PAULA MCINTYRE and

PAMELA ZARGER,

Grievants,

v. **Docket No. 00-DOE-005**

WEST VIRGINIA DEPARTMENT OF

EDUCATION/THE WEST VIRGINIA

SCHOOLS FOR THE DEAF

AND THE BLIND,

Respondent.

DECISION

Paula McIntyre and Pamela Zarger ("Grievants"), employed as teachers by the Schools for the Deaf and the Blind ("SDB") initiated this grievance on November 15, 2000, alleging that they were more qualified than the successful applicants for two mentor teacher positions. They request instatement to the positions, plus back pay and benefits. The grievance was denied at level one, and a level two hearing was held on December 14, 2000. The grievance was denied in a written level two decision dated December 20, 2000. Level three consideration was bypassed, and Grievants appealed to level four on January 3, 2001. After a level four hearing was scheduled, the parties agreed to submit this grievance for a decision based upon the record developed below. (See footnote 1) This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 20, 2001.

The following findings of fact are made from a preponderance of the evidence ofrecord.

Findings of Fact

1. Grievants are employed as classroom teachers by SDB.
2. Grievant McIntyre has been employed by SDB since 1983. She has a bachelor's degree plus

thirty hours, and she is certified to teach elementary education grades 1-6, visually impaired grades K-12, and developmental reading grades 1-6.

3. Grievant Zarger has been employed by SDB since 1979. She has a bachelor's degree plus thirty hours, and she is certified to teach elementary education grades 1-6 and visually impaired grades K-12.

4. On October 3, 2000, SDB posted a notice of vacancies for mentor teachers for two new teachers, Raven Miller and Stacey Gragg. Grievants applied for both positions.

5. Principal Connie Newhouse reviewed the applications and selected teachers who had the most similar class schedules and students to fill the mentor positions. She selected Karen Bowman to be the mentor for Raven Miller, and she selected Dennis Wolenski to be the mentor for Stacy Gragg.

6. Karen Bowman has been employed by SDB for approximately three years. She is certified to teach visually impaired grades K-12 and elementary education. At the time this grievance was filed, she had completed all but one course required to obtain a master's degree. She is assigned as a full-time basic education teacher at SDB.

7. Dennis Wolenski is employed as a secondary social studies teacher at SDB. (See footnote 2) He has a master's degree plus thirty hours.

8. Ms. Bowman was selected to be the mentor for Raven Miller because they both teach basic education courses all day long and have common planning periods.

9. Mr. Wolenski was selected to be the mentor for Stacy Gragg because they both teach primarily secondary level students in grades 7 through 11, although Ms. Gragg also teaches one class of fifth grade students. Mr. Wolenski and Ms. Gragg have fifteen students in common (students they both have in class every day). Ms. Gragg and Mr. Wolenski also share lunch duty and study hall periods.

10. Grievant McIntyre teaches three periods of elementary education, two periods of basic education, and two periods of secondary education (seventh and fifth grades.)

11. Grievant Zarger teaches pre-kindergarten, kindergarten, second, and third grades.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving

their 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); 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. W. Va. Code § 18A-3-2b governs "beginning teacher internships," and states, in pertinent part:

> 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[.]

(Emphasis added.)

The selection method for mentor teachers is not specified in the statute. The position of mentor is considered to be an extracurricular assignment and as such is covered by W. Va. Code § 18A-4-16. Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999). 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., DocketNo. 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). The standard of review for filling such positions is to assess whether the Board abused its discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993).

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).

Grievants allege that they are both more qualified than the successful applicants for either mentor position, due to their undisputed greater experience. As they have noted,Code § 18A-3-2b states that the mentor should be an “experienced” teacher, but the level of experience is not defined. Grievants also contend that Mr. Wolenski, who is a secondary teacher, should not have been assigned to mentor Ms. Gragg, whose students are allegedly of secondary age, but function at elementary school levels. Finally, Grievants argue that they were injured by SDB's failure to attach the job description for the mentor positions to the posting.

Although there can be no dispute that Grievants are more experienced teachers than the successful applicants, this does not prove that their selection was arbitrary and capricious or an abuse of SDB's considerable discretion. The statute only requires that the mentor be an experienced teacher, and it does not specify what degree of experience is necessary, and both successful applicants do have a few years of experience teaching.

As to Grievants' allegations regarding Mr. Wolenski's lack of qualification due to his being a secondary teacher, Grievant's arguments are somewhat difficult to understand. The unrefuted evidence offered at level two demonstrated that Mr. Wolenski and Ms. Gragg teach largely the same grade levels of students and, in fact, have fifteen students in common, constituting approximately three quarters of the students assigned to Ms. Gragg. Regardless of the functional level of these students, both teachers have most of the same students in their classes and teach largely the same "subjects and grade levels," as required by the statute. Neither Grievant has shown that their classes are more similar to those of Ms. Gragg. Similarly, neither of the grievants teach the exact same subject and grade levels as Ms. Miller, while the successful applicant does. Therefore, Grievants have proven no violation of the statute, nor have they established that the selection decisionswere improper in any respect.

Finally, Grievants have demonstrated no harm they have suffered by SDB's failure to attach the job description to the posting for the mentor positions. This did not prevent them from applying for the positions, and it was given to them upon request. Accordingly, Grievants have demonstrated no entitlement to relief in this regard.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In non-disciplinary matters. Grievants have the burden of proving their 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); 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. Mentors are assigned to beginning teachers, and must be "an experienced classroom teacher at the school who teaches the same or similar subject and grade level as the beginning

teacher". W. Va. Code § 18A-3-2b.

3. The position of mentor is considered to be an extracurricular assignment and as such is covered by W. Va. Code § 18A-4-16. Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999).

4. The standard of review for filling professional extracurricular positions is to assess whether the employer abused its discretion in the selection or acted in an arbitrary or capricious manner. Dillon v. Bd. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d58 (W. Va. 1986); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-398 (July 27, 1993).

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. Grievants have failed to prove that the selections for the two mentor positions at issue were contrary to the provisions of W. Va. Code § 18A-3-2b, or that they were arbitrary and capricious or an abuse of discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hampshire 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 sothat the record can be prepared and properly transmitted to the appropriate circuit court.

Date: February 26, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants were represented by Harvey M. Bane, Consultant with the West Virginia Education Association, and Respondent was represented by counsel, Rebecca M. Tinder.

Footnote: 2

The record does not reflect the length of Mr. Wolenski's employment, but it was estimated at approximately five years.