**RENDA JAMES,**

**Grievant,**

**v.** **Docket No. 05-31-048**

**MONROE COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Grievant, Renda James, filed this grievance against the Monroe County Board of Education ("MCBOE" or "Board") on October 26, 2004, over her non-selection for an administrative position. Exactly what violations she is grieving are unclear as her Statement of Grievance only states: "WV §18A-4-7a & WV §18-29-2." The relief sought is clearly stated: "Placement in position - Special Education Director, back pay and benefits."

This grievance was denied at all lower levels. Grievant appealed to Level IV on March 9, 2005, and a Level IV hearing was held on May 24, 2005, at the Grievance Board's hearing room in Beckley. This case became mature for decision on July 20, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

## Issues and Arguments

First, Grievant asserts the successful applicant did not meet the posted qualifications for the position. In the alternative, Grievant maintains she was the most qualified candidate for the position at issue, as she had more education, special education endorsements, and administrative experience. Although not averred in her Statement

ofGrievance, Grievant complained at the Level II hearing that she did not have enough time to complete the writing sample. (See footnote 2) Grievant also alleged the scoring process used by MCBOE was wrong and arbitrary and capricious. (See footnote 3) Grievant also asserted her score on the Flippen leadership test was counted against her, (See footnote 4) and the required recommendation of Grievant's supervisor should not be counted as it was invalid, subjective, and defamatory. (See footnote 5) Further, Grievant maintains the composition of the Interview Committee was incorrect.

She also appears to aver she was treated unfairly by Superintendent Lyn Guy, but the reasons for this belief are not clearly specified nor are they verified in the record. (See Grievant's curious story about a going away party for another teacher, and Grievant's assertions Superintendent Guy did not recommend her for a teaching position, but recommended a board of education member's daughter, and the board of education then voted against Superintendent Guy's recommendation to select Grievant. Compare this testimony with that of Superintendent Guy, who recommended Grievant and had to explainto MCBOE Grievant was most the qualified candidate, and if MCBOE did not select Grievant, she could file a grievance and she would win. MCBOE then followed Superintendent Guy's recommendation, and Grievant received the position. Test. Grievant and Superintendent Guy, Level IV Hearing.) See Discussions in Credibility and Interview Committee Sections.

Respondent asserts the successful applicant met the required qualifications, was the most qualified applicant for the position, and all the factors required to be considered by W. Va. Code § 18A-4-7a were contemplated. Respondent notes that in filling an administrative position, MCBOE has discretion to weight these factors, and there was no abuse of discretion in this evaluation. Additionally, MCBOE avers the composition of the Interview Committee was appropriate for the position. Further, MCBOE considers the required recommendations to be an important part of the selection process for an administrator.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

## Findings of Fact

1. Grievant has been employed by MCBOE for four years as a special education and business teacher, and as a high school counselor. Grievant had applied for and received four positions during these four years, and she was recommended for all of these positions by Superintendent Guy. At the time of the selection at issue, Grievant was a high school counselor at James Monroe High School. 2. On September 6, 2004, MCBOE posted the position of Special Education Director, and approximately nine applicants, including Grievant, applied. (See footnote 6)

3. The wording and details of the posting were handled by Superintendent Guy, as is normal for administrative positions. Additionally, Superintendent Guy was careful in this case, to make sure her secretary, Patty Hancock, was not involved in any portion of the second posting and application process after Ms. Hancock returned to work from sick leave because she learned Grievant had frequently cooked and delivered meals to Ms. Hancock while she was off. Superintendent Guy wanted to avoid the appearance of favoritism.

4. This posting stated the following qualifications:

> Professional Administrative Certification; Master's Degree in Education with at least two special education endorsement(s) and at least three years teaching experience preferred or Professional Service Certification with MA Degree and three years in special education[.]
>
> Documented experience with computers and experience in administration in special education preferred; willing to receive in training on current law governing special education and 540, or able to demonstrate current knowledge as well as continue training in this area throughout all years of service.

5. W. Va. Code § 18A-4-7a requires a board of education to assess applicants in the following areas: appropriate certification, amount of administrative experience, course work/degree, academic achievement, relevant specialized training, evaluations, and other measures or indicators.

