courses, or the hours taken by the candidates.

DISCUSSION

Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

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. (See footnote 4) 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 v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); 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).

W. Va. Code § 18A-4-7a requires that when a decision concerning the hiring of professional personnel is made, the county board of education 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" andstill 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).

It is well-settled that county boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33- 243 (Feb. 15, 1994).

Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute

her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162,286 S.E.2d 276, 283 (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). The Grievance 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).

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 the Board improperly exceeded the scope of the remand order in Oxley I, that it was arbitrary and capricious for the Board to undertake a completely new assessment of the candidates' qualifications utilizing a new method of scoring, and that the factors “academic achievement”, “amount of experience”, and “relevant specialized training” were improperly awarded to Ms. Crowder.

The Board responds it was not arbitrary and capricious to utilize the new method of scoring it had adopted subsequent to Oxley I, and that Grievant has failed to prove by a preponderance of the evidence that he is more qualified for the position of assistant principal than Ms. Crowder.

It is a familiar and long-standing doctrine in appellate proceedings that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questionswhich the mandate has laid at rest. See In re Sanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895). Further, “where an appellate judgment is silent with respect to the manner in which lower court should proceed on remand from an appellant court, a determination of the scope of the mandate requires a careful reading of the appellant court's opinion because it serves as the statement of reasons upon which the judgment rests and the opinion must read as a whole.” State v. Hatfield, 206 W. Va. 125, 522 S.E.2d 416 (1999)(citing Rogers v. Hill, 289 U.S. 582, 587, 53 S.Ct. 731, 734, 77 L.Ed. 1385 (1933)).

While the Grievance Board is not an appellate tribunal, the premise upon which the general rules regarding remand orders should apply, that premise being that remanding a portion of a case does

not give a party license to completely reopen the proceedings. A remand hearing is not a new proceeding. It is a stage in a process consisting of the first proceeding before the Board, the remand resulting from review of the Board's order, and the second proceeding before the Board in response to the remand. See NLRB v. Donnelly Garment Co., 330 U.S. 219, 67 S.Ct. 756, 91 L.Ed 854 (1947).

The correctness of the Board's complete reassessment of the candidates must be judged in light of the interrelation of the two proceedings, and the Board's justifiable interpretation of the directions which it received upon remand of the first order. “Indeed, the disposition of the present case turns decisively on the view that is taken of the Board's interpretation of its duty under the Court's mandate.” Id.

In Oxley I, ALJ Maier's order on remand simply states that “[r]espondent SBOE is **ORDERED** to reassess the qualifications of both Grievant and Intervenor for the positionof assistant principal of Summers County High School, consistent with the holdings herein.” (Emphasis in original). Oxley I held that

> SBOE did not properly rely on a factor, academic achievement, that was intended to be considered, and has established a significant flaw in the selection process, sufficient to suggest that the outcome might reasonably have been different. (Citation omitted). A searching and careful inquiry into the selection process that SBOE chose to apply to the candidates for the position shows that it was not legally sufficient. When the hiring process is flawed because a sufficient review of the relative qualifications of the candidates has not been conducted, and where a grievant has not shown that he would have inevitably prevailed as the successful applicant, the proper remedy is to reassess the qualifications of the applicants. (Citations omitted).

Based on the above, the Board interpreted ALJ Maier's remand order as a mandate to reassess all of the qualifications of the candidates. In addition, based on Maier's statement that the selection process it chose to apply to the candidates “was not legally sufficient”, the Board chose to reassess the qualifications utilizing a new method of scoring developed subsequent to Oxley I. The Board's interpretation of the remand order is not unreasonable. Had ALJ Maier intended the Board to only reassess the qualification of “academic achievement”, he could have explicitly said so. He did not, instead, referring to a line of Grievance Board cases that supports a reassessment of all the qualifications of the candidates on remand. In addition, based on ALJ Maier's statement that the Board's selection process was “not legally sufficient”, it was reasonable for the Board to determine that it was to develop a selection process that would “pass muster” with the Grievance Board.

Consequently, I find the Board's decision to reassess all of the candidates' qualifications, utilizing

a new method of selection, was not arbitrary or capricious, based upon ALJ Maier's remand order in Oxley I.

Grievant contests the award of three statutory criteria to Ms. Crowder: academic achievement, amount of experience, and relevant specialized training. Grievant argues the scoring of those criteria was significantly flawed, and had they been properly scored, the outcome of the selection might reasonably have been different.

1. Academic Achievement.

In Oxley I, Ms. Crowder was awarded a GPA of 3.43, and Grievant was awarded a GPA of 3.38. Grievant presented credible evidence that his GPA was, in fact, higher than Ms. Crowder's. The Board was unable to explain how the GPAs were calculated, and, considering the difference was “five one-hundredths of a percentage point”, ALJ Maier concluded that if Grievant were to prevail in that category, it would change the outcome of the selection process, as Ms. Crowder had bested Grievant by only one point. Because ALJ Maier was unable to know with certainty which candidate had the higher GPA, he found Grievant had proven the selection process was significantly flawed, and ordered the reassessment which is at issue here.

The individual who calculated the GPAs in Oxley I also calculated the scores in the instant grievance. Vicki Hinerman, Director of Student Services, was directed by Superintendent Rodes to prepare the matrix for the reassessment (LIV G. Ex. 2), and to calculate the GPAs again. Ms. Hinerman calculated Ms. Crowder's GPA to be 3.583 and Grievant's GPA to be 3.416. LIV G. Ex. 3; LIV Board Ex. 15. Ms. Hinerman performed thecalculations based upon which courses taken by each of the candidates were required for the Master's Degree in Education Administration. Ms. Hinerman contacted Marshall University to verify the courses which were required for the degree prior to the Level IV hearing, and confirmed the GPA calculations of 3.583 for Ms. Crowder, and 3.416 for Grievant. As a result, Ms. Crowder received one (1) point on the scoring matrix for the criterion “academic achievement”.

Grievant submitted into evidence calculations performed by Michael Underwood, Assistant to the Dean and Coordinator of Certification at Marshall University, whose conclusion was that Grievant's GPA based on education administration courses needed for a Master's Degree was 3.66. LIV G. Ex. 5. Mr. Underwood was not called to testify at Level IV, and Grievant did not know how he calculated the GPA.

Ms. Hinerman testified she was aware of Mr. Underwood's calculation of a 3.66 GPA for Grievant when she was in the process of calculating the candidates' GPAs. She opined that Mr. Underwood calculated only educational administration courses, omitting classes listed as basic education courses. She testified she calculated Grievant's GPA using what she thought was Underwood's method, and also came up with the 3.66 GPA. Ms. Hinerman explained the difference between her results and Underwood's occurred because she included some of the basic education courses as requirements for the Master's Degree, which resulted in her calculation of 3.416.

Ms. Hinerman's explanation as to why Underwood's calculation would be different from hers is inconsistent. Ms. Hinerman calculated the GPAs by averaging what she believed were only those courses required for a Master's Degree in EducationalAdministration. Upon reviewing Underwood's result, she calculated only those courses deemed educational administration courses, and came up with the same result of 3.66. However, in order to justify her calculation of 3.416, she included in the average some basic education courses which she felt were required for the Master's Degree.

In addition, it appears from the evidence that Ms. Hinerman included some questionable undergraduate courses in Ms. Crowder's list, and omitted some that clearly were required for the Master's Degree. Specifically, Ms. Hinerman included two 200-level courses on Ms. Crowder's list. When she spoke with Ken O'Neal at Marshall University, he indicated to her that he was concerned about those 200-level courses being included, because they were obtained at WVU, and Ms. Crowder's transcript did not show those credits were transferred in to Marshall. In addition, Ms. Crowder had taken two Master's level courses that should have been included on her list of courses, but which were not.

Frankly, the undersigned is inclined to give more credence to a GPA calculation rendered by the educational institution in which the specific degree was received. However, if the Board could prove that it used the same consistent criteria in calculating the candidates' GPAs, it would probably pass muster. In this case, the accurateness of both candidates' GPAs is in question, and the Board has not succeeded in convincing the undersigned that either GPA is reliable.

