ALLISON LAYMAN,

Grievant,

v. **Docket No. 01-06-001**

CABELL COUNTY BOARD OF EDUCATION,

Respondent,

and

LISA RILEY,

Intervenor.

D E C I S I O N

Allison Layman, Grievant, submitted this grievance under W. Va. Code §§ 18-29-1, et seq., alleging Respondent Cabell County Board of Education (CCBE) incorrectly filled a teaching position at the Evening Alternative Program located a Huntington High School. His Statement of Grievance reads:

> School laws of West Virginia 18A-4-7a accepted hiring practices were not followed, a less senior teacher was hired for the position for which I applied.
>
> Relief Sought: The position of health teacher at Huntington High School Evening Alternative Education Program[,] plus back pay[.]

Grievant filed this grievance on September 6, 2000, and received a denial at that level on September 19, 2000. Grievant appealed to Level II, and following a Level II hearing on October 30, 2000, this grievance was denied on November 13, 2000. On December 4, 2000, Lisa Riley asked to intervene, and on December 6, 2000, this request was granted. Grievant appealed to Level III, and a Level III hearing was held on December 19, 2000. This grievance was denied at Level III on December 20, 2000. Grievant appealed to Level IV , and a Level IV hearing was conducted in this

Board's office in Charleston, West Virginia, on February 9, 2001. This case became mature for decisionon March 13, 2001, the date the parties proposed findings of fact and conclusions of law were received. (See footnote 1)

Issues and Arguments

Grievant argues the position at issue must be filled according to W. Va. Code § 18A-4-7a, and this procedure was not followed. He asserts that if this procedure had been followed, he would have been selected for the position. Respondent maintains the position is an extracurricular assignment, and as such the Code Section that applies is W. Va. Code § 18A-4-16, and the standard for review of this selection is whether or not it was arbitrary and capricious or clearly wrong.

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 Drivers' Education teacher; he has been employed by CCBE for approximately 28 years.

2. On August 9, 2000, CCBE posted ten positions for the Evening Alternative Program, one of them for a Health teacher with the Evening Alternative Program.

3. This is the third year for the Evening Alternative Program, and it is funded by a federal grant from the National Office of School to Work and the United States Department of Labor. This alternative program offers a program of study outside thenormal school environment and works best for certain types of students. The program teaches core subjects, such as English, Health, and Math.

4. The job posting stated the positions' hours were from 3:30 p.m. to 8:30 p.m. and contained the following information:

*Salary: $24 per hour (See footnote 2)

5 hrs. per day- 2 or 3 days per wk.

Alternating Weeks

August 24, - June 4, 2001

Excluding Faculty Senate Days

5. The Health position required certification in Health and experience with at- risk students.

6. Several people applied for the Health position, including Grievant and Intervenor Riley.

7. Both Grievant and Intervenor Riley were certified in Health and had experience with at-risk students.

8. Assistant Superintendent William Smith reviewed the applications and selected the teacher for each subject area.

9. Assistant Superintendent Smith gave preference to teachers who had taught in the subject area at the Evening Alternative Program in the past.

10. Intervenor Riley had taught Health at the Evening Alternative Program since the program's inception. She had thirteen years of experience teaching Health and seventeen years of seniority. She had participated in the recent selection of the newtextbooks, and had worked with the new materials in the classroom. Intervenor Riley had attended multiple workshops in the Health area including conferences on AIDS, HIV, and Human Sexuality.

11. Although Grievant was permanently certified in Health, he had only taught the subject for one class period, for one year, more than ten years ago. (See footnote 3)

12. During the 1999 - 2000 school year, Grievant was employed in the Evening Alternative Program as a Drivers' Education teacher for one semester, but that position was not needed for the 2000 - 2001 school year.

Discussion

___As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

The issue is whether the positions in the Evening Alternative Program are extracurricular assignments. Grievant argues these positions are regular teaching positions, and as such, must be filled pursuant to W. Va. Code § 18A-4-7a. He then argues he would receive the position because he has greater seniority. (See footnote 4)

W. Va. Code § 18A-4-16 defines extracurricular assignment, and provides, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. . . .

(Emphasis Added.)

This statute 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 regularcontract 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).

Respondent cites to Harmon v. Pocahontas County Board of Education , Docket No. 00-38-201 (October 18, 2000), and argues that holding is applicable to this grievance and resolves this issue. In Harmon, the administrative law judge ruled a "[g]rievant's contract to teach evening classes in the alternative education program was an extracurricular assignment, as it occurred at a time other than regularly scheduled working hours, and involved instructing students, on a regular basis."

In this posting, the position's hours were listed as 3:30 p.m. to 8:30 p.m., outside the

regular school day. The teaching schedule, while occurring on a regular basis, alternated from two days to three days every other week. The pay was hourly, $24.00, and there were no benefits, as the position was compensated with grant money. If school were out of session, as with Faculty Senate Days or snow days, and the successful applicant did not teach, the teacher would not receive compensation. A review of these factors clearly indicates the position to be an extracurricular assignment.

"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 professionalpersonnel 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., 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)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999). Contrary to Grievant's belief, seniority is not the determining factor in the selection of professional personnel for an extracurricular assignment. Savilla v. Putnam County Bd. of Educ., Docket No. 00-40-058 (Apr. 7, 2000).

"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 ofeducation. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Here, both applicants met the minimum qualifications for the position. However, Intervenor Riley had many more years of recent experience in teaching health, familiarity with recent changes in the textbook and curriculum, recent training in classroom content, and two years of experience in teaching Health in the Evening Alternative Program. Mr. Smith's decision to select Intervenor Riley based on her prior experience and training was not arbitrary and capricious nor an abuse of discretion.

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 his 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. As previously ruled by the Grievance Board, a "[g]rievant's contract to teach evening classes in the alternative education program was an extracurricular assignment, as it occurred at a time other than regularly scheduled working hours, and involved instructing students, on a regular basis." Harmon v. Pocahontas County Bd. of Educ., Docket No. 00-38-201 (Oct. 18, 2000). ___

3. "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., 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)." Lusher v. Putnam County Bd. of Educ., Docket No. 99-40-061 (May 7, 1999).

4. Seniority is not the determining factor in the selection of professional personnel for an extracurricular assignment. Savilla v. Putnam County Bd. of Educ., Docket No. 00-40-058 (Apr. 7, 2000).

5. "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., 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).

6. "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)).

7. " 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. Seegenerally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

8. Grievant has not met his burden of proof and demonstrated the decision to select Intervenor Riley for the position of Health teacher in the Evening Alternative Program was arbitrary and capricious.

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 Cabell 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: May 8, 2001

Footnote: 1

Grievant and Intervenor represented themselves, and Respondent was represented by attorney Howard Seufer.

Footnote: 2

The * indicated the position was paid with grant money, and no benefit package was attached.

Footnote: 3

CCBE's records do not reflect Grievant ever being assigned to teach Health during the course of his teaching career, but Grievant testified he did teach the subject once, even though he had no recollection when it was. It was clear Grievant had not taught Health for a long time.

Footnote: 4

Grievant did not present any evidence to support his contention that he would have been selected if the seven

factors in W. Va. Code § 18A-4-7a had been utilized other than to assert correctly that he had more overall seniority than the successful applicant. It is noted all the factors identified in this Code Section must be applied in filling a vacancy, and seniority is only one of the criteria that must be utilized. A brief review of the seven factors, does not confirm Grievant's belief that he would have definitely have received the position if W. Va. Code § 18A-4-7a was followed.