LENA JONES,

Grievant,

v v.

DOCKET NO. 97-45-147

SUMMERS COUNTY BOARD OF EDUCATION,

Respondent,

and

ROBIN McNEER,

Intervenor.

DECISION

Lena Jones, Grievant, filed a grievance on September 6, 1996, alleging that she had applied for a guidance counselor's position and that the position had been awarded to a less qualified applicant. As relief, she requested instatement into the position. Grievant's supervisor was unable to grant relief at Level I. At Level II, Robin McNeer, the successful applicant, was allowed to intervene in the grievance. A hearing was held on February 26, 1997, and the grievance was denied. Although it is not entirely clear from the record, it appears that Level III was waived in accordance with W. Va. Code §18-29-4(c).

At Level IV, the matter was submitted for decision based upon the record developed below, and became mature for decision on July 24, 1997, the due date for the parties' proposed findings of fact and conclusions of law. For administrative reasons, the case was reassigned to me on December 16, 1997. For reasons explained herein, the grievance must be denied.

FINDINGS OF FACT

1 1.

Grievant was employed as an English teacher at Respondent's Summers County High

Schoolfor approximately 29 years, and continues to be employed by Respondent. (See footnote 1)

2 2.

On July 31, 1996, Respondent posted a position for a guidance counselor, grades 9-12, at Summers County High School. The posting required a teaching certificate in counseling, 9- 12. Grievant and Intervenor applied for the position.

3 3.

Respondent assessed the applicants using the second set of factors set forth in W. Va. Code §18A-4-7a.

4 4.

No tie-breaking procedure had been formally adopted in Summers County. Prior to posting the position, Superintendent Charles R. Rodes determined that any tie would be broken by awarding the position to the applicant who had experience in counseling. Experience was defined by Superintendent Rodes as working for Respondent as a guidance counselor.

5 5.

Intervenor and Grievant were tied, after assessing their respective qualifications under the second set of criteria found in W. Va. Code §18A-4-7a.

6 6.

Intervenor was the successful applicant for the position. Intervenor had been employed as an itinerant guidance counselor and as a guidance counselor at Summers Middle School for three years.

7 7.

Grievant had completed a practicum as part of her work toward her masters degree and certification in counseling. Grievant had completed all educational requirements for certification as a guidance counselor in May 1995, and took the area content test sometime in June or July of 1995. At that time, she gave the Board of Education's secretary checks, to request certification. For unknown reasons, no action was taken or the checks weremisplaced. Upon discovering that the certificate had not been issued, Grievant wrote another check the next spring, her certification was duly requested, and was received in due course. Grievant's certification in counseling was effective March 4, 1996.

8 8.

Prior to obtaining her counseling certification, Grievant had been employed by the Family Resource Network for five weeks during June and July of 1995, as a “counselor/coordinator.” The posting for this position also included a separate teaching position. The posting noted that both positions were made possible by a grant, and identified the location for the work as Summers County High School. The posting was headed “Summers County Family Resources Network.” The posting directly

referenced Respondent only in a small print paragraph at the bottom of the posting, which stated that the Summers County Board of Education does not discriminate, and directed inquiries to an individual at the Summers County Board of Education. The posting lists, as the only qualifications required for the positions, a four year college degree in Education, Social Work or Counseling.

9 9.

In the Family Resource Network position, Grievant counseled students ages 14 through 18. While working in this position, Grievant's pay check was issued by Respondent.

10 10.

Respondent acted as the “fiscal agent” for the grant which the Family Resources Network used to fund the position described in the Findings of Fact immediately above. The grant monies did not belong to Respondent, and Respondent merely administered the money in accordance with directions given by the Family Resources Network. Persons working in the Family Resources Network were not Respondent's employees.

DISCUSSION

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89- 06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6. "The grievance procedure, W. Va. Code §§18-29-2, et seq., ... allows for an analysis of legal sufficiency of the selection process at the time it occurred." Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). This analysis must acknowledge that county boards of education have substantial discretion in matters relating to the hiring of school personnel, so long as the “qualifying factors” set forth in W. Va. Code §18A-4-7a (1992) are considered, and the exercise of discretion is neither arbitrary nor capricious. Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997). See Hyre v. Upshur County Bd of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and I may not substitute my judgment for that of the Respondent. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). An action is arbitrary or capricious if it does not rely on factors intended to be considered, entirely ignores

important aspects of the problem, is explained in a manner contrary to the evidence before the board of education, or is a decision so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The selection process in this instance was governed by the "second set of criteria" found in W. Va. Code §18A-4-7a, as both applicants were permanently employed instructional personnel. Selection was thus based on the following criteria:

> Appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated in the job description; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority... with each criterion being given equal weight.

