LINDA J. BAUMGARDNER,

Grievant,

v. **Docket No. 99-01-005**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Linda J. Baumgardner, employed by the Barbour County Board of Education (BCBE) as a teacher at Belington Middle School (BMS), filed a level one grievance on or about October 8, 1998, in which she alleged a violation of W. Va. Code §18A-4-8b(a) when she was not selected for another teaching position. (See footnote 1) BMS Principal Karen Boone lacked authority to resolve the matter at level one, and the grievance was denied following an evidentiary hearing at level two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the complaint to level four on January 6, 1999. Grievant, represented by William White, a WVEA Consultant, and BCBE, represented by Howard E. Seufer, Jr., Esq., agreed to submit the case for decision based upon the lower level record. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by BCBE on February 1, 1999. Grievant elected not to file additional proposals.

The facts of this matter are undisputed and are set forth as follows based upon a review of the record in its entirety.

Findings of Fact

1. Grievant has been employed by BCBE for approximately nine years, and has been assigned as a teacher of the Mentally Impaired at Belington Middle School at all times relevant to this decision.

2. On September 4, 1998, BCBE posted a notice of vacancy for the position of “Instructor - Belington Middle School”. Qualifications listed for the position were valid certification in Social Studies, grades 6 - 8, and Math, grades 6 - 8.

3. Nine individuals applied for the position, including Grievant and the successful applicant, Curtis Bodkins.

4. In addition to special education certification, Grievant holds Multi-Certification, grades K - 8.

5. Mr. Bodkins holds certification in Math, grades 5 - 12, and is currently pursuing certification in Social Studies. He holds a permit from the State Department of Education (DOE) to teach Social Studies during the 1998-99 school year.

6. The previous instructor had been assigned to teach reading in addition to Math and Social Studies; however, because the school had been cited by the DOE for deficiencies in the area of Reading, Principal Boone adjusted the course schedule so that teachers who were fully-certified in that specialization would carry those classes. As a result, Mr. Bodkins was not assigned to teach Reading.

7. BMS had also been cited for deficiencies in the area of Math.

Discussion

Grievant asserts that she was fully certified to provide the instruction for the advertised position, and that BCBE has imposed requirements which are not necessary and exclude qualified individuals. She notes that the successful applicant was not certifiedto teach Reading or Social Studies, requiring schedule changes, while she was already qualified in both areas. Grievant claims that she need only complete a few classes in Math and Social Studies to obtain the subject certification, and argues that State DOE Policy 5202 would allow her to teach departmentalized seventh and eighth grade classes if the Superintendent determines that she is competent to deliver the instructional goals and objectives. She characterizes BCBE's decision to hire an individual with only one subject certification as arbitrary.

BCBE argues that it has substantial discretion in personnel matters, and that the decision to require subject specialized certifications, rather than the general Multi-Subject classification, was preferable given that BMS had cited deficiencies in the areas of Math and Social Studies. The Board further asserts that the subject certification was consistent with State DOE Policy 5202, which in fact requires that certification for teachers assigned seventh and eighth grade classes. Because fluctuating enrollment might well require the teacher assigned to this position to instruct the more advanced classes (e.g., Algebra) completed by the older students, flexibility in assignment was an important factor in filling this assignment. BCBE concludes that it has no legal requirement to include all possible certification options on position postings, and was not required to post the position in question with a Multi-Subject K - 8 certification rather than the specific subject certifications.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each

element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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 Multi-Classification, K - 8, certification which Grievant holds generally licenses her to teach all subjects in the designated grade levels. However, with the implementation of the middle school format, the K - 8 certification is not preferred in departmentalized settings. State DOE Policy 5202, Section 9.8, addresses this situation as follows:

Assignment of Elementary or Multisubjects Teachers - Effective July 1, 1998, personnel licensed for elementary education or multi-subjects may not be newly assigned to teach specific content specializations (e.g., mathematics, English language arts, music) in a departmentalized seventh and/or eighth grade unless the educator holds appropriate licensure to teach the content specialization or exhibits subject matter competence to deliver the instructional goals and objective approved by the State Board. The educator who exhibits subject matter competence shall be issued, upon recommendation from the county superintendent, an Authorization to continue to teach this specialization. In addition, an educator who is currently assigned to teach a single subject within the elementary curriculum in a departmentalized seventh and/or eighth grade based on a previous State Board policy shall be issued, upon recommendation from the county superintendent, an Authorization to continue in this specialization. In both cases, the Authorization is valid only within the county from which the recommendation was issued. An elementary education teacher may be assigned to a departmentalized setting below seventh grade without securing an Authorization.

The BMS class schedule establishes that the successful applicant was assigned to teach Math and Social Studies at the sixth grade level. Even under the provisions of Policy 5202, Grievant was properly certified to provide instruction at that level. However, both Principal Boone and Superintendent Hagar addressed future needs in light of fluctuating enrollment. With subject specialized certification, the successful applicant offers BCBEflexibility in that he may also be assigned seventh and eighth grade classes, as needed. Grievant correctly argues that she may also be authorized to instruct the higher grade levels upon demonstration of competence, and the recommendation of the Superintendent. Policy 5202 does allow for this procedure; however, Superintendent Hagar testified that he did not wish to determine whether an individual was

competent to instruct the higher level classes, and preferred to simply employ teachers with subject specialized certification. Because this option is discretionary, Grievant has no entitlement to such an authorization. The Grievance Board has held that a board of education may not arbitrarily and capriciously require certification that is not reasonably necessary for a position. In Robinson v. Wyoming County Bd. of Educ., Docket No. 90-55-137 (June 22, 1990), it was determined that the grievant, who held K - 6 certification, was improperly excluded from a self-contained, fourth grade position when K - 8 certification was required. In that case, the flexibility argument was denied. That situation differs from the present case which involves departmentalized classes, and the Policy 5202 limitation relating to grades seven and eight. BCBE has persuasively asserted that subject specialization is particularly desirable in areas of deficiency, Math and Social Studies. Although Grievant may have been closer to obtaining specialization in Social Studies than the successful applicant, he already held the certification in Math, which she also lacked.

W. Va. Code §18A-4-7a provides that a county board of education shall make decisions affecting the hiring of classroom teachers on the basis of the applicant with the highest qualifications. In determining which applicant is the most qualified, consideration must be given to a number of criteria, including appropriate certification and/or licensure. The statute does not define appropriate certification, and as this case illustrates, there areinstances in which more than one certification may be accepted.

The Grievance Board has routinely determined that while a board of education has the option of employing multi-subject teachers, it is not required to do so, and may require content specific certification of its middle school teachers. See Suan v. Lewis County Bd. of Educ., Docket No. 97-21-230 (July 20, 1998); Mounts v. Mingo County Bd. of Educ. Docket No. 96-29-479 (June 27, 1997); Crum v. Mingo County Bd. of Educ., Docket No. 96-29-452 (May 31, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29-357 (Jan. 31, 1996). In these instances the decision of the board of education will be upheld unless shown to be arbitrary and capricious.

An action is arbitrary and capricious if the agency making the decision 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); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997). BCBE's decision to require subject specialized certification was based upon applicable policy and sound reasoning. There is no evidence that the decision was arbitrary and capricious, or otherwise improper. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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.

2. While a board of education has the option of employing multi-subject teachers, it is not required to do so, and may require content specific certification. See Suan v. Lewis County Bd. of Educ., Docket No. 97-21-230 (July 20, 1998); Mounts v. Mingo County Bd. of Educ. Docket No. 96-29-479 (June 27, 1997); Crum v. Mingo County Bd. of Educ., Docket No. 96-29-452 (May 31, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29-357 (Jan. 31, 1996).

3. Grievant has failed to prove that the requirement for subject specialized certification for a middle school position was in violation of W. Va. Code §18A-4-7a, or that she was otherwise entitled to the position.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour County and 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 andState 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.

Date: February 18, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Although Grievant consistently referred to a violation of W. Va. Code §18A-4-8b(a), that provision addresses seniority rights for school service personnel. Grievant apparently intended to cite Code §18A-4-7a, which discusses the employment of professional personnel.