THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TRINA CARR,

Grievant,

v. **Docket No. 06-47-376**

Sue Keller

Senior Administrative Law Judge

TUCKER COUNTY BOARD OF EDUCATION,

Respondent,

and

CAROLE PENNINGTON,

Intervenor.

D E C I S I O N

Trina Carr ("Grievant"), employed by the Tucker County Board of Education ("TCBE") as an Aide, filed a level one grievance on September 8, 2006, in which she alleged violations of *W. Va. Code* §§ 18-29-2(o), 18A-4-8b, and 18A-4-8g, when she was not selected for the position of Autism Mentor. For relief, Grievant seeks instatement with back pay with interest, benefits and seniority. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied at level two, and TCBE waived consideration at level three. A level four appeal was filed on October 25, 2006, and an evidentiary hearing to supplement the lower-level record was conducted on March 22, 2007. Grievant was represented by Bob Brown, Executive Secretary of the West Virginia School Service Personnel Association, TCBE was represented by Harry M. Rubenstein, Esq., of Dinsmore & Shohl, LLP, while Intervenor appeared *pro se.* the grievance became mature for decision upon receipt of TCBE's reply to Grievant's proposed findings of fact and conclusions of law on April 23, 2007.

Synopsis

Grievant argues that because neither she nor Intervenor had the required experience working with an autistic student, as the senior applicant, she was entitled to the position. TCBE asserts that Intervenor has the required experience, and was therefore properly awarded the position. Grievant's claim that because the student's IEP did not indicate autism, Intervenor could not be granted the required experience is not supported by any authority, and TCBE's determination that Intervenor was qualified for the position of Autism Mentor was not arbitrary and capricious.

Findings of Fact

1. Grievant has been employed by TCBE for approximately six years, and is presently assigned as an Aide in a Special Education classroom at the Davis-Thomas Elementary School.

2. In July 2006, Grievant and Intervenor were the only two applicants for a position of Autism Mentor at Tucker Valley Elementary/Middle School. The qualifications for the position established by State Department of Education Policy 5314.01 are:

a. Meet the qualifications of Aide III.

b. Successful completion of a staff development program related to autism.

c. Two years of successful experience working with autistic students.

d. Physical ability and stamina necessary to complete all job tasks.

3. At the time of the posting, Grievant was employed as an Aide/Paraprofessional, and was on the “transferred/unassigned” list as a result of lack of need. Intervenor had been employed for two years as an Aide, but had been granted a transfer after the 2005-2006 school year to the position of Custodian, also due to a lack of need. 4. Both applicants met the requirement of Aide III, and had the physical ability and stamina necessary to complete the duties of the position.

5. Intervenor completed the staff development program relating to autism on August 8, 2007, and Grievant completed the training on August 18, 2007.

6. For two years, Intervenor worked with a student who was diagnosed as autistic by Dr. Susan Schmitt in a letter to TCBE dated March 13, 2003. Grievant had no experience working with autistic students.

7. After conferring with WVSSPA counsel regarding which applicant should receive the position, Superintendent Richard Hicks recommended, and TCBE approved, placing Intervenor as Autism Mentor at a meeting held on August 7, 2006. Grievant was in attendance, and knew she had

not received the position on that date.

8. Grievant did not file a level one grievance until September 8, 2006.

9. TCBE did not raise the issue of timliness at or before the level two hearing.

Discussion

Initially, TCBE raises the issue of whether the grievance was timely filed. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. *Casey v. Mason County Bd. of Educ*., Docket No. 01-26- 394 (Sept. 25, 2001); *Hawranick v. W. Va. Dep't of Health & Human Res*., Docket No. 98- HHR-010 (July 7, 1998); *Harvey v. Bureau of Employment Programs*, Docket No. 96-BEP- 484 (Mar. 6, 1998); *Morrison v. W. Va. Bureau of Commerce*, Docket No. 97-DOL-490 (Jan. 15, 1998); *Miller v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-501 (Sept. 30, 1997). Should the employer demonstrate that a grievance has not been timely filed, theemployee may demonstrate a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety,* Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd,* Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv*., Docket No. 90-DHS-524 (May 14, 1991). An untimely filing, if proven, will defeat agrievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997).

W. Va. Code § 18-29-4(a) provides that

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

By her own admission, Grievant knew that she had not been awarded the job on August 7, 2006. She further testified at level four that she filed the grievance after other employees urged her to

challenge the decision. Under these circumstances, the grievance was not filed in compliance with the statutory time lines. However, *W. Va. Code §* 29-6A-3 states in pertinent part,

Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer **at or before the level two hearing.**

(Emphasis added). TCBE was not represented at the level two hearing, and the issue of whether the grievance was timely filed was first raised in the level two decision. Therefore, the claim of untimeliness is denied.

Addressing the merits of the grievance, it is noted that this grievance does not involve a disciplinary matter, therefore 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 (2004); *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).

Grievant argues that Intervenor did not have two years experience working with a student whose Individualized Education Program ("IEP") included a diagnosis of autism, and that in the absence of either applicant having the required experience, the position must be awarded to the most senior applicant. TCBE asserts that Intervenor had the requisite years of experience, and was properly qualified for the position, while Grievant was not.

"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). Generally, an action is consideredarbitrary 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).

Policy 5314 does not require the experience be gained by working with students with an IEP designation as autistic. Further, Grievant's argument that TCBE cannot award the experience credit to an employee for providing services without the IEP designation is not supported by the evidence. Because Intervenor worked with an autistic student, providing appropriate services for his disability, TCBE's determination that she had the relevant experience as an Autism Mentor was not arbitrary and capricious.

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

Conclusions of Law

___1. An assertion by the employer that the filing of the grievance at level one was untimely must be made at or before the level two hearing **.** *W. Va. Code §* 29-6A-3.

2. TCBE failed to raise the issue of timliness at or before the level two hearing.

3. This grievance does not involve a disciplinary matter, therefore Grievant has the burden of proving her claims by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); *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.

4. "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).

5. 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).

6. Grievant has failed to prove that TCBE's determination that Intervenor had earned the experience required by Policy 5314 was arbitrary and capricious.

Accordingly, the grievance is **DENIED.**

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of KanawhaCounty within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: MAY 7, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE