JEFF SMITH,

Grievant,

v v.

Docket No. 03-06-312

CABELL COUNTY BOARD OF EDUCATION,

Respondent,

and

VICKIE ADKINS,

Intervenor.

D E C I S I O N

Grievant, Jeff Smith, filed this grievance on or about August 21, 2003, against his employer, the Cabell County Board of Education ("CCBOE" or "Board"). Grievant grieves his non-selection for the position of Manager of Professional Personnel and Human Resources. Intervenor Vickie Adkins was the successful applicant for the position.

This grievance was denied at Levels I and II, and Level III was by-passed. (See footnote 1) Grievant appealed to Level IV on October 10, 2003, and a Level IV hearing was held on December 1, 2003, and January 27, 2004, at the Grievance Board's office in Charleston. This case became mature for decision on February 23, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant notes school boards have discretion in the selection of administrative personnel, but argues, that in this incidence, CCBOE exceeded its discretion. Grievantasserts he was the most qualified candidate for the position of Manager of Professional Personnel and Human Resources, and CCBOE's action of not accepting the recommendation of Superintendent David Roach was

arbitrary and capricious. Respondent avers CCBOE had the right to reject Superintendent Roach's recommendation, its reasons for rejecting Grievant's nomination were not arbitrary and capricious, and the final selection was not arbitrary and capricious.

Findings of Fact

1. In Spring 2003, Linda Curtis, the long-time Manager of Professional Personnel and Human Resources, informed Superintendent Roach and CCBOE that she would be retiring on June 30, 2003. This position works closely with the Board.

2. After receiving this notice, Ted Barr, President of the Board, recommended the Board consider filling the position with someone from outside the school system or with a broad base in personnel matters, such as Workers' Compensation, etc.

3. An examination of the Job Description was done, but little change resulted.

4. On May 22, 2003, CCBOE posted a position of Manager of Professional Personnel and Human Resources.

5. Multiple people applied, including Grievant and Intervenor. Superintendent David Roach appointed his usual five-member Interview Committee for administrative positions to review the candidates and recommend two names without ranking them.

6. After a paper review, the Interview Committee decided not to interview all the candidates, and they only interviewed who they considered to be the top three. Their top three candidates after this paper review were John Flowers, David Perrine, and Grievant. 7. A matrix was completed June 6, 2003, utilizing the qualifications outlined in W. Va. Code § 18A-4-7a, but the seventh factor was only completed on the three candidates identified in Finding of Fact 6. This factor is "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged." Grievant's administrative experience was incorrect on this matrix, but since Grievant's supervisor was on the Interview Committee, it is clear all members knew this data was incorrect.

8. This matrix only listed evaluation training under Factor 5, "relevant specialized training." (See footnote 3)

9. After the interviews, the Interview Committee gave Superintendent Roach the names of the top two candidates, unranked. The two recommend candidates were John Flowers and David Perrine. Mr. Perrine was not an employee of CCBOE, and had many years of Administrative

experience, including working as a Superintendent and with the State Department of Education.

10. At an early June 2003 Board meeting, Superintendent Roach nominated Mr. Flowers, and the nomination was unanimously accepted.

11. Approximately a week after receiving the position, Mr. Flowers retired.

12. At the June 19, 2003 Board meeting, Superintendent Roach notified the Board of Mr. Flowers' resignation and nominated Mr. Perrine for the position. At this meeting, Superintendent Roach sang the praises of Mr. Perrine and indicated he was much more qualified than Grievant. These multiple, negative comparisons left some Boardmembers with questions about Grievant's abilities. Mr. Perrine was nominated, but this nomination died for lack of a second.

13. At this June 19, 2003 Board meeting, Superintendent Roach was directed by the Board to review all the candidates who had applied and to come to the next meeting with a list of recommendations.

14. Superintendent Roach then directed the Interview Committee to interview the remaining candidates and to give him a ranked list of names. (See footnote 4) The names of the remaining candidates were ranked in the following order: Grievant, Terry Porter, Intervenor. (See footnote 5) All these applicants were qualified for the position. (See footnote 6)

15. The Interview Committee reviewed the additional applicants' Executive Summaries, (See footnote 7) and reviewed the criteria to be considered for the matrix, pursuant to W. Va. Code § 18A-4-7a. The matrix comments for Mr. Porter and Intervenor did not list anything under Factor 7, "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged." At hearing, the Interview Committee agreed bothIntervenor and Mr. Porter had information in their Executive Summaries that should have been placed in this area of the matrix. (See footnote 8)

16. The Interview Committee disregarded some of the data on Intervenor's Executive Summary and resume, and some information received during her interview because it believed it was incorrect, an exaggeration, or not applicable. The Interview Committee believed Intervenor did the normal things expected of an assistant principal and did not take into account that Intervenor's prior position at the Cabell County Career and Technical Center ("CCCTC"), dealt with a different area and had different responsibilities and duties than other assistant principals. These duties were listed on her CCCTC Job Description. This assessment by the Interview Committee was wrong as indicated by Findings of Fact 18 & 19.

17. Grievant is currently serving as Principal at Beverly Hills Middle School. He received his Bachelor's Degree in 1979 in music education, his Masters of Arts in Music Education in 1982, and his Doctorate in Education Administration in 1994. His dissertation dealt with practices used by choral directors. He has six years in administration, two as an Assistant Principal, and four as a Principal. His grade point average for his doctoral degree was 3.94, and his past evaluations have been satisfactory. According to his Executive Summary and resume, Grievant has attended many staff development sessions, received awards, and been a presenter at conferences. During two years of his administrative experience, he was required to interview for several teaching positions when the school where he was principal changed from team teaching to single classroom teaching. He hascompleted the normal duties of a principal and dealt with personnel problems within his schools.

18. Intervenor is currently serving as the Principal at West Middle School. Although the dates were not listed, Intervenor has a Masters plus 45, with an Associate Accounting Degree, a Bachelor's Degree in Marketing Education, and a Master's Degree in Adult Education and is certified in administration. She has eight years in administration, seven years as an Assistant Principal at CCCTC night school, and one as a Principal. CCCTC services adult students and offered, during Intervenor's tenure there a variety of programs. Some programs were for certification or licensure, such as Nursing, some were for personal advancement, such as computer training, some were for CCBOE employees, and some were for fun, such as guitar. She has 85 hours in administration. Her grade point average for her Masters' degree was 4.0, her overall grade point average was 3.96, and her past evaluations have been satisfactory. According to her Executive Summary, resume, and staff development sheets, Intervenor has attended many staff development sessions.

19. During her time at CCCTC, Intervenor did extensive personnel work, including interviewing applicants for positions and recommending the selected candidate to the Superintendent, supervising and evaluating approximately sixty teachers a year, terminating employment as needed, writing postings, and working with numerous laws and regulations relating to certification and licensure.

20. Before Intervenor became a professional educator fourteen years ago, she had extensive personnel experience. During this time Intervenor interviewed applicants,recommended hiring, and dealt with interpersonal issues such as hygiene, dress, and inappropriate behavior.

21. At the August 5, 2003 Board Meeting, Superintendent Roach nominated Grievant for the

position. Because of the negative remarks made at the last meeting in unfavorably comparing Grievant to Mr. Perrine, Board Member David Borowski asked if Grievant was or had ever been on an Improvement Plan. Of course he had not. The Board voted 2 to 2 to reject his nomination. President Barr and Board Member Bessie Holley voted in the negative.

