SHARON SWOPE,

Grievant,

v.

Docket No. 97- 40 - 065

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent,

and

ELIZABETH MUSSER,

Intervenor.

D E C I S I O N

Grievant, Sharon Swope, alleges the Putnam County Board of Education ("PCBOE") incorrectly filled two Educational Diagnostician ("ED") positions and in so doing violated W. Va. Code § 18A-4-7a. She argues the successful applicants did not meet the minimum requirements for the positions, should not have received credit for having teaching experience in the required area, that she should have received credit for having teaching experience in the required area, and that she was more qualified than the successful applicants. This grievance was waived at Levels I and III. The Level II Grievance Evaluator found PCBOE had erred when it utilized the second set of criteria set out in W. Va. Code § 18A-4-7a in making the decisions and directed PCBOE to reassess the candidates utilizing the first set of factors. PCBOE reassessed the candidates utilizing the first set of factors, and the results were the same, with the initial successful applicants still receiving the position, except that Grievant was now ranked fifth instead of third. Grievant then appealed to Level IV, and a Level IV hearing was held on April 17, 1997. This case became mature for decision on May 27, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

Before turning to the other issues in the case, a discussion of the correct set of factors to apply when filling an ED position may be helpful. (See footnote 1) Grievant is a professional educator and

was employed as a classroom teacher, pursuant to W. Va. Code §18A-1- 1(c)(1), at the time the selection was made. The successful applicants were employed as speech therapists at the time of the selection, and, thus, were viewed as "other professional employees" pursuant to W. Va. Code § 18A-1-1(d). The West Virginia Supreme Court of Appeals in Putnam County Board of Education v. Andrews, 198 W. Va. 403 , 481 S.E.2d 498 (1996) (per curiam), a case deciding whether an ED should receive teaching or administrative seniority, ruled that when the position and functions of an educational diagnostician were examined in relation to the definitions of professional educators in W. Va. Code § 18A-1-1(c)(1), that position fit best within the definition of a classroom teacher. However, in the Andrews decision, the Supreme Court noted the grievant, as a professional educator, had to fit within one of the definitions listed in Code § 18A-1-1(c) and could not be viewed as another type of professional employee as identified in W. Va. Code § 18A-1-1-(d). Also, in Andrews, the Supreme Court noted this Grievance Board, in Smith v. Logan County Board of Education, Docket No. 91-23-291 (Oct. 29, 1991), had previously ruled that ED positions should be filled using the more flexible first set of factors listed in W. Va. Code § 18A-4-7a, as they were not classroom teachers. The Supreme Court stated in footnote 9 that as the Smith decision was not before the Court, the opinion in Andrews would not change the outcome in Smith.

Thus, the somewhat confusing question presented here, in light of the current case law, is which set of factors from W. Va. Code § 18A-4-7a should be used when selecting an ED, when the applicants are both teachers and other professionals. Prior to posting the position, PCBOE contacted the State Department of Education ("SDOE"), and asked if a teaching certificate was required for the position and was informed it was not. Thus, an ED position is, in essence, a position whose W. Va. Code § 18A-1-1 title is controlled by the individual who fills it. If the position is filled by an individual with a teaching certificate, it is a classroom teaching position per Andrews. If it is filled by a professional employee without a teaching certificate, it would be classified as "other professional employee" pursuant to W. Va. Code § 18A-1-1.

W. Va. Code § 18A-4-7a states "[a] county board of education shall make decisions affecting the hiring of professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications" and requires using the first set of factors. This Code Section also requires using the second set of factors when filling a classroom teaching position when "one or more of permanently employed instructional personnel apply." Since the applicants were both professional

educators and other professional employees, and because the position does not require a teaching certificate, it isappropriate to utilize the first set of factors in selecting the most qualified applicants for the position given the facts of this case.

The material facts of this case are not in dispute, and the undersigned Administrative Law Judge makes the following Findings of Fact based on the record in its entirety.

Findings of Fact

1. On October 10, 1996, PCBOE posted a position for an ED and stated the required certification as "MA, AND CERTIFICATION IN AT LEAST ONE AREA OF SPECIAL EDUCATION." (Level II, Grievant's. Exh. 2).

2. Prior to the posting of the position, PCBOE's administration decided to increase the pool of applicants by changing the required certification for the position. Previously the position required special education certificates in the areas of learning disability, behavioral disability, and mentally impaired. After calling the State Board of Education and confirming that the position did not require any specific special education certificate, PCBOE posted the position as requiring only one area in special education. (See footnote 2) **There are thirteen or fourteen identified areas in special education, including occupational therapy, physical therapy, speech and hearing therapy, and gifted education, as well as the typical ones identified above.**

3. An ED "provides services and leadership necessary to the effective implementation of the exceptional education programs including, but not limited to, administering and interpreting appropriate diagnostic instruments for referred students;assuring that due process procedures are followed in accordance with current mandates; development of IEP's; and participation in EC and IEPC activities as requested." (See footnote 3) **Id.**

4. Grievant and several other employees of PCBOE, applied for the positions.

5. Grievant was not selected for either position and ranked fifth on the list of applicants.

6. The successful applicants were Ms. Elizabeth Musser and Ms. Sandra Oates.

7. PCBOE utilized an eight point scale to rank applicants within the matrix. This eight point scale was developed by a committee of teachers and administrators. Applicants are required to complete a two page "Classroom Teacher Job Application," which corresponds to

the criteria in W. Va. Code § 18A-4-7a. This was the form used to make the selections for the position at issue.

8. The following table reflects the candidates' scores in each factor identified in the first set of criteria from W. Va. Code § 18A-4-7a.

Criteria	**Swope**	**Musser**	**Oates**	**Stuck***
Certification/Licensure	8	8	8	8
Relevant Experience	0	7.04 (22y)	4.86 (15y)	3.84 (12y)
Academic Achievement	7 (3.75)	7 (3.75)	8 (4.0)	7 (3.6)
Degree Level	6 (MA+30)	7 (MA+45)	7 (MA+45)	7 (MA+45)
Specialized Training (See footnote 4)	2	6	8	5
Satisfactory Evaluations	8	8	8	8
Seniority (See footnote 5)	8 (23y)	7.36 (22y)	5.28 (15y)	3.2 (9y)
Totals	39.0	50.4	49.08	40.2

***Ms. Stuck was the applicant who finished third in the selection process.**

9. Grievant has been employed by PCBOE for 23 years as a regular classroom teacher. She has 26 years of teaching experience and is certified in Elementary Education, 1-8; English, 1-9; Social Studies, 1-9; and Gifted, 1-6. Grievant has a degree level of a Masters' plus 30 and has always taught in a regular classroom setting; thus, she has no teaching experience in special education. At her school, Grievant was voted as her grade level's "Teacher of the Year" in 1991.

10. Ms. Musser has a professional service certificate in Speech and Hearing (Speech Pathology), 1-12, and Ms. Oates has the same professional certificate for grade levels K-12. Both professionals have worked all their years with PCBOE in the special education area. They have participated in eligibility meetings; tested referrals for speech,hearing and language problems; intervened with special education students, both on an individual and group level; participated in IEP meetings; and assisted both the classroom and resource room teacher in identifying interventions to assist Special Education students in coping with their problems. Both successful applicants have a Masters plus 45.

11. In her 45 hours above her Masters, Ms. Musser took course work in additional areas including: learning strategies, educational administration, as well as a variety of classes in other special education areas. She worked in the Office of Exceptional Education from January 1985, to June 1987, and during this time coordinated and chaired all the eligibility

meetings for children with only speech problems and worked with parents and schools to answer questions, arrange transportation, and facilitate the testing and evaluation of students. Ms. Musser has also been a referral officer for her assigned school for approximately sixteen years. The individual in this position takes the referred student and his parents through the special education eligibility process, and works with the Office of Exceptional Education, the teachers, the testers, and the assessment team.

13. Ms. Oates, the other successful applicant, has twenty-seven hours in learning disabilities as well as other graduate course work in the diagnosis of reading problems. She was voted as her school's "Teacher of the Year" in 1991, and has been actively involved in her school's activities.

Issues

As previously discussed, the first issue in this case identified by Grievant, was whether the position of ED is a classroom teaching position, and which set of factors from W. Va. Code § 18A-4-7a should be utilized in assessing the candidates. (See pages 2 - 4). That issue has already been decided. Grievant's second argument is she shouldreceive credit under the criteria "existence of teaching experience in the required certification area," because she had taught numerous mainstreamed, special education students during her years as a regular classroom teacher. Grievant's third argument is PCBOE erred when it filled the positions with two speech therapists. The key to this argument is that the successful applicants cannot receive credit in the areas relating to teaching experience when they are not certified as classroom teachers. (See footnote 6) **Grievant also argues she was the most qualified applicant for the position.**

Discussion

As a selection grievance is a non-disciplinary grievance, the grievant has the burden of proving the selection was flawed, or that the decision was arbitrary and capricious. 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. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). The West Virginia Supreme Court of Appeals has expanded this discretion "to matters involving curricular programs and the qualification and placement of personnel implementing those programs." Cowan v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648, 652 (1995). With regard to filling a non-classroom position, boards of education must exercisetheir discretionary authority by considering the "qualifying factors" set forth in W. Va. Code § 18A-4-7a (1992).

W. Va. Code §18A-4-7a sets forth the criteria to be used in filling a position. W. Va. Code §18A-4-7a directs county board of educations to hire "professional personnel other than classroom teachers on the basis of the applicant with the highest qualifications." When judging their qualifications, a board is to consider the following:

Appropriate certification and/or licensure; amount of experience relevant to the position or . . . the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level generally; academic achievement; relevant specialized training; past performance evaluations . . . and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.

W. Va. Code §18A-4-7a.

The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). An Administrative Law Judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper v. Mingo County Bd. of Educ., Docket No. 93-29- 064 (Sept. 27, 1993). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 ofview. Bedford County

Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Grievant's second argument, that she should receive credit for teaching experience in the in the certification or subject area because she taught mainstreamed special education students in her regular classroom, is without merit. To gain experience in the certification area a teacher must teach in the specified area; i.e. health, history, English, elementary education or special education. Although a history teacher may assign a paper and then grade it for grammar, sentence construction, and vocabulary, this does not make that person an English teacher. Assisting mainstreamed, special education students who have an assigned special education teacher cannot be seen as meeting the clearly stated language in the Code Section.

To grant Grievant's third argument, that the successful applicants cannot receive credit for their work with students, would be to elevate form over substance. While it is true that the successful applicants were not classroom teachers per se, they have been actively engaged in the instruction of special education students for many years. Additionally, the Code Section requires either an examination of the "experience relevant to the position" or "the amount of teaching experience in the subject area." The successful applicants have "experience relevant to the position" and have assessed students' learning difficulties in the classroom, devised teaching strategies to facilitate these students' educational process, and taken and applied additional course work in teaching and learning outside their chosen area of speech therapy. Although they do not posses a teaching certificate, this certification is not required by the SDOE. What is required is proper licensure for their professional position, and the successful applicants meet this requirement. Accordingly,PCBOE did not err or act in an arbitrary and capricious manner when it considered the successful applicants' experience in the areas of "experience relative to the position."

Grievant's argument that the successful applicants did not meet the stated qualifications is without merit. The posting required "MA, and certification in at least one area of special education." Although Grievant thought this meet a Masters in a teaching area, this was not the case, and her interpretation of the posting was incorrect. The testimony was clear. The type of certification to fill the position was changed prior to the posting so that the pool of applicants could be broadened to consider applicants outside the three prior certifications that had been

required in the past. The Director of the Office of Exceptional Education, Ms. Pat Homberg, explained they had individuals with these three certifications (learning disability, behavioral disorders, and mentally impaired) and wished to broaden the applicant pool to encourage participation by professionals outside these areas. Indeed, if even one of these certifications had been required, Grievant would not have been eligible for the position as she only has special education certification in the gifted area.

Additionally, a review of the applicants and their qualifications does not demonstrate that Grievant was more qualified that the successful applicants. Although Grievant possessed a certification in special education, she had never taught in a special education classroom. Further, Grievant's experience in dealing with IEP's and eligibility meetings was limited to the three or four students she had in her classroom each school year. The successful applicants had far greater experience in these type of meetings and settings. Also, the successful applicants had experience in conducting and explaining testing. After reviewing the evidence presented as a whole, Grievant has not met her burden of proof and demonstrated that the successful applicants were not qualified for the position, that PCBOE acted in an arbitrary and capricious manner when it granted them credit for their past experience in special education, or that she was better qualified for the position.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As a selection grievance is a non-disciplinary grievance, the grievant has the burden of proving the selection was flawed or arbitrary and capricious. 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. W. Va. Code § 18A-4-7a, sets forth the criteria to be used by county boards of education in evaluating the candidates for various positions. The "first set of criteria" found in 7a was the proper set of factors to apply in this case, and that Code Section reads as follows:

> **Appropriate certification and/or licensure; amount of experience relevant to the position or . . . the amount of teaching experience in the subject area; the amount of course work and/or degree level in the relevant field and degree level**

> **generally; academic achievement; relevant specialized training; past performance evaluations . . . and other measures or indicators upon which the relative qualifications of the applicant may fairly be judged.**

3. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope ofreview is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). An Administrative Law Judge cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989); Harper v. Mingo County Bd. of Educ., Docket No. 93-29- 064 (Sept. 27, 1993).

4. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

5. Grievant did not demonstrate PCBOE's failure to grant her credit for teaching experience in the certification or subject area was arbitrary and capricious or violative of W. Va. Code § 18A-4-7a.

6. Grievant has not met her burden of proof and demonstrated the successful applicants were not qualified for the position, PCBOE was arbitrary and capricious to grant them credit for their past experience in special education, or that she was better qualified for the position.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 2, 1998

Footnote: 1

This issue was discussed at the hearing. Additionally, the undersigned Administrative Law Judge wrote the parties in March 1997, requesting an additional response on which set of factors should be utilized in the selection process, as well as the matrix utilizing the first set of factors developed after the Level II Decision. The undersigned Administrative Law Judge did not receive a response from the Grievant's representative, thus it was assumed the data on this matrix was factually correct.

Footnote: 2

If the requirements had not been changed, neither Grievant nor the successful applicants would have been eligible for the position.

Footnote: 3

These initials refer to eligibility and individual educational planning committees.

Footnote: 4

The application form specifies that it is "very important to list as many relevant training sessions as possible." The committee guidelines previously cited also indicate that an applicant will receive a point for each documented relevant training program up to eight. At hearing, Grievant indicated that she had incorrectly filled out her form and had neglected to place three relevant workshops on her form. An applicant is responsible for informing a county board of education of her qualifications for a position. If she does not do so at the appropriate time, such data cannot be considered later by an Administrative Law Judge, as the purpose of a selection grievance is to assess a board's decision at the time it was made utilizing the data it had before it. See Blankenship v. Mingo County Bd. of Educ., Docket No. 96-29-365 (June 18, 1996); Green v. Mason County Bd. of Educ., Docket No. 91-26-176 (July 26, 1991); Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26,1989).

Footnote: 5

PCBOE utilized seniority as an "other measure or indicator."

Footnote: 6

The crux of this argument was resolved by the utilization of the first set of factors.