

**DAVID GAUDINO,**

**Grievant,**

**v.**

**Docket No. 00-25-142**

**MARSHALL COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and**

**WILLIAM H. STOEHR, Intervenor.**

### **DECISION**

David Gaudino ("Grievant") initiated this grievance on January 7, 2000, challenging his non-selection by the Marshall County Board of Education ("MCBOE") for the position of guidance counselor at John Marshall High School. The grievance was denied at level one, and a level two hearing was held on January 25, 2000. In a decision dated March 3, 2000, the grievance was denied at level two. Level three consideration was waived. Grievant appealed to level four on April 18, 2000, and a hearing was held in the Grievance Board's office in Wheeling, West Virginia, on June 8, 2000. Grievant was represented by counsel, Gregory A. Gaudino; MCBOE was represented by counsel, Howard E. Seufer, Jr.; and Intervenor was represented by Owens Brown of the West Virginia Education Association. This matter became mature for consideration on July 10, 2000, upon receipt of the parties' fact/law proposals.

The following findings of fact are made from a preponderance of the evidence of record.

### **Findings of Fact**

1. Grievant has been employed by MCBOE as a classroom teacher for 23 years. He is also certified as a counselor, 5-12, but has never been employed as a guidance counselor.
2. Intervenor has been employed by MCBOE for 14 years. He has served as an elementary school guidance counselor for 10 years and worked as a classroom teacher for 4 years.

3. On November 15, 1999, MCBOE posted a vacancy for the position of guidance counselor at John Marshall High School. The stated minimum qualifications were a master's degree and West Virginia Counselor Certification.
4. Both Grievant and Intervenor have a master's degree in counseling.
5. Grievant also has a doctorate degree in education, which includes 12 credit hours in counseling.
6. Both Grievant and Intervenor have received satisfactory performance evaluations for the last two years.
7. The posting for the guidance counselor position stated that applicants should provide information regarding "specialized training directly related to the performance of the job as stated in the job description."
8. Assessing the candidates' qualifications under the "second set" of statutory criteria contained in W. Va. Code § 18A-4-7a, MCBOE officials determined that the candidates were "tied" in the factors of "appropriate certification and/or licensure," "degree level in the required certification area," and "receiving an overall rating of satisfactory in evaluations over the previous two years."
9. Grievant was determined to have prevailed in the factor of "total amount of teaching experience."
10. Intervenor was given credit for prevailing over Grievant in the categories of "existence of teaching experience in the required certification area" and "seniority."
11. Intervenor was recommended by the Superintendent for the guidance counselor position and was approved by the Board on December 14, 1999.

### **Discussion**

In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process had been used.

156 C.S.R. § 4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), *aff'd* Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6.

"The grievance procedure . . . allows for an analysis of legal sufficiency of the selection process at the time it occurred." Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). This analysis must acknowledge that county boards of education have substantial discretion in matters relating to the hiring of school personnel, so long as the "qualifying factors" set forth in W. Va. Code §18A-4-7a are considered, and the exercise of discretion is neither arbitrary nor capricious. Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997). See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and an administrative law judge may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). An action is arbitrary or capricious if it does not rely on factors intended to be considered, entirely ignores important aspects of the problem, is explained in a manner contrary to the evidence before the board of education, or is a decision 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).

As both applicants were permanently employed instructional personnel, [\(See footnote 1\)](#) the selection process in this instance was governed by the "second set of criteria" found in W. Va. Code §18A-4-7a:

Appropriate certification and/or licensure; total amount of teaching experience; the existence of teaching experience in the required certification area; degree level in the required certification area; specialized training directly related to the performance of the job as stated in the job description; receiving an overall rating of satisfactory in evaluations over the previous two years; and seniority. . . with each criterion being given equal weight.

Throughout this proceeding, Grievant has raised various challenges to the method by which Intervenor was determined to have prevailed in the categories of teaching experience in the certification area and seniority. Additionally, Grievant has argued that the candidates should not have been rated equally and that he should have prevailed over Intervenor in the categories of degree level and specialized training. Each of Grievant's challenges will be discussed separately below.

Grievant contends that, as a high school classroom teacher, he has been called upon many times to utilize his training in the area of counseling to assist students. Specifically, Grievant discussed

various occasions when he has utilized these skills with gifted students, specifically with regard to college planning and financial aid. Therefore, he believes he should have been credited for having experience in the certification area of counseling. However, it is undisputed that Grievant has never been employed by MCBOE as a guidance counselor, and, as pointed out by Respondent, college preparation is a very small portion of the duties of a counselor. As listed in MCBOE's job description for guidance counselor, a wide variety of duties are expected of such individuals, including assisting in students' intellectual, personal, and academic development, monitoring students' performance and development, assessing and evaluating achievement, emotional functioning, and developmental status, performing evaluation procedures, monitoring and improving student attendance, and working with parents in numerous areas of student development and problems. As stated by this Grievance Board:

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.

Swope v. Putnam County Bd. of Educ., Docket No. 97-40-065 (Apr. 2, 1998). Similarly, providing college counseling services is something which all high school teachers may from time to time engage in, and this does not entitle Grievant to credit for work experience as a guidance counselor.

A second major argument posed by Grievant concerns MCBOE's refusal to give him credit for having more than a master's degree in the area of counseling. He contends that his 12 hours of study in counseling as part of his doctorate in education, termed by Grievant as a "minor" in counseling, should entitle him to credit in this criterion over Intervenor's master's degree. As noted by Respondent, the terms of the statute are clear that consideration is to be given to the "degree level in the required certification area," which differs from the language used in the so-called "first set of factors" in W. Va. Code § 18A-4-7a, which calls for consideration of "the amount of course work and/or degree level." There is no provision in the second set of factors for consideration of additional course work within the context of a degree in another certification area. This interpretation is consistent with the Grievance Board's prior rulings on this issue. See Belcher v. Harrison County Bd. of Educ., Docket No. 97-17-389 (Dec. 9, 1997). The highest degree Grievant has earned in the relevant certification area of counseling is a master's. Grievant is not entitled to any additional credit

for post-graduate work under the statutory criterion.

Another argument posed by Grievant is that MCBOE erred in failing to consider his specialized training relevant to the position, which he contends was superior to Intervenor's. Although the posting did request that applicants provide information regarding specialized training, it merely contained the statutory language, with no specific discussion of what types of training would be important. This Grievance Board has previously held that a generic job description applicable to all positions does not sufficiently notify applicants of the specialized training required for the position, so consideration of that criterion was improper. Hall v. Mercer County Bd. of Educ., Docket No. 96-27-175 (April 30, 1997). In the recent decision in Walker v. Harrison County Bd. of Educ., Docket No. 99-17-520 (Apr. 19, 2000), it was determined that even a reference to familiarity with a specific document or report was insufficient to notify applicants of the specific training to be considered, so the board of education erred in giving the successful applicant credit under the specialized training criterion. Accordingly, MCBOE acted appropriately in the instant case in refusing to consider the specialized training of any of the candidates, which would be improper in view of the generic language contained in the job posting.

W. Va. Code § 18A-4-7a contains the following language regarding the calculation of seniority for professional personnel:

The seniority of classroom teachers . . . with the exception of guidance counselors shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and shall be granted in all areas that the employee is certified and/or licensed.

\* \* \* \*

Guidance counselors and all other professional employees . . . except classroom teachers, shall gain seniority in their nonteaching area of professional employment on the basis of the length of time the employee has been employed by the county board of education in that area. Provided, That if an employee is certified as a classroom teacher, the employee accrues classroom teaching seniority for the time that that employee is employed in another professional area.

(Emphasis added.) Pursuant to its interpretation of this portion of the statute, MCBOE assessed only Intervenor's seniority as a guidance counselor, and gave no consideration to Grievant's seniority as a

classroom teacher. MCBOE contends that, because the position at issue was for a guidance counselor, only seniority in the area of counseling was credited.

