PAM LUSHER,

Grievant,

v. Docket No. 99-40-061

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Pam Lusher, alleges the Putnam County Board of Education ("PCBOE" or "Board") violated W. Va. Code §§ 18A-4-7a,18A-4-16, and 18A-3-2b when it filled an English mentoring position. Initially, Grievant sought the position. By the time the grievance had reached Level IV, Grievant noted it was too late in the year to replace the present mentor and asked that the policy on mentoring be changed to ensure that the most qualified candidate be selected for subsequent mentoring positions. Grievant also requested she be given back the day of personal leave she took to attend part of the mentoring training program.

Grievant filed this grievance on or about October 10, 1998. This grievance was denied at all lower levels and appealed to Level IV on February 16, 1999. A Level IV hearing was held on March 17, 1999, and this case became mature for decision on April 23, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1) **After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact based on all the evidence of record.**

Findings of Fact

1. Grievant has been employed as an English teacher by PCBOE for nineteen years. She is currently at Hurricane High School and serves as the Department Chair.

2. After Grievant learned that the new English teacher she had interviewed was to be hired, she immediately requested to be his mentor.

3. The mentoring position was posted, as is the routine, on September 24, 1998, and Grievant and the successful applicant, Karen Nowviskie, applied for the position.

4. Both applicants met the minimum qualifications for the position. In fact, both applicants were well qualified for the position.

5. Ms. Nowviskie had received mentor training previously, when she had served in the position some years earlier. At the time she applied for the position, Grievant had not taken the mentor training.

6. After Grievant filed this grievance, she completed the mentor training. She was granted a professional leave day by the Faculty Leave Committee, and she took a day of personal leave to complete the two days of training.

7. Grievant requested the principal of Hurricane High School, Bill Sanders, conduct interviews for the mentor position. He informed Grievant he did not feel that would be necessary. 8. Mr. Sanders recommended Ms. Nowviskie for the position, because she had been a successful mentor in the past, and had taken and completed the mentor training. (See footnote 2)

9. Grievant has never served as a mentor, but had guided many new teachers in her roles as an English teacher and Department Chair.

10. After Mr. Sanders made his recommendation to Assistant Superintendent Harold Hatfield, Grievant requested she be allowed to submit additional materials to demonstrate her qualifications for the position. Grievant was allowed to submit additional data to Assistant Superintendent Hatfield, and he met with Mr. Sanders and Lydia McCue, the Director of Adolescent Education. Ms. McCue is responsible for the mentoring program. (See footnote 3)

11. Although this group concluded both individuals were highly qualified for the position, they agreed Ms. Nowviskie should receive the position because of her prior mentoring experience.

Issues and Arguments

Grievant argues she was the most qualified person for the position, and PCBOE's selection of Ms. Nowviskie was arbitrary and capricious. She believes she should receive her personal leave day back, because she would have received that mentor training through professional leave days if she had been properly selected. Grievant attempted to show that Ms. Nowviskie had not properly performed her duties when she had served as a mentor in the past, and Mr.

Sanders was aware of Ms. Nowviskie's unsatisfactory performance. **(See footnote 4)**

Respondent maintained the selection of Ms. Nowviskie was not arbitrary and capricious, and its rationale for her selection was correct. It also noted Grievant did not prove Ms. Nowviskie had incorrectly performed her mentor duties in the past.

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.

Grievant's two main contentions will be discussed separately. 1. Ms. Nowviskie's prior performance

W. Va. Code § 18A-3-2b discusses "Beginning teacher internships" and states in pertinent part:

> **(a) Every person to whom a professional teaching certificate is awarded after the first day of January, one thousand nine hundred ninety-two, shall successfully complete a beginning teacher internship program under the provisions of this section, except such persons who were awarded a professional teaching certificate on the basis of at least five years teaching experience in another state.**
>
> **The beginning teacher internship program is a school based program intended to provide appropriate staff development activities and supervision to beginning teachers to assure their competency for licensure to teach in the public schools of this state. The beginning teacher internship program shall consist of the following components:**
>
> **(1) A professional support team comprised of the school principal, who shall be the chair of the professional support team, a member of the county professional staff development council and an experienced classroom teacher at the school who teaches the same or similar subject and grade level as the beginning teacher and who shall serve as a mentor for the beginning teacher;**
>
> **(2) An orientation program to be conducted prior to the beginning of the instructional term, but within the employment term, supervised by the mentor**

teacher;

(3) The scheduling of joint planning periods for the mentor and beginning teacher throughout the school year ;

(4) Mentor observation of the classroom teaching skills of the beginning teacher for at least one hour per week during the first half of the school year and which may be reduced at the discretion of the mentor to one hour every two weeks during the second half of the school year;

(5) Weekly meetings between the mentor and the beginning teacher at which the mentor and the beginning teacher discuss the performance of the beginning teacher and any needed improvements, which meetings may be reduced at the discretion of the mentor to biweekly meetings during the second half of the school year;

(6) Monthly meetings of the professional support team to discuss the performance of the beginning teacher which meetings may include all mentor members of all professional support teams at the school if helpful in the judgment of the participants;

(7) In-service professional development programs provided through the professional development project of the center for professional development for beginning teachers and for mentors both of which will be held in the first half of the school year;

(8) The provision of necessary release time from regular duties for the mentor teacher, as agreed to by the principal and the mentor teacher, and a stipend of at least six hundred dollars for the mentor teacher for duties as a mentor teacher; and

(9) A final evaluation of the performance of the beginning teacher completed by the principal on a form developed by the state board of education.

(b) The final evaluation form shall be submitted by the principal to the county school superintendent [a recommendation].

Grievant presented the testimony of Georgia Thorton, the beginning teacher Ms. Nowviskie had worked with as a mentor, to demonstrate Ms. Nowviskie had not performed her duties properly, and that Mr. Sanders was aware of this. Ms. Thorton is currently employed as a high school teacher. Ms. Thorton testified Ms. Nowviskie did not meet with her on a regular basis, did not keep logs, and was in no way helpful to her. Ms. Thorton also declared she never had a meeting with Mr. Sanders. She maintained this experience was so negative for her that she never planned to teach again. (See footnote 5) **She did not report Ms. Nowviskie's failure to meet the mentor performance standards to anyone. Mr. Sanders testified, at Level II, that Ms. Nowviskie had satisfactorily performed her duties as a mentor. He testified he had met with Ms. Nowviskie and Ms. Thorton together, gone over the logs, and reviewed the materials that had been accumulated. Ms. McCue testified that, although she did not keep the logs from Ms. Nowviskie's prior mentoring, when these logs had been submitted, she reviewed them, they were filled out, and she did not find any problems with them. Ms. McCue noted she had not received any complaints about Ms. Nowviskie's prior performance as a mentor.**

Obviously, the testimony presented is in conflict, and the issue of witness credibility must be resolved. An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit System Protection Board Handbook ("MSPB Handbook") is helpful in setting out factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence ornonexistence of any fact testified to by the witness; and 4) the plausibility of the witness' information. Id.

The undersigned Administrative Law Judge believes Ms. Thorton had a bad experience as a beginning teacher. However, it is difficult to believe that Ms. Nowviskie never really met with her, and that Mr. Sanders also never met with her. It is also difficult to believe that Mr. Sanders would recommend Ms. Nowviskie as a mentor if she did not previously perform the job properly. Further, since Ms. Thorton did not report these problems at the time they occurred, it is difficult to credit her testimony now. Apparently, her mentor experience was so terrible she planned never to teach again, and she blamed Ms. Nowviskie for many of those problems. It is hard to understand why she would not complain about her maltreatment in order to prevent other beginning teachers from having the same experience, especially as she did not plan to be in the school system. Additionally, Ms. McCue testified she received logs from this experience, and did not see any problems with these. She also noted she had received complaints about other mentors in the past, but not Ms. Nowviskie.

Given the data presented, the undersigned Administrative Law Judge finds that neither Mr. Sanders nor anyone in administration was aware of any serious problems in the mentoring received by Ms. Thorton. Additionally, the undersigned Administrative Law Judge finds this mentoring was satisfactory.

