SARAH SMITH,

Grievant,

v. Docket No. 99-06-248

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sarah Smith, was employed by the Cabell County Board of Education ("CCBOE" or "Board") as a teacher and Director of the Cabell Midland High School Day Care Center ("Center"). She filed this grievance on or about April 6, 1999, over her reduction-in-force ("RIF"). Her Statement of Grievance reads:

> **Violations of WV Code 18A-4-7a, 18A-2-2, and 78CRS1with regard to grievant's reduction in force and her qualifications as Director of the Cabell Midland High School Day Care Center. She holds both needed qualifications.**
>
> **RELIEF SOUGHT: To be reinstated to her position at Cabell Midland High School and to be removed from the reduction-in-force list.**

Grievant requested and received a RIF hearing. This grievance was denied at Levels I and II and waived at Level III. Grievant appealed this grievance to Level IV on June 6, 1999. A Level IV hearing was held on September 2, 1999, at which time the parties supplemented the record from below. This case became mature for decision on September 3, 1999, as the parties elected not to file proposed findings of fact and conclusions of law, but supplemented the Level IV hearing with the licensing requirements for day care centers on that date. (See footnote 1)

Issues and Arguments

The issue presented by this case centers on the interpretation of a regulation which governs the licensing requirements for day care centers, and questions whether the individual who replaced Grievant has the necessary qualifications, as specified by the West Virginia

Department of Health and Human Resources, to direct the Cabell Midland High School Day Care Center. Both parties agree Grievant was very well qualified to run the Center, and that Grievant performed her duties in a competent and professional manner. Grievant argues the Director of the Center must possess both the required education and necessary experience to meet the qualifications, and since her replacement does not; Grievant should be reinstated to her former position.

As might be expected, CCBOE argues the teacher who replaced Grievant was qualified for the position. CCBOE also argues the regulation's requirement for an individual with one year of day care experience is met by the current Aide, who remains at Center.

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

Findings of Fact

1. Grievant applied for and received the position of Director at the Cabell Midland High School Day Care Center in 1995, and has four years of seniority as a teacher. 2. The qualifications listed for the position were: A vocational home economics certification and two years of documented experience managing a licensed day care/child development center.

3. Faced with a need to cut teacher positions, as well as certain requirements mandated by the State Department of Education, CCBOE decided to remove home economic teaching positions from the middle school setting.

4. This action left two teachers, certified only in home economics and with 24 and 25 years of experience, without an assignment for the 1999 - 2000 school year.

5. Grievant and another teacher certified in home economics with 12 years of seniority were RIF'd for the placement of these more senior teachers. **(See footnote 2)**

6. 78 CSR 1 specifies that the director of a day care facility shall:

A. Be at least 21 years old.

B. Have a high school education plus nine college credits in early childhood

development or related field. A Child Development Associate credential may be substituted for the college credit. Directors employed prior to the promulgation of this rule shall have 24 months to comply with this requirement.

C. Be able to provide one year work experience in a program for young children. Operators/directors who cannot establish previous working experience with children shall employ a full-time staff person with one year of experience in a program for young children . . . .

7. By the start of the 1999 - 2000 school year, the Aide, Sharon Ray, who works in the Cabell Midland High School Day Center, will have at least one year of experience in caring for pre-school age children.

8. Ms. Barbara Thornburg, a home economics teacher with 24 years of teaching experience, met the educational requirements to be a director of a day care center, but she did not have the one year of experience in a program for young children. **(See footnote 3)**

9. Ms. Thornburg was selected as the teacher who would bump Grievant, as she had the same area of certification, and Ms. Thornburg had 24 years of seniority.

10. The West Virginia Department of Health and Human Services/Bureau of Family and Children Services ("BFC") is responsible for licensing day care facilities.

11. BFC's interpretation of the above cited regulation is that the director of a day care center must possess both the certification and the experience in order to be qualified for the position.

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 § 4.19 (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.

