

To what degree can a county board of education lawfully be involved in assessing or influencing the superintendent's nominees for posted vacancies, especially when some board members question the superintendent's judgment or have qualms about recommendations generated by a committee appointed by the superintendent to assist in choosing the candidate to be recommended to the board?

When we teach school board members and administrators about the respective roles of the county board and the superintendent in hiring situations, we regularly advise that the board should not involve itself in the process of selecting a candidate until after the superintendent settles upon a person to recommend to the board.

We teach this, not because it seems like a good idea, but because the relevant statutes enacted by the Legislature, as well as decisions of the Grievance Board and the courts, have been applied to require school boards and school board members to refrain from participating in the process by which the superintendent nominates candidates for posted jobs.

W. Va. Code § 18A-4-10 establishes the superintendent's recommendation as a prerequisite to board action appointing someone to fill a vacant professional or service position. In part, the statute provides:

The county superintendent shall:

* * *

(2) Nominate all personnel to be employed; in case the county board refuses to employ any or all of the persons nominated, the county superintendent shall nominate others and submit the same to the county board at a time the county board may direct. No person or persons shall be employed except on the nomination of the county superintendent . . .

Another statute, W. Va. Code § 18A-2-1, reiterates the superintendent's role in nominating candidates for professional positions. In pertinent part, it provides:

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, the superintendent shall nominate others and submit the same to the board at such time as the board may direct.

Generally speaking, once the superintendent has fulfilled his or her duty by recommending a particular person to fill a vacancy, the board of education as a board (and not as individual board members outside of a meeting) may review any documentation that is pertinent under the hiring statutes to the choice of a candidate to fill a vacancy.

In the case of a professional vacancy, this might include the names of applicants and any matrix which school officials created to reflect applicants' credentials under the qualification criteria set out in the professional vacancy-filling statute, W. Va. Code § 18A-4-7a.

It might also cover documents reflecting the candidates' relative qualifications and the fairness of the selection process itself.

In the case of a service personnel vacancy, this might include the applicants' names and current employment status, information about their relevant qualifications, their seniorities and, where relevant, their performance evaluations.

This "separation of responsibilities" sometimes causes board members to question whether they have any involvement in the hiring process at all, or whether, instead, they are simply rubber stamps. We teach that the board as a board does have a crucial role, but this role occurs only after the superintendent has informed the board of his or her choice of a candidate. We recommend that after the superintendent has so informed the board, the board should raise with the superintendent, in executive session, any questions it has about the superintendent's choice.

This makes sense since the school board, like the superintendent, is responsible for appointing the candidate who, under the governing laws, is entitled to the job in question. The discussion may include any questions the board members have about the process the superintendent followed in generating the recommendation, the reasons why other of the candidates were not recommended, the relevant credentials of the recommended candidate or other candidates, etc.

Once the superintendent makes known his or her recommendation, if a board member requests such information from the superintendent and the superintendent declines to provide it, it is up to a majority of the board whether to direct the superintendent to disclose the information to the board members. One or two board members, alone, cannot require anything of the superintendent in this situation. The board can act only as a board and only at a meeting. For that reason, if push comes to shove, the board would need to return to open session to entertain a motion that the superintendent should disclose to the board certain pertinent information about applicants for the posted vacancy. (It would be unlawful to take a vote on that issue in executive session.)

When we speak on these issues, we typically refer to the Grievance Board's 1994 decision in the case of *Rakes v. Raleigh County Board of Education*, Docket No. 93-41-448 (March 17, 1994). This was the first Grievance Board decision to discuss in any detail the relationship of the superintendent's personnel recommendation to the school board's action on the recommendation.

The *Rakes* decision requires that the respective roles of the superintendent and the county board remain distinct inasmuch as the board and the superintendent play crucial but separate roles in filling vacancies. The Grievance Board wrote:

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, the superintendent shall nominate others and submit the same to the board at such time as the board may direct." W. Va. Code § 18A-2-1. This 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.

The decision in the *Rakes* case, which was upheld upon appeal to Circuit Court, is online at: <http://www.pegb.wv.gov/Decisions%20Docs/dec1994/rakes.pdf>.

