SHAWN BUSH,

Grievant,

v. **Docket No. 02-26-071**

MASON COUNTY BOARD OF EDUCATION,

Respondent,

and

KENDRA THOMPSON, Intervenor.

DECISION

Shawn Bush ("Grievant") initiated this proceeding on January 3, 2002, challenging the selection process for a guidance counselor position at Wahama High School. He seeks instatement to the position with back pay and benefits. Grievant's immediate supervisor lacked authority to grant the requested relief, and Grievant appealed to level two on January 25, 2002. A level two hearing was held on January 31, 2002, followed by a written decision denying the grievance dated March 15, 2002. Level three consideration was bypassed, and Grievant appealed to level four on March 25, 2002. The parties agreed that a decision could be rendered based upon the record developed below, supplemented by written fact/law proposals. Grievant was represented by Kathleen W. Smith of the West Virginia Education Association; Respondent was represented by counsel, Howard E. Seufer, Jr.; and Intervenor was represented by Judy Davis of the American Federation of Teachers. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on April 22, 2002. (See footnote 1) The following findings of fact are made by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Mason County Board of Education ("MCBOE")

as a classroom teacher since October of 1994.

2. Intervenor has been employed by MCBOE as a classroom teacher since January of 2000.

3. Both Grievant and Intervenor were, as of the date of the level two hearing in this grievance, enrolled in the Masters in Counseling degree program at Marshall University. Both are expected to graduate in May of 2002.

4. Intervenor had been working as guidance counselor at Mason/Ashton Elementary School since January of 2001. She was issued a first class permit in counseling by the State Department of Education, effective January 21, 2001.

5. Grievant has never been employed as a counselor.

6. On October 24, 2001, Respondent posted a vacancy for the position of counselor at Wahama Junior/Senior High School. Grievant and Intervenor both made timely applications for the position.

7. Applying the second set of statutory criteria in West Virginia Code § 18A-4- 7a, Grievant and Intervenor were deemed to be “tied” in four factors. Both were deemed to have “appropriate certification and/or licensure,” neither was given credit for “degree level in the required certification area” or “specialized training,” and both were given credit for having satisfactory evaluations.

8. Grievant prevailed over Intervenor in the statutory criterion “total amount ofteaching experience.”

9. Intervenor prevailed over Grievant in the statutory criteria of “existence of teaching experience in the required certification area” and “seniority.” She was given credit over Grievant because of her employment as a counselor at Mason/Ashton Elementary School. Grievant was not given credit under these two criteria, because he had never worked as a counselor.

10. Intervenor was awarded the counselor position, which is to begin at the onset of the 2002-2003 school year.

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. § 4.21 (2000); 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 CountyBd. 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 2) 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.

Although at the level two hearing Grievant challenged only Respondent's determination that Intervenor should prevail in the seniority criterion, he also argued in hislevel two post-hearing submission that Respondent had erred regarding the criterion “existence of teaching experience in the required certification area.” This argument was not considered by the level two hearing evaluator,

who believed it would be unfair to allow Grievant to “expand his grievance after the taking of evidence was closed.” However, as Grievant has correctly noted, this Grievance Board has previously held in a similar situation that, where a grievance statement merely challenges the selection process in general, it is permissible for the grievant to target additional specific aspects of the selection decision after evidence has been taken. See Snyder v. Preston County Bd. of Educ., Docket No. 98-39-509 (May 26, 1999). Moreover, as was the case in Snyder, supra, Respondent was fully aware of Grievant's argument and has addressed it in its level four brief. Therefore, Grievant's argument regarding both this and the seniority criterion will be addressed.

Grievant contends that Intervenor was not entitled to credit for having experience in the area of counseling because she was working under a temporary permit, rather than a permanent certificate. This argument is based upon the Grievance Board's holding in Jones v. Summers County Board of Education, Docket No. 97-45-147 (Jan. 7, 1998), where it was determined that the grievant's counseling work, performed prior to her obtaining certification, could not be considered as “teaching experience in the required certification area.” Respondent counters that this decision was premised upon the fact that the counseling work had been performed while working for a third party in a federal summer program without benefit of even a temporary permit.

