KATHRYN WILLIAMSON,

Grievant,

v. **Docket No. 04-03-355**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Kathryn Williamson ("Grievant") initiated this proceeding on August 26, 2004, claiming she should have been selected for a special education teaching position at Scott High School. The grievance was denied at level one on August 30, 2004. A level two hearing was held on September 8, 2004, and the grievance was denied in a decision dated September 23, 2004. Level three consideration was waived, and Grievant appealed to level four on September 27, 2004. In lieu of a level four hearing, the parties elected to submit this matter for a decision based upon the lower level record. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 29, 2004. (See footnote 1)

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 for approximately 31 years. She is currently a special education teacher at Scott High School. 2. In early August of 2004, Respondent posted a vacancy for an itinerant LD/MI teacher at Scott High School. Under "qualifications," the posting contained the following language:

> Must hold a valid West Virginia Teaching Certificate in the area for which you are applying. (Preference will be given to those who are fully certified in the area which you are applying). ALSO, TRAINED IN WILSON READING PROGRAM

(Emphasis in original.)

3. Grievant is certified in LD/MI, but she has not been trained in the Wilson Reading Program.

4. The LD/MI position at Scott High School was for a teacher who would spend all of his/her time teaching special education students in the Wilson Reading Program ("Wilson"). This program is specifically designed to teach reading skills to learning disabled students by a specific method, and teachers using the method are trained by the company which developed the program. By 2004, Respondent had sent approximately seven teachers to the Wilson training program, at Board expense. (See footnote 2) The Wilson Reading Program had been implemented in Boone County in 2001. The hiring of a Wilson teacher at Scott High School was meant to continue the teaching of middle school special education students who had previously used the program, along with introducing new special education students to the program. 5. Lisa Carden was the only applicant for the position who was certified in LD/MI and had also completed the Wilson training, so she was hired for the position on August 10, 2004. (See footnote 3)

6. Grievant applied for the position at issue, but she was not considered to be minimally qualified, because she had not been trained in the Wilson Reading Program.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant contends that Respondent erred by not assessing her qualifications pursuant to the criteria set forth in W. Va. Code § 18A-4-7a(d). Grievant is correct that the statute mandates that, when one or more "permanently employed instructional personnel apply for a classroom teaching position," the so-called "second set of factors" must be used to assess the applicants' qualifications. However, Respondent contends that it was not required to assess Grievant's qualifications, because she was not minimally qualified for the position, due to her lack of Wilson training. In support of its position, Respondent points to additional language contained in W. Va. Code § 18A-4-7a(d), which states that the seven criteria are to be utilized if one or more teachers apply "and meet the standards

set forth in the job posting[.]" Pursuant to Respondent's reasoning, Wilson training was anabsolute requirement to be minimally qualified for this position, and Grievant did not possess it. Accordingly, the statutory criteria did not come into play.

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with this principle, a county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. See Cowen v. Harrison County Bd. of Educ., 196 W. Va. 377, 465 S.E.2d 648 (1995); Mounts v. Mingo County Bd. of Educ., Docket No. 96-29-479 (June 27, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29- 357 (Jan. 31, 1996).

"A board of education's right to set standards is crucial, especially when it desires to hire the most qualified person for a specific position[,] and the potential field of applicants may include the most minimally certified or qualified persons." Gilkey v. Brooke County Bd. of Educ., Docket No. 91-05-489 (June 25, 1992). See Argabright v. Wyoming County Bd. of Educ., Docket No. 93-55-03 (Apr. 6, 1993). Additionally, "[a] board of education may identify required certification for a position, as long as this decision is not arbitrary and capricious or an abuse of discretion." Crawford v. Boone County Bd. of Educ., Docket No. 94-03-1131 (June 30, 1995); Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-128 (June 10, 1999). See Dillon, supra. Thus, unless Grievant candemonstrate that Respondent's decision to require Wilson training was arbitrary and capricious, this grievance must fail.

"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)).

The arbitrary and capricious standard of review of a county board's decision 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). An administrative law judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). The specific purpose behind creation of this position was to have a special education teacher to teach the Wilson reading method to those students. Accordingly, it was not an arbitrary and capricious decision for Respondent to include that training as a prerequisite to qualification for the position. Moreover, it has been held by this Grievance Board that, if an applicant does not have training specifically required for the position and contained in the job posting, he/she does not meet the “standards set forth in the job posting,” as set forth in W. Va. Code § 18A-4-7a, and the board of education is not obligated to consider the applicant's qualifications under the criteria set forth in the statute. Trabucco v. Kanawha County Bd. of Educ., Docket No. 93-20-279 (Oct. 7, 1993). Wilson training was a logical and necessary qualification for consideration for this position, and since Grievant did not possess it, she was not entitled to consideration.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. A county board of education has substantial discretion when establishing the qualifications

for a position at the time of posting. See Cowen v. Harrison County Bd. of Educ., 196 W. Va. 377, 465 S.E.2d 648 (1995); Mounts v. Mingo County Bd. of Educ., Docket No. 96-29-479 (June 27, 1997); Bailey v. Mingo County Bd. of Educ., Docket No.95-29-346 (Feb. 21, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29- 357 (Jan. 31, 1996).

3. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. The arbitrary and capricious standard of review of a county board's decision 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 (W. Va. 1982).

5. If an applicant does not have training specifically required for the position and contained in the job posting, he/she does not meet the “standards set forth in the job posting,” as set forth in W. Va. Code § 18A-4-7a, and the board of education is not obligated to consider the applicant's qualifications under the criteria set forth in the statute. Trabucco v. Kanawha County Bd. of Educ., Docket No. 93-20-279 (Oct. 7, 1993).

6. Respondent did not abuse its broad discretion, nor was it arbitrary and capricious, to require Wilson Reading Program training as a prerequisite to qualification for the LD/MI position at Scott High School.

7. Grievant did not have training in the Wilson Reading Program, so she was not minimally qualified for the position at issue.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Boone 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.

Date: November 19, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Gary E. Archer of WVEA, and Respondent was represented by counsel, Timothy R. Conaway.

Footnote: 2

As funding becomes available, it is Respondent's goal to train all special education teachers in the Wilson Reading Program.

Footnote: 3

At the time she applied for this position, Ms. Carden was employed by Respondent as an LD/MI teacher at another school.