CRYSTAL CROSSLAND,

Grievant,

v. **Docket No. 01-24-328**

MARION COUNTY BOARD OF EDUCATION,

Respondent,

DINA HUDSON,

Intervenor.

D E C I S I O N

Grievant, Crystal Crossland, employed by the Marion County Board of Education (MCBE) as a Secretary, filed a level one grievance on January 30, 2001, in which she alleged violations of W. Va. Code §§ 18A-4-16, 18A-4-8, 18A-4-8b, and 18A-4-8g, when her appointment as "Homework Hotline/Web Site Coordinator" was rescinded and awarded to Intervenor. Grievant requests instatement with back pay, benefits, and interest on all monetary sums. After the grievance was denied at levels one and two, Grievant elected to bypass consideration at level three and advanced the matter to level four on May 16, 2001. After a number of continuances granted for good cause, a level four hearing was conducted on November 5, 2001, in the Grievance Board's Westover office. Grievant was represented by John E. Roush, Esq. of WVSSPA, MCBE was represented by Stephen R. Brooks, Esq., of Flaherty, Sensabaugh & Bonasso, and Intervenor was represented by Don Craft, WVEA Consultant. The grievance became mature for decision on December 6, 2001, upon receipt of proposed findings of fact and conclusions of law filed by all the parties.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been regularly employed by MCBE for approximately eight years, and has been assigned as a Secretary at East Fairmont Junior High School at all times pertinent to this grievance.

2. Intervenor has been employed by MCBE as a certified classroom teacher at East Fairmont

Junior High School at all times pertinent to this grievance.

3. Together with Fairmont State College, MCBE offers a GEAR UP program, a federally-funded project for students beginning in the seventh grade, with the goal of increasing attendance at institutions of higher learning upon high school graduation.

4. In Spring 2000, MCBE posted a vacancy for the professional position of “Homework Hotline Coordinator” which was to continue for the remainder of the 1999-2000 school year. No professional employees applied for the position which was awarded to Grievant. In Summer 2000 Grievant worked at a computer camp to teach students how to set up web pages at their schools, another part of the GEAR UP program.

5. On or about October 2, 2000, MCBE posted a professional position for “Homework Hotline/Web Site Coordinator”, for the 2000-2001 school year. Qualifications for this position were, “Must have knowledge of html. Must have web page training in htm. Must be available during/after school.”

6. Grievant applied for, and was awarded the position of “Homework Hotline/Web Site Coordinator” on October 26, 2000.

7. By letter dated November 9, 2000, Intervenor, who had also applied for the position, requested instatement based upon language in the posting that”preference shall be given to professional employees currently assigned to the specific site.” (Emphasis added). 8. The GEAR UP Program does not require the “Homework Hotline/Web Site Coordinator” to hold any licensure or certification, or that the position be designated as professional.

9. Subsequent to a recommendation by Superintendent Thomas Long, MCBE rescinded Grievant's appointment because she was “ineligible” as a service employee, and placed Intervenor into the position on or about November 27, 2000.

10. The employment of two other Secretaries in the GEAR UP Program was not rescinded because no professional employees were interested in the positions.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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.

Grievant argues that the "Homework Hotline/Web Site Coordinator" is a service personnel position because no certification or licensure is required, as in professional positions. As a service position, Grievant asserts that it must be filled on the basis of seniority, evaluation, and qualifications, with first preference given to regularly employed school service personnel. MCBE argues that the decision to post the position as professional or service was within the discretion of each county that participated in the GEAR UP program, and that it did not abuse that discretion by designating it as a professional one because of the "strong component of student interaction." Furthermore, the primary goal of the GEAR UP program is to promote academic advancement and toenhance academic expectations of students, the determination to fill positions with professional personnel was not arbitrary and capricious. Intervenor simply argues that Grievant was not qualified for the position as posted.

W. Va. Code §18A-1-1 provides that all employees of county boards of education must be considered professional or service. Professional personnel "means persons who meet certification and/or licensing requirements of the state, and shall include the professional educator and other professional employees. Service personnel "means those who serve the school or schools as a whole, in a nonprofessional capacity, including areas such as secretarial, custodian, maintenance, transportation, school lunch and as aides." While all employees must be classified as professional or service, all positions are not so clearly delineated. To illustrate, an accountant may be either a professional or service position. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). Coaching positions may also be filled with professional or service personnel. Brown v. Wetzel County Bd. of Educ., Docket No. 00-52-402 (Mar. 29, 2001). County boards of education have substantial discretion in personnel matters, including the determination that certain positions should be filled with professional or service personnel, so long as the decision is not arbitrary and capricious.

An action is arbitrary and capricious if the agency making the decision 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); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, DocketNo. 96-DOE-081 (Oct 16, 1996). An action may also be

arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Grievant has successfully performed in the position of “Homework Hotline Coordinator” and demonstrated the necessary computer skills to teach students how to produce web pages. Her performance was so good that county GEAR UP administrators recommended her for the 2000-2001 assignment. However, the posting was for a professional assignment. Because the goal of the GEAR UP program is to promote the academic advancement of higher education among disadvantaged and high risk youth, and to raise their expectations to attend college, MCBE's determination that the position should be filled with a professional was not arbitrary or capricious.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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 §4.21 (2000); 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 personnel matters provided they exercise that discretion reasonably in the best interests of the schools and in a manner which is not arbitrary and capricious.” Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. An action is arbitrary and capricious if the agency making the decision 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); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W.

Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

4. MCBE's determination that the position of “Homework Hotline/Web Site Coordinator” should be filled with a professional employee was properly within its discretion, and was not arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion County and such appeal must be filed within thirty (30) days ofreceipt 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: December 21, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE