DELLA HOUCK,

Grievant,

v. DOCKET NO. 99-55-289

WYOMING COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed, on September 22, 1998, by Della Houck (Grievant) against Wyoming County Board of Education (Respondent)(WBOE), alleging that a violation of W. Va. Code § 18A-4-7(a) occurred when WBOE did not select her as Principal of Glen Rogers Elementary School.

The grievance was denied at Level I by Immediate Supervisor Joseph L. Stewart on that same date. The record does not clearly reflect what proceedings, if any, occurred at Levels II and III. After protracted discussions, changes in attorneys by both parties, settlement talks, and pre-hearing conferences on November 10, 1999, April 12, 2000, and July 27, 2000, the undersigned Administrative Law Judge permitted this grievance to proceed to Level IV for its first evidentiary hearing.

A Level IV hearing was held on May 25 and 26, and September 5, 2000, before the undersigned Administrative Law Judge, at the Grievance Board's Beckley office. Grievant was represented by Derrick Leffler, Esq., and WBOE was represented by Greg Bailey,Esq. The parties were given until November 6, 2000, to submit proposed findings of fact and conclusions of law, and this grievance became mature for decision on that date.

The following Findings of Fact are made based upon a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is currently employed by WBOE as an Assistant Principal at Oceana High School.

2. On August 26, 1998, WBOE posted the position of Principal of Glen Rogers Grade School. The minimum qualifications for the position were a valid Elementary Teaching Certificate and

Elementary Administrative Certificate.

3. WBOE's requirement of these elementary certificates reflects its policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators.

4. Grievant, successful applicant Richard Davidson (Davidson), Connie Walls, (Walls), Donald Clay, and Rebecca Cooke applied for the position.

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

6. WBOE Superintendent Frank Blackwell (Blackwell) prepared a matrix, using the first set of factors in W. Va. Code § 18A-4-7(a), to assess the qualifications of the candidates.

7. Grievant had four years administrative seniority and 23 years overall seniority. She had a Masters + 45 in Education Administration. She had teaching certificates in Elementary 1-8, Early Childhood, English 7-8, Art 7-8, and Music 7-8. Shehad administrative certificates in Principal K-8, Principal 5-12, Superintendent K-12, Supervisor of General Instruction K-12, and Vocational Administrator 5-Adult. She had attended the Principals' Academy.

8. Davidson had three years administrative seniority and 31 years overall seniority. He had a Masters + 45 in Guidance and Counseling and Administration. He had teaching certificates in Biological Science 7-12, General Science 7-12, Counselor K-8, and Counselor 7-12. He had administrative certificates in Principal 5-12, Superintendent K-12, Principal K-8, Supervisor of General Instruction K-12, and Vocational Administrator 5- Adult. He did not have the Elementary Teaching Certificate required by the posting. He had not attended the Principals Academy.

9. Walls had two years 176 days administrative seniority and 21 years overall seniority. She had a Masters + 45 in Educational Administration and Speech Communication and certificates in Elementary Education 1-8, Math 1-8, Principal K-8, and Principal 5-12/Superintendent/Supervisor/Vocational Administrator.

10. Blackwell recommended that WBOE select Grievant for the position.

11. WBOE did not accept Blackwell's recommendation of Grievant, or his second choice, Walls. At its September 14, 1998, meeting, WBOE selected Davidson for the position.

12. On June 26, 1998, Grievant received a written reprimand for failure to follow established administrative guidelines.

13. On July 10, 1998, Grievant received a written reprimand for submitting an inaccurate

workshop attendance list. 14. Grievant was Principal of Baileysville Elementary School for the 1997-1998 school year.

15. During the period of time relevant to this grievance, a Title 1 review took place at Baileysville Elementary School, concerning Grievant's occasional use of Title 1- funded teachers to “supplant” her school's regular teachers. The West Virginia Department of Education disagreed with this aspect of the use of Title 1 funds at Baileysville and, by letter of June 15, 1998, ordered WBOE to credit its Title 1 account with $4557.24. Grievant was not reprimanded concerning this review.

16. On May 23, 2000, WBOE issued a resolution stating that Grievant was not selected as Principal of Glen Rogers Grade School because of the nature and closeness in time of her two written reprimands and the Title 1 review findings.