It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. StateHealth Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985). See W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Security Nat'l Bank v. W. Va. Bancorp, 166

W. Va. 775, 277 S.E.2d 613 (1981). Additionally, where the plain language of a policy does not compel a different result, deference must be extended to the agency in interpreting its own policies. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally Blankenship, supra; 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). Thus, BFC's interpretation of its policy is entitled to deference by this Grievance Board, unless it is contrary to the plain meaning of the language, is inherently unreasonable, or is arbitrary and capricious. Dyer, supra.

BFC has interpreted the regulation 78 CSR 1 to mean that the education and experience requirements must be held by the same person. Grievant argues that since Ms. Thornburg does not have the required one year of experience she cannot be the Director of the Cabell Midland High School Day Center, and thus another teacher must be RIF'd instead of her.

CCBOE argues the regulation is plain on its face; and thus, it is not open to the interpretation made by BFC. To support its argument CCBOE cites to several cases. Unfortunately for Grievant, these cases are persuasive. In Habursky v. Recht, 153 W. Va. 128, 375 S.E.2d 760 (1988), the West Virginia Supreme Court of Appeals restated its holding in Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970), which held at Syllabus Point 2, "While long standing interpretation of its own rules by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous." (Emphasis added). Additionally, "[a] corollary principle is that it is not permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words." Crockett at 719.

The regulation at issue states the following requirements for a director at B and C:

> **B. Have a high school education plus nine college credits in early childhood development or related field . . . .** (See footnote 4)

> **C. Be able to provide one year work experience in a program for young children. Operators/directors who cannot establish previous working experience with children shall employ a full-time staff person with one year of experience in a program for young children . . . .**

The unusual issue for the undersigned Administrative Law Judge to decide is whether this regulation is plain on its face or requires interpretation. The language is plain on its face. Directors who do not have the prior experience working with children can meet this requirement by hiring a person who has this experience. It may very well be that the writers of this provision wanted the director to possess both these requirements, but this is not what the regulation says. Since Ms. Thornburg is qualified for the position and clearly has much greater seniority, CCBOE is required by W. Va. Code § 18A-4-7a to place Ms. Thornburg in the position and RIF Grievant. The key provisions of this Code Section are stated below:

> **Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two [§ 18A-2-2], article two of this chapter: . . . : Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.**

Ms. Thornburg has no other certification into which she can be placed. Grievant also has no other certification into which she can be placed. Given this set of facts, the reality that a home economics position must be reduced, and the decision that Ms. Thornburg is qualified for the position, CCBOE's action to RIF Grievant is correct.

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 § 4.19 (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 long standing interpretation of its own rules by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous." Crockett v. Andrews, Syl. Pt. 2, 153 W. Va. 714, 172 S.E.2d 384 (1970). See Habursky v. Recht, 153 W. Va. 128, 375 S.E.2d 760 (1988)

3. "A corollary principle is that it is not permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words." Crockett at 719.

4. The language in 78 CSR 1 is clear and unambiguous and interpretation is impermissible.

5. The director of a day care center is not required to possess both the educational requirements and have one year of child care experience. If the Director does not meet the experience requirement, she must provide or hire an employee with this experience.

6. Ms. Thornburg is qualified to direct the Cabell Midland High School Day Center this year, as long as she has a full-time employee who has one year of young childhood experience. This requirement is currently met by Ms. Ray.

Accordingly, this grievance is DENIED.

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

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: October 28 , 1999

Footnote: 1

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by attorney Howard Seufer.

Footnote: 2

At the time of the RIF and Level II hearings, the exact placement of these two teachers was unknown. By the time of the Level IV hearing, CCBOE had identified Ms. Thornburg as Grievant's replacement.

Footnote: 3

The other home economics teacher also met these same requirements.

Footnote: 4

A review of Ms. Thornburg's transcript discloses she meets the education requirement in B, contrary to Grievant's prior statement.