ANGELA BOWMAN,

Grievant,

v. **Docket No. 03-24-121**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Angela Bowman ("Grievant") initiated this proceeding on November 6, 2002, alleging she was the most qualified applicant for a special education teaching position at North Marion High School. She seeks placement in the position, with back pay and benefits. The grievance was denied at level one on November 20, 2002. A level two hearing was conducted on April 1, 2003, and the grievance denied in a written decision dated April 17, 2003. Level three consideration was waived on April 29, 2003, and Grievant appealed to level four on May 5, 2003. A hearing was held in the Grievance Board's office in Westover, West Virginia, on July 30, 2003. Grievant was represented by her father, Tom Bowman, and Respondent was represented by counsel, Stephen Brooks. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on September 3, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a substitute classroom teacher for three years. 2. Grievant has a bachelor's degree in education and is certified to teach K-8.

3. Grievant is taking courses toward a master's degree in special education, and at the time she applied for the position at issue, she had completed nine credit hours toward that degree.

4. Grievant has substituted in special education classes since she has been employed by Respondent.

5. Andrew Sorine has been employed by Respondent for five years, and he worked as a substitute for four years. He has also served as the basketball coach at North Marion High School for five years.

6. Mr. Sorine has a master's degree in safety education.

7. At the time he applied for the position at issue, Mr. Sorine had no credits in special education and was not enrolled in any courses in that program. However, he had substituted in some special education classes.

8. In August of 2002, Respondent posted a vacancy for a special education teacher, BD/SLD, at North Marion High School.

9. On August 2, 2002, due to the need for several special education teachers in Marion County for the upcoming school year, Grievant and a number of other applicants were interviewed by Bob VanGilder, Administrative Assistant for Special Services, who oversees special education programs for the county. The applicants were rated using a grid reflecting the seven statutory criteria contained in West Virginia Code § 18A-4-7a. At that time, Mr. Sorine had not applied for a special education teaching position. 10. When the North Marion position was posted, the information on the applicants for special education positions who had been interviewed was provided to Paul Donato, Principal of North Marion High School.

11. The North Marion position was offered to Diana Reeves, a certified special education teacher. Ms. Reeves had taken another position, so Mr. Sorine was placed in the position as a substitute until a full-time employee could be hired.

12. After Ms. Reeves declined the position, Mr. Donato interviewed Mr. Sorine for the position, because he was the only applicant who had not been interviewed. He did not apply for a special education until the North Marion position was posted.

13. After the interview of Mr. Sorine, Mr. Donato and Dennis Edge, Assistant Superintendent, discussed the interview over the telephone. During that conversation, Mr. Edge completed the grid used for the other interviews, based upon the information provided to him by Mr. Donato.

14. On the grid used for the interviews, Grievant received a total of 16 points, and Mr. Sorine received 19 points.

15. Mr. Sorine was selected to fill the position at North Marion High School.

16. Neither Grievant nor Mr. Sorine were given credit for “amount of teaching experience in the

subject area" or specialized training, which was considered inapplicable because none was specifically required in the job description.

Discussion

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particularposition rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code § 18-29-6.

"The grievance procedure . . . allows for an analysis of legal sufficiency of the selection process at the time it occurred." Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). This analysis must acknowledge that county boards of education have substantial discretion in matters relating to the hiring of school personnel, so long as the "qualifying factors" set forth in W. Va. Code §18A-4-7a are considered, and the exercise of discretion is neither arbitrary nor capricious. Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997). 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 requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an administrative law judge 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). An action is arbitrary or capricious if it does not rely on factors intended to be considered, entirely ignores important aspects of the problem, is explained in a manner contrary to the evidence before the board of education, or is a decision 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). Grievant contends that she was the most qualified applicant for the position, because she had already earned credit hours toward her master's in special education, while Mr. Sorine had not even enrolled in any such courses. She also argues that the hiring process was biased in favor of Mr. Sorine, exemplified by his interview and assessment by the principal and Mr. Edge, while she and the other applicants were evaluated by Mr. VanGilder. Grievant further argues

that the statutory criteria in W. Va. Code § 18A-4-7a were not properly followed in this case.

Respondent contends that, because none of the applicants were certified in special education, it was not required to follow any statutory provision, and that its selection is governed only by the arbitrary and capricious standard. Because Mr. Sorine was substituting in the position at the time of his hiring and relating well to the students, Respondent contends that he was the most qualified applicant. In support of its position, it relies upon the decision rendered by this Grievance Board in Lane v. Raleigh County Board of Education, Docket No. 02-41-265 (Oct. 15, 2002), where it was determined that, because the applicants did not meet the standards in the job posting, neither the "first" nor "second" set of criteria in W. Va. Code § 18A-4-7a was applicable. That statute provides:

> (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.

(Emphasis added.)

Clearly, the first set of factors applies to the instant case, which involves the “hiring of [a] new classroom teacher,” since both Grievant and Mr. Sorine were substitutes. Lane, supra, is distinguishable, in that the applicants were permanently employed teachers, but did not meet the standards set forth in the posting, a situation to which neither set of factors applies. Therefore, Respondent's reliance on Lane is misplaced, and the selection decision was erroneous, because the first set of factors was not properly utilized. While the grid used for the interviews did, in fact, contain the statutory criteria, Respondent'srepresentatives admitted that the factors were not actually measured and considered as required by W. Va. Code § 18A-4-7a.

Because the first set of factors are not prioritized, and the statute does not mandate that any one area be afforded particular significance, a county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13-503 (Mar. 31, 1996); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997). Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

All that Code §18A-4-7a requires . . . is that the decision is the result of a review of the credentials of the candidates in relation to the seven factors set forth. Once that review is completed, the Board may hire any candidate based solely upon the credentials it feels are of most importance. An applicant could "win" four of the seven "factors" and still not be entitled to the position based upon the Board's discretion to hire the candidate it feels has the highest qualifications. Again, a board is free to give whatever weight it deems proper to various credentials of the candidates and because one of the factors is "other measures or indicators," it is extremely difficult to prove that a decision is based upon improper credentials or consideration of such.

Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993).

While it is clear that the statute provides Respondent with fairly broad discretion in this hiring decision, it is also mandated that each statutory factor be considered. The interviewers and Mr. Edge did not consider the applicants' teaching experience in the subject area. While it has been held that “teaching experience in the required certificationarea,” under the second set of factors, may not be granted to an applicant who is not yet certified (Jones v. Summers County Bd. of Educ., Docket No. 97-45-147 (Jan. 7, 1998)), there is no such requirement with regard to the criterion in the first set of factors. Both Grievant and Mr. Sorine testified to having taught special education classes--the “subject area” at issue, which should have been considered, with each receiving credit for their comparative amounts of time teaching those courses. The undersigned is unable to make this determination on the existing record, because the applicants' exact number of days teaching special education has not been provided.

Second, Respondent erred in not considering specialized training. While specialized training must be listed as a requirement in the job description when the second set of factors is used, there is no such requirement when the first set of factors is applicable. Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998). Therefore, any specialized training that the applicants had which relate to special education must be assessed and considered.

In a selection decision pursuant to W. Va. Code § 18A-4-7a, when the required statutory criteria were not properly assessed for any of the applicants, the appropriate remedy is to remand the case to the board of education for a reassessment of all of the candidates' qualifications. Snyder v. Preston County Bd. of Educ., Docket No. 98-39-509 (May 26, 1999); See also Owen v. Wood County Bd. of Educ., Docket No. 97-54-557 (July 2, 1998); Hoffman v. Mingo County Bd. of Educ., Docket

No. 97-29-266 (June 15, 1998).

In addition, as ordered in Snyder, supra, the reassessment of the applicants must also include an interview of all candidates by the same individuals utilizing the same process. Respondent's hiring of Mr. Sorine after having him interviewed by the principal, while the other applicants were interviewed by Mr. VanGilder, was inherently flawed.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used. 156 C.S.R. § 4.21 (2000); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code § 18-29-6.

2. When no “permanently employed instructional personnel” apply for a teaching vacancy, the “first set of factors” in W. Va. Code § 18A-4-7a is applicable to the selection process. Fittro v. Cabell County Bd. of Educ., Docket No. 97-06-556 (May 22, 1998). In applying this set of factors, “consideration shall be given to each of the following: Appropriate certification 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, article two of this chapter; and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.” W. Va. Code § 18A-4-7a. 3. W. Va. Code § 18A-4-7a's first set of factors does “not prioritize the areas of consideration, or mandate that any one area be afforded particular significance. A county board may objectively or subjectively assign different weights to the various aspects of the applicants' credentials. Jenkinson v. Greenbrier County Bd. of Educ., Docket No. 95-13- 503 (Mar.

31, 1996); Fisher v. Marion County Bd. of Educ., Docket No. 93-24-042 (Mar. 11, 1993); Marsh v. Wyoming County Bd. of Educ., Docket No. 94-55-022 (Sept. 1, 1994). See Saunders v. Cabell County Bd. of Educ., Docket No. 97-06-149 (Dec. 29, 1997); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997)." Fittro, supra. Thus, a county board of education may determine that "other measures or indicators" is the most important factor. Baker v. Lincoln County Bd. of Educ., Docket No. 97-22-482 (Mar. 5, 1998).

4. The first set of factors requires consideration of specialized training, but does not require the specialized training to be listed in the job description or posting. Younger v. Marshall County Bd. of Educ., Docket No. 97-25-432 (May 13, 1998).

5. W. Va. Code § 18A-4-7a requires that consideration be given to a new teacher's experience in the applicable subject area, regardless of certification.

6. When the required statutory criteria were not properly assessed for any of the applicants, the appropriate remedy is to remand the case to the board of education for a reassessment of all of the candidates' qualifications. Snyder v. Preston County Bd. of Educ., Docket No. 98-39-509 (May 26, 1999); See also Owen v. Wood County Bd. of Educ., Docket No. 97-54-557 (July 2, 1998); Hoffman v. Mingo County Bd. of Educ., Docket No. 97-29-266 (June 15, 1998). 7. In order to be given equal statutory consideration, all candidates must be subjected to the same interview and scoring process, and review by the same interview committee. See Snyder, supra.

8. Grievant has proven by a preponderance of the evidence that Respondent failed to properly assess the applicants' credentials pursuant to the first set of criteria in W. Va. Code § 18A-4-7a, that the interview process was inherently flawed, and that the outcome might have been different absent these errors.

Accordingly, this grievance is **GRANTED IN PART**, and Respondent is **ORDERED** to reassess the applicants' qualifications, giving consideration to all of the first set of statutory criteria, and interviews by an identical interviewer(s). If it is determined that Grievant should have been the successful applicant, Respondent is directed to provide her back pay, plus benefits and seniority, to the date of the initial hiring.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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 andState 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.

Date: September 24, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge