PRISCILLA SUAN,

Grievant,

v. **Docket No. 97-21-230**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Priscilla Suan, employed by the Lewis County Board of Education (LCBE), initiated grievance proceedings at level two on August 20, 1996, alleging:

I was not awarded the Chapter One position in Math recently awarded. The position which required a K-8 multi-subject certification for a middle school Ch. I position was arbitrary and capricious and was done to exclude me from the position. I have Bus. Math 5-12 cert [sic] and can teach all grades at the middle school.

For relief, Grievant requested placement into the position, back pay, PEIA premium, retirement credit, seniority, damages and attorney fees.

The grievance was denied at level two, and LCBE waived consideration at level three. Grievant appealed to level four on May 1, 1997. After some delay, the parties agreed to submit the matter for decision based upon the lower level record, supplemented with proposed findings of fact and conclusions of law. The grievance became mature for decision upon receipt of the level two transcript on July 6, 1998. (See footnote 1)

The following undisputed findings of fact are derived from the level two transcript and exhibits.

Findings of Fact

1. Grievant, employed by the Lewis County Board of Education as a businesseducation teacher at Lewis County High School, was subject to a reduction in force in the Spring of 1996. This action resulted in her placement on the preferred recall list.

2. On July 25, 1996, LCBE posted a vacancy for the position of Title I Math Teacher at Robert L. Bland Middle School.

3. The qualifications listed for the position were: [Math] Major 1-8 or Multi-Subjects, computer

literate, and that the applicant be acquainted with work utilizing Math Manipulatives.

4. LCBE received twelve applications for the Title I Math position, including Grievant.

5. Grievant was certified in Business Math, grades 5-12.

6. The position was awarded to Sonya Turner, who is certified in Multi-Subjects, grades K-8.

Discussion

Grievant argues that the certification qualifications are arbitrary and capricious in that they exclude any applicant with math certification. Grievant asserts that she has fifteen hours of math classes, and that Multi-Subject certification requires only twelve hours of math classes; therefore, she probably has more hours in math, more computer experience, and more seniority than the successful applicant. LCBE asserts that it has substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel, and that the certification requirements for this position were not arbitrary and capricious, but stated the minimal requirements for the position. Because Grievant did not possess the minimum requirements stated on the posting, LCBE argues that she lacks standing to challenge the selection of Ms. Turner.

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); 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.

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with this principal, a county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. See Cowen v. Harrison County Bd. of Educ., 196 W. Va. 377, 465 S.E.2d 648 (1995); Mounts v. Mingo County Bd. of Educ., Docket No. 96-29-479 (June 27, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996).

In order for Grievant to prevail on her contention the LCBE improperly stated the qualifications for the position, she must demonstrate that the school board's decision was either arbitrary and

capricious, or an abuse of discretion. See Cowen, supra; Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991); McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994). In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. At the level two hearing, Assistant Superintendent Gabriel Devono testified that the qualifications were determined by the Director of Federal Programs, Nelson Lough. Mr. Lough did not testify; however, three earlier postings establish that the required certification was consistently listed as Major 1-8 or Multi-Subjects. While certification in the appropriate major for grade levels 5-12 would appear to be an equally reasonable addition, the undersigned is not aware of any legal requirement that a board of education include all possible certification options on position postings. (See Glick v. Logan County Bd. of Educ., Docket No. 97-23-435 (Jan. 29, 1998), in which it was held that a board's failure to include appropriate specialized training in the posting was not arbitrary and capricious.)

Further, Grievant's certification is in the area of Business Math, not general Math. This designation is very specific, and it is not evident from the record whether certification in Business Math would have qualified Grievant for a general, remedial math position, had Math 5-12 certification been included on the posting. In these circumstances, Grievant failed to establish that LCBE's determination was either arbitrary and capricious or an abuse of discretion. See Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Cir. Ct. of Kanawha County, No. 95-AA-106 (Jan. 8, 1997). (See footnote 2)

Consistent with the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

Conclusions of Law

1. In a grievance which does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19(1996); 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. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. A county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. See Cowen v. Harrison County Bd. of Educ., 196 W. Va. 377, 465 S.E.2d 648 (1995); Glick v. Logan County Bd. of Educ., Docket No. 97-23- 435 (Jan. 29, 1998); Mounts v. Mingo County Bd. of Educ., Docket No. 96-29-479 (June 27, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996).

4. In applying an “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. 5. Grievant failed to establish that LCBE's decision to post the Title I Math vacancy with only Major 1-8 and Multi-subject certifications was either arbitrary and capricious or an abuse of discretion.

Accordingly the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to theCircuit Court of Lewis County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: July 20, 1998 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Basil Legg, Esq., LCBE was represented by Sophie Zdatny, Esq.

Footnote: 2

Grievant offered no evidence that the qualifications were manipulated to exclude her from the position, and that claim is deemed abandoned.