17. Glen Rogers Grade School closed after the 1999-2000 school year.

DISCUSSION

This grievance is one of three filed by Grievant over WBOE's failure to select her for three principal positions. These grievances have a confused procedural history. On September 22, 1998, Grievant filed the instant grievance over her non-selection to be Principal of Glen Rogers Grade School. On October 8, 1998, Grievant filed a grievance over her non-selection to be temporary Principal of Road Branch Grade School. (See footnote 1) On July 30, 1999, Grievant filed a grievance over her non-selection to be permanent Principal of Road Branch Grade School. (See footnote 2) As noted above, the undersigned permitted this grievanceto proceed to Level IV for its first evidentiary hearing. (See footnote 3) In this grievance, Grievant requests instatement into the position of Principal of Glen Rogers Grade School, back pay, benefits, and attorney fees. (See footnote 4) However, WBOE argues that Grievant abandoned this grievance when she unilaterally attempted to waive it to Level IV.

WBOE's abandonment argument will be addressed first. The lower-level record of this grievance is confused by various procedural letters that do not identify to which grievance they refer. For example, by letters of October 20, and November 30, 1998, Blackwell informed Grievant that her Level II hearing had been continued. These letters could refer to either the instant grievance concerning the Glen Rogers Grade School position, or the Road Branch temporary grievance, but do not indicate to which grievance they refer. Other letters from Grievant's attorney at the time, W.

Richard Staton, Esq., dated October 30, 1998, and November 23, 1998, concerning scheduling matters, also do not identify to which of Grievant's two pending grievances they refer. The record also appears to show that, with respect to the instant grievance, attorney Staton mistakenly believed that Grievant could unilaterally waive the grievance from Level I to Level IV. (See footnote 5) Grievant also argued that WBOE had balked at attending a Level II hearing in this grievance, an argument supported by the long delay this grievance suffered at the lowerlevels, and by pre-hearing conferences in which neither party could explain what was going on at the lower levels.

This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya v. Bd. of Educ. of County of Mingo, 181 W. Va. 203, 382 S.E.2d 40 (1989), the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, "[i]n the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with filing provisions contained in W. Va. Code §§ 18A-2-8 and 18-29-1, et seq., is entitled to the requested hearing." Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991); Duruttya, supra.

Consistent with the established principle that cases should be decided upon their merits as opposed to being dismissed for technical or procedural reasons, it is inequitable to dismiss a grievance upon the basis of timeliness when grievant's counsel, and not Grievant, is at fault. Jack v. W.Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

It appears that not only was attorney Staton unfamiliar with the procedural requirements of the grievance procedure for education employees, (See footnote 6) but that he wasdistracted by the death of his mother. WBOE also hindered the processing of this grievance by issuing the imprecise letters described above. The undersigned declines to penalize Grievant for any errors WBOE and Mr. Staton may have made. His letter of April 1, 1999, which purported to unilaterally waive the two instant grievances to Level IV, as well as his letter of August 5, 1999, which requests that Grievant's Road Branch permanent position grievance be consolidated with her two others, reflect Grievant's

desire to advance her grievances to their first evidentiary hearing, a hearing which, for whatever reasons, was not forthcoming at the lower levels. There is also no evidence of bad faith on Grievant's part. Duruttya, supra. Accordingly, WBOE's abandonment argument with respect to the instant grievance is rejected.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. 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); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

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-4-7(a). 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-4-7(a) 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, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson, supra; Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994); Fisher v. Marion

County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); 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-4-7(a) 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 theposition 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, 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 theproblem, 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). It is the duty of the county board of education to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind. The rejection of the recommended or nominated candidate must not be arbitrary and capricious or demonstrate an abuse of discretion. Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

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).

The record in this grievance contains a great deal of evidence of little relevance to its central issue, the legal sufficiency of WBOE's selection process for Principal of Glen Rogers Grade School, evidence concerning Grievant's two reprimands and the Title 1 review findings concerning Baileysville Elementary School. However, because these events are cited by WBOE in its Resolution of May 23, 2000, explaining its reasons for not selecting Grievant for the position, the voluminous evidence about them will be summarized very briefly.

On June 26, 1998, Grievant received a written reprimand for failure to follow established administrative guidelines. This reprimand arose when Grievant rescheduled a faculty senate meeting because so many teachers were absent that a quorum wasimpossible. Grievant maintained that she left a message on WBOE Assistant Superintendent McGrady's answering machine informing him of her decision. McGrady received a garbled message, and Grievant was reprimanded for failing to get permission to change the meeting date.

On July 10, 1998, Grievant received a written reprimand for submitting an inaccurate workshop attendance list. This reprimand occurred when a staff development workshop at Baileysville Elementary School that some teachers claimed did not occur raised a question about payments to teachers who might not have attended this session.

The Title 1 review at Baileysville Elementary School concerned Grievant's occasional use of Title 1-funded teachers to “supplant” her school's regular teachers, a procedure approved by WBOE's Title 1 Supervisor, Vernon Short. However, the West Virginia Department of Education disagreed with this

aspect of WBOE's use of Title 1 funds at Baileysville and, by letter of June 15, 1998, ordered it to credit its Title 1 account with $4557.24. Grievant was not reprimanded over this review.

The credible testimony of Grievant, Blackwell, Teachers Paulette and Jim Blankenship, Bottsie May Hicks, WBOE President Harless, and Secretary Sheronda Shields, showed that before Grievant became Principal there, Baileysville Elementary school was a problem school with low test scores, poor discipline, and teachers, particularly certain Title 1 teachers, arriving late and leaving early, to the extent that state intervention was possible. Grievant improved the school, raised test scores, and took steps to get the errant teachers back “on task.” Sadly, Grievant's efforts created a backlash of animosity from some teachers at Baileysville, particularly certain Title 1teachers, who chose the time Grievant was on leave with her seriously ill son to go to WBOE with their complaints about her, which led to the two reprimands described above. (See footnote 7)

However, Grievant did not grieve her reprimands, and their merits cannot be placed in issue now. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR- 371 (Oct. 30, 1996); See Stamper v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-144 (Mar. 20, 1996); Womack v. Dep't of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994).

As noted in Finding of Fact 15, on May 23, 2000, WBOE issued a resolution stating that Grievant was not selected as Principal of Glen Rogers Grade School because of the nature and closeness in time of her two written reprimands and Title 1 review findings. The resolution concluded:

> 8. Candidates for the principal positions in question who had not been subjected to recent disciplinary action and who met the minimum qualifications for the positions in question were available and were worthy of the Superintendent's nomination in accordance with the criteria contained in W. Va. Code § 18A-4-7a.
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> 9. No other factors were considered in the decisions of the Board to disapprove the recommendations of the Superintendent that she be employed as the Principal of Glen Rogers Elementary School and that she be employed as the Principal of Road Branch Grade School.

In support of its decision to select Davidson as Principal of Glen Rogers Grade School, WBOE presented the credible testimony of four of its five members. (See footnote 8) WBOEmember Margaret Swimm credibly testified that Grievant is a good elementary school principal; that Grievant had been held responsible “to some extent” for the Title 1 findings at Baileysville Elementary School; that

WBOE member Don Nuckols had promised to help Davidson because Nuckols felt that Davidson had been “passed over” for past positions because he had won two grievances; (See footnote 9) that she didn't know whether Davidson had the required Elementary Teaching Certificate; and that Davidson's other certifications equaled an Elementary Teaching Certificate. Ms. Swimm 's testimony did not include any reference to the factors set forth in W. Va. Code § 18A-4-7(a).

WBOE member Riley Brooks credibly testified that WBOE member Don Nuckols had promised to help Davidson any way he could; that Davidson had more overall seniority than Grievant and was better qualified; that he felt that Grievant needed time to get her life in order after a tragic accident befell her son; that her reprimands and her son's accident were the reasons for the Board's decision; that Grievant was never disciplined over the Title 1 findings at Baileysville Elementary School; and that Davidson's certification as a Counselor K-8 qualified him to be Principal of Glen Rogers Grade School. Mr. Brooks' testimony did not include any reference to the factors set forth in W. Va. Code § 18A-4-7(a).

WBOE member Gerald L. Short credibly testified that Grievant's reprimands and the findings of the Title 1 review were too close in time for her to be selected for the position;that she was possibly the most qualified applicant were it not for her reprimands; and that Davidson was well qualified for the position as he had counseled at elementary schools. Mr. Short's testimony did not include any reference to the factors set forth in W. Va. Code § 18A-4-7(a).

WBOE President Arnold W. Harless credibly testified that Grievant was qualified to be Principal of Glen Rogers Grade School and had more administrative experience than Davidson; that all of Grievant's administrative experience was in elementary education; that Davidson had no elementary administrative experience, but had done some elementary school counseling; that the first two factors of W. Va. Code § 18A-4-7(a) (appropriate certification and/or licensure and amount of experience relevant to the position) were the only two factors that applied to the selection of administrative personnel; that the phrase “most qualified” in W. Va. Code § 18A-4-7(a) trumped the factors; that Davidson has the required Elementary Teaching Certificate by means of his Counselor K-12 certificate; that Nuckols supported Davidson for the position; and that he considered Grievant's two reprimands, but that they didn't fall under either of the two factors he considered.

