MITZI AKERS,

Grievant,

v. Docket No. 01-41-435

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Mitzi Akers, filed this grievance against her employer, the Raleigh County Board of Education ("RCBOE" or "Board"). The Statement of Grievance reads:

> **Grievant, a regularly employed secretary/accountant, contends that the Respondent has erred in posting service personnel positions as a [sic] professional positions. The positions in question were posted as "Medicaid Billing Reviewer[s]". These positions were clearly clerical in nature and should have been posted as a Secretary II, Secretary III, Accountant II or a multiclassification combination of said class titles. Grievant alleges a violation of West Virginia Code §§ 18A-4-8, 18A-4-8b, and 18A-1-1.**
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> **Relief Sought: Grievant seeks (a) instatement into one of the positions; (b) compensation for any and all wages and all benefits lost as a result of Respondent's actions; (c) interest on any sums to which she is entitled[;] and (d) "future postings reflected to be service personnel positions".**

This grievance was filed and denied at Level I on June 6, 2001. Grievant filed at Level II, and after a June 26, 2001 hearing, this grievance was denied on July 12, 2001. Grievant elected to by-pass Level III and appealed to Level IV on July 17, 2001. A Level IV hearing was held in the Grievance Board's Beckley office on September 7, 2001. This grievance became mature for decision on October 10, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant argues the positions were incorrectly posted, and the duties identified in the posting should be performed by clerical service personnel, with perhaps one professional

reviewer. Grievant also argued that similar duties are already performed by the secretarial staff within the Special Education Department.

Respondent asserts the duties are new, complex, and require special training and knowledge. The performance of these duties requires a professional employee with a detailed knowledge of the laws and regulations of special education and the IEP (Individual Education Plan) process. Additionally, the employee must possess knowledge about school medicaid billing. Respondent notes Grievant does not have the necessary knowledge, experience, and training. Respondent also notes these positions were posted last year, Grievant did not apply, and two of the employees who received the positions for the Summer of 2001 served in the positions the prior summer.

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 is currently employed as a Secretary III/Accountant II in a school setting. In this position she performs many billing and accounting functions.

2. Grievant worked for two months in 1989, as a Special Education Aide. For approximately four months in 1999-2000, she worked part-time as a transcriptionist for a psychologist. As a part of her duties in this position, she filled in Social Security billing forms for his adult patients after the psychologist gave her the correct codes and amountof time for the services provided. (See footnote 2) **Grievant has no experience in school medicaid billing procedures.**

3. In 2000, medicaid began reimbursing schools for additional services for eligible, special education students. These services included payment for: initial and triennial IEP's, IEP updates, personal care, and care coordination.

4. The additional services discussed in Finding of Fact 3 generated many thousands of teacher-completed forms which had to be checked for accuracy, eligibility, and content to insure payment. If the form is not completely and accurately filled out, the form will be "kicked backed," and RCBOE will not receive payment. These documents are time sensitive, and if they are not completed within the required time frame, RCBOE will not receive compensation.

5. In 2000, Respondent posted a notice for four summer positions of Medicaid Billing Reviewer. The posting listed the following qualifications:1) experience in school medicaid billing procedures; 2) must have knowledge of special education due process paperwork process; 3) must have knowledge of students' rights in terms of confidentiality; and 4) preference would be given to experienced applicants. The duties were to review IEP information and complete billing forms for medicaid reimbursement, and to complete care coordination billing forms.

6. Grievant was not aware of the posting and did not apply for the position. 7. Only three applicants were selected for the positions. A fourth was not selected because there was no other applicant who met the stated qualifications. Leonard Fink, an occupational therapist, Marsha Fink, a speech pathologist, and Suzanna Neil, a speech pathologist, were selected for the Medicaid Billing Reviewer positions.

8. During the Summer of 2000, the Medicaid Billing Reviewers reviewed approximately 5000 forms completed by teachers. The two major areas of focus were IEP updates and care coordination. The Medicaid Billing Reviewers determined: 1) if the students were eligible for services, when they became eligible, and if the completed forms reflected the students were eligible for care coordination services at the time they were provided; 2) if the care coordination activity required documentation, if the proper documentation was included, and if the activity was billable to medicaid within the time frame it was performed; 3) if the special education teacher had billed for all eligible students, whether the correct forms were used, and whether the proper diagnostic code was assigned; and 4) if the correct amount of time was assigned to the activity and if the form was signed by the appropriate personnel. If the Medicaid Billing Reviewers had questions about the information on these forms and the required documentation, or they found possible errors, they talked to the special education teacher for additional data and corrected them where appropriate.

9. On February 9, 2001, Cynthia Corley-Hicks, Director of Special Education, informed all special education teachers that mandatory IEP training would be scheduled in February and March because it appeared RCBOE would be monitored by the Office of Special Education the following year. The focus of this training would be " appropriate IEPdevelopment, requirements for the Continuous Improvement Process and Medicaid billing

procedures." Resp. Ex. No. 6, at Level II. (Emphasis in the original). This program was designed for professional, special education teachers. Service personnel did not attend as they did not perform the identified duties.

10. On May 7, 2001, Respondent again posted four summer positions for special education teachers to work as Medicaid Billing Reviewers. The posting listed the following qualifications: 1) must have experience in school medicaid billing procedures; 2) ability to review annual IEP update and care coordination medicaid billing forms for accuracy; 3) knowledge of special education due process paperwork process as outlined in state and county policies; 4) knowledge of students' rights in relation to confidentiality; and 5) competency in designing database/spread sheet formats. Preference would be given to experienced applicants. The duties were to 1) collect, sort, and review IEP updates and care coordination medicaid billing forms for content and accuracy; 2) review IEP update and care coordination medicaid billing forms for accuracy; 3) design a database format for processing the data on the forms; and 4) log in information from forms into the database. The duties were similar to those described in Finding of Fact 8.

11. Grievant applied for one of the positions, but was informed she did not meet the qualifications for the position, as she did not have experience in school medicaid billing procedures. Grievant agreed she did not have sufficient training and knowledge to review IEP updates and care coordination medicaid billing forms for content and accuracy, and this task should be performed by a professional. 12. Mr. Fink and Ms. Fink again applied for the positions and were selected. Additionally, Beverly Winter, the Coordinator of Special Education, and Susy Calvert, a special education teacher, were selected to fill the remaining two positions based on their qualifications. Ms. Calvert and Ms. Winter had experience in designing databases, as they had helped design the database for the older, medicaid billable services. All the selected Medicaid Billing Reviewers had attended the training session identified in Finding of Fact 9, and Ms. Winter was the instructor for this part of the training.

13. Contrary to Grievant's assertion, the secretaries in the Special Education Office do not fill out medicaid billing code information and do not review medicaid billing forms for accuracy or return forms to teachers or other professionals when they are inaccurate. These secretaries enter the information into the computer given to them by professionals.

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 theevidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant asserts the positions do not fit any of the professional positions defined in W. Va. Code § 18A-1-1, as no certification was required in the posting. Grievant also argues the positions were incorrectly posted and must be posted as service personnel slots as the positions are clerical in nature. Grievant's assertions are incorrect.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, as long as this discretion is exercised reasonably, in the best interests of the schools, and executed in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ. of Wyoming, 177 W. Va. 145, 351 S.E.2d 365 (1986). See State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

"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 asarbitrary 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 posting of May 7, 2001, stated the positions were to be filled by special education teachers. Special education teachers must be certified, and other professional positions must be licensed. It was within RCBOE's discretion and not arbitrary and capricious for RCBOE to identify the positions as professional. **(See footnote 3)**

Grievant's argument that the positions are clerical in nature must also fail. 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). While there are some clerical aspects to the duties of the Medicaid Billing Reviewer, it is clear an understanding of the laws, rules, and regulations governing special education is necessary to perform the essential assignments of the position. Additionally, detailed knowledge of the IEP process, and an awareness of the types of activities that can and cannot be covered in care coordination are essential to carrying out the tasks of the position. RCBOE's decision to post the assignments as professional positions, requiring experience, knowledge, and training, cannot be found to be arbitrary and capricious given the various responsibilities of a Medicaid Billing Reviewer. Grievant did not possess the qualifications listed in the posting, and these qualifications were reasonably necessary to fulfill the responsibilities of the position.

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. "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.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, as long as this discretion is exercised reasonably, in the best interests of the schools, and executed in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ. of Wyoming,177 W. Va. 145, 351 S.E.2d 365 (1986). See State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. "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.

5. 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). 6. RCBOE's decision to post the Medicaid Billing Reviewer positions as professional positions was within its discretion and was not arbitrary and capricious.

7. Grievant did not possess the qualifications necessary to execute all the responsibilities of the positions. See Robinson, supra.

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 Raleigh 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: December 5, 2001

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 2

Grievant stated she filled out Social Security forms, and she believed these were the same as medicaid.

Footnote: 3

It is noted not all of the successful applicants were teachers, but this issue was not raised by the parties. The other successful applicants were professionals, whose activities requires licensure, and they worked extensively with special education students.