KATHY CORNELL,

Grievant,

v. **DOCKET NO. 03-40-111**

PUTNAM COUNTY

BOARD OF EDUCATION,

Respondent,

and

DEBRA HODGES,

Intervenor.

DECISION

In a grievance filed January 2, 2003, Grievant stated: "Grievant has been denied Secretary/Accountant position S12. According to policies 18A-4-8B and 18A-4-8G grievant was tested and filled a Secretary/Accountant position since 12/2/96 therefore giving her more seniority than other applicants." Grievant's stated relief requested is: "Be given Secretary/Accountant position S12."

After being denied at the lower levels, a level four hearing was held May 27, 2003, at the Grievance Board's Charleston Office. Grievant was represented by W. Va. School Service Personnel Association attorney John E. Roush, Esq. and Respondent was represented by its counsel, Greg Bailey, Esq. of Bowles Rice McDavid Graff & Love, PLLC. Debra Hodges was permitted to intervene at level two. (See footnote 1) The parties agreed to submit theirproposed findings of fact and conclusions of law by June 13, 2003, whereupon the matter became mature for decision.

I find the following facts, which are not in dispute, have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Both Grievant and Intervenor are regularly employed by Respondent, and are multiclassified as Accountant/Secretaries.

2. Grievant has been multiclassified since December 2, 1996, when the Accountant classification was added to her existing Secretary classification. Her secretarial seniority began August 1, 1989.

3. Intervenor's secretarial seniority began August 25, 1975, and the Accountant classification was added to her position August 24, 2000.

4. On October 30, 2000, Respondent circulated a memorandum to all regularly employed secretaries and secretary accountants informing them that all regularly employed secretaries who agreed to do so would be reclassified as Accountant/Secretaries effective August 24, 2000. Level four Grievant's Exhibit No. 1. This memorandum stated in part, "Once the reclassification is completed, all such jobs will be posted as secretary/accountant positions. Seniority will be determined by considering **overall** seniority of the applicants for each position." [Emphasis in original.]

5. Attached to the memorandum was a "Reclassification Agreement" on which secretaries were to pick one of three preferences, 1) to be reclassified; 2) not to be reclassified but indicating their understanding of the process; and 3) stating, "I am alreadyclassified as a secretary/accountant and understand the provisions of the agreement stipulated in the above referenced memorandum."

6. Although Grievant was already classified as a Secretary Accountant, she did not make a choice or sign the form, as she did not agree with the provision concerning seniority determination. She did not file a grievance over the seniority determination method.

7. Respondent posted position S12 in December 2002 for a Secretary/Accountant in the central office. Both Grievant and Intervenor applied and were qualified. Intervenor was awarded the position because her overall seniority was greater than Grievant's. (See footnote 2)

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156

W. Va. C. S. R. 1 § 4.21. Grievant argues that because she has held the multiclassification title of Secretary/Accountant longer than Intervenor, she should have been awarded the position notwithstanding that her overall seniority is less than Intervenor's. Both Respondent and Intervenor argue that employees do not accrue seniority in a multiclassification title, but accrue seniority separately in each classification title.

"'Multiclassification' means personnel employed to perform tasks that involve the combination of two or more class titles in [W. Va. Code § 18A-4-8(i)]." W. Va. Code § 18A- 4-8(i)(61). "School service personnel who hold multiclassification titles shall accrueseniority in each classification category of employment which the employee holds and shall be considered an employee of each classification category contained within his or her multiclassification title." W. Va. Code § 18A-4-8g(i).

Although seniority rights for school service personnel are fairly well defined in W. Va. Code § 18A-4-8b, which requires an employer to make decisions affecting the filling of service personnel positions "on the basis of seniority, qualifications and evaluation of past service," there appears to be a serious lacuna in the Code with regard to the seniority rights of multiclassified personnel. The West Virginia Supreme Court of Appeals has attempted to clarify these rights by holding, "[m]ulticlassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001). However, that holding does little to address the situation at issue, how do you compare the seniority of two employees holding the same multiclassification titles?

Here, Grievant has been a secretary for less time than Intervenor has, but has been an Accountant longer. Grievant cites Edmonds v. Kanawha County Board of Education, Docket No. 99-20-023 (Mar. 31, 1999), in which it was held, "Grievant, who held the multi- classification title of bus operator/clerk, was entitled to the position in question because she had greater seniority as a bus operator/clerk than the successful applicant." While that case does certainly support Grievant's position here, the logic behind it was expresslyrejected by Taylor-Hurley. In Edmonds, the

Administrative Law Judge relied on an even earlier Grievance Board decision finding that, "since multi-classification is listed as a separate class title in W. Va. Code § 18A-4-8, it should not be viewed fractionally." Wilson v. Marion County Board of Education, Docket No. 93-44-084 (July 27, 1993). Although Taylor-Hurley dealt with a reduction in force situation rather than a hiring situation, it implicitly states that multiclassification is not a separate title, and each category within the multiclassification should be viewed separately.

"Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard . . . ." Wellman v. Mercer County Bd. of Educ. Docket No. 95-27-327 (Nov. 30, 1995). 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." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). "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." Trimboli, *supra*; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

If the posting in question had been for an accountant only, there is no question that Grievant would have been awarded the position over Intervenor, notwithstanding Intervenor's much greater overall seniority. This supports Grievant's argument that it is seniority related to the position in question which should matter. Respondent's method of seniority determination, which it has used since 2000 when all the secretaries had theaccountant classification added to their titles, is to compare similarly-multiclassified employees based on overall seniority. Since "overall seniority" is not expressly defined in the October 30, 2000 memorandum outlining this policy, a Secretary/Accountant whose seniority started as a cook or custodian could "outrank" another Secretary/Accountant who was multiclassified on the same day but who started employment with Respondent later. While this seems less logical than Grievant's suggested method, it is not so illogical or implausible as to be arbitrary and capricious. In fact, it is consistent with a provision in the statutes for comparing seniority of applicants who are applying for a job outside their present classifications, in W. Va. Code §18A-4-8g(h), which provides as follows:

> Seniority acquired as a substitute and as a regular employee shall be calculated separately and shall not be combined for any purpose. Seniority acquired within

> different classification categories shall be calculated separately: Provided, That when a school service employee makes application for a position outside of the classification category currently held, if the vacancy is not filled by an applicant within the classification category of the vacancy, the applicant *shall combine all regular employment seniority acquired for the purposes of bidding on* the position.

[Emphasis added.] Respondent's method, while perhaps less than ideal, is consistent with the statutory intent of recognizing length of service and rewards the employee with the greatest length of service to the employer, so it is not entirely unreasonable.

The following conclusions of law support this discussion.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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. "'Multiclassification' means personnel employed to perform tasks that involve the combination of two or more class titles in [W. Va. Code § 18A-4-8(i)]." W. Va. Code § 18A-4-8(i)(61) "School service personnel who hold multiclassification titles shall accrue seniority in each classification category of employment which the employee holds and shall be considered an employee of each classification category contained within his or her multiclassification title." W. Va. Code § 18A-4-8g(i).

3. An employer must make decisions affecting the filling of service personnel positions "on the basis of seniority, qualifications and evaluation of past service." W. Va. Code § 18A -4-8b.

4. "Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employee of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." Taylor- Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d

702 (2001).

5. A lacuna exists in the personnel statutes with regard to comparing the relative seniority of one or more similarly-multiclassified employees.

6. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard . . . ." Wellman v. Mercer County Bd. of Educ. Docket No. 95-27-327 (Nov. 30, 1995). 7. 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).

8. 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." Eads, *supra* (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

9. "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 (1982)." Trimboli, *supra*; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

10. Respondent's method of using overall seniority to make hiring decisions regarding multiclassified personnel is not arbitrary or capricious.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 tosuch 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.

Date: June 26, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Intervenor elected not to appear at the level four hearing, but reserved the right to file proposed findings of fact and conclusions of law. Intervenor was represented by Becky Ballard ofthe Putnam County School Service Personnel Association.

Footnote: 2

Grievant would have been the successful candidate had her overall seniority been greater than Intervenor's.