RICK LANE,

Grievant,

v. **Docket No. 02-41-265**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rick Lane, filed this grievance against his employer, the Raleigh County Board of Education ("RBOE"), on April 15, 2002, when he was not selected for a teaching position. The statement of grievance reads, “violation of WV Code § 18A-4-7a.” As relief Grievant seeks “position at Park Jr. High (gifted).” (See footnote 1)

The following Findings of Fact are made from the evidence presented at the Level II hearing.

FINDINGS OF FACT

1. Grievant has been employed by RBOE since 1989 as a classroom teacher, teaching business courses. Prior to that he was employed by RBOE as a substitute teacher. He is certified in Business Principles 5-12.

2. Grievant's position was reduced in force at the end of the 2001-2002 school year, and he was placed on preferred recall. At the time of the Level II hearing, he was employed by RBOE as a coach.

3. On January 28, 2002, RBOE posted a vacancy for a Special Education “BD” Teacher at Park Junior High School. The posting required certification “in the primary area of exceptionality listed” (BD), and “[p]revious experience with disabled students, including children having behavior problems and pervasive developmental delays.”

4. It was anticipated that there would be six or seven students in the BD classroom, who would remain in the classroom all day, except to go to a physical education class. Some of the students

would be allowed out of the classroom to attend an elective course on a probationary status. Physical restraint of students would be required at times.

5. Among the applicants were Grievant and Andre White. None of the applicants was certified in BD.

6. RBOE used the first set of criteria in W. Va. Code § 18A-4-7a in evaluating the qualifications of the applicants.

7. Mr. White is certified in Physical Education K-12, and Safety Education 7-12.

8. Grievant and Mr. White both had one and a half years of experience in Special Education. Grievant had no experience teaching BD students. His Special Education teaching experience was in LD/MI, in 1989 and 1990. At the time of the posting, Mr. White was employed by RBOE as a BD teacher, and had been issued an out of field authorization in BD.

9. Grievant holds a Masters Degree in communication. Mr. White holds a Bachelors Degree. Grievant and Mr. White have the same number of hours of course work in Special Education, at six hours each, and neither holds a degree in Special Education.

10. Grievant's GPA was higher than Mr. White's. 11. Grievant had not had IEP training since the requirements were changed significantly seven years ago. Mr. White had current IEP training.

12. Grievant had more seniority than Mr. White, with 12 ½ years as a teacher. Mr. White had been teaching for 5 ½ years.

13. Gary Nichols, Principal of Park Junior High School, and Dr. Emily Meadows, RBOE's Personnel Director, evaluated the candidates. They consulted with RBOE's Special Education Department during the selection process. Mr. White was selected as the most qualified applicant based upon his experience teaching BD students, and his current IEP training.

14. Grievant has had Special Education students, including BD students, in his business classes, and has participated in IEP meetings on a regular basis.

DISCUSSION

Grievant bears the burden of proving the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). Grievant argued RBOE used the wrong set of factors in evaluating the qualifications of the applicants.

Grievant argued that RBOE should have used the second set of factors, and had it done so, he would have been the successful applicant. Grievant relied upon Bush v. Mason County Board of Education, Docket No. 02-26-071 (May 10, 2002).

RBOE argued it properly used the first set of factors, because no applicant met the standards set forth in the posting, as none was certified in BD. RBOE further argued that even had it used the second set of factors, Grievant still would not have been selected.

The issue presented by the parties is whether the first or second set of factors in W. Va. Code § 18A-4-7a applies to the selection. (See footnote 2) That Code § provides, in pertinent part:

> (a) 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.
>
> (b) The county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications.
>
> (c) In judging qualifications for hiring employees pursuant to subsections (a) and (b) of this section, consideration shall be given to each of the following:
>
> (1) Appropriate certification and/or licensure;
>
> (2) 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;
>
> (3) The amount of course work and/or degree level in the relevant field and degree level generally;
>
> (4) Academic achievement;
>
> (5) Relevant specialized training;
>
> (6) Past performance evaluations conducted pursuant to section twelve, article two of this chapter; and
>
> (7) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.
>
> (d) If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, the county board of education shall make decisions affecting the filling of such positions on the basis of the following criteria:

(1) Appropriate certification and/or licensure;

(2) Total amount of teaching experience;

(3) The existence of teaching experience in the required certification area;

(4) Degree level in the required certification area;
(5) Specialized training directly related to the performance of the job as stated in the job description;

(6) Receiving an overall rating of satisfactory in evaluations over the previous two years; and

(7) Seniority.

(e) In filling positions pursuant to subsection (d) of the section, consideration shall be given to each criterion with each criterion being given equal weight. If the applicant with the most seniority is not selected for the position, upon the request of the applicant a written statement of reasons shall be given to the applicant with suggestions for improving the applicant's qualifications. (Emphasis added.)

This Grievance Board has previously addressed the issue at hand, finding that neither set of factors is applicable when one or more permanently employed instructional personnel apply for a position, but do not meet the standards set forth in the posting.

> However, it is also clear that W. Va. Code § 18A-4-7a is not applicable because no candidate "[met] the standards set forth in the job posting." The language of the statute is clear that only when at least one of the applicants meets the standards set forth in the job posting are the seven criteria required to be utilized in the selection process. When a situation arises that is not specifically governed by the school personnel laws, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 156, 406 S.E.2d 687 (1991); See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-003 (Apr. 25, 1997).

As noted, Grievant pointed to Bush, supra, in support of his position. While that decision discussed whether the individual factors of Code § 18A-4-7a's second set of factors were correctly applied in filling a counselor position, for which neither the grievant nor the successful applicant held the "degree level in the required certification area," the decision does not indicate that the parties argued about which set of factors, if any, were applicable, nor was the issue analyzed. Further, the

decision does not note what standards were set forth in the posting, and there is no discussion of whether the applicants met any such standards. The decision does state that both the grievant and the successful applicant were “deemed to have 'appropriate certification and/or licensure.'”Accordingly, the undersigned does not find Bush to be controlling on the issue presented in this grievance.

As noted in Bell, supra, the applicable standard of review is whether the decision as to who was the most qualified candidate was arbitrary and capricious. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991). The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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 RBOE did not have to rely upon either the first or second set of factors in making its determination, these factors supply guidance as to what qualifications may beconsidered relevant in evaluating the applicants . As such, it was not unreasonable for RBOE to look to the first set of factors. In this case, neither Grievant nor the successful applicant was the perfect candidate for the position, and the qualifications of the two were considered to be very similar overall. However, the

successful applicant did have recent IEP training and recent experience with BD students, and had apparently demonstrated that he was capable of providing instruction to them. It was not inappropriate or unreasonable for RBOE to make this experience and IEP training the deciding factors, absent BD certification.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996).

2. W. Va. Code § 18A-4-7a is not applicable in determining which applicant should have been hired into the posted position, “because no candidate '[met] the standards set forth in the job posting.' The language of the statute is clear that only when at least one of the applicants meets the standards set forth in the job posting are the seven criteria required to be utilized in the selection process.” Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-003 (Apr. 25, 1997).

3. “When a situation arises that is not specifically governed by the school personnel laws, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 156, 406 S.E.2d 687 (1991); See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).” Bell, supra.

4. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope ofreview is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). Arbitrary and capricious actions have been found to be closely related to

ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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)).

5. The decision to select Mr. White for the posted position, based upon his recent experience teaching BD students and IEP training, was not unreasonable.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: October 15, 2002

Footnote: 1

The parties agreed to waive Level I. A Level II hearing was held on July 23, 2002, and a decision denying the grievance was issued on July 30, 2002. Grievant appealed to Level III, where RBOE waived participation. Grievant appealed to Level IV on August 20, 2002. The parties agreed to submit this grievance for decision based upon the record developed at Level II. Grievant was represented by Ben Barkey, and Respondent was represented by Erwin L. Conrad, Esquire. This matter became mature for decision on September 24, 2002, upon receipt of the last of the parties' written arguments.

Footnote: 2

The Supreme Court of Appeals of West Virginia has stated that a third set of factors found in W. Va. Code § 18A-4-7a may be applicable when an applicant is on preferredrecall. Ewing v. Bd. of Educ. of County of Summers, 202 W. Va. 228, 242-243, 503 S.E.2d 541 (1998). Code § 18A-4-7a provides in this regard:

> *(m) 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, the 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.*

As Grievant was not certified in BD, this provision is not applicable here.