FLOYD FRIEND,

Grievant,

v.

Docket No. 05-34-043

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent,

and

BILLY HUTCHINSON,

Intervenor.

DECISION

The grievant, Floyd E. Friend, Sr., ("Friend") (See footnote 1) challenges his non-selection for the position of principal at Richwood High School. Friend alleged in his statement of grievance that the respondent Nicholas County Board of Education ("BOE") "failed to hire the most qualified administrator in violation of *West Virginia Code* §18A-4-7a." For relief, Friend seeks to be instated into the principalship of Richwood High School. Friend asserts that, during the selection process, his qualifications were not properly assessed under the seven criteria set forth in West Virginia Code section 18A-4-7a. Friend further asserts that the successful applicant's administrative experience "was inflated" because his service as Dean of Students and as an appointed Assistant Principal were

counted. Friend maintainsthat the successful applicant “did not hold an administrative certificate” when he served in these two positions. (See footnote 2)

This grievance was denied at the first level. The successful applicant, Billy J. Hutchinson (“Intervenor Hutchinson”), intervened at Level II. A Level II hearing was held on October 29, 2004, and December 14, 2004. The underlying record, which includes the transcript of the Level II hearing, (See footnote 3) is incorporated as part of the Level IV record. After being denied at Level II, this grievance was brought before the West Virginia Education and State Employees Grievance Board (“the Grievance Board”) for proceedings at Level IV.

A Level IV evidentiary hearing was held on April 4, 2005, in the Grievance Board's hearing room at Beckley. At the Level IV hearing, Friend was represented by Anita Mitter of the West Virginia Education Association. Intervenor Hutchinson represented himself. The respondent Nicholas County Board of Education (“BOE”) was represented by attorney Erwin L. Conrad. This grievance matured for decision on May 5, 2005, after proposed findings of fact and conclusions of law had been submitted by BOE and Friend. (See footnote 4)

In reviewing the evidence adduced in a non-selection case, it is important to remember that the Grievance Board's role is to review and determine the legal sufficiency of the selection process used by BOE. With this limited role in mind, and after carefulreview of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

I 1. On June 17, 2004, BOE posted a vacancy for a secondary principal at Richwood High School (“RHS”) for the 2004-2005 school year.

II 2. Requirements for the posted position were as follows: Masters Degree in Secondary Administration (10-12) or Secondary Principal's Administrative Specialization (10-12), Secondary Principal's Certification, the ability to maintain student discipline according to state and county policy and to demonstrate strong administrative leadership skills. In addition, the posting indicated that there were also “preferred” qualifications of five years of teaching experience, certain computer skills, and school administration experience. Jt.Exh.1 at II.

III 3. When the RHS principal position was posted, Friend was Assistant Principal at Richwood Junior High School, with approximately 27 years of experience in the school system.

IV 4. When the RHS principal position was posted, Intervenor Hutchinson was a

Health/Physical Education/Safety teacher at RHS, where he had taught for over twenty years.

V 5. Friend holds a number of certifications and other credentials, which include 1) Business Principles, Grades 7-12; 2) Language Arts, Grades 7-9; 3) Social Studies, Grades 1-9; 4) Elementary Education, Grades 1-8; 5) Pre-vocational Business; 6) Superintendent, Grades K-12; 7) Supervisor General Instruction, grades K-12; 8) Principal Elementary, Grades K-8; 9) Middle/Junior/Senior High School Principal, Grades 5-12; 10) Vocational Administration, Grades 5-Adult; 11) Masters + 45 hours; and 12) 4 years of administrative seniority.

VI 6. At the time of the posting, Intervenor Hutchinson held certification in Principal PreK-Adult. This administrative certification was issued May 8, 2004, upon completion of the requisite academic course work. He also held certification in Physical Education/Health and Safety for grades 1-12.

VII 7. Intervenor Hutchinson had previously held administrative certification that was issued on October 31, 1991, but allowed to expire on June 30, 1994. This certification had been issued under legislative mandate. (See footnote 5)

VIII 8. Both Friend and Intervenor Hutchinson applied for the principalship of RHS.

IX 9. The selection process for the principalship at RHS was the same process that had been used to fill all administrative positions while Gus Penix ("Superintendent Penix") was Superintendent of Nicholas County Schools. Tr.23; *Lester v. Nicholas County Bd. of Educ.*, Docket No. 01-34-581 (Jan. 25, 2002). A committee selected by Superintendent Penix interviewed all applicants who met the minimum qualifications for the posted position.

X 10. The interview committee for the RHS principalship consisted of 1) Cathy Powers, Faculty Senate President for RHS, 2) Luther Baker, the central office administrator responsible for evaluating the principal at Richwood Junior High School, (See footnote 6) 3) Gene Sparks,Director of Personnel, and 4) Superintendent Penix (See footnote 7) (collectively "the Interview Committee").

XI 11. The Interview Committee used the same list of questions with each applicant and attempted to keep the interviews equal in terms of length of time. Of course, follow-up questions varied, depending upon an applicant's answers to the scripted questions.

XII 12. The Interview Committee invited each applicant to provide any additional information that would support the applicant's candidacy for the RHS principalship.

XIII 13. At the conclusion of the interviews, the members of the Interview Committee

exchanged opinions as to the relative merits of the applicants. Tr.133, 139.

XIV 14. Superintendent Penix composed a matrix comparing Friend and Intervenor Hutchinson, who were the only two applicants for the position. Gr.Exh.1 at II. (See footnote 8)

XV 15. Both Friend and Intervenor Hutchinson were rated on the seven criteria set forth in West Virginia Code section 18A-4-7a, which include certification/licensure; amount of relevant experience; degree level, both in relevant field and in general; academic achievement; relevant specialized training; past performance evaluations; and other measures or indicators. Gr.Exh.1 at II.

XVI 16. Friend received a total of 8 points on the matrix. Gr.Exh.1 at II.

XVII 17. Intervenor Hutchinson received a total of 14 points on the matrix. Gr.Exh.1 at II. XVIII 18. The matrix revealed divergences in the points awarded the two applicants in the categories of “relevant specialized training” and “other measures or indicators upon which the relative qualifications may fairly be judged.”

XIX 19. Friend received 1 point in the category of relevant specialized training for having participated in a conference on “No Child Left Behind.” No points were awarded to Intervenor Hutchinson in this category.

XX 20. The largest divergence in the points awarded the two applicants appears under “other measures or indicators upon which the relative qualifications may fairly be judged.” Friend received 3 points in this category, while Intervenor Hutchinson received 10 points. Tr.31.

XXI 21. The grounds for the 10 points awarded Intervenor Hutchinson in the “other measures or indicators” category were set forth, as follows, in the matrix:

a a.
has served as a coach at the high school level

b b.
taught at the high school level

c c.
has previous administrative experience at the high school level

d d.
served as Faculty Senate President at RHS (aware of situations at the school)

e e.
served as Athletic Director at RHS (aware of athletic programs at the school i.e. budget, coaching staff, equipment, needs, etc.)

f f.
worked with lunch program Point-of-Service (POS)

g g.
worked with attendance issues at RHS

h h.
familiar with issues affecting RHS and has the confidence of the staff to effectively lead and administer the school (letter from staff)

i i.
excellent and impressive interview

j j.
one class from completing Curriculum Certification

Gr.Exh.1 at II.

22. The “letter from staff,” mentioned above, was a letter from twenty-one faculty and staff members (See footnote 9) at RHS expressing their support for Intervenor Hutchinson as a candidate for the RHS principalship. Tr.35.

23. Superintendent Penix also received, and shared with the Interview Committee, an anonymous letter opposing Intervenor Hutchinson's candidacy for the RHS principalship. Tr.35, 111.

24. The grounds for the 3 points awarded Friend in the “other measures or indicators” category were set forth, as follows, in the matrix:

j.`.a a.
has served as a coach at the high school level

j.0.b b.
obtained Budget Digest grants for projects at schools

j.0.c c.
has previous administrative experience

Gr.Exh.1 at II.