6. In 1998, MCBOE directed Superintendent Guy to assess applicants for administrative positions applying the following rating system to the W. Va. Code § 18A-4- 7a factors: appropriate certification - 5%, amount of administrative experience relevant to the position - 5%, course work/degree - 5%, academic achievement - 5%, evaluations - 5%. The other measures or indicators category was broken down into two areas: 1) Interview/writing sample - 55%, and 2) recommendations - 15%. In the category of evaluations, only candidates with West Virginia Department of Education evaluations could receive points. As no relevant specialized training, which is usually afforded 5%, was requested in the posting, this category was not rated for this position. If only one qualified applicant applied for the position, this assessment was not needed.

7. Superintendent Guy selected an Interview Committee made up of a special education parent, a special education teacher, Karen Bowden, a central office administrator, and herself. The Interview Committee's only duty was to ask the applicants questions and review their responses. After all the applicants had been interviewed, the Interview Committee unanimously recommended Anne Monterosso for the position. The successful applicant met the qualifications for the position.

8. After the interviews and the recommendation of the Interview Committee, Superintendent Guy completed a matrix for the top four candidates. The 55% for the interview portion also includes the untimed writing sample, which required the applicant toreview and evaluate a special education situation and make a recommendation for appropriate action to Superintendent Guy.

9. Grievant did complete the writing sample. She did not request additional time to work on the writing sample, and this exercise was untimed. If she had requested

additional time, this request would have been readily granted. Test. Grievant and Guy, Level IV Hearing.

10. The matrix scores for the four highest scoring applicants are as follows:

| Candidate | James | Eagle | Monterosso | Wilcox |
|---|---|---|---|---|
| Certification | 5 | 5 | 5 | 0 |
| Relevant experience | 0 | 0 | 0 | 5 |
| Degree level | 5 | 0 | 0 | 5 |
| Academic achievement | 0 | 5 | 0 | 0 |
| Specialized training | – | – | – | – |
| Past evaluations | 5 | 5 | 0 | 0 |
| Other measures: Interview (55%) | 28 | 28 | 55 | 14 |
| Recommendations (15%) | 8 | 8 | 15 | 0 |
| Total | 51 | 51 | 75 | 24 |

(The successful applicant's score was initially miscalculated as 74.)

11. Grievant has 37 years of experience as an educator, is certified as an administrator, and has seven years administrative experience. (See footnote 7) Grievant has endorsements in four areas of special education. Grievant is also certified as a business teacher, and counselor. She has an undergraduate degree in business education, amaster's of arts in teaching, a graduate specialist degree in special education, and an EdD in industrial education. It is unclear from the record when she completed various portions of her education. Much of her prior teaching experience was in Maryland where she was an assistant principal for five years and a special education coordinator for two years. Her grade point average for her undergraduate degree was 2.0, and her past evaluations have been satisfactory. Grievant is computer literate.

Grievant's scores on the Flippen test did not indicate she would have any difficulty in relating to the current administrative staff.

12. The successful applicant has 19 years of experience as an educator, is certified as an administrator, and worked as an administrator for six years. At the time of her application for the position, she was employed as a principal at a high school in Ohio, but she also had Central Office experience in special education. The successful applicant has one endorsement in special education and could obtain a second endorsement by requesting it from the West Virginia Department of Education, as she has already met the requirements. She had at least a Master's degree, at the time of her application, and she is a National Board-Certified Teacher. Her grade point average for her undergraduate degree was a 2.4. Since her evaluations were not under the West Virginia Department of Education guidelines she could not and did not receive credit in this area. (See footnote 8) The successful applicant's scores on the Flippen test did not indicate she would have any difficulty in relating to the current administrative staff.

13. The Interview Committee found the successful applicant to be very nurturing, refreshing, and to possess excellent ideas. 14. Superintendent Guy assessed the untimed writing samples herself and found the successful applicant's to be superior to Grievant's. (A unbiased review of these documents supports this conclusion.) Resp. Nos. 1 & 2 at Level II.

15. Grievant's immediate supervisor, Principal Christine Parker, rated Grievant as meeting and/or exceeding standards in her 2003 - 2004 teaching evaluation. The data in this evaluation is based only on Principal Parker's official observations of Grievant's teaching at specified intervals. Grt. Nos. 8 & 9 at Level IV.