Nevertheless, even if Grievant were awarded the one point for GPA, he would not necessarily prove that he is entitled to the position. As noted above, Ms. Crowder had five (5) points over Grievant, and even giving him the one point for GPA, she still has himbeaten by four (4) points. Thus it is necessary to move on and review the other criteria Grievant contends were either wrongly

calculated and/or awarded to Ms. Crowder.

2.

Amount of Experience Relevant to Administration.

In the original scoring in the category of “amount of experience relevant to administration”, the Board awarded Grievant “0", and Ms. Crowder a “1", because Ms. Crowder had 5 years of administrative experience, and Grievant had 2 years. In the reassessment, the Board changed its scoring method, and awarded each applicant a point for each year of administrative experience, thus Ms. Crowder received “5" points, and Grievant received “2" points. There is no dispute about the amount of experience each candidate had, but Grievant asserts that changing the method of scoring that category gave Ms. Crowder an added edge of “3" total points in the final tally, and alleges the change was intentionally made to guarantee Ms. Crowder was awarded the position.

The Board argues it changed the way it scored that factor in order to make a comparative assessment of that criteria, which is required, and that the change cannot be considered arbitrary or capricious, particularly in light of the fact that the points awarded accurately reflect the experience of each applicant. The Board points to the West Virginia Supreme Court of Appeals' holding in Keatley v. Mercer County Board of Education, 200 W. Va. 487, 490 S.E.2d 306 (1997), to support its position.

In Keatley, the Board allocated a total of five points for its "experience" criterion. The Board chose to use an "all or nothing" method for awarding "experience" points. That is, if an applicant had assistant principal experience of any length, the applicant received all five points. If an applicant had no experience as an assistant principal, the applicantreceived zero points for the "experience" criterion. In that case, Keatley and the successful applicant (“SA”) each received five points for the "experience" criterion. Keatley argued that the Board's method of allocating experience points was arbitrary, in that it did not distinguish his twelve years of experience from the SA's one year of experience.

The Court held that “[u]nder W. Va. Code § 18A-4-7a (1993) county boards of education are required to utilize a fair method of awarding credit for experience when filling professional personnel positions; such a method must establish a system that will differentiate experience among the applicants.” The Court went on to hold that the statute clearly requires a board to consider the "amount" of experience of each applicant, not merely the "existence" of experience, and that the

Board's method of awarding points did not comply with the statute's requirement to consider the "amount" of experience. Id.

The Court reasoned that Keatley was not positing the argument that he should have been awarded the position solely on the grounds that he worked twelve years as an assistant principal and the SA only worked one year in that position. It found Keatley's argument more subtle, that he was challenging the Board's decision to use a method of assigning points to "experience" that does not distribute those points based upon a formula which awards more points for greater years of experience and less points for lesser years of experience. The Court pointed out that, in the final analysis, such a point formula would not automatically give the position to the individual with the highest experience points as the experience points are calculated in the overall scoring system used by the Board. It is the final point tabulation which dictates the most qualified candidate for the position. Id. As a point of reference, the Court also provided an example of what it considered to be a more equitable method of scoring “amount” of experience:

> We hasten to point out that no set formula exists. Discretion must be appropriately used in creating point systems that make fair and reasonable adjustments for greater experience. As an example and nothing more, we offer the following scale: 1-5 years experience = 1 point; 6-10 years experience = 2 points; 11-15 years experience = 3 points; 16-20 years experience = 4 points; 21 or more years experience = 5 points.

Id., n. 16.

In the instant case, the Board decided to give each candidate one point per each year of administrative experience, thus Ms. Crowder received 5 points for her 5 years of experience, and Grievant received 2 points for his 2 years of experience. There is clearly nothing inherently arbitrary or capricious about such a scoring system, although the undersigned envisions a situation that could clearly produce an unfavorable result for the Board in a system which purports to give each category equal weight. (See footnote 5) Thus, Grievant has failed to prove in this instance that the Board's method of scoring the criteria “amount of experience relevant to the position” is arbitrary or capricious.

3.

Amount of Course Work and/or Degree Level in the Relevant Field and Degree Level Generally.

In the first assessment, the Board separated out this field into “amount of course work” and “degree level”. Grievant received one (1) point in “amount of course work” and Ms. Crowder got no points, because Grievant had completed more course work. Bothcandidates got one (1) point in “degree level” because they both had Master's Degrees. In the reassessment, the Board used the criteria as stated in W. Va. Code § 18A-4-7a, which is “amount of course work and/or degree level in the relevant field and degree level generally.” Both candidates received one (1) point because they possessed the requisite degree level, Master's Degree. The statute clearly specifies a board can look at the amount of course and/or the degree level. In this case, the Board opted to score the candidates based upon their degree level, giving both of them a point for that factor.

While Grievant would prefer the Board score based upon “amount of course work” because he would “win” that factor, he has not shown that the Board's decision to utilize degree level was arbitrary or capricious or significantly flawed.

4.

Relevant Specialized Training.

This category was not utilized at all in the original scoring, but was added into the matrix for the reassessment. Grievant again asserts the Board added in this factor in the reassessment to give Ms. Crowder an edge, and to otherwise guarantee that she was awarded the position. The Board argues it added in this criteria on the advice of counsel, and because the language of Oxley I dictated that the criteria be evaluated.

The method by which the Board assessed the factor “relevant specialized training” was similar to the method used to calculate academic achievement: Ms. Hinerman and Mr. Kessler were directed to review the candidates' resumes and choose those seminars and courses listed which they felt were relevant to the position of assistant principal. Ms. Hinerman testified she and Mr. Kessler reviewed the candidates' resumes, and decided Ms. Crowder's training was more relevant to the position. She conceded she was notaware of the content or length of any of the work advanced by the parties, but made her determination based solely on the title of the work. Ms. Hinerman testified she did not consider course work to be relevant specialized training, and believed that course work was considered in the category of academic achievement. Further, as this category was not considered during the first go-round, the candidates were not asked about their extra seminars or course work,

and thus, had no input into this category other than their resumes.

Grievant argues that Ms. Hinerman's method was entirely subjective, as she was not familiar with the contents of the seminars listed on the resumes, and while this may be true, at least it was true for both Grievant and Ms. Crowder. Ms. Crowder was just as much at risk as Grievant in having Ms. Hinerman decide which seminars and workshops were relevant, and which were not. Grievant also contends Ms. Hinerman should have taken into account his amount of course work, which far exceeds Ms. Crowder's, in determining relevant specialized training. However, Ms. Hinerman testified she did not consider course work at all in this category, because she felt that was adequately covered in the category of “degree level”. Grievant complains that this explanation means that his course work above and beyond that of the Master's Degree level was entirely ignored, and the decision was thus arbitrary and capricious. While Grievant's course work may be “superior” to Ms. Crowder's, there is nothing in the statute which mandates a board to make that distinction between candidates, and this Grievance Board has rejected the “superior” course work or degree level argument before. Thus, Grievant has failed to prove he was entitled to win the category “relevant specialized training.” Consequently, Grievant has failed to prove by a preponderance of the evidence that he is more qualified than Ms. Crowder for the assistant principal position, or that the Board's method of scoring was arbitrary and capricious, or significantly flawed such that a reassessment would be mandated.

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 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 for an administrative position, a board 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. Grievant has failed to prove, by a preponderance of the evidence, a significant flaw in the Board's selection process, sufficient to suggest that the outcome might reasonably have been different.

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. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

MARY JO SWARTZ

Administrative Law Judge

Dated: June 15, 2001

Footnote: 1

Ms. Crowder did not intervene in the instant grievance.

Footnote: 2

The Grievance Board does not award attorney fees.

Footnote: 3

In Oxley I, Ms. Crowder was given a GPA of 3.43, and Grievant a GPA of 3.38.

Footnote: 4

W. Va. Code § 18A-4-7a provides that "[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...; 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...; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged."

Footnote: 5

The undersigned cautions the Board that, when faced with such a situation, any future attempts to change the weighting system could be viewed as discriminatory and/or engaging in favoritism.