

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**JILL STRAHAN,
Grievant,**

v.

DOCKET NO. 2017-0148-MonED

**MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent, and,**

**CAROL LYNN PONCEROFF,
Intervenor.**

DECISION

Grievant, Jill Strahan, filed this grievance against her employer, the Monongalia County Board of Education, on or about July 11, 2016, contending she should have been selected for a posted position. The statement of grievance reads:

Ms. Strahan was wrongfully and unlawfully denied a position upon which she was the most qualified because: 1) another applicant, who was unqualified for the position, was allowed to take the certification test even though there were qualified candidates, and 2) the position was wrongfully measured on the secretary seniority list instead of the accountant seniority list, since the new position is primarily, if not entirely, dealing with accountant duties and responsibilities. Ms. Strahan asserts that this is in violation of W. Va. Code Sections 18A-4-8a and 18A-4-8b.

As relief Grievant seeks “to be made whole, including, but not limited to, reinstatement in the position, backpay with interests [sic], benefits including, but not limited to, seniority, and all other such relief deemed necessary by the grievance evaluator.”

A conference was held at level one on August 19, 2016, and a level one decision denying the grievance was issued on August 29, 2016. Grievant appealed to level two on September 13, 2016, and a mediation session was held on January 27, 2017. Grievant

appealed to level three on February 14, 2017, and a level three hearing was held before the undersigned Administrative Law Judge, on May 19, 2017, at the Grievance Board's Westover office. Grievant was represented by Jeffrey G. Blaydes, Esquire, Carbone & Blaydes, P.L.L.C., and Respondent was represented by Jennifer S. Caradine, Esquire. This matter became mature for decision on June 19, 2017, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued she should have been selected for a posted Secretary III/Accountant II vacancy. No applicant held the multi-classification title in the posting. The successful applicant had the most seniority as a Secretary, and the most overall seniority, but she had not taken the competency test for Accountant, while Grievant had seniority both as a Secretary and a Secretary III/Accountant II. The statutory provisions do not address how Respondent is to evaluate seniority for a multiclassified position. Accordingly, it is evaluated under the arbitrary and capricious standard. Grievant did not demonstrate that it was arbitrary and capricious for Respondent to allow applicants to take the Accountant competency test, or to use overall seniority in making the selection.

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

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") since March 29, 2006, and she has been a Secretary III at North Elementary

School for several years. She was employed by MBOE for a few years prior to this, but experienced a break in service.

2. On May 13, 2016, MBOE posted a vacancy for a 261-day Secretary III/Accountant II at MTEC (Monongalia County Technical Education Center). The deadline for applications was May 20, 2016. The posting listed the Secretary duties of the successful applicant and the Accountant duties of the successful applicant, and did not indicate that either set of duties was predominant.

3. Grievant applied for the position, as did Intervenor Carol Ponceroff, and 12 other applicants.

4. None of the applicants held the multi-classification title of Secretary III/Accountant II at any time during the time from the date of the posting through the time the position was filled.

5. Grievant passed the competency test for the Accountant classification on March 29, 2006, and was employed by MBOE as a Secretary III/Accountant II at the County Board office from March 29, 2006, through June 30, 2007.

6. MBOE gave five of the applicants the opportunity to take the competency test for the Accountant classification on June 21, 2016, including Intervenor Ponceroff. It has been MBOE's practice for many years to allow the employee applicants who hold one of the class titles when a multi-classified position is posted, to take the competency test for the remaining class title(s), even if there are applicants who have already passed the competency tests for all the class titles in the posting. Intervenor Ponceroff passed the Accountant competency test.

7. Intervenor Ponceroff was a Secretary for MBOE at the time of the posting at issue, and her seniority date as a Secretary is December 2, 1996. She has never been classified as an Accountant, and had no seniority in that classification. The record does not reflect whether Intervenor Ponceroff had actually performed any accounting or bookkeeping duties in her job as a school Secretary, but many MBOE employees classified as Secretaries do perform some basic accounting or bookkeeping duties as part of their Secretary jobs.

8. Nancy Jamison was the applicant with the most seniority in either the Secretary or Accountant classification, and had passed the Accountant competency test. Ms. Jamison withdrew her application on June 6, 2016. Nancy Miller was also an applicant for the position at issue. She had also passed the Accountant competency test at the time of her application, and her seniority date in the Secretary classification is August 27, 2003, making her more senior than Grievant in that classification. The record does not reflect whether Ms. Miller had ever been classified as an Accountant.

9. Grievant's seniority date as a Secretary with MBOE is April 26, 2006.¹

10. Intervenor Ponceroff was selected for the position at issue based on the fact that she had the most seniority with MBOE in either of the classifications of the remaining applicants, as is MBOE's practice in situations such as this.

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

¹ The record does not reflect why Grievant's Secretary seniority date is not the same as her Accountant seniority date.

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 argued she should have been selected for the position at issue because she has more *experience* in performing accounting duties. Respondent pointed out that the statutory provisions governing the selection decisions for school service personnel require Respondent to base the selection on qualifications, seniority and evaluations, and that the definition of qualifications is the employee holds the class title, not that the employee has experience performing the job duties. Further, the record does not reflect whether Grievant does indeed have more experience performing accounting type duties than any of the other applicants, as no information was placed in the record regarding the actual duties performed by any of the other applicants. It was Grievant's burden, not Respondent's, to demonstrate that she should have been placed in the position at issue.

WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy.

If an applicant does not hold the classification title, and has never held the classification title, the applicant *will still be deemed qualified* if he or she passes the state competency test for the classification title. “Achieving a passing score [on the state competency test] *conclusively* demonstrates the qualification of an applicant for a classification title.” W. VA. CODE § 18A-4-8e(c)(3). (Emphasis added.) “Once an employee passes the competency test of a classification title, the applicant is *fully qualified* to fill vacancies in that classification category of employment.” W. VA. CODE § 18A-4-8e(c)(4). (Emphasis added.)

In this case, the vacancy at issue was a multiclassified position. “Multiclassification’ means a person employed to perform tasks that involve the combination of two or more class titles in this section [W. VA. CODE § 18A-4-8(i)].” W. VA. CODE § 18A-4-8(i)(62). A school service employee who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an employee of each classification category contained within his or her multiclassification title. W. VA. CODE § 18A-4-8g(l). In this case, none of the applicants held the multiclassification title in the posting at the time of the posting. Grievant had held the multiclassification title about 10 years ago, and other applicants who were in the Secretary classification had passed the Accountant competency testing, making them qualified for the position at issue, although the record does not reflect whether they had ever worked in the Accountant

classification title and accrued seniority in that title. The first issue, as it relates to the successful applicant, is whether it was lawful for Respondent to allow applicants to take the Accountant competency test when there were applicants who already met the qualifications for the posted position.

“The Grievance Board has determined that “only if no qualified individuals apply, i.e., no applicants hold the class titles in question or have successfully completed the competency test, is the board *obligated* to offer competency testing in order for other employees to be deemed qualified through successful completion of the examination.” *Nelson v. Boone County Bd. of Educ.*, Docket No. 2008-1190-BooED (Feb. 24, 2009) *aff'd*, Kan. Co. Cir. Ct. Civil Action No. 09-AA-49 (Jan. 14, 2011), *aff'd*, W.Va. Sup Ct. App. Docket No. 11-0278 (Feb. 14, 2012).” *Ward, et al., v. Nicholas County Bd. of Educ.*, Docket No. 2013-2224-CONS (Apr. 1, 2014)(emphasis added). The Grievance Board has also stated that although a county board of education’s “decision to allow a service employee the opportunity to obtain a required license prior to his assuming the duties of a position is not precluded by statute, utilizing this alternative does not negate the CODE § 18A-4-8b requirement that the position be filled within twenty working days.” *Cyphers v. Marion County Bd. of Educ.*, Docket No 94-24-134 (Oct. 31, 1994). Likewise, the undersigned has found nothing in the governing statutes which preclude a county board of education from providing applicants with the opportunity to take the competency test for the posted classification title, even though it already has applicants who are fully qualified.

“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*, 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)).

It has been Respondent's long-standing practice to allow employee applicants to take the competency test in situations such as this, if they have not already done so. While Respondent had applicants who were qualified for the position, it was not unreasonable for Respondent to allow other applicants to take the competency test for Accountant, as long as it did not delay the statutory time period for filling the position.²

² Grievant raised through questioning the issue of whether the position was filled within the statutory time period, but the date the position was filled was not placed in the record, nor was information placed in the record regarding holidays or other days not considered working days. Accordingly, there is not sufficient information in the record to make a finding on this issue.

The next issue then is whether Respondent should have used seniority in the Secretary classification to fill the position. Grievant argued that accounting duties were an important part of the job, and it was unreasonable for Respondent to ignore her seniority as an Accountant, and base the selection on overall seniority. “Although seniority rights for school personnel are well defined in W. VA. CODE § 18A-4-8b, which requires an employer to make decisions affecting the filling of service personnel positions ‘on the basis of seniority, qualifications and evaluation of past service,’ there is a lack of definition with regard to seniority rights of multiclassified personnel.” *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003), *aff’d Cir. Ct. of Kanawha County*, Civil Action No. 03-AA-107 (June 23, 2004). The Supreme Court of Appeals of West Virginia has attempted to clarify these rights, stating:

Pursuant to W. VA. CODE § 18A-4-8g(i) (2000), multiclassified school service personnel do not belong to a separate or unique classification category, but rather are employees of each classification category contained within their respective multi-classification titles. Under the statute, a multiclassified employee accrues seniority in each of the several classification categories composing his or her multiclassification title, and correspondingly, is subject to a reduction in force in these individual job categories on the basis of the respective seniority accumulated in each. In all instances where an employee has seniority in a particular job category - - whether that employee is multiclassified or holds only a single job classification - - such employee will be entitled to preference during a reduction in force in that category. In the event a multiclassified employee is subject to a reduction in force in one or more, but less than all, of the categories composing his or her multiclassification title, such employee remains in the employ of the county board of education with those categories that are subject to the reduction in force being deleted from the employee’s multiclassification title.

Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001), *Syl. Pt. 5.*

The Grievance Board has addressed the issue of which seniority date should be used in making a selection for a multiclassified position in cases involving different factual scenarios, each time concluding that Respondent had not acted in an arbitrary and capricious manner. In *Miller v. Preston County Board of Education*, Docket No. 2011-0107-PreED (August 9, 2011), the county board of education had used the most overall seniority in any of the classifications in the posting to select the successful applicant, although the grievant was the most senior employee. The Administrative Law Judge found this was not an abuse of discretion, and stated, “multiclassification seniority can be measured by looking to the greatest seniority in one of the relevant classification categories of the position in question.” In *Bowyer v. Fayette County Board of Education*, Docket No. 2012-1352-FayED, (August 22, 2013), the posted position was an Itinerant Special Education Supervisory Aide/Autism Mentor. Respondent filled the position based on seniority in the Aide classification, after concluding that the majority of the responsibility would involve supervisory Aide duties, and experience as an Aide was the most important consideration. The Administrative Law Judge concluded that “[t]his determination was reasonable and not arbitrary and capricious.” In *Cornell, supra*, Respondent had posted a Secretary/Accountant position, and awarded the position to the applicant with the most overall seniority in one of the classification titles in the posting, which, like this case, was the Secretary classification, even though the successful applicant and the grievant were both multiclassified as Accountant/Secretary, and Grievant had held the multiclassified title longer than the successful applicant. The Administrative Law Judge found respondent’s hiring decision was not arbitrary and capricious, stating, “Respondent’s method, while perhaps less than ideal, is consistent with the statutory intent of recognizing length of

service and rewards the employee with the greatest length of service to the employer, so it is not entirely unreasonable.”

The legal conclusion which can be reached from these decisions is that when a multiclassified position is posted, it is a county board of education’s choice as to which of the classifications in the posting it looks to in assessing the statutory requirement that seniority of the applicants be a determining factor in filling the position, so long as the decision is not unreasonable or an abuse of discretion. In this case, Respondent’s practice was to award the position to the employee applicant who was the most senior employee in one of the classifications in the posting. Grievant did not demonstrate that this action was unreasonable or an abuse of discretion.

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 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).

2. WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that hiring decisions be made “on the basis of seniority, qualifications and evaluation of past service.” Qualifications means the employee holds the classification

title or has passed the state competency test for the classification title. W. VA. CODE §§ 18A-4-8b and 18A-4-8e(c)(4)

3. “The Grievance Board has determined that “only if no qualified individuals apply, i.e., no applicants hold the class titles in question or have successfully completed the competency test, is the board *obligated* to offer competency testing in order for other employees to be deemed qualified through successful completion of the examination.” *Nelson v. Boone County Bd. of Educ.*, Docket No. 2008-1190-BooED (Feb. 24, 2009) *aff'd*, Kan. Co. Cir. Ct. Civil Action No. 09-AA-49 (Jan. 14, 2011), *aff'd*, W.Va. Sup Ct. App. Docket No. 11-0278 (Feb. 14, 2012).” *Ward, et al., v. Nicholas County Bd. of Educ.*, Docket No. 2013-2224-CONS (Apr. 1, 2014)(emphasis added).

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

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. 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*, 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)).

6. It was not arbitrary and capricious for Respondent to allow applicants to take the competency test for Accountant prior to filling the position at issue.

7. "Although seniority rights for school personnel are well defined in W. VA. CODE § 18A-4-8b, which requires an employer to make decisions affecting the filling of service personnel positions 'on the basis of seniority, qualifications and evaluation of past service,' there is a lack of definition with regard to seniority rights of multiclassified personnel."

Pursuant to W. VA. CODE § 18A-4-8g(i) (2000), multiclassified school service personnel do not belong to a separate or unique classification category, but rather are employees of each classification category contained within their respective multi-classification titles. Under the statute, a multiclassified employee accrues seniority in each of the several classification categories composing his or her multiclassification title, and correspondingly, is subject to a reduction in force in these individual job categories on the basis of the respective seniority accumulated in each. In all instances where an employee has seniority in a particular job category - - whether that employee is multiclassified or holds only a single job classification - - such employee will be entitled to preference during a reduction in force in that category. In the event a multiclassified employee is subject to a reduction in force in one or more, but less than all, of the categories composing his or her multiclassification title, such employee remains in the employ of the county board of education with those categories that are subject to the reduction in force being deleted from the employee's multiclassification title.

Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001), *Syl.*

Pt. 5.

8. When a multiclassified position is posted, it is a county board of education's choice as to which of the classifications in the posting it looks to in assessing the statutory requirement that seniority of the applicants be a determining factor in filling the position, so long as the decision is not unreasonable or an abuse of discretion.

9. Respondent's decision to look to seniority in one of the two classification titles in the posting in making the selection was not arbitrary and capricious or an abuse of discretion.

Accordingly, this 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 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).

Date: July 14, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

