CHRIS BAKER, et al.,

Grievants,

v. DOCKET NO. 01-22-528

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was initiated by Grievants, Chris Baker, Sheila Burns, and Christina Napier, against Respondent, Lincoln County Board of Education, when they were not selected for various extracurricular positions in February 1999. Grievant Baker applied for two positions, Project Director and Area Director, but is grieving only his non-selection for one of two Area Director positions. Grievant Burns is grieving her non-selection for the Project Director position. Grievant Napier is grieving her non-selection for one of six Site Coordinator positions. As relief, each requested instatement into the positions at issue, back pay, interest, and any benefits. (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 Baker has been employed by the Lincoln County Board of Education ("LBOE") for 21 years. At the time of the selection at issue, he was principal of Branchland Elementary School, and had been in that position since 1984. Prior to that, he was principal of Ranger Elementary for six years, and an elementary teacher for five years. He has a Bachelor's Degree in social studies, and a Master's Degree in educational administration. He holds supervisory certification and superintendent certification.

2. Grievant Burns has been employed by LBOE for 27 years. At the time the selection was made, she was principal of Ranger Elementary School. Prior to that, she had been an elementary teacher, high school teacher, special education teacher, supervisor, director of curriculum K through

12, and early childhood director. She has a Bachelor's Degree in English, speech, and journalism 7-12, a Master's Degree in elementary education, and a Doctorate in curriculum and instruction K-12 and in educational administration.

3. Grievant Napier has a Bachelor of Arts Degree in elementary education (K-8), and a Master's Degree in reading education (K-12), plus 30 hours. She has worked as a Title I teacher at West Hamlin, Ranger, and Branchland, JTPA teacher at Harts High School, kindergarten teacher at Midkiff Elementary, special education teacher at Atenville Elementary, Pleasant View Elementary, and Guyan Valley High School, fourth, fifth, and sixth grade reading and social studies teacher at Ferrellsburg Elementary, and computer lab teacher for LBOE, since at least 1994. She worked in the Title I summer school two summers. At the time of the selection at issue, she was a Title I teacher at Branchland Elementary. 4. Darlene Dalton, Principal at Atenville Elementary, Peggy Adkins, Principal at Harts High School, and Michael Tierney, Director of Step By Step, a non-profit organization, prepared a grant application for a “21st Century Community Learning Centers” Grant, which would be administered by LBOE. Ms. Dalton was informally notified in November 1998, that LBOE would receive the grant, and formal notification was made in December 1998. The grant was to be used for an after school community education program to provide academic assistance, resiliency training for at risk youth, and arts training to students in the Harts area of Lincoln County. Classroom teachers would send lessons for the students to work on. It was important that the program be in place as soon as possible.

5. The grant management team initially consisted of Ms. Dalton, Ms. Adkins, Mr. Tierney, and Bill Bryant. Mr. Bryant later resigned.

6. The management team decided the program needed a Project Director, three Area Directors, six Site Coordinators, and Activity Directors. Mr. Tierney, as the Step-By- Step representative, would be one of the Area Directors. The Site Coordinators were located at Atenville, Harts High School, and Ferrellsburg/Big Ugly, with two Coordinators at each site.

7. LBOE advertised the positions in December 1998, beginning the day before Christmas break, and the positions were posted at some schools. The postings were not received by one or more schools until after Christmas break. The posting described the positions as “extra duty assignments,” during the evening, weekends, and summer. Grievants were not aware of the posting and did not apply for any of the positions. Due to concerns raised by Grievant Burns at an LBOE

meeting, that employees were not aware of the posting, the positions were posted a second time in January 1999. Superintendent Rick Powell was prepared to make recommendations to LBOE at that meeting for filling the positions. When Grievant Burns raised these concerns at the LBOE meeting,Superintendent Powell responded by stating that the same people would get the jobs anyway.

8. Attached to the posting was a job description for Project Director. It listed five qualifications, as follows:

1. MA Degree or higher
2. Grant writing skills and experience in writing, administering and evaluating grants.
3. Experience in administration and teaching.
4. Training in Resiliency Programs
5. Experience working with public agencies.

The posting listed the responsibilities of the position as:

1. Oversee the implementation of the 21st Century Community Learning Projects.
2. To assist with the management of the budget for the 21st Century Grant.
3. To provide supervision of personnel at each learning center.
4. To develop organizational structure for the Learning Center Projects (LCP).
5. To establish a Calendar of Activities for the LCP.
6. To assist in providing meals for LCP.
7. To assist with the evaluation of the 21st Century Grant (pre and post evaluations).
8.

Serve as a member to the Management Team of the 21st Century Grant.

9. Work with focus groups.

9. After the first posting, four people applied for the Project Director position: Charles McCann, LBOE's Personnel Director at the time, Laurie Casto, and two gentlemen who had no education background and were not considered by the management team to be viable candidates. Ms. Casto withdrew her application when she was told the position would be located in the Harts area. Grievants Burns and Baker applied for the Project Director position after the second posting.

10. Grievant Burns and Mr. McCann were interviewed for the Project Director position by Mr. Tierney, Ms. Dalton, and Ms. Adkins. Each rated the two interviewees during the interview in the following eight areas: background/qualifications, after school/summer goals and in school goals, arts, micro society, supervision, parentinvolvement and leadership, grants management, and development. The ratings were 1 through 5, with 1 being “weak”, and 5 being “strong.” Grievant Burns received an overall rating of 2.54, while Mr. McCann received an overall rating of 4.7.

11. Mr. Tierney and Ms. Dalton found both Grievant Burns and Mr. McCann to be good candidates. Ms. Adkins believed Mr. McCann's qualifications were much greater than those of Grievant Burns, she did not believe Grievant Burns had grant writing experience, and both she and Ms. Dalton believed that Grievant Burns felt the arts were a waste of time. The management team decided Mr. McCann was the best candidate for the position, and recommended him. This recommendation was submitted in writing by Mr. Tierney to Superintendent Powell, noting Mr. McCann's “extensive experience in community development and his commitment to involving parents, community members and students themselves in decision making.” He further noted “the program is, in essence, an effort to bring the entire community together to create safe places for children with constructive activities and caring adults. We believe that Mr. McCann's history of developing community capacity makes him an ideal person to direct this project in a way that it will be sustainable beyond the three year grant project.” Mr. McCann, as Personnel Director, signed the Board Agenda Request dated January 27, 1999, on which he submitted the personnel recommendations to Superintendent Powell, presenting himself as the recommendation of the management team for the Project Director. This recommendation was accepted by LBOE on

February 1, 1999.

12. Grievant Burns has written and been awarded many grants for Ranger Elementary. She served as director of a federal office of education grants when she was director of the Transition Grant awarded to Southwestern Community Development Corporation. She has resiliency type training, and has worked with agencies such as VISTA and Southwestern Community Action Council. She has worked as a 4-H leader atRanger, has served on the Board of Directors of Lincoln Primary Care, and was a volunteer tutor in the Ranger and Hamlin areas. She was a social worker for a short period of time.

13. Mr. McCann has a Master's Degree in school administration, plus 45 hours, and a Bachelor's Degree in science and physical education. At the time of the selection, he had been an LBOE employee for 32 years. He was a high school teacher for six years, an elementary principal for three years, a high school principal for seven years, an assistant principal one year, assistant superintendent four years, superintendent in Lincoln County eleven years, superintendent in Gilmer County one year, Director of Safe and Drug Free Schools/Grant Writer during the spring of 1993, and Director of Safe and Drug Free Schools/Secondary Supervisor from 1996 through the time of the selection, and he was Personnel Director at that time also. He has experience working with grants, experience working with boards and community groups on community projects, and served on several community boards and agencies. He served on the Executive Board of Directors for RESA II as Chairman for four years, the 4-H advisory board, Accreditation Teams, the Ambulance Service Board of Directors, and the Harts Medical Clinic Board of Directors. He was a member of various volunteer organizations, and served as President of the Lincoln County Education Association, and the Lincoln County Commission.

14. On April 6, 2000, in a Conciliation Agreement, Mr. McCann received a public reprimand from the West Virginia Ethics Commission, which found he had violated W. Va. Code § 6B-2-5(b)(1). The Conciliation Agreement states that Code Section “provides, in relevant part, that 'a public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.'” The Ethics Commission concluded that, “[a]s personnel director, Mr. McCann shared the same obligation [as Ms. Adkins and Ms. Dalton] to insure that the hiring selection process for all positions was reasonable, fair and objective. Mr. McCann acquiesced in Ms. Adkins and Ms. Dalton functioning as management team

membersresponsible for making hiring recommendations and as applicants for two administrative positions they created. Mr. McCann also did not remove himself from the hiring process once he became interested in the position of Project Director." Although the Conciliation Agreement was entered into after Mr. McCann had resigned his position, it did not reverse the selection, or require Mr. McCann to return any money he had been paid as Project Director.

15. Mr. McCann assisted in writing the job descriptions for the Area Directors and Site Coordinators.

16. Mr. McCann resigned as Project Director in August 1999. LBOE then combined the duties of the Project Director with Secondary Education and Drug Free Schools, and posted the position as a full-time position. Grievant Burns applied for the position, but was not selected, and did not file a grievance over her non-selection.

17. Attached to the posting was a job description for Area Director. It listed five qualifications, as follows:

> 1. MA Degree or higher
> 2. Grant writing skills and experience in writing, administrating [sic] and evaluation of grants.
> 3. Familiar with Resiliency Programs, Micro Society, Focus Groups and Youth Development.
> 4. Experience in school administration and teaching.
> 5. Knowledge of the 21st Century Community Learning Center Grant.

The posting listed the responsibilities of the position as:

> 1. Implement the 21st Century Community Learning Project for [Harts High School and Midkiff Community Center or Atenville and Ferrellsburg Elementaries] (LCP).
> 2. To order all necessary supplies, materials and equipment.
> 3. To maintain inventory of materials, supplies and equipment.

4. Schedule focus groups and participate in focus groups.

5. Maintain a calendar of events for the 12 month period.

6. Provide publicity on the LCP for [Harts High School and Midkiff Community Center or Atenville Elementary and Ferrellsburg Elementary].

7. Provide supervision to activity supervisors and others.

8. Work with evaluator of the project.

9. Keep record of participation and other records as needed.

10. Maintain records for payroll department and send to Payroll Office monthly.

11. Schedule personnel for work and special events.

12. Schedule and attend Family Education Night.

13. Conduct Summer Enrichment Programs

14. Schedule program for people with disabilities as needed.

15. Coordinate after school program.

16. Coordinate Family Outreach Celebration.

17. Serve on the Management Team and attend necessary meetings.

18. Work with the Advisory Committee(s).

The Atenville/Ferrellsburg position included a 19th responsibility: “Provide supervisory services to Atenville Elementary and Ferrellsburg Elementary.”

18. Three people applied for the two Area Director positions: Grievant Baker, Ms. Adkins, and Ms. Dalton. Mr. Tierney made the decision to recommend Ms. Adkins and Ms. Dalton for the two positions. He made his recommendations to Superintendent Powell, and they were accepted and approved by LBOE.

19. Grievant Baker has been involved in parent involvement activities at Branchland Elementary, and has served on school accreditation teams. His resume does not reflect any training in grant writing or experience with grants, nor does it reflect any training in resiliency or micro society, or any community involvement.

20. Ms. Dalton has a Bachelor's Degree in psychology, and a Master's Degree in special education, plus 66 hours. She has been employed by LBOE since 1975, as a teacher for 16 years, and as a principal since 1991. She has written grant applications, supervised and assisted with an after-school tutoring program, is knowledgeable of micro society, and has worked on community involvement and improvement efforts.

21. Ms. Adkins has a Bachelor's Degree in elementary education, and a Master's Degree in educational administration 1-9, plus 75 hours. She has been employed by LBOE since 1979, serving as a teacher for eight years, a principal for nine years, andassistant superintendent for two years. She has training in identifying, working with, and empowering at-risk students, has experience in working with grants, and has been involved in various community organizations.

22. On April 6, 2000, in a Conciliation Agreement, Ms. Dalton and Ms. Adkins received a public reprimand from the West Virginia Ethics Commission for violation of W. Va. Code § 6B-2-5(b)(1). The Ethics Commission concluded they “had an obligation to insure that the hiring selection process for all positions was reasonable, fair, and objective. Once they decided to seek paid employment under the 21st Century grant, they should have removed themselves from the management team and the entire hiring process.”

23. Attached to the posting was a job description for Site Coordinator. It listed five qualifications, as follows:

1. Degree in education
2. Knowledge of grant writing
3. Experience in working with grants
4. Ability to conduct art, music and related activities with

groups.

5. Preferred training in tutoring, micro-society, resiliency program, life skills, grant management and focus groups.

The posting listed the responsibilities of the position as:

1. Prepare order[s] for supplies, materials and equipment.
2. Assist with scheduling of focus groups.
3. Participate in focus groups.
4. Develop a 12 month calendar of events for 21st Century Projects.
5. Provide direction for Activity Supervisor.
6. Assist with pre and post evaluations.
7. Schedule personnel for work.
8. Plan, attend and participate in Family Education Night.
9. Be able to conduct activities for groups in art, music and related other activities.
10. Work as a tutor for identified students.
11. Be able to train staff to serve as a tutor.
12. Be able to conduct after school programs[.]

24. Six people applied for the six Site Coordinator positions after the first posting. Eight people applied for the Site Coordinator positions after the second posting, including Grievant Napier.

25. Ms. Dalton, Ms. Adkins, and Mr. Tierney reviewed the applications and resumes for the Site Coordinator positions. In addition to considering the information on the applications and resumes, they considered information each personally knew about the applicants, and included this

information on a document which summarized and compared the qualifications of the candidates, and was referred to as a “matrix.” They did not conduct interviews, although they did meet with the six people who applied after the first posting. They recommended to Superintendent Powell that Betty Thompson, Jacqueline McCann, Deborah Dingess, Kimberly Light, David Lucas, and Judith McCann be hired for the six Site Coordinator positions. LBOE approved the recommendations on February 1, 1999. (See footnote 2)

26. Ms. Dalton and Jacqueline McCann are sisters. Ms. Dingess is Ms. Dalton's cousin. Ms. Dalton participated fully in the discussions about the applicants, and in the decision to recommend the six applicants for the Site Coordinator positions.

27. Ms. Thompson was selected for one of the Site Coordinator positions at Big Ugly. Ms. Thompson is a Special Education Supervisory Aide at Harts High School, and has been a Special Education Aide since 1975. She has a Regents Bachelor of Arts Degree. Most of the courses she took were in education, but she has not done any student teaching, and the record does not reflect that her degree is in education. Her resume does not reflect that she has knowledge of grant writing, or that she has any experience working with grants. Her resume does not reflect that she has any experiencein or ability to conduct art or music with groups, or that she has training in tutoring, micro society, resiliency programs, life skills, grant management, or focus groups. She has served as Vice President of the Lincoln County Education Support Personnel, on the State Executive Committee West Virginia Educational Support Personnel, the Lincoln County Staff Development Council, the Harts High Effectiveness Team, as a Board Member of Harts Community Development, a Harts Community Collaborative Member, a WVEIS Computer Program (RESA) Member, a JOSTEN Computer Lab Member, and on the Harts High School Unified School Team. She coached basketball for special olympics one year, and has coached special olympics at Lincoln County field day since 1980. She was the State representative at the National Educational Association Assembly in 1991, and for the Harts Community Collaborative Team in 1996-97. She was the recipient of a service personnel award and the Bonnie Lucas Memorial Award in 1991.

28. Jacqueline McCann is a teacher at Atenville Elementary. Ms. McCann does not hold a Master's Degree. Ms. McCann has obtained funding for several projects through grants, including a grant focusing on classical art and music. She participated in after-school tutoring at Atenville Elementary, plays the piano and saxophone, has integrated drama into the curriculum, and is able to

conduct focus groups. She has training in reading and writing assessment, whole language, micro society, and cooperative learning. She helped develop the Summer Science Institute for students and received a grant for it. She has served as cheerleading coach at Harts High School, and on the Lincoln County Teacher's Academy Planning committee, the Harts of the Community Action Research and Community Schools Committees, the Micro Society Steering Committee, the Effective School Improvement Planning Committee, and the discipline and attendance committees. She developed community education classes in gymnastics, photography, line dancing, computers, and math. She has given presentations locally and regionally on various topics, including micro society. 29. Grievant Napier lives in the Harts area and has worked in the three schools in the area. She has experience in ordering supplies, materials, and equipment, managing a budget, keeping purchase and inventory records, scheduling, and supervising. She has provided staff development workshops in using the internet and multi media. She has experience in grant writing, although her first experience was unsuccessful as she missed the deadline. She has additional reading assessment and writing assessment training, training in using music to help teach reading, computer and technology training, success for all training, parent involvement training, brain-based teaching-building excitement for learning training, and cooperative learning training.

30. Kimberly Light's resume reflects that she received a Master of Arts Degree from Marshall University in 1991. She lives in Ranger, and has worked as a teacher for 21 years. She was a Title I summer camp supervisor for three years, and a supervisor for the Governor's Summer Youth Program one year. She has served as cheerleading sponsor, a Sunday school teacher, and a church camp teacher and coordinator. Her resume does not reflect that she has any training or experience in grant writing, or that she has been active in parent involvement activities.

Discussion

Grievants bear the burden of proving each element of their grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29- 476 (Mar. 28, 1996). Grievants argued W. Va. Code § 6B-2-5(b)(1) was violated, in that the management team had an obligation to ensure that the hiring was reasonable, fair, and objective, that the selection process was flawed, and that Grievants were the most qualified applicants. While the Conciliation Agreement has been made a part of this record, and certain parts of it have been included in the findings of fact, and have been

considered by the undersigned in evaluating whether the selections at issue were made in an arbitrary and capricious manner, it was the role of the Ethics Commission, not the Grievance Board,to evaluate whether Code § 6B-2-5(b)(1) was violated, and if so, what sanction should be imposed. As Respondent pointed out, the Ethics Commission did not conclude that Mr. McCann, Ms. Adkins, or Ms. Dalton should be required to relinquish their positions, or that they should return any of the money they had been paid for serving in these positions.

W. Va. Code § 18A-4-16 defines extracurricular assignment, and provides, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. . . .

The positions at issue are extracurricular assignments. As such, “the provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for the assignment. Hall v. Mingo County Bd. of Educ. Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). Thus, 'the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' McCoy v. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Foley, supra; See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999).

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 andcapricious 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, 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). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Id. (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

Selection of the Project Director

Grievant Burns argued she was clearly more qualified than Mr. McCann, and believed the entire process was a sham, including her interview. She questioned whether Mr. McCann's resume was submitted in response to the posting, or was created at some later time, pointing to the lack of a cover letter. Ms. Dalton and Mr. Tierney testified the resume was submitted by Mr. McCann at the time of the posting, and Grievant presented no evidence to contradict this.

Grievant Burns questioned whether Mr. McCann could perform the duties of the position due to the duties of his full-time job with LBOE, but she did not demonstrate he was not able to perform these duties. To the contrary, Mr. Tierney testified that Mr.McCann had put in his 20 hours a week, and Ms. Adkins testified he was always at one of the sites. Ms. Dalton testified that she believed it would be up to Superintendent Powell to work with Mr. McCann to see that his duties were covered.

Grievant Burns argued the document which showed how the management team ranked the applicants during the interview, the interview score sheet summary, must have been prepared after the selection was made, because she had repeatedly asked for a “matrix” to compare her qualifications to those of Mr. McCann, and none was provided until the Level IV hearing. This document should have been provided to Grievant earlier in the process if she asked for it, but it is not a “matrix;” nor does the fact that Grievant did not see it earlier represent proof that it was prepared after the selection. The evidence, however, does not support a finding that Grievant requested this document during the course of the grievance procedure, or that she ever made a formal request for the document from a person who would be required to respond. Grievant testified she had asked

after the conclusion of the LBOE meeting when Mr. McCann was hired into the position, if there was a matrix she could look at which showed points awarded for education and experience, and no one seemed to have one. She then stated she had asked for a matrix on more than one occasion. She did not say whom she had asked, or that she had ever requested such a document once she began the grievance. Grievant did not mention her repeated requests when asked whether there was any objection to admission of this document, but asked to see the score sheets prepared by Ms. Dalton, Ms. Adkins, and Mr. Tierney. Respondent stated at that time that these documents had not been requested before, and this statement was not contradicted at that time by Grievant. The witness testimony was that the form was prepared prior to the interviews by Mr. Tierney for use by the team members, and Mr. Tierney compiled the scores after the interviews. Grievant did not argue she was prejudiced by the introduction of this documentinto evidence at Level IV, and the undersigned has found no reason to discount its authenticity.