22. Superintendent Roach then nominated Mr. Porter for the position. The Board voted 2 to 2 to reject the nomination. Board Member Holly testified she reviewed the administrative experience and compared Mr. Porter to Intervenor. She believed Intervenor was the better candidate because Mr. Porter had one year as a Principal and two years as Assistant Principal, and Intervenor had one year as a Principal and seven years as Assistant Principal. (See footnote 9) President Barr and Board Member Holley voted in the negative on Mr. Porter's nomination.

23. Superintendent Roach then nominated Intervenor for the position. The Board voted unanimously to accept this nomination. 24. CCBOE did not examine any applicants' qualifications in any detail before it accepted or rejected these nominations. They did discuss some of the candidates with Superintendent Roach and the Interview Committee. Superintendent Roach also did not examine any applicants' qualifications in any detail before he made his recommendations.

25. During his run for election, Board President Barr met Intervenor, who had just been selected to fill the principal's position in his old neighborhood at West Middle School. He stated they should have lunch or dinner some time to discuss this area. Intervenor had dinner with Mr. Barr one time, three years ago, in a public place. President Barr had also been out to eat with Mr. Flowers.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

This case presents an issue, which was recently addressed by the Grievance Board in Oldham v.

Cabell County Board of Education, Docket No. 03-06-2003 (February 27, 2004).

I. Qualifications The initial issue to address is qualifications. Both Grievant and Intervenor were qualified for the position. W. Va. Code § 18A-4-7a requires the best or most qualified individual be selected using the qualifications outlined therein. The pertinent part of this statute 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 past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

It should be noted that this position was not a teaching position, but a human resources position. Accordingly, the assessment of the above listed criteria would be different from selecting a principal or assistant principal because of the skills and abilities required.

In looking at the qualifications for the position, some of the assessments made by the Interview Committee are problematic. While the record reflects why the nominations of Mr. Flowers and Mr. Perrine should clearly have been the first two nominations, the differences between Grievant, Mr. Porter, and Intervenor, ranked third, fourth, and fifth, do not reflect these differences, especially if the Interview Committee had closely examined the candidates' backgrounds and compared this data to the position to be filled. The Interview Committee's failure to examine these backgrounds and properly check the data it received, instead of judging on their own biases, is untenable. A review of the comparisons should be helpful. First, it is understandable that Grievant would be given credit for his Ed. D. and his greater administrative experience as a principal. However it appears that no to little consideration was given to the fact that Intervenor had slightly greater total administrative seniority.

Second, it is difficult to understand why the Interview Committee would discount Intervenor's time at CCCTC without checking out the duties Intervenor reported on her Executive Summary and resume, and were identified in her Job Description. If the Interview Committee did not believe Intervenor or thought she was "puffing," they should have asked about this issue instead of just assuming they were right that all assistant principals are created equal. Certainly Intervenor's duties and responsibilities were not the norm for an assistant principal. Additionally, if in future applications,

assistant principal experience of this type is to be counted as less worthwhile, all employees should be aware of this fact before they apply for these type of positions.

Third, it is difficult to understand the Interview Committee's failure to place any positive assessment on Intervenor's personnel work prior to becoming an educator. While it is true that this work was not in the educational arena, it was still work dealing with people, and there are sure to be some similarities.

Fourth, the undersigned Administrative Law Judge can find no reason why Intervenor was ranked below Mr. Porter, especially since Grievant was more qualified than Mr. Porter based on one of the factors the Interview Committee said was important, administrative seniority. Mr. Porter had one year as a principal and two years as an assistant principal, and Grievant had one year as a principal and seven years as an assistant principal. Additionally, Intervenor had a 3.96 grade point average, while Mr.Porter's was unknown. Grievant and Mr. Porter were equal in degree level, evaluations, and certification.

It appears the Interview Committee, in ranking Intervenor after Mr. Porter, may have given weight to the rumors about Intervenor and President Barr being "close" personal friends. It is unclear how Intervenor could combat this subtle prejudice without knowing it was present. Another possible explanation is the Interview Committee viewed Intervenor's work with adult education as not as worthy or applicable to the position of Manager of Professional Personnel and Human Resources, a position that works with adults. See Test. Interview Committee Member Mike O'Dell, Level IV Hearing. This reasoning appears flawed.

A review of the qualifications identified above does not reveal Grievant to be more qualified than Intervenor on the factors specified in W. Va. Code § 18A-4-7a.

II. Was the decision of the Board arbitrary and capricious

The next issue to address is whether CCBOE's actions were incorrect or were arbitrary and capricious. A review of the Grievance Board's past rulings on the required interaction between a superintendent and board members should be beneficial in considering this grievance. The discussion in the case of Oldham, supra and Stinn v. Calhoun County Board of Education, Docket No. 98-07-085 (August 28, 1998), is helpful in that regard.

W. Va. Code § 18A-2-1 describes the respective duties of the superintendent and the board of education in the employment process and states, in pertinent part:

> The employment of professional personnel shall be made by the board only upon nomination and recommendation of the superintendent. In case the board refuses to employ any or all of the persons nominated, thesuperintendent shall nominate others and submit the same to the board at such time as the board may direct. All personnel so nominated and recommended for employment and for subsequent assignment shall meet the certification, licensing, training, and other eligibility classifications as may be required by provisions of this chapter and state board regulation. (See footnote 10)

The West Virginia Supreme Court has generally addressed the role of a county superintendent and held that persons holding that position are not merely employees, but "officers" of the county board with "a multitude of powers and duties independent of the board." State ex rel. Rogers v. Bd. of Educ. of Lewis County, 125 W. Va. 579, 25 S.E.2d 537, 540 (1943). "Clearly, the nomination of persons qualified to fill vacancies is a statutory duty of the superintendent and not a responsibility which arises by virtue of his or her employment with the county board." Gore v. Monroe County Bd. of Educ., Docket No. 93-31-532 (Apr. 26, 1994). In the case of professional personnel, the superintendent's duty to nominate necessarily entails the duty to adhere to the provisions of W. Va. Code §18A-4-7a, which set forth the criteria to be used in assessing the qualifications of the applicants. "There is no law, policy, or regulation which mandates that a board of education must accept a Superintendent's, or principal's, recommendation in personnel matters." Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997). In employing administrative personnel the first set of factors is applied. It appears well settled that the chief executive officer of a county school system may not delegate the duties of the post to others. Gore, supra; See, 78 C.J.S. Schools and School Districts §171 (1952). It follows that others may not take actions which have the effect of impedingor usurping the exercise of those duties. "W.Va Code §18A-2-1 prohibits a county board from participating in the evaluation process by which the superintendent reaches a decision to nominate a particular candidate, not through the use of specific language[,] but by explicitly establishing a bifurcated appointment procedure." Gore, supra.

County school boards in West Virginia also draw their powers from statute and can only exercise such authority as is expressly given them or arises by necessary implication. Evans v. Hutchinson, 158 W. Va. 356, 214 S.E.2d 453 (1975). W. Va. Code §18A-2-1 explicitly confers upon a board the ultimate authority to accept or reject the Superintendent's recommendation, and to direct the Superintendent to nominate an additional qualified candidate, if the first nomination is rejected. Thus, any interpretation of the statutory language at issue must take into account the respective duties of

the board and the superintendent under W. Va. Code §18A-2-1. As stated in Rakes v. Raleigh County Bd. of Educ., Docket No. 93-41-448 (Mar. 17, 1995):

> This [Code] language effectively divides the power to hire equally between the superintendent and the county board. No person may be appointed to a professional position until both have exercised their authority under the statute. Implicit in the statute is that the respective roles in the hiring process must be distinct, i.e., that the superintendent must exercise his statutory duty to nominate independent of the county board and that the board, in fulfilling its obligations under the statute, must reject or accept without undue influence from the superintendent. Otherwise, the division of authority is rendered meaningless.

