DEBORAH HARRIS,

Grievant,

v. **Docket No. 01-29-120**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

SUE FULLEN,

Intervenor.

D E C I S I O N

Grievant, Deborah Harris, is employed by the Mingo County Board of Education ("MCBOE") as a principal at Riverside Elementary School. It is unclear when Grievant initially filed this grievance. The Statement of Grievance reads:

> The job responsibilities as contained in the posting for Secondary Education Coordinator do not fall within any recognized area of school personnel as defined by WV Code. JTM (See footnote 1) and MCBOE have shown favoritism as defined in WV Code 18-29-2 in that they have shown unfair treatment to all professional employees of Mingo County by showing preferential, exceptional and advantageous treatment of one specific individual by selectively posting the job of Coordinator of Secondary Education through both qualifications and responsibilities.
>
> These allegations are evidenced by the fact that there is not now or has never been a Coordinator of Elementary Education or Special Education. MCBOE and Superintendent JTM have continually engaged in a pattern and practice of arbitrarily and capriciously creating jobs, job qualifications and responsibilities for jobs at the MCBOE Central Office to show favoritism, whereby the qualifications and responsibilities for a job are customized to a particular pre-selected individual.
>
> Relief Sought: 1) Two (2) additional jobs of coordinator of elementary education and coordinator of Special Education be posted or thequalifications and responsibilities changed and the job reposted in a manner that does not show favoritism.

2) require that MCBOE & JTM cease the pattern and practice of arbitrarily and capriciously creating jobs, job qualifications and job responsibilities for pre-selected individuals.

This grievance was denied at Levels I and II, Respondent waived Level III, and Grievant appealed to Level IV on April 6, 2001. A Level IV hearing was held on July 26, 2001. This case became mature for decision on August 17, 2001, after receipt of the parties' proposed Findings of Fact and Conclusions of Law. (See footnote 2)

Issues and Arguments

Grievant argues Respondent has posted several Central Office positions recently that were designed for pre-selected applicants. Grievant notes that in two instances in recent memory, there was only one person in the entire county who met the required qualifications, the latest being the position of Coordinator of Secondary Education. She avers this type of posting limits the pool of qualified applicants and does not allow other qualified individuals, especially those who serve in principals' positions, to achieve a position in the Central Office.

Respondent asserts it did not preselect any candidates. The fact that only one individual in the county fit the required qualifications was just a coincidence. Then Assistant Administrator, and current Superintendent David Temple, stated he was unaware that only one person would meet the qualifications, the qualifications were reached throughdiscussions, and he believed all the required qualifications were essential. He clarified this statement by noting many Central Office staff cover a variety of areas.

Findings of Fact

1. On June 2, 2000, Respondent posted the position of Assistant Superintendent. The qualifications listed in the posting are as follows:

* Masters' Degree in Education

* West Virginia Professional Administrative Certification _ Superintendent endorsement required

* Three years Central Office administrative experience

***** Three years as a school principal

2. Only one person in the county, Karen Browning, met these qualifications and she was then employed in the Central Office.

3. On July 3, 2000, Respondent posted the position of Director of Special Education/Instructional Services. The qualifications listed in the posting are as follows:

***** WV teaching certification in a minimum of two special education areas **<u>or</u>** WV certification as a Professional Administrator

***** Masters['] Degree in Education

***** Three years successful teaching experience as a special education teacher or three years successful experience as a principal or central office administrator

(Emphasis Added.)

4. On July 3, 2000, Respondent posted the position of Director of Title I/ Instructional Services. The qualifications listed in the posting are as follows:

* WV teaching certification in reading **<u>or</u>** WV certification as a Professional Administrator

* Masters' Degree in Education

* Three years successful teaching experience as a Title I teacher or three years successful experience as a principal or central office administrator

(Emphasis Added.)

5. On December 12, 2000, Respondent posted the position at issue, Coordinator of Secondary Education. The qualifications listed in the posting are as follows:

***** Masters' Degree in Education

***** <u>WV teaching certification in gifted education, one or more area(s) of special education and one or more areas of secondary education</u> . . .

***** Knowledge of secondary curriculum and instruction, including special education, Schools to Work and gifted education . . .

(Emphasis Added.)

6. Included within the duties of the Coordinator of Secondary Education are the following responsibilities:

* Assist the Assistant Superintendent with the coordination of the secondary education program and Schools to Work Program.

* Assist the Special Education Director with the coordination of the gifted education program (See footnote 3) and the Special Education itinerant program.