Grievant Burns pointed to Mr. McCann's service on the County Commission, and asserted the County Commission has provided funding to Step-By-Step. This is incorrect. Mr. Tierney testified that the County Commission had never funded Step-By-Step, but had only acted as the entity through which funding from the Legislature had flowed to Step-By- Step.

Grievant Burns pointed to the timing of the posting, and Superintendent Powell's statement that the same people would get the jobs as evidence that Grievants were never considered for the positions; it was a “done deal.” The timing of the posting, as testified to by the witnesses, was a result of the rush to get the program up and running as quickly as possible, not a desire to limit the applicant pool. As the positions were posted a second time, this is no longer an issue. As to Superintendent Powell's inappropriate comment, while Grievants may have indeed found it disconcerting, if he believed new applicants would not get serious consideration would he really be so stupid as to say so in a public meeting?

Grievant found it significant that the newspaper advertisement was different from the posting, which the undersigned does not, and that she was unable to get a copy of the grant from the central office. Certainly LBOE personnel should have made an effort to make the grant available to all applicants so they could obtain information about the grant and the after school program. However, Ms. Dalton stated information about the grant would have been available to anyone who chose to seek this information from the federal government, and she had offered such information to her fellow

principals several times, but no one was interested. Further, Grievant Burns did not demonstrate that she suffered any harm because she did not see the grant. Finally, Grievant Burns pointed to the fact that Mr. McCann had received a public reprimand. Indeed, Mr. McCann should not have involved himself in the selection process in any way once he became an applicant for one of the positions. In particular, he should not have signed off on the document which set forth the recommendations for the positions, and included the recommendation that he be hired for Project Director. However, his participation is merely one fact to be weighed in determining whether the decision of the management team and LBOE was arbitrary and capricious; it is not determinative.

The resumes of Grievant Burns and Mr. McCann demonstrate that LBOE was fortunate to have two highly motivated and qualified applicants for the position of Project Director. Each had particular strengths, and both had a record of community service. Grievant Burns was well qualified for the position, but the evidence does not support a finding that she was “clearly more qualified” than Mr. McCann.

Ms. Adkins' and Ms. Dalton's testimony, however, raises questions about their ability to evaluate the candidates. Ms. Adkins stated that Mr. McCann's qualifications were much greater than Grievant Burns', specifically noting that Grievant Burns had little experience in grant writing, which is not correct. Ms. Adkins explained Grievant Burns' doctorate was not a consideration, while both she and Ms. Dalton pointed to Grievant Burns' statement in a principal's meeting that “she wanted to get rid of those art things, that she wanted to make sure that the academics were happening, and that the art things were just a waste of time, more or less,” was considered, apparently negatively. Grievant Burns did not recall ever making such a statement, and pointed out that the arts program at her school was very strong. Ms. Dalton further testified, however, that Mr. McCann had more experience in grant administration and in resiliency programs, lots of experience working with community groups, and his administrative experience was broader. She testified he had talked about building the community and empowering individuals during the interview, whileGrievant Burns' expressed philosophy was that leaders come to the top, she saw challenges as personalities being different, she said nothing about building people, and she had no understanding of micro society. She pointed out that the members of the management team each scored Mr. McCann higher than Grievant Burns on the interview points.

While Ms. Adkins' and Ms. Dalton's decision to recommend Mr. McCann for the Project Director

position was based in part upon inaccurate information, there was no indication that Mr. Tierney was similarly misinformed, yet he too favored Mr. McCann, for sound reasons. His decision was not influenced by Mr. McCann's position as Personnel Director, but rather, was based upon Mr. McCann's excellent qualifications.

Selection of the Area Directors

Grievant Baker argued it was unlawful for Ms. Dalton and Ms. Adkins to hire themselves into positions which they created. He did not argue he was a better candidate than either of them, although he did argue he met the minimum qualifications. He argued interviews should have been granted.

As noted in the findings of fact, Ms. Dalton and Ms. Adkins did not “hire themselves” into any positions. Mr. Tierney made the decision to recommend Ms. Dalton and Ms. Adkins for the Area Director positions. Mr. Tierney testified he felt no pressure to select any particular person for any position, including the two Area Director positions. He stated he had asked someone to help him with interviews, but when the resumes came in, he saw no need for interviews, because Ms. Adkins and Ms. Dalton had “tons of experience,” and Grievant Baker had far fewer qualifications. He noted the years of experience Ms. Adkins and Ms. Dalton had in community outreach. The three resumes support his conclusions.

Mr. Tierney also noted that it is not unusual for those involved in writing grant applications to derive some financial benefit from the grant. He believed that those awarding grants want those who were involved in the application process to be involvedin grant implementation, and noted the resumes of the management team members had been provided to those awarding this grant.

While the Ethics Commission has found that Ms. Adkins and Ms. Dalton acted inappropriately in participating in the selection of any person for any of the positions, their resumes reflect they have much more experience than Grievant Baker in the required areas. Grievant Baker testified that he had written grants and received grant money for Branchland Elementary and Ranger Elementary Schools, however, his resume does not mention that he has any training in grant writing or administration, or that he has any experience in writing or administering grants. Without this, he did not even meet the minimum qualifications for the position, and he did not challenge the propriety of any of the required qualifications. It is the applicant's obligation to make his qualifications known to those making the selection decision, and this Grievance Board, as a rule, does not consider any skills

or activities which an applicant does not make known to those making the selection decision. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996)) It cannot be said that Mr. Tierney's recommendation was arbitrary and capricious, and there was no requirement that he conduct interviews.