The Jones administrative law judge relied, in part, upon the holding in Clutter v. Webster County Board of Education, Docket No. 95-51-429 (Dec. 29, 1995), where the successful applicant was found not to be entitled to credit under the criterion because hissubstitute teaching of special education classes--for the respondent board of education-- had occurred prior to his having obtained special education certification. Accordingly, it was held in Jones, supra, “[o]ne cannot possess 'teaching experience in the required certification area' . . . without first obtaining the certification required.” However, neither Clutter nor Jones involved a situation in which a teacher was employed by the board in a position with a permit issued by the State Board of Education. (See footnote 3)

Grievant similarly argues that, because she was working under a temporary permit, Intervenor should not have received credit for having more seniority than Grievant. (See footnote 4) This contention is based largely upon a line of Grievance Board cases in which it was held that, in order to be credited with administrative seniority, employees functioning as assistant principal/”dean of students” must hold administrative certification along with performing the duties of an administrative position. Hunter v. Mingo County Bd. of Educ., Docket No. 94- 29-1063 (Apr. 28, 1995);

Ward/Cantees v. Mingo County Bd. of Educ., Docket No. 94-29- 1134 (April 26, 1995); Talbert v. Mingo County Bd. of Educ., Docket No. 93-29-166 (Jan. 20, 1994). The issue was explained by the administrative law judge in Jones, supra, as follows:

> In Ward, Administrative Law Judge Swartz explained that 'individuals who donot possess an administrative certificate, even if they are performing the duties described in the Dean of Students position description, may not properly be awarded administrative seniority, because they do not hold the appropriate administrative certification.' Conversely, if an individual holding the post of Dean of Students does possess an administrative certificate, but is not performing the duties enumerated in the position description of the Dean of Students, that individual likewise should not be awarded administrative seniority.' Actually holding the certificate at the time work is performed is a prerequisite, but not the only factor, in determining whether the time worked should qualify for seniority purposes.

As Grievant has correctly noted, these decisions were based, in part, upon the following language from West Virginia Code § 18A-4-7a:

> 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** . . .

(Emphasis added.) Respondent has pointed to the same language in support of its argument that, regardless of whether an employee is working under a temporary permit or a permanent certificate, seniority is earned while the individual is employed by the board of education in a professional position. There can be no dispute that the Talbert line of cases stand for the proposition that a professional employee, such as guidance counselor, only earns seniority credit while employed in his or her position and also holds the applicable certification. However, once again, the specific issue of granting seniority credit to an employee working under temporary permit has not been addressed.

Temporary permits are issued by the state pursuant to Policy 5202 to individuals who do not meet the requirements for full certification, but who have been determined to be the most qualified applicant for a position. Although not fully certified, Intervenor has been employed by Respondent as a guidance counselor, performing all duties related to that classification, under the auspices of an official permit. The language of Code § 18A-4-7a, set forth above, would seem to mandate that she be granted seniority credit for the time she has served in that position. Unlike an employee who may be performing the job duties of a particular position without benefit of certification, like the assistant

principals discussed in Talbert, supra, and its progeny, an employee working under permit is in the unique position of being given a permit, i.e. a license, to perform those duties that he could not otherwise "officially" perform without certification. Accordingly, the undersigned finds that the situation presented here is distinguishable from those presented in prior cases wherein an uncertified individual was found not to be entitled to seniority or experience credit. Because she had been granted an official permit to perform the duties of a guidance counselor and was employed in that position by the Respondent board of education, Intervenor should be granted seniority and experience credit.

Accordingly, the undersigned finds that Respondent correctly applied the statutory criteria of seniority and experience, and Intervenor was correctly placed in the guidance counselor position.

The following conclusions of law support the decision reached.

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 had been used. 156 C.S.R. § 4.21 (2000); 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 KanawhaCounty, No. 90-AA-181 (Mar. 25, 1993). See also, W. Va. Code §18-29-6.

2. When filling a guidance counselor position, a board of education must consider "[a]ppropriate 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." W. Va. Code §18A-4-7a.

3. Guidance counselors 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. W. Va. Code §18A-4-7a.

4. Respondent correctly applied the statutory criteria of W. Va. Code §18A-4-7a when filling the guidance counselor position in this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Mason 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 GrievanceBoard. 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: May 10, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant and Intervenor did not file level four arguments.

Footnote: 2

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).

Footnote: 3

Clutter did not specify whether the employee was substitute teaching under a temporary permit or not.

Footnote: 4

Although this Grievance Board has previously held that overall seniority as an employee should be considered when filling guidance counselor positions, the Kanawha County Circuit Court reversed Gaudino v. Marshall County Bd. of Education, Docket No. 00-25-142 (July 26, 2000), finding that only seniority as a guidance counselor should be considered (Civil Action # 00-AA-136). Both parties agree with the circuit court's reversal and do not contest Respondent's consideration of only guidance counselor seniority in filling the position at issue.