25. Both Friend and Intervenor Hutchinson were given one point on the matrix for the category of “[a]mount of experience in position and/or subject area.”

26. In terms of administrative experience, Friend had one year as principal of Dixie Elementary School and three years as an assistant principal of Richwood Junior High School.

Tr.27. 27. Intervenor Hutchinson was credited with administrative experience for serving as Dean of Students at RHS for one year, in 1995. Tr.27-28. The Dean of Students is not a position recognized by the West Virginia Board of Education, but is used by various county boards of education. Level IV Testimony of Pamela Abston. There is no state-level requirement for a Dean of Students to hold an administrative certificate. Level IV Testimony of Pamela Abston.

28. Intervenor Hutchinson was also credited with administrative experience for the period from March 13, 2000, through the end of the 1999-2000 school year time, after Superintendent William K. Grizzell appointed him to fill a sudden vacancy as Assistant Principal at RHS. (See footnote 10) Tr.28.

29. Because Intervenor Hutchinson's administrative experience was at the high school level and, more particularly, in the same school where the vacancy existed, it was considered by Superintendent Penix to be comparable to Friend's lengthier administrative experience. Tr.27-28.

30. During the course of his interview, Friend acknowledged that he could be hardheaded and opinionated. Tr.42-43, 106. One of the members of the Interview Committee noted that this “is not a positive attribute of a potential principal” and expressed amazement that “a candidate would shoot himself in the foot” in this manner. Tr.118.

31 31.

Intervenor Hutchinson presented a “cordial demeanor” during the interview process, which was viewed as an asset in dealing with staff, students, and parents. Tr.48.

32. During their respective interviews, each applicant explained his view of therole of a secondary school principal. Tr.48. Intervenor Hutchinson gave a thorough, detailed expression of his views on this topic. By contrast, one member of the Interview Committee described Friend's view on this subject as “nebulous.” Tr.114.

33. In terms of discipline, the two applicants had divergent approaches. (See footnote 11) Friend took the more authoritarian view that the principal should make sure the students know the rules and should maintain control, whereas Intervenor Hutchinson focused on attempting to correct the behavior and trying to include a counseling component in discipline. Tr.49, 119. In addition, Intervenor Hutchinson emphasized the role of administrators and faculty members as role models. Tr.49.

34. Intervenor Hutchinson made a point of letting the Interview Committee know that he was only one class away from obtaining certification in curriculum. Superintendent Penix viewed this as quite favorable in light of a current trend in school administration is to “focus more on the curriculum aspect[.]” Tr.36.

35. Friend served as assistant principal at Richwood Junior High School under C.C. Lester until Mr. Lester's retirement.

36. In testimony during the grievance process, Mr. Lester conceded that some people considered Friend hardheaded, but defended Friend as a sensitive person who was sometimes reduced to tears after having to take disciplinary action against a student. Tr.80. It is not clear whether Mr. Lester shared such information with the Interview Committee during the selection process. (See footnote 12)

37. Mr. Lester recommended Friend for the position of principal at RHS because Friend “did a good job for” Mr. Lester. Tr.77.

38. Superintendent Penix recommended Intervenor Hutchinson for the position.

39. BOE adopted this recommendation and awarded the principalship at RHS to Intervenor Hutchinson.

Discussion

This grievance was brought to challenge the action of BOE in failing to select Friend to fill the

posted position of principal at RHS. As the unsuccessful applicant for the position in question, Friend bears the burden of proving, by a preponderance of the evidence, that he was the more qualified applicant and, as such, should have been selected for the position in question, or that, but for a substantial flaw in the selection process, it is reasonable to believe that the outcome of the selection process might have been different. *Napier v. Logan County Bd. of Educ*., Docket No. 99-23-114 (July 15, 1999)*, Pack v. Summers County Bd. of Educ*., Docket No. 98-45-097 (Nov. 24, 1998). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v.Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001).

As provided in West Virginia Code section 18A-4-7a(a), "[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 assessing the qualifications of applicants for a position under the foregoing section, the statute instructs that "consideration shall be given" to each of the following:

> (1) Appropriate certification, licensure or both;
>
> (2) 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;
>
> (3) The amount of course work, degree level or both in the relevant field and degree level generally;
>
> (4) Academic achievement;
>
> (5) Relevant specialized training;
>
> (6) Past performance evaluations conducted pursuant to section twelve [§ 18A-2-12], article two of this chapter; and
>
> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code § 18A-4-7a(c).

Although all of the factors set forth in West Virginia Code section 18A-4-7a must be considered during the selection process, a board of education is entitled "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." *English v. Logan County Bd. of Educ*., Docket No. 03-23-307 (Feb. 27, 2004)(citing *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)). As recently noted in *Bell v. McDowell County Bd. of Educ*., Docket No. 05-33-020 (Mar. 25, 2005), the only restriction upon the use of "other indicators or measures" is that they must be "factors 'upon which the relative qualifications of the applicant may fairly be judged.'"

> Indeed, W. Va. Code 18A-4-7a contemplates that county boards may look beyond certificates, academic training, and length of experience in assessing the relative qualifications of the applicants. *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. *Stinn v. Calhoun County Bd. of Educ*., Docket No. 98-07-085 (Aug. 28, 1998).

Bell v. McDowell County Bd. of Educ., Docket No. 05-33-020 (Mar. 25, 2005).

The matrix, along with the explanation by Superintendent Penix as to how the points on the matrix were awarded, demonstrate that the selection process comported with the requirements of West Virginia Code section 18A-4-7a, in that each of the statutory factors was considered. Therefore, the pivotal question is whether, in evaluating those factors, BOE abused its substantial discretion.

Friend argues that BOE erred in evaluating Intervenor Hutchinson's qualifications under the category of "[a]mount of experience relevant to the position." In particular, Friend takes issue with the fact that Intervenor Hutchinson was credited with administrative experience for serving as Dean of Students at RHS. In response, BOE argues that this issue has previously been addressed by the Grievance Board and resolved in BOE's favor. In support of this argument, BOE cites *Jeffrey v. Mingo County Board of Education*, Docket No. 95-29-105 (Jan. 11, 1996) and *Ward v. Mingo County Board of Education*, Docket No. 94-29-1134 (Apr. 26, 1995). These two are part of a line of cases from Mingo County relating to awarding administrative experience credit for serving as Dean of Students.

However, under this line of cases, there are two conditions that must be met before such experience credit is awarded. "A professional educator earns administrative seniority if the duties she

performs are those typically assigned to an assistant principal, and if the educator performing those duties possesses an administrative certificate." *Alexander v. Kanawha County Bd. of Educ*., Docket No. 01-20-377 (Sept. 12, 2001) (citing *Talbert v. Mingo County Bd. of Educ*., Docket No. 93-23-166 (Jan. 20, 1994), *Ward v. Mingo County Bd. of Educ*., Docket No. 94-29-1134 (Apr. 26, 1995), and *Hunter v. Mingo County Bd. of Educ*., Docket No. 94-29-1063 (April 28, 1995)).

Intervenor Hutchinson served as Dean of Students in 1995. His original administrative certificate expired on June 30, 1994. It was not renewed until May 8, 2004. Under the cases cited by BOE, Intervenor Hutchinson did not meet the criteria for receiving administrative experience credit for the year he served as Dean of Students because he did not hold a valid administrative certificate during that time.

As noted, each of the two applicants were awarded one point in the experience category on the matrix. Even if that one point were to be removed from Intervenor Hutchinson's score, in recognition that he should not receive credit for his term as Deanof Students, Intervenor Hutchinson would still have 13 points as compared to Friend's 8 points.

It was a mistake on the part of BOE to credit Intervenor Hutchinson with administrative experience for his service as Dean of Students. However, this mistake does not rise to the level of a fatal flaw in the selection process because, as noted, even if the improperly awarded credit is disregarded the balance still does not tip in Friend's favor. In other words, Friend has failed to prove that "flaws in the process were so significant that the outcome might reasonably have been different." *Napier v. Logan County Bd. of Educ*., Docket No. 99-23-114 (July 15, 1999)(citing *Stover v. Kanawha County Bd. of Educ*., Docket No. 89-20-75 (June 26, 1989)).

Nor has Friend proven by a preponderance of the evidence that he was the best qualified applicant for the principalship at RHS. In considering this issue, it must be remembered that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Actions by a board of education have been deemed arbitrary and capricious when the board "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." *Baker v. Lincoln County Bd. of Educ*., Docket No. 01-22-528 (Mar. 1, 2002). The Interview Committee relied upon a standard set of questions as a guideline in conducting the interviews. All of the applicants were invited to provide any additional information that would support their candidacy. The factors set forth on the matrix and used in evaluating the applicants, which are statutorily-mandated, were given due consideration during the selection process.

The explanations offered by Superintendent Penix as to how the various factors were evaluated and weighted was logical and supported by the evidence, with the exception of the administrative experience discussed above. The qualifications that Superintendent Penix listed under the rubric of "other measures or indicators" all related in a reasonable manner to the applicants' respective abilities to fill the role of principal at RHS.

Applying the statutory factors, combined with the applicants' performance in the interviews, the Interview Committee and Superintendent Penix determined that Intervenor Hutchinson was the best qualified applicant for the position. The grounds relied upon for selection of Intervenor Hutchinson were not arbitrary and capricious but rather fairly based upon reasonable and appropriate concerns. BOE selected an applicant who was familiar with the students, staff, and issues at RHS. He had a pleasant demeanor, an appealing philosophy regarding discipline, and a well-defined, well-stated vision for how the school would proceed under his leadership. Intervenor Hutchinson's administrative experience, while not as extensive as Friend's, was acquired at the high school level and, in fact, in the very school in which the vacancy occurred. BOE did not abuse its considerable discretion by selecting Intervenor Hutchinson for the principalship at RHS, nor was the selection arbitrary and capricious. Friend has failed to prove otherwise. Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1.

This is not a disciplinary grievance. Therefore, the grievant, Friend, bears

the burden of proving his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *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).

2 2. "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 & Human Resources*, Docket No. 92-HHR-486 (May 17, 1993). Phrased differently, a preponderance "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Petry v. Kanawha County Bd. of Educ*., Docket No. 96-20-380 (Mar. 18, 1997)." *Harvey v. Summers County Bd. of Educ*., Docket No. 01-45-360 (Sept. 20, 2001).

3 3. It is well-established that the grievance procedure is not intended to be a "super interview" but, rather, "it allows analysis of the legal sufficiency of the selection process at the time it occurred. If the decision was properly based on the information then available to the board of education, and the process was not flawed to the point that the outcome might reasonably have been different otherwise, the hiring will be upheld." *Harrison v. Wyoming County Bd. of Educ.*, Docket No. 89-45-500 (citing *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989)). The selectionprocess at issue in this grievance passes muster.

4 4. Selection of a secondary school principal falls is governed by the statute that requires BOE to "make decisions affecting the hiring of professional personnel *other than classroom teachers* on the basis of the applicant with highest qualifications[.]" W. Va. Code § 18A-4-7a(a)(emphasis added).

5 5. BOE gave the requisite "consideration" to each of the following factors when determining which applicant for a secondary principalship holds the "highest qualifications," as that term is used in West Virginia Code section 18A-4-7a(a):

> (1) Appropriate certification, licensure or both; (2) Amount of experience relevant to the position . . .; (3) The amount of course work, degree level or both in the relevant field and degree level generally; (4) Academic achievement; (5) Relevant specialized training; (6) Past performance evaluations . . .; and (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code § 18A-4-7a(c).

6 6. A "county board of education may determine that 'other measures or indicators' is the most important factor" in selecting the successful applicant for an administrative position." *Bussey v. Jefferson County Bd. of Educ*., Docket No. 03-19-359 (July 21, 2004)(citing *Baker v. Lincoln County*

Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998)). Therefore, the emphasis on this factor in the selection of Intervenor Hutchinson did not impugn the integrity or validity of the selection process. 7 7. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). This discretion is particularly broad with respect to selecting administrators. "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). Therefore, BOE was vested with broad discretion in selecting a principal for RHS. BOE did not abuse its discretion in selecting Intervenor Hutchinson for the position in question.