2. Whether the decision to select Ms. Nowviskie instead of Grievant was arbitrary and capricious.

Little by way of testimony was presented on the second issue at Level IV. It is clear Grievant was definitely qualified for the position, and by all reports would have made an excellent mentor for the beginning teacher. The method by which mentors are selected is not specified in W. Va. Code § 18A-2-3b. PCBOE has used the guidelines in County Policy 7.16(3) to fill mentoring positions in the past. This policy only states that the position is to be posted, and a qualified applicant is to be selected by the building principal.

The position of mentor is considered to be an extracurricular assignment and as such is covered by W. Va. Code § 18A-4-16. This Code Section sets forth the legal requirements for the employment of persons in these types of positions. In essence, under W. Va. Code § 18A-4-16, the terms and conditions of the extracurricular assignment must be mutually agreed upon by the employer and employee, and formalized by a contract separate from the worker's regular contract of employment. Spillers v. Brooke County Bd. of Educ., Docket No. 95-05-329

(Sept. 18, 1995). See Ramey v. Mingo County Bd. of Educ., Docket No. 93-29-470 (May 12, 1994).

This Grievance Board has previously determined that the provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. Hall v. Mingo County Bd. of Educ. Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991). Thus, "the appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion." McCoy v. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185W. Va. 256, 406 S.E.2d 687 (1991); Foley, supra; See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997).

Generally, an action is considered arbitrary and capricious if the agency 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 was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Here, both applicants were well qualified for the position. Mr. Sanders' decision to select Ms. Nowviskie based on her prior mentoring experience is not arbitrary and capricious nor an abuse of discretion. Experience was a reasonable basis for deciding between two qualified applicants.

The above-discussion will be supplemented by the following additional Findings of Fact and Conclusions of Law.

Additional Findings of Fact

12. Given the data presented, the undersigned Administrative Law Judge finds that neither Mr. Sanders or anyone in administration was aware of any serious problems in the

mentoring received by Ms. Thorton.

13. Grievant has not met her burden of proof and demonstrated the mentoring received by Ms. Thorton was unsatisfactory.

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. The method by which mentors are selected is not specified in W. Va. Code § 18A-2-3b, and the position of mentor is considered to be an extracurricular assignment and as such is covered by W. Va. Code § 18A-4-16.

3. The provisions of W. Va. Code § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. Hall v. Mingo County Bd. of Educ. Docket No. 95-29-529 (Mar. 28, 1996); Foley v. Mineral County Bd. of Educ., Docket No. 93-28-255 (Oct. 29, 1993); Smith v. Logan County Bd. of Educ., Docket No. 91-23-040 (July 31, 1991).

4. "The appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion." McCoyv. Kanawha County Bd. of Educ., Docket No. 94-20-141 (Oct. 13, 1994), citing Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); Foley, supra. See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Jackson v. Grant County Bd. of Educ., Docket No. 97-12-224 (Oct.16, 1997).

5. Generally, an action is considered arbitrary and capricious if the agency 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 was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996).

6. While a searching inquiry into the facts is required to determine if an action was

arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

7. Grievant has not met her burden of proof and demonstrated the decision to select Ms. Nowviskie for the position of mentor was arbitrary and capricious. The factor of past mentoring experience was a reasonable basis for deciding between two qualified applicants. 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 Putnam 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 7, 1999

Footnote: 1

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by Attorney John Grafton.

Footnote: 2

As Grievant was recovering from surgery at the time this prior position was posted, she did not apply. She attempted to allege the placement of Ms. Nowviskie into that position had not been properly done at that time, but had no actual knowledge about the posting and filling of the position.

Footnote: 3

Assistant Superintendent Hatfield believed that Ms. Nowviskie was also given an opportunity to submit additional materials to support her placement into the position.

Footnote: 4

At Level II, Grievant alleged the selection of Ms. Nowviskie was the result of discrimination and favoritism. These allegations were not addressed at Level IV, and indeed, Grievant withdrew her second grievance, which charged Mr. Sanders with multiple counts of discriminatory actions, including Mr. Sanders's selection of Ms. Nowviskie for the mentor position. Given this state of affairs, the issues of discrimination and favoritism will not be addressed further. Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-079 (Dismissal Order entered Mar. 29, 1999)

Footnote: 5

Ms. Thorton stated she only returned to reaching when she was promised by her employer that things would be very different.