PAUL BURGESS,

Grievant,

v. **DOCKET NO. 02-23-385**

LOGAN COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

In a grievance filed October 14, 2002, concerning the filling of a posted vacancy for a School Bus Supervisor position, Grievant alleged violations of W. Va. Code §§ 18A-4-5b, 18A-4-8b, 18-29-2(m) and (o), and the Logan County Board of Education (LCBOE) Transportation Policy. As relief, he "seeks instatement into the position with back pay, seniority, other benefits of position, pecuniary and non-pecuniary retroactive to the date successful [applicant] received [position]."

After being denied at the lower levels, a level four hearing was held January 3, 2003, at the Grievance Board's Charleston Office. Grievant was represented by Donald R. Jarvis of ATU Local 1539, and Respondent was represented by its counsel, Leslie Tyree, Esq. (See footnote 1) The parties agreed to submit their proposed findings of fact and conclusions of law by January 23, 2003, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is a Bus Operator employed by LCBOE with 31 years of seniority, the most of any of LCBOE's bus operators. He has missed less than two days of work in his 31 years, and has excellent evaluations.

2. Respondent posted a job opening for a Transportation Coordinator/Bus Supervisor around October, 2002. (See footnote 2) One of the qualifications listed for the position was a certificate as a bus operator trainer. This certification was not required for the position the last time it was posted, in 1989.

3. Of Respondent's 62 regularly-employed bus operators, six have the required certification. Grievant does not.

4. The employee who was interviewed and selected for the position has less seniority than Grievant, but does have a trainer's certificate. Grievant had bid on the posting, but was not interviewed because he did not meet the minimum qualifications.

5. In 2000, Respondent had two bus supervisors, and developed a list of job responsibilities for them to differentiate their duties and for evaluation purposes. Ms. Tabor, whose retirement led to the vacancy filled by the posting in question, supervised driver trainers, conducted and coordinated training, had a certificate as trainer, and had many years' experience training drivers.

6. In developing the job posting for Ms. Tabor's replacement, Dr. Pat White, LCBOE Assistant Superintendent of Schools, talked to Wayne Clutter, who is Director of State Transportation for the West Virginia Department of Education (WVDOE). Mr. Clutter suggested that the replacement should have driver training experience and a trainer's certificate. 7. The school bus operators instructor course is conducted by the WVDOE, and upon successful completion, participants receive a trainer's certificate. The course is usually held once or twice a year in Charleston, and anyone may attend although it is limited to 18-20 people. Notice of the course is sent to each county transportation director, who determines who from that county wishes to attend and then sends the names of all interested people to the WVDOE. The WVDOE has the final determination as to who may attend based on need and availability.

8. Two classes were held in 2002, one in June and one in July. Notification thereof was sent to the counties in May and June, 2002. Grievant knew about the courses, but did not wish to attend because he had a summer driving job. Had he wished to attend, his name would have been forwarded to the WVDOE and a substitute could have been used to cover his summer route for the four days of the course.

9. Even if Grievant had applied to attend the class, Respondent could not guarantee he would have been admitted since the final determination as to who attends is up to the WVBOE. His mileage and lodging would have been paid by Respondent, but he would not have received pay for the time involved.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant contends that Respondent acted arbitrarily and capriciously in adding the trainer's certificate requirement to the job posting, as it was not included the last time the job was posted and it is not, in fact, required to perform the job, in violation of W. Va. Code § 18A-4-8b(g). Respondent contends that theaddition of a trainer's certificate requirement to the qualifications of the position was a legitimate revision of the job specification.

Respondent has a great deal of discretion in filling its job vacancies, but it is limited by the requirements of W. Va. Code § 18A-4-8b(g) that the job posting “be written so as to ensure that the largest pool of qualified applicants may apply,” and that it not include “criteria which are not necessary for the successful performance of the job.” Inclusion of unneeded qualifications in order to limit the pool of applicants would be an abuse of discretion, and would be arbitrary and capricious. “Generally, an action is considered arbitrary and capricious if the agency 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 was so implausible that it cannot be ascribed to a difference of opinion." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of a board of education." Trimboli, *supra*, Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant presented no evidence that the job posting for the bus supervisor position was written so as to exclude him from consideration. Interim Superintendent David Godby, who was Personnel Director at the time, wrote the posting and did not know whether or not Grievant had the required certification. He conferred with Mr. White, who sought input from Mr. Clutter, and attempted to develop a list of duty requirements that would meet the needsof the LCBOE. Because the position supervises the bus operator trainers and coordinates the training process in general, it reasonably determined that the supervisor should be at least as qualified to train as his supervisees.

Grievant likely could have attended the training seminar if he had wanted to. He chose not to because he had a paying summer run and was uncertain as to whether he could keep that run and attend the class, although he did not ask anyone about this. Also, Grievant stated he had no reason to go to the class in order to qualify for a bus supervisor opening, because that had not been a qualification in the past, and Respondent should not be able to change the qualifications for the position. In prior cases, the Grievance Board held that "[w]ith the implementation of statutory definitions and guidelines for establishing qualifications, county boards of education may no longer develop or expand qualifications for service personnel positions where a competency test has been developed by the State Board of Education." Hawken v. Hancock County Bd. of Educ., Docket No. 95-15-577 (Apr. 29, 2996) *citing* Bowman v. Marion County Bd. of Educ., Docket No. 95-24-003 (Oct. 10, 1995). Although no competency test for Bus Supervisor has been established, the same logic would seem to apply here, since the position is defined by statute. However, the West Virginia Supreme Court of Appeals upheld the circuit court's reversal of Hancock, finding that "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259; 546 S.E.2d 258 (1999), *citing Syl. pt. 3*, Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). The Supreme Court went on to find that the Board "did not abuse its discretion by demanding additional qualifications beyond thepassing of the competency test." *Id.* at 263. Again, the same logic would apply here, and there has been no showing that Respondent abused its substantial discretion by arbitrarily and capriciously adding the Bus Operator Trainer certification requirement to the qualifications for bus supervisor.

Based on his seniority and other qualifications, he almost certainly would have gotten the position had he met the minimum qualifications. He was mistaken in believing that the departing bus supervisor did not participate in training bus operators, and did not show that the decision to have the supervisor possess the same certification as the supervisees was unreasonable or more than a difference of opinion. However, he did not meet his burden of proving that the addition of the bus trainer certificate as a requirement was arbitrary or unreasonable.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. Job postings must “be written so as to ensure that the largest pool of qualified applicants may apply,” and may not include “criteria which are not necessary for the successful performance of the job.” W. Va. Code § 18A-4-8b(g).

3. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in amanner contrary to the evidence before it, or reached a decision that was 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); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, *supra* (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*, Blake v. Kanawha County Bd. of Educ., Docket No. 01- 20-470 (Oct. 29, 2001).

4. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259; 546 S.E.2d 258 (1999), *citing Syl. pt. 3*, Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. A Board does not abuse its discretion by demanding additional qualifications beyond the

passing of the competency test." *Id.* at 263. 6. Respondent did not act arbitrarily or unreasonably when it added the requirement of a bus trainer's certificate to the qualifications for the bus supervisor position.

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: February 10, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Ms. Tyree also served as the level two Grievance Evaluator.

Footnote: 2

The exact date of the posting is not in evidence.