ANNABETH RIFFLE,

Grievant,

v. Docket No. 04-51-122

WEBSTER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Annabeth Riffle ("Grievant"), employed by the Webster County Board of Education ("WCBE") as an Aide, filed a level one grievance on October 17, 2003, in which she alleged violations of W. Va. Code §§ 18A-4-8b and 18A-4-8g, when she was not selected for a position of Aide/Autism Mentor. For relief, Grievant requests instatement to the position, with back pay and benefits. (See footnote 1) **The grievance was denied at levels one and two. Grievant elected to bypass level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced her appeal to level four on March 26, 2004. A hearing to supplement the record was conducted in the Grievance Board's Elkins office on June 9, 2004. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and WCBE was represented by Howard E. Seufer, Jr., Esq., of Bowles, Rice, McDavid Graff & Love. The grievance became mature upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before July 1, 2004.**

The following facts essential to this grievance are undisputed, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been employed by WCBE as an Aide since October 19, 1992, and was assigned to Glade Elementary School at the time this grievance arose.

2. WCBE posted a notice of vacancy in the position of itinerant Aide/Autism Mentor at Webster Springs Elementary School for the period September 24, 2003, through September 30, 2003.

3. Grievant and the successful applicant, Ray "Doc" Holliday, were two of the six applicants for the position. Both were qualified for the position. Grievant has no regular

seniority, but has summer experience, in the Autism Mentor classification.

4. Mr. Holliday's Aide seniority date was August 27, 1998, and his Autism Mentor seniority date was September 10, 1998. He has been employed by WCBE as an Aide/Autism Mentor continuously since that time.

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. "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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met his burden. Id.

Grievant argues that applying the W. Va. Code § 18A-4-8b(a) criteria, both she and the successful applicant had good evaluations, and both appear to have been qualified toserve as Autism Mentor, therefore, she was entitled to the position based upon her greater seniority. WCBE asserts that even though W. Va. Code § 18A-4-8b(d) provides that the Autism Mentor class title shall be included in the same classification category as Aides, an individual employed as an Aide is not considered to be multi-classified as an Aide/Autism Mentor until he or she is actually employed as an Autism Mentor. Because the successful applicant held the multi-classification title of Aide/Autism Mentor, and Grievant did not, WCBE concluded that Mr. Holliday was entitled to the position.

The following statutory provisions are relevant to this grievance.

W. Va. Code § 18A-4-8b(a)- “A county board shall make decisions affecting promotions and the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service.”

W. Va. Code § 18A-4-8(i)(61)- "'Multiclassification' means personnel employed to perform tasks that involve the combination of two or more class titles in W. Va. Code § 18A-4-8(l).”

W. Va. Code § 18A-4-8g(l)- "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-4-8b(d)- "Paraprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides."

While helpful, these statutes lack any direction with regard to the seniority rights of multiclassified personnel. The West Virginia Supreme Court of Appeals has attempted toclarify 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." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003), citing 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 issue of whether seniority as an Aide or as an Aide/Autism Mentor should be applied when determining which applicant is entitled to the multi-classified position.

"Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard . . . ." Cornell, supra; 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 Res., 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). The controlling factor in this case is that while Aide/Autism Mentor is a multi- classified job title, and an Autism Mentor is an Aide, an Aide is not necessarily an Autism Mentor. The successful applicant had earned

more than five years of seniority as an Autism Mentor, while Grievant had no regular seniority in that classification. WCBE's determination that Mr. Holliday's experience as an Autism Mentor entitled him to the position was not arbitrary and capricious.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. 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.

2. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard . . . ." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003); Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995).

3. 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 forthe Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997).

4. 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)).

5. WCBE's use of Autism Mentor seniority rather than Aide seniority to make a hiring decision for the position of Aide/Autism Mentor is not arbitrary or capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Webster 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 GrievanceBoard. 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: JULY 30, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Sometime prior to the level four grievance, Grievant was transferred to an Aide/Autism Mentor position; however, she believes the assignment at WSES is more desirable, and seeks instatement to that position.