Mr. Harless also credibly testified that Grievant did a good job as Principal of Baileysville Elementary School, which had problems due to some teachers not being on task, which caused a

backlash by some teachers against Grievant; and that he made his decision based in part upon the fact that Grievant had been reprimanded after the Title 1 review findings, although he later acknowledged that she had not.

Grievant credibly testified that she had six years experience as an elementary school principal; (See footnote 10) that she had attended the Principals' Academy; that BaileysvilleElementary School had a poor reputation, lax discipline, low test scores, and Title 1 teachers who were not “on task” and who came and went as they pleased; that she implemented a plan to improve the school, which resulted in test scores above the fiftieth percentile for the first time; and that she felt that she was the most qualified candidate for the position of Principal at Glen Rogers Grade School.

Superintendent Blackwell credibly testified that he applied the “first set of factors” set forth in W. Va. Code § 18A-4-7(a) to his selection process and constructed a matrix to compare the candidates; that Grievant was the most qualified candidate for the position after consideration of all of the factors, including “other measures or indicators,” and considering her two reprimands; and that Grievant is an excellent educator and administrator, respected by her peers and the subject of many favorable parent comments. Blackwell also credibly testified that WBOE has a policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators; (See footnote 11) that all of Grievant's experience is in elementary education; that Davidson had no elementary experience or elementary administrative experience; that Davidson did not meet the minimum qualifications of the posting because he lacked a valid Elementary Teaching Certificate; that Davidson had never been an elementary school principal, while Grievant had been one for six years and done a very good job; that Davidson had applied for elementary administrative jobs before but was never selected due to his lack of an Elementary Teaching Certificate; and that WBOE's selection ofDavidson was contrary to its previous policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators.

As noted above, Blackwell recommended that WBOE select Grievant for the position. WBOE did not accept Blackwell's recommendation of Grievant, or his second choice, Walls. At its September 14, 1998, meeting, WBOE selected Davidson for the position.

The undersigned concludes that Blackwell, as he compared the candidates in order to recommend the most qualified, clearly had applied the “first set of factors” set forth in W. Va. Code § 18A-4-7(a). Unfortunately, it is equally clear that the members of WBOE did not. Their credible

testimony about their decision making process at the time they made the decision to reject Blackwell's recommendation of Grievant, and select Davidson, shows that only Mr. Harless gave any thought to the factors they were required by law to apply, and even then applied only two of them. It appears instead that something else was going on, which included political favor trading, a willingness to ignore the minimum qualifications of the position, some reliance on disciplinary actions which had not been imposed on Grievant, and a certain degree of paternalism. WBOE failed its legal duty to apply the "first set of factors" set forth in W. Va. Code § 18A-4-7(a), Baker, supra, and to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind, and to ensure that the rejection of the recommended candidate is not arbitrary and capricious or an abuse of discretion. Stinn, supra. As a result, the most qualified candidate was not selected, in violation of W. Va. Code § 18A-4-7(a). In reaching this conclusion, the undersigned is mindful of WBOE's resolution, referred to in Finding of Fact 16, purporting to explain the reasoning behind its selection decision. It is noted that this resolution was issued some 20 months after WBOE's decision. However, given the credible testimony of the WBOE members, set forth above, as to their decision making process at the time of their decision, their subsequent resolution appears to be nothing more than a post-hoc rationalization of their flawed decision making process.

Accordingly, Grievant has established that WBOE did not properly rely on the "first set of factors" set forth in W. Va. Code § 18A-4-7(a), which it was legally mandated to follow, and has established a significant flaw in the selection process, sufficient to suggest that the outcome might reasonably have been different. Hopkins, supra. A searching and careful inquiry into the selection process that WBOE chose to apply to the candidates for the position shows that it was not legally sufficient. Thibault, supra. WBOE failed to rely on factors that were intended to be considered (the "first set of factors" set forth in W. Va. Code § 18A-4-7(a)); entirely ignored important aspects of the problem (the minimum qualifications for the position), and explained its decision in a manner contrary to the evidence before it. Bedford County Memorial Hosp., supra. The candidate selected by WBOE as Principal of Glen Rogers Grade School did not meet the minimum qualifications for the position. See Peters v. Putnam County Bd. of Educ., Docket No. 90-40-247 (Aug. 16, 1991); Via v. Nicholas County Bd. of Educ., Docket No. 89-34-710 (Apr. 11, 1990); Ashworth v. Putnam County Bd. of Educ., 89-40-560 (Oct. 31, 1989). Grievant proved, by a preponderance of the evidence, that she