When we speak to these issues, we also typically cite the Grievance Board's subsequent 1994 opinion in the case of *Gore v. Monroe County Board of Education*, Docket No. 93-31-532 (April 26, 1994). In the *Gore* decision, the Grievance Board ruled that the school board is, by law, prohibited from interfering with the superintendent's decision about whom to nominate to fill a posted vacancy. In particular, we teacher that a member of the school board should not sit on an interview committee that assists the superintendent in deciding whom to nominate.

Like the Grievance Board's decision in the *Rakes* case, the *Gore* decision explains the legal requirements of the superintendent-board relationship in the hiring of professional employees.

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. In order to give that procedure and the mandates of Code § 18A-4-7a full effect, it must be concluded that, except where it is necessary to explore the credentials of a particular person nominated or examine the process by which the candidates were assessed, each party in the process must exercise its authority independent of the other. Neither party should delegate its statutory responsibilities to the point that it relinquishes those responsibilities. Likewise, a superintendent or board should not take actions calculated to interfere with or usurp the other's duty. Since the superintendent is subordinate to the board in a great many respects, see W. Va. Code §§ 18-4-3, 18-4-4, it is the board with whom the greater responsibility for the integrity of the process rests.

Because the prohibition against undue interference by either party is an implied and not explicit part of the statute, it is not possible to promulgate a rule applicable to all situations in which a violation of that prohibition is alleged. Each case must be decided on its own merits. The present case, however, is an example of clearly

excessive intrusion on the part of a county board into the superintendent's statutory duty.

While it was not per se violative of Code § 18A-2-1 for the Board to involve itself in the development of the process by which candidates for the position would be assessed, the extent of that involvement was so substantial as to constitute an encroachment on the superintendent's authority. Specifically, the Board's control over the weight to be afforded the various criteria and the questions to be asked during the interviews effectively deprived Superintendent Guy of any meaningful say in the assessment. Her role in the development of the procedure was essentially reduced to that of an assistant to the Board, a role which is incompatible with the legislative intent of the statute.

The participation of the two board members on the interview committee was, in and of itself, violative of Code § 18A-2-1. Such participation was wholly unnecessary for the Board to ensure that the selection process conformed to the requirements of Code § 18A-4-7a. At the very least, such participation afforded the Board substantial influence over which candidate would ultimately be nominated. The involvement was particularly intrusive in that the Board had already mandated that the results of the interviews would be a major if not determinative factor in that nomination. Clearly, Code § 18A-2-1 does not contemplate such extensive participation in the nomination process on the part of a board.

The Grievance Board's written opinion in the *Gore* case is available online at: <http://www.pegb.wv.gov/Decisions%20Docs/dec1994/gore.pdf>. Board members will want to read it carefully and think twice about disregarding its advice, since to do so could give rise to a grievance that is ultimately decided by the Grievance Board.

In the interests of consistency, the Grievance Board is faithful to its own prior decisions on various legal issues. In a case where the evidence shows that a school board violated the required separation between the superintendent's role and the board's, the Grievance Board can be expected to issue a decision that, in effect, asks why the school board is not following Grievance Board rulings on that issue which date back more than 20 years and have been reaffirmed over the years.

Indeed, the Grievance Board has, in the years since 1994, issued opinions that reiterate the bifurcated nature of the hiring process and the respective roles of the superintendent and board. Illustratively, the Grievance Board, in *Smith v. Cabell County Board of Education*, Docket No. 03-06-312 (December 17, 2004), and in *Oldham v. Cabell County Board of Education*, Docket No. 03-06-269 (February 27, 2004), reiterated and reaffirmed the analysis of the *Rakes* and *Gore* cases. The *Smith* and *Oldham* decisions were both upheld upon appeal to Circuit Court. The Grievance Board's opinions in both cases are available online, *Smith* at:

<http://www.pegb.wv.gov/Decisions%20Docs/dec2004/smith.pdf>, and *Oldham* at <http://www.pegb.wv.gov/Decisions%20Docs/dec2004/oldham.pdf>.

[In one decision of which we are aware, *Snyder v. Preston County Board of Education*, Docket No. 98-39-509 (May 26, 1999), the Grievance Board did not take issue with a county board member's presence on a committee that interviewed the candidates. However, the evidence was clear that it was the superintendent of schools' idea to include the board member on the committee. There was no evidence to indicate that the board member's presence was the board's idea or the member's idea. Additionally, the superintendent gave a convincing explanation for his voluntary decision to include the board member on the committee.]