

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JENNIFER ELAINE BOWYER,
Grievant,

V.

Docket No. 2012-1352-FayED

**FAYETTE COUNTY BOARD
OF EDUCATION,**
Respondent.

DECISION

Grievant, Jennifer Bowyer, is employed by the Respondent Fayette County Board of Education ("Board"). She filed a level one grievance form dated May 26, 2012, which alleged the following:

I applied for 2 summer positions as Itin. Sp. Ed. Supv. Aide/Autism Mentor¹ at New River Elementary. The positions were awarded to Vanessa Palmer and Anthony Ramsey. I allege a violation of 18-5-39 WV Code 18A-4-8b.

As relief, Grievant seeks instatement into one of the summer positions plus back pay, benefits, and seniority for summer employment. A level one hearing was held on July 13, 2012, and a decision denying the grievance was entered on August 2, 2012.

Grievant Bowyer filed a level two grievance form dated August 10, 2012. On that form, the statement of grievance alleges:

Grievant asserts she should have received one of the two Aide/Autism Mentor positions posted at New River Elementary School for the summer of 2012. Grievant asserts a violation of W. VA. Code 18A-48b & 18-5-39.

At level two, Grievant seeks the following relief:

. . . Instatement into one of the positions if the positions exist in future summers, compensation for all lost wages and benefits (pecuniary and non-pecuniary) for the summer of 2012 and future summers, and summer seniority/priority for

¹ Itinerate Special Education Supervisory Aide/Autism Mentor.

return to those positions in future summers. Grievant seeks interest on all sums of money to which she is entitled.

A level two mediation was conducted on December 17, 2012, and Grievant perfected her appeal to level three on December 20, 2012.

A level three hearing was conducted in Beckley, West Virginia on March 19, 2013. Grievant appeared in person and was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by Rebecca M. Tinder Esq., Bowles Rice LLP. The parties submitted Proposed Findings of Facts and Conclusions of Law, the last of which was received at the Grievance Board on April 22, 2013. This matter became mature for decision on that date.

Synopsis

Grievant was the unsuccessful applicant for two positions as summer Aide/Autism Mentor. She argued that she had more seniority than the successful applicants as an Autism Mentor, and that one of the applicants was not certified to be an Autism Mentor at the time she was selected for the position. The Board decided that seniority as a Supervisory Aide was the primary factor for selecting these positions and that decision was not arbitrary or capricious. Further, the successful applicant was certified as an Autism Mentor at the time she began work in the summer position.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Bowyer was first employed by the Respondent in 2004 as a substitute Cook. Subsequently, she took a position as a half-time Cook and then moved into a position as a full-time Cook.

2. In 2008, Grievant became a Kindergarten Aide and later became a Special Education Aide. Grievant's seniority date as an Aide is October 7, 2008. Her seniority date as an Autism Mentor is August 15, 2011.²

3. Before she could be certified as an Autism Mentor, Grievant had to take several hours of staff development and work two years with autistic students.

4. Grievant has not been previously hired to fill a summer aide position.

5. The Board posted four Itinerant Special Education Supervisory Aide/Autism Mentor ("Aide/Autism Mentor") positions at New River Elementary, for the 2012 Special Education extended summer year ("ESY") program, on March 22, 2012.³ These were summer school service personnel positions which ran from June 25, 2012, through July 27, 2012.⁴

6. Among the applicants for the ESY Aide/Autism Mentor positions were Grievant Bowyer, Anthony Ramsey and Vanessa Palmer.

7. Grievant was not selected for any of these ESY Aide/Autism Mentor positions.

8. Anthony Ramsey and Vanessa Palmer were selected by the Board to fill the two ESY Aide/Autism Mentor positions at New River Elementary School at the Board's meeting on May 7, 2012.⁵

9. Anthony Ramsey is employed as a regular, full-time Aide with an Aide seniority date of September 16, 2008, and Autism Mentor seniority date of September 26, 2011. Grievant's Exhibit 3 & 4.

² Grievant's Exhibits 3 & 4, school service personnel seniority lists.

³ Grievant's Exhibit 1, summer vacancy job postings.

⁴ Grievant's Exhibit 2, the agenda of the May 7, 2012, Board meeting.

⁵ Grievant's Exhibit 2.

10. Vanessa Palmer is employed as a regular full-time Aide with an Aide seniority date of February 26, 2007, and Autism Mentor seniority date of May 18, 2012. Grievant's Exhibit 3 & 4.

11. Of these three applicants, Grievant had the least seniority as an Aide and the most seniority as an Autism Mentor, Anthony Ramsey ranked second as an Aide and an Autism Mentor, and Vanessa Palmer had the most seniority as an Aide but the least seniority as a Autism Mentor.

12. Vanessa Palmer previously held an ESY Aide/Autism Mentor position in the summers of 2010 and 2011. Neither Grievant, nor Mr. Ramsey, had held a regular ESY Aide/Autism Mentor position in any previous summer.

13. Only ten of the sixty to seventy students participating in the ESY program at New River Elementary School were identified as autistic.

14. The duties for the employees holding the ESY Aide/Autism Mentor positions include: bus duty, breakfast duty, lunch duty, supervising playground at recess and breaks, escorting and assisting children with mobility issues, and working with children with autism.

15. The Board anticipated that the majority of the responsibility of the persons in these positions would be supervisory Aide duties and determined that experience as an Aide was the most important consideration in filling the EYS Aide/Autism Mentor positions at New River Elementary School. Consequently, they selected Mr. Ramsey and Ms. Palmer because they both held more seniority as an Aide than Grievant.⁶

⁶ The information provided in Findings of Fact 14,15, and 16, was provided in the level three testimony of Linda Palenchar, Fayette County Schools Director of Special Education.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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 makes two arguments. First, that she should have been selected over the two successful applicants because she has more seniority as an Autism Mentor. Second, that Ms. Palmer was not certified as an Autism Mentor when the Board voted to fill the positions on May 7, 2012. The date of Ms. Palmer's certification as an Autism Mentor is May 18, 2012.

"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)." *Cornell v. Putnam County Bd. of Educ.*, Docket No.

03–40–111(June 26, 2003). This holding still left unanswered the question of how to compare the seniority of two employees holding the same multiclassification.

The Grievance Board has consistently resolved that issue by noting that "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). Accordingly, multiclassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question as long as the county board's selection of the relevant classification was not arbitrary and capricious. See *Cornell, supra*; *Riffle v. Webster County Bd. of Educ.*, Docket No. 04-51-122 (July 30, 2004); and *Miller v. Preston County Bd. of Educ.*, Docket No. 2011-0107-PreED (Aug. 9, 2011). 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 is 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).

In this case, the Board anticipated that the majority of the responsibility of the persons in these positions would be supervisory Aide duties and determined that experience as an Aide was the most important consideration in filling the ESY Aide/Autism Mentor positions at New River Elementary School. That determination was made based upon the fact that only one sixth of the total students enrolled in the program were autistic and the duties to be performed by the successful applicants were

more closely related to the Supervisory Aide classification and not the Autistic Mentor classification. This determination was reasonable and not arbitrary and capricious. Since Grievant held the least seniority in the Aide classification, her non-selection was appropriate.

With regard to the certification date, the fact pattern in this case is very similar to the one in *Keatley v. Mercer County Board of Education*, 200 W. Va. 487; 490 S.E.2d 306 (1997). In *Keatley, supra*, the successful applicant for a high school principal position was not certified to be a principal at the time of his selection. However, he obtained that certification before his duties in the position began. The West Virginia Supreme Court of Appeals held that as long as he was properly certified to hold the position when his duties began it was not improper for the board to hire him before that certification became effective.

In this case, Grievant was hired for the ESY position on May 7, 2012. Her Autism Mentor certification became effective on May 18, 2012, but her duties for the DYS position did not start until June 25, 2012. As in *Keatley, supra*, Ms. Palmer was certified to hold the Autism Mentor position prior to assuming the duties of that position. Consequently, she was qualified for the position and her selection over Grievant was not arbitrary or capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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. Multiclassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question as long as the county board's selection of the relevant classification was not arbitrary and capricious. See *Cornell, supra*; *Riffle v. Webster County Bd. of Educ.*, Docket No. 04-51-122 (July 30, 2004); and *Miller v. Preston County Bd. of Educ.*, Docket No. 2011-0107-PreED (Aug. 9, 2011).

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 is 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).

4. The Board's decision to make that seniority as an Aide the deciding factor in filling the ESY Aide/Autism Mentor positions was reasonable, and not arbitrary and capricious.

5. A county board of education may select a candidate for a position who does not hold the required certification as long as the applicant obtains the certification before the position starts. *Keatley v. Mercer County Board of Education*, 200 W. Va. 487; 490 S.E.2d 306 (1997).

Accordingly, the grievance is DENIED.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

DATE: AUGUST 22, 2013,

**WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE**