DAVID ANDERSON,

Grievant,

v. **Docket No. 99-20-177**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On February 19, 1999, David Anderson (Grievant), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Kanawha County Board of Education (KCBE) improperly failed to select him for a Special Education Specialist position vacancy. Grievant's immediate supervisor was without authority to resolve the grievance at Level I, and Grievant appealed to Level II where an evidentiary hearing was conducted on April 1, 1999. On April 26, 1999, Karen Williams, the Superintendent's designee, issued a written decision denying the grievance at Level II. Grievant waived Level III, as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on April 30, 1999. (See footnote 1) Grievant further elected to have this matter decided on the basis of the recorddeveloped at Level II. This matter became mature for decision on May 28, 1999, upon receipt of the parties' written submissions.

Based upon a preponderance of the credible evidence contained in the record established at Level II, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Kanawha County Board of Education (KCBE) as an elementary classroom teacher at Elk Elementary School.

2. On January 8, 1999, KCBE posted a vacancy announcement for a Special Instructional Assistant - Special Education (SIASE) Specialist in Area 4.

3. The qualifications for the position included:

Master's Degree in Education with at least three areas of Special Education endorsements required - LD, BD, MI.

Specialized training in Effective Teaching, Crisis Prevention Institute Strategies, curriculum development and best practices, and Kansas Learning Strategies preferred.

Certification in elementary or secondary education.

J Ex 2.

4. Grievant and Connie Mize, the successful applicant, filed timely applications for the position.

5. At the time of her application, Ms. Mize was employed by KCBE as a Special Education Teacher at Flinn Elementary School. HT at 13. From 1994 to 1997, Ms. Mizeworked as a regular classroom teacher, having served in another Special Education position from 1989 to 1994.

6. At the time of their applications, Grievant had 13 years of total teaching experience while Ms. Mize had been teaching for 9 years. HT at 13; J Ex 1.

7. Both Grievant and Ms. Mize held the certifications required by the posting. Each of them attained 4.0 undergraduate grade point averages. In addition, they each held a Master's Degree, plus 45 hours of additional coursework, and had received satisfactory evaluations over the past two years. J Ex 1.

8. Grievant was employed by KCBE as a Special Education Teacher at Frame Elementary School from 1986 to 1989. HT at 18. Grievant was transferred to a regular teaching position at Frame Elementary when the Special Education position was eliminated. He continued teaching at Frame until 1992, when he was transferred to his current position at Elk Elementary.

9. While Grievant has not been assigned to teach Special Education since 1989, he has continued to stay abreast of standards and trends in that field of education. He has served on state and county-level committees addressing inclusion issues, is currently serving as the mentor for a Behavior Disorder teacher at Elk Elementary, has special needs students included in his classes at Elk Elementary, and has taught in previous summers at the Barboursville School, which is primarily for students with special needs.

10. A committee headed by Area Assistant Superintendent Jim Simmons interviewed all qualified applicants, including Grievant and Ms. Mize. 11. Assistant Superintendent Simmons indicated that Ms. Mize was recommended to the Superintendent to fill the position because she had more recent experience in Special Education, being in a Special Education teaching position for the past two years.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 position of Special Instructional Assistant - Special Education (SIASE) Specialist is an administrative position. Filling vacancies in such positions is accomplished under the more flexible standards contained in the so-called "first set of factors" in W. Va. Code § 18A-4-7a:

> 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 certifi cation 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 degree level generally; academic achievement; relevant specialized training; 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 be fairly judged.

"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. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). The selection of candidates for administrative positions is not simply a mechanical or mathematical process. See Tenney v. Bd. of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990); Villers v. Kanawha County Bd. of Educ., Docket No. 97-20- 294 (Jan. 30, 1998). Further, the grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended as a “super interview” but merely an analysis of the legal sufficiency of the selection process at the time it occurred. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26,

1989). See Sparks v. Mingo County Bd. of Educ., Docket No. 96-29-447 (Feb. 18, 1997). Thus, W. Va. Code § 18A-4-7a permits county boards of education to determine the weight to be applied to each of the factors listed above in assessing a candidate's qualifications for administrative positions, so long as they do not abuse their discretion. E.g., Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); 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). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

The record indicates Grievant had more total teaching experience than the successful applicant, although he is not currently employed in a special education position. However, as previously noted, W. Va. Code § 18A-4-7a permits school boards to lookbeyond such factors as experience and seniority when selecting applicants to fill vacancies in administrative or management positions. Villers, supra. See Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-365 (June 18, 1997). Indeed, the Code broadly allows the school board to consider "other measures or indicators upon which the relative qualifications of the applicant may be fairly judged." See Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). Further, while each factor specified in the first set of factors of § 18A-4-7a must be considered, the board is free to consider one factor as more important than another. Frashier v. Jackson County Bd. of Educ., Docket No. 98-18-485 (May 26, 1999). See Saunders, supra.

Grievant argues that although W. Va. Code § 18A-4-7a provides discretion to KCBE in selecting a professional employee to fill the position at issue, the decision to select another applicant because she was currently teaching special education constituted an arbitrary and capricious employment decision, resulting in selection of an employee who was clearly less qualified. In determining whether a discretionary decision was "arbitrary and capricious" a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Mar. 22, 1995). Alternatively, it may be shown that the county board and school superintendent, in making their selectiondetermination, “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." Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Although reasonable people, including professional educators, might disagree with regard to the relative merits of Grievant and Ms. Mize for the Special Education Specialist position at issue, the undersigned Administrative Law Judge is not persuaded that Grievant's qualifications were so superior that the selection of Ms. Mize cannot be attributed to such a professional difference of opinion. Accordingly, Grievant did not establish that KCBE's decision was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such professional determinations.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. A county board of education must make decisions on the selection of professional personnel other than classroom teachers on the basis of the highest qualifications. In making its selection, the board must give consideration to appropriate certification, experience relevant to the position, course work and degree level in the relevant field, degree level generally, academic achievement, relevant specialized training, past performance evaluations and other measures or indicators upon which the

relative qualifications of the applicants may be fairly judged. Once they have reviewed the criteria in W. Va. Code § 18A-4-7a, county boards have wide discretion in choosing administrative personnel. Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). See Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

4. The grievance procedure in W. Va. Code §§ 18-29-1, et seq., is not intended to be a "super interview" for unsuccessful job applicants, rather, in this context it allows review of the legal sufficiency of the selection process. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. In reviewing a county board's exercise of discretion in a hiring decision, the inquiry into the process by which the decision was made must be thorough and searching,but considerable deference must be afforded those conducting it. Fittro, supra; Hopkins v. Monroe County Bd. of Educ., Docket No. 95-31-477 (Feb. 21, 1996).

6. Grievant failed to establish that he was more qualified than the successful applicant for the Special Education administrative position at issue in accordance with the requirements of W. Va. Code § 18A-4-7a. See Pockl, supra; Villers, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: June 22, 1999

Footnote: 1

Grievant was represented by Steve Angel with the West Virginia Federation of Teachers. Respondent was

represented by its General Counsel, James W. Withrow.