ANGELA ROACH,

Grievant,

v. Docket No. 00-26-368

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Angela Roach, grieves the failure of the Mason County Board of Education ("MCBOE") to select her for a teaching position. Her Statement of Grievance reads:

> **Violations of WV Code 18A-4-7a with regard to grievant's non-selection for the posted position at Mason Elementary. Grievant was more qualified than the successful applicant and more senior reduction-in-force employee.**

Relief Sought: Relief sought is to be awarded the position with all benefits.

This grievance was denied at all lower levels, and appealed to Level IV on November 27, 2000. The parties agreed to submit this case on the record developed below, and this case was to become mature for decision on December 22, 2000, after receipt and consideration of the parties' proposed findings of fact and conclusions of law. Counsel for the Respondent did not receive notice of this date, and after his request, the date for these submissions was extended, with Grievant's consent, until December 29, 2000. (See footnote 1)

Issues and Arguments

Although the issue is who should have been selected for the position, the key question is whether MCBOE properly considered only the successful applicant's priorseniority and not Grievant's. This determination resulted in the successful applicant receiving the position.

Grievant argues, that pursuant to W. Va. Code § 18A-4-7a, both employees are to have

their seniority counted, as both had been reduced-in-force, and neither had returned to work. Respondent maintains W. Va. Code § 18A-4-7b requires the Board to consider the successful applicant as a regular, full-time employee, as she had been selected to fill a position earlier in July 2000. MCBOE asserts that as the successful applicant must be considered a regular, full-time employee, she is entitled to have her seniority counted while Grievant, on the preferred recall list, is not.

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. Both Grievant and Lisa Moody, the successful applicant, were placed on the preferred recall list due to a reduction-in-force at the end of the 1999 - 2000 school year.

2. On July 18, 2000, the successful applicant was hired for a full time, regular position as a special education teacher at Leon Elementary for the 2000 - 2001 school year.

3. Before the school year started, a third grade teaching position at Mason Elementary was posted on August 16, 2000.

4. Both Grievant and the successful applicant applied.

5. Because the successful applicant was considered a regular, full time employee, the second set of criteria in W. Va. Code § 18A-4-7a was used. 6. At the time of their reduction-in-force, the successful applicant had 800 days of seniority and Grievant had 833 days of seniority.

7. A matrix was completed, and the following table reflects MCBOE's scoring of the candidates in each criteria from W. Va. Code § 18A-4-7a.

Criteria	**Grievant**	**Moody**	**Result**
Certification/Licensure	Elem. Ed. 1-6; Math 4-8	Multi- subjects K-8	Both
Total Teaching Experience	11 years	4 years	Grievant
Existence of Teaching Exp. in Cert. Area	yes	yes	Both
Degree Level	AB	AB	Both
Specialized Training			N/A
Satisfactory Evaluations	yes	yes	Both
Seniority	0	4 years	Moody

Total	5 points	5 points	tied

8. MCBOE did not give Grievant credit for her prior seniority because she was still on the preferred recall list.

9. As indicated by the above table, MCBOE viewed the candidates as being tied after completion of the matrix factors.

10. Although not a written policy, it has been MCBOE's long-standing policy to break ties by awarding the position to the regular, full-time candidate with the most seniority.

11. At the time of the posting and application, the successful applicant had not yet started her duties in the special education position. 12. Grievant began the school year as a long-term substitute and received regular employee status on October 5, 2000.

13. The successful applicant started the school year in the Mason Elementary position.

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, either by establishing she was the more qualified applicant, or there was such a substantial flaw in the selection process that the outcome may have been different, if the proper process had been utilized. 156 C.S.R. § 4.21 (2000); 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 . . . 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 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 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). "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)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The portions of W. Va. Code § 18A-4-7a at issue are:

> The seniority of classroom teachers as defined in section one, article one [§ 18A-1-1] of this chapter . . . shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and shall be granted in all areas that the employee is certified and/or licensed.

. . .

> All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

No portion of this Code Section indicates a preferred recall employee is not entitled to count their seniority when applying for a position and competing with a regular employee. Additionally, the West Virginia Supreme Court of Appeals, in Ewing v. Board of Education of Summers, 202 W. Va. 228, 503 S.E.2d 541 (1998), has clarified that there is no automatic preference for a regular employee over an employee on the preferred recall list. Further, Ewing, notes a regular employee is not to be

considered more qualified for a position than another applicant on the preferred recall list, solely because the regular employee has "greater seniority." (Emphasis added). This phrase indicates the employee on the preferred recall list is entitled to have their seniority counted when competing with a regular employee. See Grogg v. Kanawha County Bd. of Educ., Docket No. 96-20-521 (Apr. 18, 1997). It of course is recognized that typically the regular employee will be the one with greater seniority.

The portion of W. Va. Code § 18A-4-7b at issue states:

> (c) Any professional employee whose employment with a county board of education is terminated either voluntarily or through a reduction-in-force shall, upon reemployment with the same board of education in a regular full-time position, receive credit for all seniority previously accumulated with the board of education at the date the employee's employment was terminated.

MCBOE's reliance on W. Va. Code § 18A-4-7b is misplaced. This statute was enacted in 1993 in reaction to the West Virginia Supreme Court of Appeals's Decision inTriggs v. Berkeley County Board of Education, 188 W. Va. 435, 425 S.E.2d 111 (1992). Hazelwood v. Mercer County Bd. of Educ., 200 W. Va. 205, 188 S.E.2d 480 (1997). Triggs did not allow a teacher to retain seniority rights if she voluntarily resigned or retired, and the enactment of the above-cited statute changed this outcome. There is no indication this statute intended to change in the way in which boards of education were to assess the seniority of applicants or to change the way boards of education were to make hiring decisions. Further, the directions in the later issued Ewing did not refer to W. Va. Code § 18A-4-7b.

Accordingly, MCBOE should have considered the seniority of Grievant when it completed the matrix. If it had done so, Grievant would have been the successful applicant for the position with a point total of six to four.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

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 either establishing she was the more qualified applicant, or demonstrating there was such a substantial flaw in the selection process the outcome may have been different if the proper process were used. 156 C.S.R. §4.21 (2000); 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. The selection process in this case was governed by the "second set of criteria" found in W. Va. Code § 18A-4-7a. Ewing v. Bd. of Educ. of Summers County, 202 W. Va. 228, 503 S.E.2d 541 (1998); Grogg v. Kanawha County Bd. of Educ., Docket No. 96-20-521 (Apr. 18, 1996).

3. Pursuant to W. Va. Code § 18A-4-7a, MCBOE should have considered Grievant's seniority when completing the matrix for the position at issue. Ewing, supra.

4. If Grievant's seniority is considered, the outcome is changed, and Grievant would receive the position.

5. Grievant has met her burden of proof and demonstrated she was the most qualified applicant for the Mason Elementary position, and that the selection process was significantly flawed.

Accordingly, this grievance is **GRANTED**.

Respondent is directed to place Grievant in the Mason Elementary position and to grant her all regular seniority from the beginning of the school year until October 5, 2000. It does not appear Grievant is entitled to any additional monetary compensation as she worked the entirety of the school year.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Mason 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 to serve a copy of the appeal petition upon the Grievance Board. The appealing party mustalso 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

Date: January 30, 2001

Footnote: 1

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