THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHERRY EAVES,
Grievant,

v. **DOCKET NO. 2009-0372-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent, and

DAVID MARTY THACKER,
Intervenor.

DECISION

Grievant, Sherry Eaves, filed a grievance against her employer, the Wayne County Board of Education, on September 18, 2008. The statement of grievance reads:

> Respondent employed a less senior aide to fill an autism mentor vacancy. Neither Grievant nor the successful applicant had the required two years of experience necessary for certification. (Both have the training and acceptable evaluations.) Grievant contends that on [t]he basis of her superior seniority, she should have been placed in the position. Grievant alleges a violation of West Virginia Code §§ 18A-4-8b & 18A-4-8g and W. Va. BOE Policy No. 5314.01.

As relief Grievant sought, "instatement into the autism mentor/aide position at Wayne Middle School with compensation for all lost wages and benefits with interest."

A hearing was held at level one on December 5, 2008,[1] and a level one decision denying the grievance was issued on January 5, 2009. Grievant appealed to level two on January 8, 2009, and a mediation session was held on March 6, 2009. Grievant appealed to level three on March 16, 2009. Two days of hearing were held at level three before Administrative Law Judge Mark A. Barney, on June 10 and November 8, 2009, at the Grievance Board's Charleston office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, Respondent was represented by David Lycan, Esquire, and Intervenor was represented by Jeremy Radabaugh, West Virginia Education Association. This matter became mature for decision on December 7, 2009, on receipt of the last of the parties' proposed findings of fact and conclusions of law. This mater was then reassigned to the undersigned Administrative Law Judge for administrative reasons on January 6, 2010.

Synopsis

Intervenor was placed in a posted Autism Mentor/Itinerant Aide position rather than Grievant, because Respondent's records showed that he had acquired the required two years of experience working with autistic students to be fully qualified as an Autism Mentor, while Grievant had not. Grievant had more seniority than Intervenor, and both were

[1] The record did not contain a transcript of the level one hearing, and when asked to provide the record, Respondent's counsel informed the Grievance Board staff that the recording was of such poor quality that a transcript could not be provided. The undersigned held a telephone conference with the parties on April 13, 2010, at which time counsel for Grievant and Respondent stated that they were satisfied with the record developed at the level three hearing, and no further evidence needed to be taken. Neither Intervenor nor his representative was able to participate in the telephone conference, but upon being informed of the outcome of the telephone conference, Intervenor's representative likewise did not see a need to supplement the record.

substitute employees. Intervenor was credited with one day of experience for each day he worked with an autistic student during the Spring semester of 2007, even though he only worked with this student for 45 minutes to one hour per day, because these were intense one on one sessions. Respondent's decision to equate one hour of instruction to one full day of experience was without foundation. Without these days of experience credit, Intervenor was not fully qualified as an Autism Mentor, and Grievant should have been placed in the position based on her seniority.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Wayne County Board of Education ("WBOE") as a substitute Aide. Her substitute seniority date is January 4, 2006.

2. On August 11, 2008, WBOE posted an Autism Mentor/Itinerant Aide position at Wayne Middle School. The qualifications for the positions were:

a. meet the qualifications of an Aide III;

b. successful completion of a staff development program related to autism;

c. two years of successful experience working with autistic students; and,

d. physical ability and stamina necessary to complete all job tasks.[2]

3. Grievant applied for the position, as did Intervenor, David Marty Thacker. Intervenor was placed in the position.

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[2] These are the minimum mandatory standards established for this position by the State Department of Education and are found at 126 C.S.R. 146A § 3.

4. Prior to being placed in the posted Autism Mentor position, Intervenor had been a substitute Aide. His substitute seniority date is December 20, 2006.

5. Both Grievant and Intervenor had completed the training required to perform the duties of an Autism Mentor, and both met the requirements for an Aide III.

6. WBOE's records reflect that as of August 6, 2008, Intervenor had acquired two years of experience working with autistic students. Grievant had not acquired two years of experience working with autistic students.

7. WBOE does not have a policy in place which states how much time an employee must work with an autistic student to acquire one day of experience. WBOE's current practice, which was applied both to Grievant and Intervenor, is to count a half day of work with an autistic student as one full day of experience. It is WBOE's practice to give the principal of each school the discretion to credit an employee with a full day of experience when the employee works with an autistic student for less than a half day.

8. WBOE does not have a policy in place which states how many days an employee must work with an autistic student in order to acquire one year of experience. WBOE's practice has been to count 133 days of working with an autistic student as one year of experience.

9. The Principal of Wayne Middle School gave Intervenor a full day of experience credit for the 45 minutes to one hour per day he spent working one on one with an autistic student, from February 22, 2007, through June 5, 2007. During this time he tutored this student, helping him with his math and science homework and any other subject with which he was having trouble. If this one hour of experience were not counted

as one day of experience, Intervenor would not have acquired two years of experience working with autistic students by August of 2008.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 questions whether Intervenor had acquired two years of experience working with autistic students, challenging the decision to credit Intervenor with a full day of experience for the approximately one hour a day he spent working with an autistic student in the spring of 2007. Grievant also questions WBOE's determination that employees who work with an autistic student for 133 days should receive one year of experience credit. Had Intervenor not had two years of experience working with autistic students, Grievant would have been entitled to placement in the posted Autism Mentor position due to her seniority. W. VA. CODE § 18A-4-8b.

Respondent argued that it is within Respondent's discretion to determine whether an individual's work with autistic students has been such that he or she has acquired the

requisite two years of experience. Wayne Middle School Principal Loren Perry testified that he made the decision to give Intervenor credit for a days' experience based upon the depth of instruction provided in the 45 minute to one hour one on one sessions with the autistic student during the Spring semester of 2007. Special Education Director Kimberly Adkins opined that when determining how much experience an individual should be awarded for work with an autistic student, quality, or the intensity of the session with the student, was more important than the amount of time spent with the student, and she had no problem with a principal giving one days' experience credit for one hour of time spent in a one on one session with an autistic student.

"'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)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). "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 Res.*, 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)).

While the undersigned must certainly defer to Ms. Adkins' expertise, her opinion, as well as that of Principal Perry, that one hour of intensive one on one instruction can equal one day of experience is without any basis. The State Department of Education could have written in the experience requirement as a certain number of hours, rather than two years, but did not do so. A school day consists of seven hours, and it goes beyond the realm of rationality to credit someone with a full day toward the required two years of experience, when that person has only worked with an autistic student one seventh of a day, regardless of how intense the instruction is. The undersigned concludes that the decision to give Intervenor credit for one day of instruction for each day he worked one hour with an autistic student, was arbitrary and capricious. If Intervenor's hours were recalculated, he would not have the required two years of experience, even under Respondent's method of counting 3 ½ hours as one day, and 133 days as a year.[3]

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan*

[3] Whether Respondent may count 133 days of experience as one year need not be addressed.

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). "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).

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)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007).

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 for the 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). 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)).

4. Respondent's decision to credit Intervenor with one day of experience for each day he worked with an autistic student during the Spring semester of 2007, when he worked with an autistic student for only 45 minutes to one hour a day, was without foundation, and therefore arbitrary and capricious.

5. W. VA. CODE § 18A-4-8b provides that the selection of an employee to fill a posted position is to be made based upon seniority, qualifications and evaluation of past service.

6. As neither Grievant nor Intervenor was fully qualified as an Autism Mentor, Grievant should have been placed in the posted Autism Mentor/Itinerant Aide position based on her seniority.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to place Grievant in the Autism Mentor/Itinerant Aide position at issue, if it still exists, and to pay her backpay in the amount of the difference between the amount she would have earned had she been placed in the position in August 2008, and the amount she earned as a substitute during the time Intervenor has served in this position, plus interest; and any benefits she would have earned had she been placed in the position, to the extent possible; and to adjust her regular seniority as though she had served in the position from the first day Intervenor filled the position in August 2008. Grievant is not to be credited with experience working with an autistic student.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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. 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 16, 2010