Selection of Site Coordinators

Grievant Napier argued she was more qualified than Betty Thompson, Kimberly Light, and Jacqueline McCann. She pointed to her Master's Degree in reading, while arguing that those three applicants did not possess a Master's Degree (See footnote 3), and to Ms.Thompson's lack of a degree in education. She noted that she did not have the benefit of having a friend or relative on the management team, and that it was improper for the team to share information they had in their possession about certain applicants.

The first issue which will be addressed is whether Ms. Thompson was minimally qualified for the position. Contrary to the opinions of Ms. Dalton and Ms. Adkins that the qualifications listed in the posting were simply “preferred,” the posting clearly **required** a “degree in education.” Certainly, a decision could have been made prior to posting that the qualifications be listed as “preferred,” in which case the word “preferred” would have been inserted in front of each qualification, just as it is inserted in front of the type of training listed in the qualifications. Ms. Dalton testified she felt Ms. Thompson had a degree in education because she had taken so many education courses. Mr. Tierney and Ms. Adkins did not express this opinion, but believed Ms. Thompson's education course work and work as a special education aide was sufficient. No evidence was presented by either party to explain what a “degree in education” is, or that Ms. Thompson possessed such a degree. Ms. Thompson's diploma simply says she has a Regents Degree. The undersigned cannot make a finding under the facts presented here that Ms. Thompson possessed a degree in education. The next question is whether she could be placed in one of the Site Coordinator positions when she did not hold such a degree.

“[A] county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. See Cowen v. Harrison County Bd. of Educ., 196 W. Va. 377, 465 S.E.2d 648 (1995); Mounts v. Mingo County Bd. of Educ., Docket No. 96-29-479 (June 27, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29-357 (Jan. 31, 1996).” Glick v. Logan County Bd. of Educ.,

Docket No. 97-23-435 (Jan. 29, 1998). Once the qualifications are established, it is important that they be followed.

> This Grievance Board has repeatedly addressed the importance of postings being accurate. "It is well established that 'skills required by a board of education for an applicant to qualify for a position must be included in the posting.' Wall v. Putnam Co. Bd. of Educ., Docket No. 89-40-664 (July 10, 1990)." Feltz v. Marion County Bd. of Educ., Docket No. 90-24-078 (Oct. 19, 1990). "The purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position." Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263 (June 7, 1988).

Conners v. Hardy County Bd. of Educ., Docket No. 99-16-459 (Jan. 14, 2000). This Grievance Board has further found an abuse of discretion where a county board of education selected “an applicant who did not meet the minimum qualifications for the position, when there were other applicants available who held the appropriate credential required by the posting. See W. Va. Code § 18A-3-2; Johnson v. Cassell, 182 W. Va. 317, 387 S.E.2d 553 (1989); Peters, supra.” Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

Grievant has proven that a degree in education was a minimum qualification which LBOE could not simply disregard, and Ms. Thompson did not meet this minimum qualification. However, Grievant did not meet all the minimum qualifications either. The posting also required experience in working with grants, which Grievant did not have.

Ms. Thompson's resume does not reflect that she meets at least two of the remaining three minimum qualifications. It does not list either knowledge of grant writing, or experience in working with grants. It further does not indicate that she has any experience in or ability to conduct art or music, although her experience coaching special olympics would be experience in conducting a related activity with groups. In addition, there is no indication on Ms. Thompson's resume that she meets the “preferred training in tutoring, micro society, resiliency program, life skills, grant management and focus groups.”

The document prepared by Ms. Dalton which compares the qualifications of the applicants lists Ms. Thompson as assisting with the Community Collaborative Grant,although it does not indicate what assistance she provided. It also lists, “wrote, supervised, and implemented Body by Choice Grant.” Ms. Dalton testified she knew Ms. Thompson had worked on this grant, but she was not very familiar with it. The document contains other training for Ms. Thompson, as well as for Ms. Light,

about which no witness testified, and which was not on either's resume. The undersigned finds this document, to the extent is was prepared from the memories of the management team, to be unreliable, and it cannot be used as evidence of the activities of the applicants. Further, it was improper for the management team members to consider what they thought they knew of the applicants' training and activities, but which was not included on the resumes. Certainly they could not know, and could not remember, everything about every applicant, which could give some applicants an advantage. If the management team thought the resumes were incomplete, they should have conducted interviews.

The question remains, was it an abuse of discretion to select Ms. Thompson over Grievant Napier when neither met all the minimum qualifications. Mr. Tierney, Ms. Adkins, and Ms. Dalton explained that Ms. Thompson was selected because she had taken a lot of education courses, had experience working with at-risk students, which they defined as special education students, was quite familiar with the Big Ugly community, which was important to them, she had expressed a desire to work at that location, and she had lots of community involvement experience. While the matrix prepared by the management team reflects more activities than Ms. Thompson's resume, her resume does support all of this, except her familiarity with the Big Ugly community.

Ms. Adkins testified she was not aware of Grievant Napier working with the arts or any community projects, and she had not administered a grant. Ms. Dalton testified that Grievant Napier's knowledge of grant writing was minimal, and noted she had missed the deadline for submission of a grant application, which is critical. She noted Grievant Napier's lack of training in micro society, and minimal training in other areas, and statedthat Ms. Thompson's experience working with special education students far exceeded Grievant Napier's. Mr. Tierney testified Grievant Napier did not have a strong track record of participating in parent involvement activities, particularly in after school programs, and since she missed the deadline on her one grant application, he did not find her experience in this area to be significant. He stated he was looking for people who knew the families and children in the area, and Ms. Thompson knew the families in the area, while Grievant did not work with the children in the area everyday.

Mr. Tierney's conclusion that Grievant Napier did not work with the children in the area everyday is incorrect. She lives in Harts and works as a teacher at Branchland Elementary School, a school in the Harts area. Ms. Dalton is correct that Ms. Thompson has about 20 more years of experience

working with special needs children than Grievant Napier, although Grievant Napier's experience has been a special education teacher, while Ms. Thompson has been a special education aide. Grievant Napier pointed to her specialized training in reading.

Looking solely at Grievant's resume, which is what Grievant chose to tell the management team about her abilities, the undersigned cannot conclude that Grievant Napier's experiences and training were so superior to Ms. Thompson's that it was an abuse of discretion to select Ms. Thompson over Grievant, given the explanation of the management team members for choosing Ms. Thompson. (See footnote 4) Respondent did not present any testimony to explain why Ms. Light was chosen over Grievant Napier. Contrary to the summary document prepared by Ms. Dalton which compares the applicants, and to Grievant Napier's argument, Ms. Light does possess a Master's Degree, according to her resume, although the area of specialization is not noted. Ms. Light's resume reflects that she has more teaching experience than Grievant Napier, but Grievant Napier has taught special education, while Ms. Light has not. Inasmuch as this experience was significant to the management team in its selection of Ms. Thompson for a position, it should have weighed heavily in the comparison of Ms. Light to Grievant Napier. The summary document prepared by Ms. Dalton reflects that Ms. Light has grant writing and grant administration experience, but this was not listed on her resume, and no evidence of this experience was placed into the record, and cannot be considered. The summary document also lists training for Ms. Light which is not listed on her resume, including a site visit to a micro society school. No testimony was offered that Ms. Light had in fact had such training, and this training must likewise be disregarded. Ms. Light's resume provides little information about her, other than the fact that she is a teacher, and has worked as a Title I summer camp and Governor's Summer Youth program supervisor, has been involved in one after school activity: cheerleading, and is active in her church, but not in any other community organization. In addition to her work with special education students, Grievant Napier has relevant training, experience ordering supplies, experience managing a budget, and experience in scheduling.

The undersigned concludes that the decision to recommend Ms. Light for one of the Site Coordinator positions was based upon information which was not provided to the management team by Ms. Light, and which may or may not have been accurate. As noted above, if the management team was going to go outside the resume, it needed to interview the applicants so that every applicant was given the opportunity to present additional information about his or her activities.

Further, the management team failed to give thesame weight to Grievant Napier's experience in working with special education students as it gave to Ms. Thompson's experience. The decision to recommend Ms. Light over Grievant Napier for one of the Site Coordinator positions was arbitrary and capricious. However, inasmuch as the three year grant period has ended, and the program is in place through May 2002, according to the testimony offered, only because employees have taken a pay cut to keep the program running, Respondent will not be required to place Grievant Napier in one of the positions, but will only be required to pay her for the three years of the grant as though she had been placed in one of the Site Coordinator positions in February 1999, plus interest. If the grant period is extended beyond May 2002, however, and the positions are not re-posted, Grievant Napier must be placed in Ms. Light's position.

As to Ms. Dalton's relatives being selected, Ms. Dalton saw nothing wrong with serving on the selection committee when two of her relatives were applicants. She stated, “had the qualifications been even close to being equal, I would have definitely removed myself from the hiring of Ms. McCann and Ms. Dingess. But from reviewing their resumes, and I'm certain you probably have, you can see for yourself they were the two top applicants so their qualifications were never questioned.”

Grievant did not introduce any policy which would preclude Ms. Dalton from participating in selecting her own sister for one of these positions. While there is no indication that Ms. Dalton attempted to influence the other members of the selection committee, it must be kept in mind that the committee did not confine itself to the resumes submitted by the applicants, but rather discussed with each other what they knew about the applicants. It is difficult to imagine that Ms. Dalton refrained from supplying additional positive information about her sister. Ms. Dalton should not have participated in the selection process. Nonetheless, there is no doubt that Jacqueline McCann was certainly well qualified for the position. In fact, she met all the minimum qualifications, while, as noted, Grievant did not. While the process used here cannot be condoned, Grievant has not demonstrated an abuse of discretion in the selection of Ms. McCann.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

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

2. The positions at issue are extracurricular assignments. As such, “the provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for the assignment. Hall v. Mingo County Bd. of Educ. Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). Thus, 'the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' McCoy v. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Foley, supra; See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999).

3. 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, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in mattersrelating to the selection of candidates for vacant positions. 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 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

4. Two of the three members of the management team based their decision to recommend Mr. McCann as Project Director, in part, upon erroneous information. As such, their decisions were not entirely based upon fact. However, Mr. Tierney's decision to recommend Mr. McCann was based upon sound reasons. While Grievant Burns was an excellent candidate for the position, so was Mr. McCann. LBOE's decision to place Mr. McCann in the position was not an abuse of discretion.