Respondent's interpretation of this provision is clearly contrary to the provisions and intent of W. Va. Code § 18A-4-7a. If applicants for positions were only to be given seniority credit within the relevant certification area, many long-time professional employees would receive no seniority credit at all when applying for positions outside the certification area of their previous employment. There is no restriction in the statute which requires that seniority be limited in this fashion. It is a customary rule of statutory construction that "where the language of a statute is clear and without ambiguity the plain meaning is to be accepted[.]" Syllabus Point 3, Pullano v. City of Bluefield, 342 S.E.2d 164 (W. Va. 1986). Especially in light of the fact that the legislature saw fit to place specific limitations upon the manner in which other portions of the seven criteria were to be calculated, such as "total" teaching experience, and teaching experience "in the required certification area," the absence of such limiting language with regard to seniority clearly means that seniority is to be calculated as provided by the remaining portion of the statute. Accordingly, Grievant would be credited with 23 years of seniority as a classroom teacher for MCBOE, and Intervenor would be credited with 14 years of seniority for his combined employment as a teacher and guidance counselor for the Board. Therefore, Grievant should have prevailed in the category of seniority.

Because he should have prevailed in the category of seniority, Grievant should have been awarded the position at issue, because he would have prevailed in more of the statutory criteria than Intervenor. The candidates were equally assessed in the categories of certification/licensure, degree level, specialized training, and evaluations. However, Grievant prevailed over Intervenor in the additional categories of total teaching experience and seniority, and Intervenor only prevailed in one additional category, i.e. existence of experience in the certification area. Therefore, Grievant is entitled to instatement to the position of guidance counselor at John Marshall High School, with all applicable back pay, seniority, and benefits, retroactive to December 14, 1999.

Consistent with the foregoing, the following conclusions of law are made.

### **Conclusions of Law**

1. In a non-selection grievance, Grievant bears the burden of proving, by a preponderance of the evidence, that he should have been selected for a particular position rather than another

applicant, by establishing that he was the more qualified applicant, or that there was such a substantial flaw in the selection process that the outcome may have been different if the proper process were used. 156 C.S.R. §4.19 (1996); Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (Mar. 23, 1990); Lilly v. Summers County Bd. of Educ., Docket No. 90-45-040 (Oct. 17, 1990), aff'd Cir. Ct. of Kanawha County, No. 90-AA-181 (Mar. 25, 1993).

2. The selection process in this case is governed by the "second set of criteria" found in W. Va. Code § 18A-4-7a.

3. An action is arbitrary or capricious if it does not rely on factors intended to be considered, entirely ignores important aspects of the problem, is explained in a manner contrary to the evidence before the board of education, or is a decision 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 (4<sup>th</sup> Cir. 1985).

4. Grievant's occasional assistance to students with college admission and financial aid matters, while employed as a classroom teacher, does not entitle him to credit for experience in the area of counseling. See Swope v. Putnam County Bd. of Educ., Docket No. 97-40-065 (Apr. 2, 1998).

5. There is no provision in the second set of factors for consideration of additional course work within the context of a degree in another certification area, so Grievant was not entitled to credit for post-graduate credit hours in counseling as part of a doctorate degree in education. See Belcher v. Harrison County Bd. of Educ., Docket No. 97-17-389 (Dec. 9, 1997).

6. A reference to generic training requirements is insufficient to allow consideration of the specialized training criterion under the second set of factors set forth in W. Va. Code § 18A-4-7a. Hall v. Mercer County Bd. of Educ., Docket No. 96-27-175 (April 30, 1997). See Sisk v. Mercer County Bd. of Educ., Docket No. 95-27-113 (Sept. 22, 1995), app. den'd, Civil Action No. 95-CV-777 (Mercer County Circuit Court).

7. Seniority for classroom teachers is to be calculated on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education.

8. Grievant should have prevailed in the statutory criterion of seniority, entitling him to placement in the guidance counselor position at issue.

Accordingly, this grievance is **GRANTED**, and Respondent is directed to place Grievant in the position of guidance counselor at John Marshall High School, as discussed above.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marshall 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

**Date: July 26, 2000**

**DENISE M. SPATAFORE**

**Administrative Law Judge**

---

[Footnote: 1](#)

*School guidance counselors are included within the definition of "classroom teacher" set forth in W.Va. Code 18A-1-1. Fadoul v. Ohio County Bd. of Educ., Docket No. 96-35-330 (March 7, 1997), Conclusion of Law No. 2; See Beine v. Bd. of Educ., 181 W.Va. 669, 383 S.E.2d 851(1989).*