W. Va. Code §18A-4-7a.

Grievant here alleged that she should have received credit in the criterion “existence of teaching experience in the required certification area,” and that, had she been so credited, she would have been awarded the position. It appears that she also challenged the tie-breaker chosen by Mr. Rodes, as Grievant specifically argued that Superintendent Rodes erred in defining experience as work for Respondent, because “experience” is then indistinguishable from “seniority.” Finally, she argues that her summer counseling work for the Family Resources Network should have qualified as experience for purposes of the tie-breaker.

Respondent counters that Grievant's “experience” was gained in jobs which required neither a counseling degree nor certification, prior to Grievant obtaining her certification as a guidance counselor. Respondent argues that one logically must have received one's certification prior to obtaining experience “in the certification area,” and Grievant's work therefore cannot qualify for consideration. Respondent asserts that the applicants tied under the statutory criteria, and the tie-breaker chosen was neither arbitrary nor capricious, and indeed was manifestly reasonable.

The initial question is whether Respondent is obligated by law to consider work performedprior to obtaining one's certification as “teaching experience in the required certification area” for purposes of assessing applicants' qualifications under W. Va. Code §18A-4-7a. (See footnote 2) The precise question has been explicitly addressed in only one prior case, although “experience” has been addressed in several cases pertaining to another selection criterion or different statutory provisions. (See footnote 3)

In Clutter v. Webster County Bd. of Educ., Docket No. 95-51-439 (Dec. 29, 1995), Administrative Law Judge Koval found the successful applicant for a special education teaching position should not have been given credit in the criterion, "existence of teaching experience in the required certification area," because, “[a]lthough he had briefly taught special education classes [as a substitute], he was not certified in special education at the time.” Although there is no conclusion of law specifically to that effect, Clutter indicates that one cannot obtain “experience in the certification area” without first holding the certification itself. Applying Clutter here, Grievant's argument must fail, as both her practicum and her Family Resources Network work occurred priorto Grievant obtaining the counseling certification. (See footnote 4)

In an analogous case addressing how one accrues administrative seniority, holding a valid certification was found to be an essential prerequisite to eligibility for seniority credit. Ward v. Mingo County Bd. of Educ., Docket No. 94-29-1134 (Apr. 26, 1995). That case required explanation of the decision in Talbert v. Mingo County Bd. of Educ., Docket No. 93-29-166 (Jan. 20, 1994), which granted administrative seniority credit to a Dean of Students who was performing tasks essentially identical to those of an assistant principal. In Ward, Administrative Law Judge Swartz explained that “individuals who do not possess an administrative certificate, even if they are performing the duties described in the Dean of Students position description, may not properly be awarded administrative seniority, because they do not hold the appropriate administrative certification.” Conversely, “if an individual holding the post of Dean of Students does possess an administrative certificate, but is not performing the duties enumerated in the position description of the Dean of Students, that individual likewise should not be awarded administrative seniority.” Actually holding the certificate at the time work is performed is a prerequisite, but not the only factor, in determining whether the time worked should qualify for seniority purposes. Thus, Ward supports the determination made in Clutter. Work performed prior to Grievant obtaining her guidance counseling certification need not be considered as “teaching experience in the required certification area.

Grievant also argued that “experience” as a tie breaking consideration should not have been limited to experience as Respondent's employee, because that definition transforms the considerationinto “seniority.” However, it is left to the sound discretion of a county board of education to resolve ties between candidates. State ex rel. Monk v. Knight, et al., W. Va. Sup. Ct., No. 24366, (Nov. 24, 1997). (See footnote 5) Challenges to the method of resolving ties should be reviewed under

the 'arbitrary and capricious' standard pronounced in Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986). See, Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997).

Whatever the label, the tie-breaking consideration here was chosen deliberately, before the position was posted. Either “experience” or “seniority” are reasonable bases for making a final choice between applicants equally qualified under the statutory criteria. The statute neither prohibits them as tie-breaking considerations, nor mandates some other tie-breaking method for professional employee selections. The tie-breaking method was neither arbitrary nor capricious, and Grievant's challenge to the definition of “experience” as used to break the tie must fail. See Monk, supra.