* Assist with curriculum designing and the development of curriculum guides

* Provide leadership in the provision of appropriate training for staff, including secondary educators and service personnel

7. The posting for Director of Special Education/Instructional Services did not require any certifications in special education. The posting specified the applicant needed either West Virginia teaching certification in a minimum of two special education areas <u>or</u> West Virginia certification as a Professional Administrator. (Emphasis Added.)

8. The posting for Coordinator of Secondary Education <u>required gifted education, [and] one or more area(s) of special education</u>. (Emphasis Added.) 9. Persons outside the Mingo County school system could apply for these positions. The Assistant Superintendent position was posted statewide, but the rest were only posted within the school system and in the local papers.

10. No one outside the county applied for these positions.

11. The posting for Coordinator of Secondary Education did not require administrative certification or teaching experience. Superintendent Temple stated the lack of a teaching experience requirement was an oversight. Superintendent Temple also maintained the position, which would evaluate and oversee high school principals and their programs, did not require an administrative certification.

12. There is no gifted education program in the high schools as there is in the earlier school years. These needs are met in advance placement and college level courses.

13. Four people, including Grievant and the successful applicant, applied for the coordinator position. Only one, Intervenor Fullen, met the listed qualifications. At the time of her application, Intervenor Fullen was employed in the Central Office as Coordinator of Special Education/Dean of Exceptional Students. She was interviewed and selected for the position.

14. Intervenor Fullen is MCBOE's only employee who possessed the required certifications.

15. Intervenor Fullen does not hold an administrative certification, and all of her regular, secondary teaching experience was in Ohio, many years ago. 16. At the time of her hiring, Intervenor Fullen knew little about the Schools to Work Program and career clusters, as they pertain to the majority of secondary students. Her work in these areas had been limited to special education students.

17. Prior to the posting of the position, there were plans to decrease the number of special education positions in the Central Office. Intervenor Fullen's position was not one that was to be eliminated.

18. The other Coordinators of Education were not required to possess certifications in any special education areas or in gifted education. These positions were posted prior to this posting.

19. Grievant does not allege Intervenor was not qualified for the position, only that the qualifications were too restrictive and specifically designed for Intervenor.

20. Grievant has been a professional educator for seventeen years, has a Master's + 45, is certified in General Science, 7-12 and Pre-Vocational Environmental Science, and has a professional administrative certificate with specializations in 1) Elementary/Middle/Junior High Education, Principal K-8; 2)Middle/Junior/Senior High Education, Principal 5-12; 3) Superintendent, K-12; 4) Supervisor General Instruction, K- 12; and 5) Vocational Administration, 5-Adult.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd.of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

County boards of education are authorized to fill vacancies in administrative positions 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.

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school, and are not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). A county board of education is free to establish the necessary requirements for each administrative position, and to determine the weight to apply to each of the above-stated factors when assessing an applicant's qualifications for an administrative position, as long as this substantial discretion is notabused. See Workman v. Wayne County Bd. of Educ., Docket No. 99-50-099 (June 11, 1999); Stinn v. Calhoun County Bd. of Educ., Docket No. 98-07-085 (Aug. 28, 1998); 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).

County boards of education have substantial discretion in determining the minimum qualifications for professional positions. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Baker v. Lincoln County Bd. of Educ., Docket No. 00- 22-081 (June 28, 2000). See March v. Wyoming County Bd. of Educ., Docket No. 94-55- 022 (Sept. 1, 1994); Elkins v. Boone County Bd. of Educ., Docket No. 95-03-415 (Dec. 28, 1995). Additionally, job postings are to identify the requirements reasonably necessary to meet the responsibilities of the position. Robinson v. Wyoming County Bd. of Educ., Docket No. 90-55-137 (June 25, 1990). The imposition of certification requirements that are not necessary to carry out the responsibilities of the position can be arbitrary and capricious. Robinson, supra.

Selection of the best candidate for an administrative position is judged under the arbitrary and capricious standard. "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 thatare 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." Id. (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 arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp., supra; Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990).

Here, the question is whether MCBOE abused its considerable discretion in its imposition of the requirements of the position. Baker, supra; Robinson, supra. See Dillon, supra; Amick v. Nicholas County Bd. of Educ., Docket No. 95-34-037 (Aug. 23, 1995). Allegations of preferential postings are difficult to prove. See Baker, supra; Villers v. Kanawha County Bd. of Educ., Docket No. 97-20-294 (Jan. 30, 1998). However, in this case, Grievant has presented sufficient evidence to support her contentions that the minimum requirements for the Coordinator of Secondary Education were person-specific and/or the minimum requirements unreasonably limited the pool of applicants as thequalifications identified were not required by the position. It is also very difficult to believe the job posting was not designed to favor Intervenor Fullen.

In response, MCBOE has not offered legitimate reasons to substantiate its actions, nor has it explained sufficiently why so much expertise in special education was required for a position in secondary education. Especially troubling is the requirement for a certification in gifted education, when there is, in actuality, no freestanding gifted program in the secondary schools. It is also

troubling that Respondent required special education certification for the Coordinator of Secondary Education position, when it was not required for the Director of Special Education/Instructional Services. Respondent also did not explain sufficiently why the teaching requirement, and the requirement for an administrative certification, were not identified as required, or even identified as preferred when prior similar positions identified them as alternatives. The duties of the position listed in Finding of Fact 6 would seem to indicate an administrative certification would be helpful in fulfilling the duties of the position. It is noted these preferences were identified in other similar postings.

Grievant has established MCBOE's posting, as written, constituted an abuse of the discretion extended school boards when making such professional determinations. As previously stated, the imposition of certification requirements that are not necessary to carry out the responsibilities of the position can be arbitrary and capricious. Robinson, supra. A shorter, less specific list of required qualifications with an indication of certifications that would be "preferred" could serve to open the pool of qualified applicants, and insure MCBOE was able to select the best applicant from a variety of professional employees with multiple talents. Grievant also argued that MCBOE engaged in discrimination and favoritism when it identified requirements only one county employee could fill. This action ensured Intervenor Fullen would receive the position. Discrimination is defined in W. Va. Code § 18-29-2(m) , as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 4) of discrimination and favoritism under W. Va. Code §§ 18-29-2(m) & (o), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievantmay show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995).

Grievant has met her burden of proof and established a prima facie case of discrimination and favoritism. The posting was written so that only one employee in the entire county had the necessary qualifications. Certain qualifications, not required for the position, were inserted, and other qualifications which would appear to be necessary, or at least helpful, such as administrative certification, were not listed, even as preferred. Robinson, supra. These additions and non-additions matched the qualifications of Intervenor Fullen.

The Respondent did not offer legitimate reasons to substantiate its actions for the stated requirements.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. 2. W. Va. Code § 18A-4-7a sets forth the criteria to be used in filling administrative positions. That Code Section directs county boards of education to hire "professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications."

Further, in judging qualifications, consideration shall be given to each of the following:

> Appropriate certification and/or licensure; amount of experience relevant to the position . . . 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 . . . and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged.

3. It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the school, and are not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. County boards of education have substantial discretion in determining the minimum qualifications for professional positions. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Villers v. Kanawha County Bd. of Educ., Docket No.97-20-294 (Jan. 20, 1998). See Jones v. Summers County Bd. of Educ., Docket No. 94-45-153 (Nov. 16, 1994).

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 forthe 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." Id. (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.

6. Not all of the listed requirements for the position of Coordinator of Secondary Education were reasonably necessary in order to successfully perform the duties of the position. Robinson v. Wyoming County Bd. of Educ., Docket No. 90-55-137 (June 25, 1990). See Baker v. Lincoln County

Bd. of Educ., Docket No. 00-22-081 (June 28, 2000).

7. Grievant demonstrated MCOBE improperly identified the required qualifications for the position of Coordinator of Secondary Education, thus insuring only one candidate was qualified for the position.

8. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." 9. W. Va. Code § 18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

10. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 18-29-2(m) & (o), must demonstrate the following:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

11. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

12. Grievant has met her burden of proof and established a prima facie case of discrimination and/or favoritism.

13. Respondent did not offer legitimate reasons to substantiate its actions. Accordingly, this grievance is **GRANTED**. Respondent is directed to repost the position. Instead of the requirement "WV teaching certification in gifted education, one or more area(s) of special education and one or more areas of secondary education," MCBOE is directed to state "WV teaching certification in one area of special education or WV certification as a Professional Administrator," and "WV teaching certification in one or more areas of secondary education required."

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Mingo 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: October 26, 2001

Footnote: 1

This is a reference to then Superintendent John T. Mattern.

Footnote: 2

Grievant was represented by Anita Mitter of West Virginia Education Association, Respondent was represented by Attorney Hannah Curry, and Intervenor was represented by Kathy Smith from the West Virginia Education Association.

Footnote: 3

The need for this responsibility was not explained. See Finding of Fact 12, infra.

Footnote: 4

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).