Because the prohibition against undue interference by either party is an implied and not explicit part of the statute, it is not possible to adopt a rule applicable to all situations in which a violation of that prohibition is alleged. Gore, supra. Each case must be decided on its own merits. It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va 145, 351 S.E.2d 58 (1986). As previously stated, when selecting an administrator the first set of factors listed in W. Va. Code § 18A-4-7a is utilized. While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position, so long as this does not result in an abuse of discretion. Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). Once a board reviews the criteria required by W. Va. Code § 18A-4-7a, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Stinn, supra; Baker v. Lincoln County Bd. of Educ., Docket No. 97-22- 482 (Mar. 5, 1998).

> All that Code §18A-4-7a requires when a decision concerning the hiring [for an administrative position] is made is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because

> one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.(Emphasis added).

Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993)). (See footnote 11)

The standard of review for a county board of education's decision is whether it was arbitrary and capricious or an abuse of discretion. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE- 081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93- HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Additionally, nothing in the language of W. Va. Code § 18A-4-7a restricts the area of measures or indicators, as long as they are factors "upon which the relativequalifications of the applicant may fairly be judged." Oldham, supra; Stinn, supra. Indeed, W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the qualifications of the applicants. Stinn, supra. Anderson v. Wyoming County Bd. of Educ., Docket No. 93-55- 183 (Sept. 30, 1993). The selection of candidates for educational positions is not simply a "mechanical or mathematical process." Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998)(citing Tenny v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990)); See Deadrick v. Marion County Bd. of Educ., Docket No. 90-23-071(Jan. 30, 1991). This is especially true in the selection for an administrative position.

In summary, a review of W. Va. Code § 18A-2-1 reveals no requirement for a board of education to conduct an independent review when it rejects the recommendation of a superintendent. This Code Section states a board of education may "refuse to employ the person nominated," and the

superintendent "shall nominate others." Of course, the requirement of W. Va. Code § 18A-4-7a, to select the candidate with the highest qualifications for the position at issue, is still in effect. Stinn, supra; Barrett, supra. This is the key issue here.

In the present case, the Board's actions were within its statutory mandate, and its actions were not based on arbitrary and capricious reasons. CCBOE rejected Superintendent Roach's nominations for a variety of reasons. In terms of Grievant's rejection, it appears part of the negative response to Grievant may have been caused by Superintendent Roach's strong support of Mr. Perrine and his comparison to Grievant. Overall, the Board felt Superintendent Roach's belief in Grievant's abilities was less thanstaunch. It was clear from the record that Grievant's experience in personnel matters was far less than either Mr. Flowers or Mr. Perrine.

It may also be true that by the time CCBOE got to Grievant's nomination President Barr saw Intervenor's name on the list and remembered her considerable background in personnel issues. As previously stated, President Barr was a strong proponent of a Manager of Professional Personnel and Human Resources with a background that was in also business and not just in education. Intervenor had that. Additionally, President Barr is just one Board member, and Intervenor would not have been confirmed unless there was a majority vote. (See footnote 12)

In reevaluating the actions of CCBOE as whole, these actions are not seen as arbitrary and capricious. As previously stated, W. Va. Code § 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the qualifications of the applicants, and the selection of candidates for educational positions is not simply a "mechanical or mathematical process." Stinn, supra; Anderson, supra; Hoffman, supra. See Deadrick, supra. Once a review of the matrix factors is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. Owen, supra. While it is clear the Board and the Superintendent Roach disagreed on what were the proper qualifications for the position and what weight to give to the factors, the choice made by CCBOE in this set of facts cannot be seen as arbitrary and capricious. The undersigned Administrative Law Judgedoes not find the decision-making process was fatally flawed, or that CCBOE overstepped its broad discretion as described in W. Va. Code §§ 18A-2-1 and 18A-4-7a.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. It is the duty of the superintendent to nominate candidates for the consideration of the county board of education after he has considered all the factors identified in W. Va. Code § 18A-4-7a. See W. Va. Code § 18A-2-1.