16. Although Principal Parker's recommendation of Grievant was not submitted into evidence because of a confidentiality agreement, it is clear by knowing the scores on the two other recommendations, that some portions of Principal Parker's recommendation were unfavorable for the position because these other individuals gave

Grievant the highest possible rating they could. (See footnote 9) For example on Question 3 of the Recommendation, it is known the other two evaluators gave Grievant 10's. For Grievant to receive the average of 7, Principal Parker must have given Grievant a 1 in this area. By the same token, Principal Parker must have given Grievant a 9 on question 5. The other raters were selected by Grievant, and one was a former special education teacher and one was a counselor. (See footnote 10) 17. Principal Parker's recommendation was based on multiple complaints she received from faculty, staff, and parents during the approximately two years Grievant was under her supervision, and the requirement of the recommendation form for Principal Parker to assess how Grievant would perform in an administrative role requiring interpersonal skills.

18. MCBOE approved the hiring of the successful applicant on October 5, 2004. Board Member Keith Wickline voted against the hiring because the recommended candidate was from outside the county and because a pay increase was also recommended. Sometime during the hiring process, Grievant called MCBOE President Charles Sams to discuss the matter, and stated she had heard he was "a fair and honest person." President Sams does not remember when Grievant called him, and it could have been between the first and second posting. President Sams called two school administrators and was told Grievant was hard to work with.

19. At a Board meeting held after the hiring of the successful applicant, MCBOE discussed her hiring and the non-selection of Grievant.

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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). See W. Va. Code § 18-29-

6. "The preponderance standard generally requires proof that a reasonable person would acceptas sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

**I. Credibility**

An issue to address is credibility, as Grievant asserts Superintendent Guy is lying, and Grievant's interpretation of several incidents is different from that of Superintendent Guy. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96- 29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness'sinformation. (See footnote 11) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

"[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of

Treasury, 44 M.S.P.R. 201 (1990). The undersigned Administrative Law Judge finds Grievant's interpretation of some information to be skewed. Thus, her credibility must be called into question. The testimony outlined in the Issues and Arguments section support this finding by the undersigned Administrative Law Judge. Additionally, Grievant's demeanor was stiff, with little affect, and several of her statements were just not plausible. By contrast the testimony of Superintendent Guy and Karen Bowden, the special education teacher on the Interview Committee, was straightforward, reasonable, and consistent.

Further, because of the type and number of allegations made by Grievant about Superintendent Guy, the members of the Interview Committee, and some MCBOE members, the overall flavor of these assertions was rather paranoid. To follow Grievant's logic, every step Superintendent Guy, especially, and others, to a lesser degree, took was directed at keeping her from the position. It almost seemed Grievant was alleging a "conspiracy" to which Superintendent Guy had devoted an inordinate amount of time.

For example, Grievant complained about the scoring of the matrix, as if this calculation were directed toward her, but indeed this method was adopted in 1998, beforeGrievant was ever employed by MCBOE. Grievant also asserted Superintendent Guy did not follow past practice and intentionally prevented Ms. Hancock from doing the posting for the special education director's position, even though Ms. Hancock was on sick leave and Superintendent Guy usually did the postings for administrative positions. It should also be noted that after Ms. Hancock's return to work Superintendent Guy was careful to keep Ms. Hancock out of the hiring loop when she found out Grievant had frequently taken Ms. Hancock meals during her illness. This action was to insure there could be no assertions of favoritism made later.

Accordingly, the undersigned Administrative Law Judge finds Grievant's assertions and testimony to be less than credible.

## II. Qualifications

A. Is the successful applicant qualified for the position?

The first issue to address is qualifications. The parties stipulated Grievant was qualified for the position, but Grievant asserts the successful applicant did not meet the posted minimum qualifications because she only had one endorsement in special education and two were required by the posting.

The applicable portion of the posting stated: "Master's Degree in Education with at least two special education endorsement(s) and at least three years teaching experience preferred or Professional Service Certification with MA Degree and three years in special education." (Emphasis added). While this statement is not one of absolute clarity, Superintendent Guy, who wrote the posting, testified that while two special education endorsements were preferred, they were not required, and the successful applicant met the posted qualifications. The key qualification to Superintendent Guy was theadministrative certification, as that was the reason for the reposting. Both Grievant and the successful applicant possessed this requirement.

Superintendent Guy's interpretation of her own posting is judged by the arbitrary and capricious standard. McCoy & Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 99-PEDTA-074 (July 19, 1999). Where the plain language of a policy, memo, or posting does not compel a different result, some deference must be extended to the agency in interpreting its own memos. Id. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

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 is 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). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for thatof Superintendent Guy. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Superintendent Guy's interpretation of her own posting is entitled to some deference by this Grievance Board, and the undersigned Administrative Law Judge does not find her interpretation contrary to the plain meaning of the language, or inherently unreasonable. Dyer, supra.

B. Was Grievant the best qualified applicant and was MCBOE's Decision arbitrary and capricious?

W. Va. Code § 18A-4-7a requires the best or most qualified individual be selected. These qualifications are judged by the factors outlined in that Code Section. 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 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 isutilized. 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 action does not result in an abuse of discretion. Oldham v. Cabell County Bd. of Educ., Docket No. 03-06-269 (Feb. 27, 2004); 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)).

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." 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).

After the interviews, the Interview Committee unanimously agreed the successful applicant had performed best during the interview. The Interview Committee found Ms. Monterossa to be very nurturing, refreshing, and to possess excellent ideas. Superintendent Guy then reviewed the writing samples and the recommendations. Again, the successful applicant proved to be the better applicant, and Superintendent Guy recommended Ms. Monterossa to MCBOE. MCBOE approved Superintendent Guy's recommendation by a vote of four to one.

Contrary to Grievant's assertions, it was not arbitrary and capricious for MCBOE to consider the candidates' interpersonal skills as demonstrated by the interview, and written communication skills as demonstrated by the writing sample. The Special Education Director will frequently need to interact with frustrated parents, teachers, and students. Additionally, the Special Education Director will need to make clear, concise, written recommendations utilizing all data at hand to ensure students receive appropriate educational opportunities. These abilities are ones the Special Education Director could reasonably be expected to utilize regularly. In evaluating the actions of MCBOE 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 upon the credentials it finds important to the position. Owen, supra.

Here, each of the Code Section factors was considered, and MCBOE determined it wanted to place greater emphasis on the interview, writing sample, and recommendations in the other measures or indicators category. Stinn, supra; Baker, supra. The undersigned Administrative Law Judge does not find this decision to be arbitrary and capricious or an abuse of discretion in a position that requires excellent interpersonal, planning, and writing skills. Oldham, supra; Elkins, supra; Hughes, supra; Blair, supra. The choice made by MCBOE in this set of facts cannot be seen as arbitrary and capricious, and the undersigned Administrative Law Judge does not find the decision- making process was fatally flawed, or that MCBOE overstepped its broad discretion as described in W. Va. Code § 18A-4-7a.

**III. Recommendations**

Grievant asserts MCBOE should not have considered Principal Parker's negative recommendation because it did not mirror Grievant's 2003 - 2004 evaluation which found Grievant either met and/or exceeded set standards. Principal Parker adequately explained why these two documents produced different results. Principal Parker based the 2003 -2004 evaluation strictly on classroom observations, and evaluated Grievant on her teaching performance in her current, non-administrative position. She found Grievant to meet and/or exceed standards.

In completing the recommendation, Principal Parker was asked different questions, and was asked to assess how Grievant would perform in an administrative/managerial position. After considering all the information she had about Grievant, including

numerous complaints dealing with interpersonal interactions, the rating she gave Grievant was not favorable in many areas. While the negative assessment may have been a surprise for Grievant, that does not make the assessment invalid. The undersigned Administrative Law Judge does not find there to be a problem with MCBOE utilizing this recommendation as well as the other two outstanding recommendations.

(See footnote 12)

**IV. Interview Committee**

Grievant also complained about the make-up of the Interview Committee, especially because a teacher with whom she alleges she had a conflict, Ms. Bowden, was a member. Although not presented into evidence, it appears Grievant wrote a letter in 2001 complaining about how IEP's were done in the school where she was currently assigned. Superintendent Guy testified she did not know this letter was about Ms. Bowden, did not remember the letter until she reviewed it at hearing, and there was no evidence to suggest Ms. Bowden even knew this letter was written.

