B. LYNN McGINNIS,

Grievant,

v. **DOCKET NO. 03-41-161**

RALEIGH COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant B. Lynn McGinnis filed this grievance against her employer, the Raleigh County Board of Education, Respondent, on September 27, 2002. Her Statement of Grievance reads, "Elementary Counseling Position - Interim - Central Office/yrs. of experience." As relief, she seeks, "Position and/or add'l years of experience in certification area."

The grievance was denied at level one, and granted in part at level two. The level two decision granted Grievant work experience credit for the time from June 4, 1990, through January 14, 1992, effective from October 23, 2002, but denied Grievant's request to be placed in the elementary guidance counselor's position she was seeking. Level three was waived, and a level four hearing was held at the grievance Board's Beckley office on October 1, 2003, to determine the issue of whether Grievant should have been selected for the position in question. Grievant was represented by Sidney Fragale of the West Virginia Federation of Teachers, and Respondent was represented by counsel, Kathryn Reed Bayless. The parties agreed to submit their proposed findings of fact andconclusions of law by October 21, 2003, whereupon this matter became mature for decision.

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

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Counselor at Shady Spring High School.

2. Grievant was one of twelve applicants for an elementary counselor position advertised by Respondent on August 15, 2002. Barbara Spencer was the successful applicant.

3. In assessing the qualifications of the candidates under the second set of factors contained in W. Va. Code § 18A-4-7a, Grievant and Ms. Spencer were determined to be equally qualified. Although Grievant has more seniority than Ms. Spencer, Ms. Spencer was credited with more years of experience. In all other areas, the two candidates were ranked identically.

4. Respondent has in place a policy for breaking ties in the selection of professional personnel when the candidates are rated equally under the second set of factors. This policy states in part, "The applicant with the greatest total amount of experience in the required certification area shall be selected for the position." Level two Joint Exhibit No. 18.

5. The vacancy in question was posted August 15, 2002, and was listed as an Elementary Guidance Counselor - Itinerant, and noted "appropriate Certification required, K-8 minimum." Level two Joint Exhibit No. 3.

6. Respondent selected Ms. Spencer because it determined she had greater experience in counseling. She was given experience credit for working as a licensed socialworker from 1988 to 1991 and as a counselor from 1991 to 2000. Grievant received credit for working at Concord College, where she was Director of the Counseling Center, from 1992 to 1998.

7. Grievant was employed by FMRS Health Systems, Inc. from June 4, 1990 through January 14, 1992, as a case manager, working under a temporary social work license, providing counseling services. She was also employed by the West Virginia Department of Health and Human Resources from June 1985 through May, 1990, where her duties included social work and counseling. Respondent received verification of this work experience October 23, 2002, after this grievance was filed.

8. Grievant received her K-8 Counseling Certification July 1, 1999. Ms. Spencer's certification date is not in evidence, nor is the amount of educational experience she has had since she was certified.

9. For purposes of the criteria identified in W. Va. Code § 18A-4-7a Grievant was credited with 10 years of "Experience in the required certification area," and Ms. Spencer was credited with 14 years.

10. Ms. Spencer's 14 years of credited experience included the time since she had worked after receiving her 4-year degree, working in a social work setting, even though portions of that time did not include providing direct counseling services to elementary-age children and antedated her

master's degree in counseling.

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 neither her nor Ms. Spencer's "years of experience" were counted correctly. Respondent disagrees, and avers that even if Grievant's years of experience were adjusted to include the additional time she feels should be added, she would not have been the successful candidate, and further argues that the additional time added by the level two decision could not have been considered as it was not verified prior to the hiring decision. Both arguments fail to address the fact that Respondent counted both Grievant's and Ms. Spencer's experience incorrectly when it counted years not within the certification area required by the posting, but counted general counseling experience instead.

"[I]t is left to the sound discretion of a county board of education to resolve ties between candidates. State ex rel. Monk v. Knight, et al., W. Va. Sup. Ct., No. 24366, [201 W. Va. 535; 499 S.E.2d 35](Nov. 24, 1997). Challenges to the method of resolving ties should be reviewed under the 'arbitrary and capricious' standard pronounced in Dillon v. Bd. of Educ. of the County of Wyoming, [177 W. Va. 145;] 351 S.E.2d 58 (W. Va. 1986). *See*, Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997)." Jones v. Summers County Bd. of Educ., Docket No. 97-45-147 (Jan. 7, 1998). 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 andcapricious, the scope of review is narrow, and an administrative law judge may not simply substitute her 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).

The evidence shows Respondent erred in following its own policy to break the tie between

candidates for a posted position. "County boards of education are bound by procedures they properly establish to conduct their affairs." Syl. Pt. 3, Mingo County Board of Educ. v. Jones, 204 W. Va. 340; 512 S.E.2d 597 (1998). Respondent's policy clearly states, "The applicant with the greatest total amount of experience *in the required certification area* shall be selected for the position." (Emphasis added.) Both Grievant and Ms. Spencer were evaluated based on experience they gained outside their certification areas. Now, Grievant contends she was not given enough credit for that experience, while Ms. Spencer was given too much credit.