3. 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). 4. W. Va. Code §18A-2-1 provides that a county board of education and its superintendent must share equally in hiring decisions. The respective roles of each should remain distinct and it is contrary to the intent of the statute for either to take actions designed to influence or interfere with the other's decision as to which candidate should be selected

5. County boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the schools and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W.Va 145, 351 S.E.2d 58 (1986).

6. Once a board reviews the W. Va. Code § 18A-4-7a criteria it must consider, it has "wide discretion in choosing administrators . . . ." March v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994).

7. While each of these factors must be considered, this Code Section permits county boards of education to determine the weight to be applied to each factor when filling an administrative position,

so long as this does not result in an abuse of discretion. Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995); Hughes v. Lincoln County Bd. of Educ., Docket No. 94-22-543 (Jan. 27, 1995); Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Blair v. Lincoln County Bd. of Educ., Docket No. 92-22-009 (July 31, 1992). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998). Once a review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance,unless the this assessment is arbitrary and capricious. Owen v. Wood County Bd. of Educ., Docket No. 97-54-537 (May 18, 1998) (citing Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993)).

8. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). An administrative law judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Harper, supra; Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

9. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. 10. The actions of CCBOE in selecting Intervenor for the Manager of Professional Personnel and Human Resources position were not arbitrary and capricious as the decision was based on criteria intended to be considered, the

Board did not reach a decision contrary to the evidence, and the decision reached that was not so implausible that it could not be ascribed to a difference of opinion. Bedford, supra.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 30, 2004

Footnote: 1

Grievant presented little to no evidence at the Level II hearing.

Footnote: 2

Grievant was represented by Attorney Erwin Conrad, Intervenor was represented by Susan Hubbard of the West Virginia Education Association, and CCBOE was represented by Attorney Howard Seufer of Bowles Rice McDavid Graff and Love.

Footnote: 3

It is unclear from the record why this was the only data included under this section as the position would not evaluate teachers, and this training is not applicable to the selection process.

Footnote: 4

It was not explained why one of the applicants was not interviewed.

Footnote: 5

Grievant was placed third on the remaining list of the original five applicants because of the prior decision by the Interview Committee that he was the third most qualified. He was not reinterviewed by the Interview Committee, and there was no "head to head" comparison of these three remaining candidates.

Footnote: 6

Grievant asserted Intervenor was not qualified for the position. This issue will not be addressed further because both the Interview Committee and Superintendent Roach agreed Intervenor met the minimum qualifications for the position.

Footnote: 7

The Executive Summary is one of the major tools used to assess applicants for administrative positions. A candidate is asked to state his or her knowledge of the duties and responsibilities required for the position, list educational proficiencies, and enumerate relevant specialized training related to the position.

Footnote: 8

See Finding of Fact 7.

Footnote: 9

The only clear reason given for recommending Mr. Porter over Intervenor appeared to be that Intervenor's administrative experience was in adult education. Apparently this experience for the Manager of Professional Personnel and Human Resources position, is less valued than experience in a middle school. The undersigned Administrative Law Judge did not find this reasoning to be persuasive given that the duties of the position were to deal with adults. For the same reason, the fact Grievant had extracurricular programs such as golf and football at his schools, while Intervenor did not when she was CCCTC, is not considered important for this particular position.

Footnote: 10

Code §§18-4-10(2) and 18A-2-9 also address the manner in which persons are employed by a county board of education. Their language essentially mirrors that of Code §18A-2-1, the more general statute. For the purposes of this decision, reference is made only to the latter.

Footnote: 11

It has already been determined by this Board that an applicant's greater experience in education administration does not necessarily entitle him to an administrative position. March, supra.

Footnote: 12

Grievant's attorney noted Board Member Holly and President Barr almost always vote the same way.