Grievant also seems to believe the placement of Ms. Bowden on the Interview Committee was an intentional act to prevent Grievant from obtaining the position. Grievantdid not meet her burden of proof on this issue. Additionally, it should be noted Grievant did not tell Superintendent Guy why she opposed Ms. Bowden's placement on the Interview Committee, only saying immediately after the interview something like, "Why is that woman on the Interview Committee?" and "I don't think she should be on the Interview Committee." Grievant gave no reasons or explanations for this opinion. Both Grievant and Superintendent Guy agree that this was all that was said.

Superintendent Guy stated she frequently talked to this special education teacher during the summer because Superintendent Guy was performing the duties of the Special Education Director until a new one was hired. When Superintendent Guy asked Ms. Bowden to serve on the Interview Committee, Ms. Bowden informed Superintendent Guy she thought she knew one of the applicants (not Grievant). Superintendent Guy

asked Ms. Bowden if she could judge the applicants only on the interview, and when Ms. Bowden answered "yes," she was then placed on the Interview Committee. During the Interview Committee's discussion of the applicants, Ms. Bowden did not address any issues outside the information presented during the interview.

Additionally, Ms. Bowden's testimony did not reveal any animus toward Grievant. At the Level II hearing, Ms. Bowden remembered Grievant questioned her in 2001 about some of the ways they did IEP's, and Ms. Bowden informed Grievant they must do it differently in Monroe County than they do in Maryland. No one questioned Ms. Bowden about the letter Grievant wrote to Superintendent Guy allegedly complaining about the practices at that school. The letter was not placed into evidence, and Superintendent Guy testified she did not even know the letter referred to Ms. Bowden. Accordingly, Grievant has not met her burden of proof in this area. Grievant also complained about the placement of a special education parent on the Interview Committee because he was a contract employee for MCBOE, and Superintendent Guy could control his vote. This assertion was not proven. Further, Grievant averred, an Interview Committee should be made up of people from outside the county, again so Superintendent Guy could not control their votes. No evidence was presented that Superintendent Guy attempted to control the votes of any member of the Interview Committee. Additionally, while not controlling the outcome, a superintendent should have input into the selection of an administrator he/she would work closely with, and who would serve in his/her stead if were absent.

Superintendent Guy had the right to select the Interview Committee, and there was no showing that this selection was based on any animosity toward Grievant. Accordingly, the undersigned Administrative Law Judge finds Grievant did not prove a flaw in the make- up of the Interview Committee. See Workman v. Wayne County Bd. of Educ., Docket No. 99-50-099 (June 11, 1999).

Further, the record is bereft of any evidence that established Grievant's non-

selection was related to any wrongful act on the part of Superintendent Guy. All Grievant put forth to support these assertions were confused rumors, hearsay, and double hearsay. (See note in Issues and Arguments and findings in Credibility Section, infra.) As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Here, Grievant has not presented sufficient evidence to establish any wrongful or unfair treatment by Superintendent Guy. 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 her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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). 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 Res., Docket No. 92-HHR-486 (May 17, 1993).

2. An administrator's interpretation of her own posting is judged by the arbitrary and capricious standard. See McCoy & Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 99-PEDTA-074 (July 19, 1999). Where the plain language of a policy or a memo does not compel a different result, some deference must be extended to the agency in interpreting its own memos. Id. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).

3. Where the language is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

4. Superintendent Guy's interpretation of her own posting is not contrary to the plain meaning of the language, or inherently unreasonable. Dyer, supra.

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 Boardmay hire any candidate based solely upon the credentials it feels are of most importance, unless 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, 169 W. Va. 162, 286 S.E.2d 276 (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 Res., 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. Grievant has failed to prove by a preponderance of the evidence that the selection criteria of W. Va. Code § 18A-4-7a were not utilized and considered, or that

the percentages assigned to the matrix by MCBOE for assessing administrative positions were arbitrary and capricious or an abuse of discretion. Owen, supra; Baker, supra.