Grievant also argued, by implication, that her five weeks of experience in the Family Resources Network position was actually work for Respondent, and thus mandated consideration in the tie-breaker. Grievant submitted evidence that Respondent paid her for the summer work. However, as made clear by the West Virginia Supreme Court of Appeals, workers are not “employees” of a county board of education where it acts merely in the capacity of “fiscal agent,” as was the case here. Parker v. Summers County Bd. of Educ., 185 W. Va. 319, 406 S.E.2d 744 (1991). Thus, Grievant's summer employment cannot be construed as work for Respondent, evenif it were considered work as a guidance counselor. (See footnote 6)

In conclusion, the statutory language, requiring “teaching experience” suggests that the work must be done for some school authority in order to be considered under the selection criterion “existence of teaching experience in the required certification area.” Prior case law holds one must have the required certification before one's in-school work experience is eligible for consideration as “experience in the required certification area.” Grievant failed to prove she obtained her certification prior to performing the work which she alleged must be considered, and the work was clearly not performed as Respondent's employee. Consequently, Respondent cannot be said, as a matter of law, to have illegally declined to consider Grievant's work for the Family Resources Network as “teaching experience in the required certification area.” Further, Respondent acted neither arbitrarily nor capriciously in choosing and applying its tie-breaking method.

CONCLUSIONS OF LAW

1 1.

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). 2 2.

The selection process in this case is governed by the "second set of criteria" found in W. Va. Code §18A-4-7a.

3 3.

One cannot possess “teaching experience in the required certification area” under W. Va. Code §18A-4-7a, without first obtaining the certification required. Clutter v. Webster County Bd. of Educ., Docket No. 95-51-439 (Dec. 29, 1995).

4 4.

A board of education has substantial discretion in determining a tie-breaking method to be employed where applicants for a professional position are tied under the selection criteria set forth in W. Va. Code §18A-4-7a. State ex re. Monk v. Knight, et al., W. Va. Sup. Ct., No. 24366 (Nov. 24, 1997). Such a determination is reviewed under the “arbitrary and capricious” standard of review pronounced in Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986). See, Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997).

5 5.

Grievant failed to prove that she was more qualified than Intervenor, or that there was a substantial flaw in the selection process.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha or Summers County. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Dated: January 7, 1998

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JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

Since February 2, 1997, well after the events contested in this grievance, Grievant has been employed in a guidance counselor's position with Respondent. The position is different from the one at issue here.

Footnote: 2

It is clear that any teaching experience in the certification area results in credit for this criterion, as the word "existence" is not a quantitative term. The determination is merely a "yes or no" decision by the evaluator. See Richmond v. Raleigh County Bd. of Educ., Docket No. 92-41-363 (May 27, 1993) and its progeny. See also, Keatley v. Mercer County Bd. of Educ., 1997 W. Va. Lexis 123 (S. Ct. June 19, 1997) (addressing assistant principal's selection).

Footnote: 3

While "experience" under W. Va. Code §18A-4-1 (defining "Years of experience" for purposes of determining salary supplements) has been addressed in at least one West Virginia Supreme Court of Appeals decision and several Grievance Board decisions, those cases are inapplicable here. The statutory provision distinguishes between several terms which are defined "[f]or the purpose of this article," and other terms (including "years of experience") which are defined as pertaining only to "[t]he column heads of the state minimum salary schedule" found in W. Va. Code §18A-4-2. The Legislature clearly could have chosen to include the definition in the first part of Code §18A-4-1, defining terms for purposes of the entire article. Thus, the Legislature distinguished its definition of "years of experience" from the "experience" criteria in the selection provision of Code §18A-4-7a.

Footnote: 4

Obviously, the practicum was a requirement for obtaining the educational degree, which was itself a prerequisite to the certification. As there can be no argument that Grievant had effectively obtained her certification prior to engaging in the practicum, it will not be further discussed.

Footnote: 5

The West Virginia Supreme Court of Appeals restricted the methods by which ties can be resolved in filling vacant teaching positions in Monk, by ruling that random selections or lotteries cannot be used absent specific statutory authorization.

Footnote: 6

Even if it were considered, five weeks' experience is substantially less than the three years' experience which Intervenor possessed.