5. Grievant Baker has not demonstrated the selection of Ms. Adkins and Ms. Dalton for Area Director positions was arbitrary and capricious. While the two should have completely removed themselves from the selection committee for any position, their resumes demonstrate that they are highly qualified for the positions, while Grievant Baker's resume does not support a finding that he met the minimum qualifications.

6.

> This Grievance Board has repeatedly addressed the importance of postings being accurate. "It is well established that 'skills required by a board of education for an applicant to qualify for a position must be included in the posting.' Wall v. Putnam Co. Bd. of Educ., Docket No. 89-40-664 (July 10, 1990)." Feltz v. Marion County Bd. of Educ., Docket No. 90-24-078 (Oct. 19, 1990). "The purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position." Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263 (June 7, 1988).

Conners v. Hardy County Bd. of Educ., Docket No. 99-16-459 (Jan. 14, 2000). This Grievance Board has further found an abuse of discretion where a county board of education selected “an applicant who did not meet the minimum qualifications for the position, when there were other applicants available who held the appropriate credential required by the posting. See W. Va. Code § 18A-3-2; Johnson v. Cassell, 182 W. Va. 317, 387 S.E.2d 553 (1989); Peters, supra.” Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998).

7. While Ms. Thompson did not meet at least three of the four minimum qualifications for the posted Site Coordinator position, Grievant Napier did not meet one of the four minimum qualifications.

8. Comparing the resumes of Ms. Thompson and Grievant Napier, Grievant's qualifications for the posted position were not so superior to Ms. Thompson's that it was an abuse of discretion to select Ms. Thompson over Grievant for a Site Coordinator position.

9. Comparing the resumes of Ms. Light and Grievant Napier, and the areas which the management team found to be important for Site Coordinator positions, Grievant Napier has proven that the decision to recommend Ms. Light for one of the positions was arbitrary and capricious, and she should have been placed in one of the positions rather than Ms. Light.

10. Grievant Napier did not demonstrate an abuse of discretion in the selection of Jacqueline McCann, who met all the minimum qualifications and was otherwise well qualified, for one of the

posted Site Coordinator positions.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART**. The Lincoln County Board of Education is **ORDERED** to pay Grievant Napier for the three years of the grant as though she had been placed in one of the Site Coordinator positions in February 1999, plus interest. If the grant period is extended beyond May 2002, and the positions are not re-posted, Grievant Napier must be placed in Ms. Light's position.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 1, 2002

Footnote: 1

Grievants filed separate grievances in February and March, 1999. The grievances of Grievants Baker and Burns remained at Level II while Grievant Napier appealed a March 9, 1999 Level II ruling that LBOE did not have jurisdiction over the matter, to Level IV. The Grievance Board dismissed that grievance for lack of jurisdiction in Napier v. Lincoln County Bd. of Educ., Docket No. 99-22-116 (July 15, 1999). Grievant Napier appealed that decision, and on July 2, 2001, the Supreme Court of Appeals of West Virginia reversed this Grievance Board's decision (Appeal No. 28486). Grievant Napier's grievance was then heard again at Level II with that of Grievants Baker and Burns, on September 4, 2001. The grievance was denied at Level II on October 2, 2001. Grievants waived Level III, appealing to Level IV on October 9, 2001. Two days of hearing were held at Level IV, on November 13, and December 12, 2001. Grievants were represented by Anita Mitter, and Respondent was represented by James W. Gabehart, Esq. This case became mature for decision on January 22, 2002, upon receipt of the parties' written arguments.

Footnote: 2

The other applicant who was not selected, Orlantha Maynard, also filed a grievance. Her grievance was denied by this

Grievance Board on January 23, 2002, Maynard v. Lincoln County Board of Education, Docket No. 99-22-158.

Footnote: 3

Grievant was specifically asked at the Level IV hearing to identify those applicants whom she believed she was more qualified than, and she identified Ms. Thompson, Ms. Light, and Jacqueline McCann. She argued in her written argument submitted after the hearing that she was also more qualified than Ms. Dingess and Judith McCann, because she held a Master's Degree and they did not. Respondent was not put on notice that Grievant was challenging the selection of Ms. Dingess and Judith McCann, and did not have the opportunity to address these challenges at the hearing. Accordingly, as is the Grievance Board's practice, the undersigned will not address Grievant's argument that she is more qualified than Ms. Dingess and Judith McCann, other than to point out that possession of a Master's Degree does not demonstrate superior qualifications for an extracurricular assignment.

Footnote: 4

While this Grievance Board, as a rule, does not consider any skills or activities which an applicant does not make known to the selection committee (Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996)), in this case the selection committee took it upon itself to go beyond the resumes without interviewing the applicants, or otherwise asking them for additional information, relying instead upon their own knowledge of the applicants, and their own memories. The undersigned pointed out to the parties at the Level IV hearing that this was a concern, and told Grievant she would be allowed to introduce evidence of her qualifications for the position which did not appear on her resume, contrary to the normal rule, although what role this evidence would play in the final decision was not clear. Grievant took advantage of this opportunity and discussed additional training and experience in working with youth in the community in a counselor type capacity. The undersigned concludes, however, that it is not necessary to look beyond the resumes to determine whether there was an abuse of discretion.