The required certification area for the posting in question was "Counseling, K-8 minimum." Both candidates were inappropriately given credit for social work and counseling experience they gained before they were certified. For purposes of the selection criteria in W. Va. Code § 18A-4-7a, "years of experience" is not explicitly defined. However, Respondent's policy does state the experience must be "in the required certification area." This is consistent with the definition of "years of experience" used for salary determination, as codified by W. Va. Code § 18A-4-1(1), in which credit is limited to "the number of years the teacher has been employed in the teaching profession, including active work in educational positions other than the public schools, and service in the armed forces of the United States if the teacher was under contract to teach at the time of induction." West Virginia Code § 18A-4-7a has separate categories for "total years of experience" and "existence of experience in the required certification area, " furthersupporting the idea that general experience and experience as a certified educator are two different things. Unfortunately, Respondent compared the candidates' general experience to break the tie when it should have compared their experience as a counselor, certified in grades K-8, rather than simply as a counselor or social worker counseling elementary-age children.

The West Virginia Supreme Court of Appeals treated the distinction between experience in general and experience in the required certification area for counselors in a similar fashion, finding that the correct definition of experience in the required certification area was even narrower. It found that even experience as a certificated counselor for a school board at a grade level different than that in the posting did not count:

> Specifically, the definitions found in W. Va. Code, 18A-1-1 (1997), notwithstanding, W. Va. Code, 18A-4-7a (1993), separates guidance counselors from classroom teachers and provides guidance counselors with seniority "in their nonteaching area" for the length of time they have been "employed" in that area. As indicated above, guidance counseling experience and seniority acquired by working at a particular certified grade

> level, does not infuse that person with experience and seniority when applying for a guidance counselor position at a separately certified grade level. In other words, [Intervenor] Stoehr acquired experience and seniority pursuant to W. Va. Code, 18A-4-7a (1993), as an elementary school guidance counselor but did not thereby acquire experience and seniority in the area of high school guidance counseling as to which he was never employed.

Bd. of Educ. of the County of Marshall v. Gaudino, 212 W. Va. 640; 575 S.E.2d 250 (2002). If experience counseling in a school with counseling certification does not count if it is work performed at a different grade level than that required by the posting, then it follows that experience outside the school system, performing counseling services with out a West Virginia Teaching Certificate endorsed for counseling cannot be considered as "experience in the required certification area." Grievant received her K-8 counseling certificate July 1, 1999. The record does not reflect the date Ms. Spencer became certified in counseling, K-8, so it is impossible for the undersigned to compare the candidates' experience in the required certification area. Although for purposes of the criteria identified in W. Va. Code § 18A-4-7a Grievant was credited with 10 years of "Experience in the required certification area," and Ms. Spencer was credited with 14 years, the evidence does not support these numbers as Respondent improperly evaluated "total years of experience" and "experience in the required certification area" identically. Since it is the Grievant's burden of proving she has more experience in the required certification area, by failing to provide any criteria for a valid comparison, she has failed to meet this burden.

In fact, it is unclear if there even would have been a tie had Respondent correctly evaluated the candidates based on experience in the required certification area of Counseling, K-8. It is assumed that Respondent had the information necessary for this determination at the time it made its hiring decision. The only extra information Grievant provided concerned her experience outside the school system. Even if this were creditable experience within the required certification area, Respondent found out about it too late to use it as a basis for the hiring decision. The grievance procedure only permits analysis of the selection process based on the information the employer had at the time the decision occurred. An employee must provide all the information on which she wishes her application reviewed prior to the hiring decision being made. *See* Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

However, Grievant has proven a significant flaw existed in the selection process that may have affected the outcome. The appropriate remedy would be to re-evaluate the candidates for the

position in question using the proper method of determining years ofexperience within the required certification area, both in the original evaluation of the seven factors from W. Va. Code § 18A-4-7a, and in making any tie breaking decisions that may be required.

The following conclusions of law support this decision:

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. "[I]t is left to the sound discretion of a county board of education to resolve ties between candidates. State ex rel. Monk v. Knight, et al., W. Va. Sup. Ct., No. 24366, [201 W. Va. 535; 499 S.E.2d 35](Nov. 24, 1997). Challenges to the method of resolving ties should be reviewed under the 'arbitrary and capricious' standard pronounced in Dillon v. Bd. of Educ. of the County of Wyoming, [177 W. Va. 145;] 351 S.E.2d 58 (W. Va. 1986). *See* Cummings v. Lincoln County Bd. of Educ., Docket No. 97-22-324 (Dec. 3, 1997)." Jones v. Summers County Bd. of Educ., Docket No. 97-45-147 (Jan. 7, 1998).

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 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. *See* Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools forthe 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). 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 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 are bound by procedures they properly establish to conduct their affairs.' Syllabus Point 2, Dillon v. Wyoming County Board of Education, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 3, Mingo County Board of Educ. v. Jones, 204 W. Va. 340; 512 S.E.2d 597 (1998).

5. "Years of experience within the required certification area" as used in W. Va. Code § 18A-4-7a means years teaching or counseling at the required grade levels and with the required teaching certification.

6. Respondent's improper consideration of general counseling experience in place of experience in counseling, K-8 resulted in a failure to follow its own tie-breaking policy, and was therefore arbitrary and capricious.

7. Grievant failed to meet her burden of proving she had greater experience in the required certification area than the successful candidate.

8. The grievance procedure only permits analysis of the selection process based on the information the employer had at the time the decision occurred. Anemployee must provide all the information on which she wishes her application reviewed prior to the hiring decision being made. *See* Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

Accordingly, this grievance is hereby **GRANTED IN PART**. Respondent is **ORDERED** to review the applications of the candidates for the position in question using the seven factors from W. Va. Code § 18A-4-7a, and calculating years of experience within the required certification area in accordance with this decision. If Grievant is the successful candidate after this re-evaluation, Respondent is **ORDERED** to instate her in the position.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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: November 19, 2003 _____

M. Paul Marteney

Administrative Law Judge