11. MCBOE's decision to focus on other measures or indicators as established by the interview, writing sample, and recommendations, was not arbitrary and capricious, nor did it render the selection process flawed. Owen, supra; Baker, supra.

12. The action of MCBOE in selecting the successful applicant for the Special Education Director position was 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 was not so implausible that it could not be ascribed to a difference of opinion. Bedford, supra.

13. Grievant did not meet her burden of proof and demonstrate Principal Parker's recommendation was invalid and should not be used by Superintendent Guy and MCBOE in assessing Grievant's qualification for the position.

14. Grievant failed to demonstrate the selection of the successful applicant was inappropriately affected by the placement of Ms. Bowden on the Interview Committee. See Workman v. Wayne County Bd. of Educ., Docket No. 99-50-099 (June 11, 1999).

15. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No.97-BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Grievant has not presented sufficient evidence to establish any wrongful or unfair treatment by Superintendent Guy.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monroe 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: September 29, 2005**

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Footnote: 1

*Grievant was represented by her husband, Ben James, and by Ben Barkey from the West Virginia Education Association, and MCBOE was represented by Attorney Greg Bailey of Bowles Rice McDavid Graff and Love.*

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Footnote: 2

*As demonstrated by Finding of Fact 9, this assertion was not proven and will not be discussed further.*

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Footnote: 3

*At the Level IV hearing, Grievant also asserted she had been subjected to age discrimination. Respondent objected to this issue being addressed within the grievance process, as Grievant had filed an age discrimination complaint with the Equal Employment Opportunity Commission. After discussion, Grievant withdrew this assertion before the Grievance Board and planned to pursue it with the Commission.*

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Footnote: 4

*Superintendent Guy testified this test was only considered to see if any of the applicants had a leadership style that would not fit at all with the other administrators. Since Grievant's test did not indicate such a problem, the test was not considered further. Grievant's concern may arise from the fact that the designer of the Flippen test did tell Superintendent Guy that Grievant had a "perfect" score, and he had never seen anyone achieve a perfect score before.*

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Footnote: 5

*Grievant did not ask for the recommendations submitted by the individuals she selected, which gave Grievant the highest possible score, to be removed.*

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Footnote: 6

*There was a prior posting for this position in August 2004, and Grievant applied at that time as well. That posting had an error and did not include the requirement for administrative certification. The position was reposted as discussed in Finding of Fact 2. The reposting of the position was grieved by Grievant, denied at Level II, and this grievance was then*

*abandoned by Grievant. See Resp. No. 1 at Level IV ( Level II Decision in reposting grievance). During the Level IV hearing in this matter, Grievant repeatedly attempted to address issues from the prior grievance. In response to objections by Respondent, the undersigned Administrative Law Judge directed Grievant to address the issues in the grievance at hand. The Level II Decision in the reposting grievance found no error or violation on the part of Superintendent Guy or MCBOE in reposting the position.*

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*Footnote: 7*

*The effective date of her administrative certification is September 10, 2004, shortly after the position was posted the second time.*

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*Footnote: 8*

*Although Grievant asserted the successful applicant was not qualified and in the alternative asserted she was more qualified, Grievant put forth little data about the qualifications of the successful applicant, Ms. Monterosso, as compared to herself.*

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*Footnote: 9*

*Grievant attempted to obtain Principal Parker's recommendation through a FOIA request, and this request was denied by the Circuit Court by order. James v. Lyn Guy, Civil Action No. 05-C-46 (June 28, 2005). Judge Robert Irons noted the instructions for completing the form stated the original form would not be disclosed to the applicant, but the overall numerical rating along with all comments would be supplied on a summary document, and this information was given to Grievant. The undersigned Administrative Law Judge also denied Grievant's Motion for this recommendation as the individuals who complete this form were promised confidentiality by MCBOE. MCBOE did provide the promised composited score to Grievant along with all the written comments.*

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*Footnote: 10*

*The other recommenders gave permission to release their recommendations.*

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*Footnote: 11*

*The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).*

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*Footnote: 12*

*The undersigned Administrative Law Judge looks with askance on the validity of the two other ratings, as these individuals gave Grievant a perfect score in all twelve areas.*