was the most qualified applicant for the position. The issue of the proper remedy for Grievant is a difficult one, as Glen Rogers Grade School closed after the 1999-2000 school year. The record is silent as to whether Grievant would have enjoyed a higher salary had she been selected. However, because WBOE has a policy of requiring elementary certification for elementary administrators and secondary certification for secondary administrators, Grievant may be disadvantaged in future selection processes if she is deprived of the elementary administrative seniority she would have earned had WBOE conducted a legally sufficient selection process. (See footnote 12) Therefore, WBOE will be ordered to credit Grievant with the elementary administrative seniority she would have earned had she been selected as Principal of Glen Rogers Grade School, and to pay her any difference in salary, with interest, between that position and the position or positions she held between her non-selection as Principal of Glen Rogers Grade School and the closing of that school.

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 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 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-4-7(a): 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. It is the duty of the county board of education to consider the candidates recommended or nominated by the county superintendent in a thoughtful manner, and with the best interest of the schools in mind. The rejection of the recommended or nominated candidate must not be arbitrary and capricious or demonstrate an abuse of discretion. Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998).

8. WBOE failed its legal duty to apply the “first set of factors” set forth in W. Va. Code § 18A-4-7(a).

9. The candidate selected by Respondent WBOE as Principal of Glen Rogers Grade School did not possess an Elementary Teaching Certificate and so did not meet the minimum qualifications for the position.

10. Grievant proved, by a preponderance of the evidence, that she was the most qualified applicant for the position.

Accordingly, the grievance is **GRANTED**, and Respondent WBOE is **ORDERED** to credit Grievant with the elementary administrative seniority she would have earned had she been selected as Principal of Glen Rogers Grade School, and to pay her any difference in salary, with interest, between that position and the position or positions she held between her non-selection as Principal of Glen Rogers Grade School and the closing of that school.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming 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.

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ANDREW MAIER

Administrative Law Judge

Dated: March 1, 2001

Footnote: 1

The "relief requested" portions of these two grievances were apparently transposed upon filing at Level IV. Decisions in the Road Branch Grade School grievances will be issued separately.

Footnote: 2 *As relief in this grievance, Grievant sought to be instated into the Glen Rogers Grade School position.*

Footnote: 3 *WBOE agreed to do so without waiving any timeliness defenses it may have.*

Footnote: 4 *Attorney fees are not awarded by this Grievance Board. Smarr v. Wood County Bd. of Educ., Docket No. 54-86-062 (June 16, 1986).*

Footnote: 5 *By letter of April 1, 1999, attorney Staton informed Superintendent Blackwell that Grievant "hereby waive[ed] the two grievances she has pending over principal assignments to level four."*

Footnote: 6 *A search of the more than 4,000 Grievance Board decisions did not reveal that attorney Staton has ever appeared before this Board.*

Footnote: 7 *The record does not reflect any previous discipline of Grievant in her 23 year career with WBOE.*

Footnote: 8 *WBOE member Don Nuckols did not testify because he had been indicted on a felony charge of unlawfully buying or selling a vote and a misdemeanor charge of unlawfully promising employment in exchange for political support for allegedly promising Davidson the Glen Rogers Grade School Principal position in exchange forhis support in the May, 1998, school board election. The charges against Mr. Nuckols were dismissed on or about July 15, 2000. However, Mr. Nuckols still asserted his right not to testify after that date because he felt his re-indictment was possible.*

Footnote: 9 *See Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-268 (Feb. 26, 1993) and Davidson v. Wyoming County Bd. of Educ., Docket No. 92-55-402 (Feb. 23, 1993).*

Footnote: 10

The record does not reflect why the matrix prepared by Blackwell reflects only four years of administrative seniority.

Footnote: 11 *It is not arbitrary and capricious for a board to require secondary school experience for a secondary school position. Baker v. Lincoln County Bd. of Educ., Docket No. 00-22-081 (June 28, 2000).*

Footnote: 12 *For this reason, WBOE's argument that this grievance is moot is rejected.*