8 8. In comparing the experience of applicants, BOE may consider more than the amount of experience in terms of time. W. Va. Code § 18A-4-7a(c). Because the statutory requirement is for a board of education to consider experience relevant to the position, it was permissible for BOE to give Intervenor Hutchinson's experience at the high school level, and in the school in which the vacancy occurred, the same weight as Friend's four years of experience, none of which was at the high school level.

9 9. Friend proved, by a preponderance of the evidence, that Intervenor Hutchinson did not hold an administrative certificate during his tenure as Dean of Students and, therefore, could not receive credit for having gained administrative experience from that position. *Alexander v. Kanawha County Bd. of Educ*., Docket No. 01-20-377 (Sept. 12, 2001) (citing *Talbert v. Mingo County Bd. of Educ*., Docket No. 93-23-166 (Jan. 20, 1994) and its progeny). However, even if the point afforded Intervenor Hutchinson in thiscategory were eliminated, he still scores higher than Friend on the matrix. Thus, the outcome would not be altered even if this mistake had not occurred.

10 10. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, reached a decision that is unsupported by the evidence, explained its decision in a manner that is inconsistent with the evidence before it, or came to a decision that was so implausible that it cannot be ascribed to a difference of opinion. *Trimboli v. Dep't of Health & Human Res*., Docket No. 93-HHR-322 (June 27, 1997). The selection of Intervenor Hutchinson was not arbitrary and capricious.

11 11. Friend has failed to meet his burden of proving, by a preponderance of the evidence that he was more qualified than Intervenor Hutchinson for the posted position, that, but for flaws in the selection process, Friend would have been selected for the posted position, or that the selection of Intervenor Hutchinson was arbitrary and capricious or an abuse of BOE's discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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 West Virginia Code section 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.

Date: July 7, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Friend filed his statement of grievance under the name "Floyd E. Friend" despite having made a point at Level II that he preferred to be known as Floyd E. Friend, Sr., to avoid confusion with his son, Floyd E. Friend, Jr.

Footnote: 2

The quoted language is from the first page of Friend's post-hearing submission, which is not paginated.

Footnote: 3

References to pages in the transcript of the Level II hearing shall appear herein as "Tr.__."

Footnote: 4

Intervenor Hutchinson chose not to submit proposed findings and conclusions.

Footnote: 5

Such certificates are colloquially and derisively termed "Taco Bell" certificates because they only required a Masters degree and 3 years of administrative experience, which arguably could have come from managing a fast food restaurant.

Footnote: 6

By the time of the Level IV hearing, Luther Baker was serving as Superintendent of Nicholas County Schools.

Footnote: 7

By the time of the Level IV hearing, Gus Penix was serving as Assistant Executive Director of RESA IV in Summersville, West Virginia.

Footnote: 8

The first page sets forth, in chart form, the scores associated with each of the criteria under which the applicants qualifications were being assessed. The second page explains the rationale for how the points were awarded.

Footnote: 9

One of the typed signatures appearing on the letter was that of Cathy Powers. The parties did not raise this as an issue.

Footnote: 10

The letter of appointment, dated March 8, 2000, is included as the last page of the exhibit section of the Level II transcript. It does not bear a separate exhibit number.

Footnote: 11

During Friend's tenure as Assistant Principal at Richwood Junior High School, the school has suffered from a number of disciplinary problems, leading to concern that Richwood Junior High School would be designated a "dangerous" or "dangerously impaired" school. Tr.85, 116. This label could expose the school to sanctions. Tr.85, 116. This information was not included on the matrix, so the undersigned does not perceive this to have been a factor in the selection of Intervenor Hutchinson for the position in question.

Footnote: 12

Interestingly, Mr. Lester's testimony corroborates Friend's description of himself as hardheaded and opinionated.