ALISON FLUHARTY,

Grievant,

v. **DOCKET NO. 02-52-405**

WETZEL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Alison Fluharty filed this grievance on October 30, 2002, stating: “I believe I was the most qualified teacher to apply for the General Science 7-12 position at Paden City High School. My employee rights were violated under WV Code 18A-4-7a.” Grievant stated the relief sought as: “To be placed in the above disputed position.”

Having been denied at all lower levels, the matter was submitted for a Level IV decision based on the record developed at the previous levels. Grievant was represented by Owens L. Brown of the West Virginia Education Association, and Respondent was represented by Larry Blalock, Esq. of Jackson Kelly, PLLC. This matter became mature for decision upon the filing of the parties' proposed findings of fact and conclusions of law on February 17, 2003.

Based on a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. For the 2001-2002 school year, Grievant was regularly employed by Respondent as a half-time science teacher, grades 7-8 and as a half-time social studies teacher at Paden City High School.

2. At the end of that school year, Grievant was “bumped” from her half-time science teaching position by a more senior employee as a result of a reduction in force.

3. At the beginning of the 2002-2003 school year, that more senior employee failed to report for work, his contract was invalidated, and Grievant was placed back in the open position as a substitute.

4. Respondent posted the open half-time position in September, 2002. The posting required "Valid WV certification in General Science Grades 7-12," and further stated, "If there are no fully certified applicants, consideration will be given to those certified teachers who are willing to pursue obtaining the required certification areas for this position."

5. Grievant and Kelly Haught applied for the position. Neither possessed the required certification.

6. Grievant held certification in Social Studies, grades 5-12. She had a permit for General Science, grades 5-12, but it had expired June 30, 2002.

7. Ms. Haught was certified in General Science, grades 5-9.

8. Under the legislative rules governing certification at the time, there was no longer a grades 7-12 certification class.

9. The position was awarded to Ms. Haught because she was the only applicant certified in General Science, and her certification covered the grades listed in the posting, specifically grades 7 and 8.

DISCUSSION

In a non-selection case, Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for the position rather than another applicant because she was more qualified, or that there was such a substantial flaw in the selection process that the outcome would have been different if the proper process were used. Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (1990). Grievant contends she was the most qualified applicant for the position and alleges a violation of W. Va. Code § 18A-4-7a, which provides in part:

> (d) If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, the county board of education shall make decisions affecting the filling of such positions on the basis of the following criteria:
>
> (1) Appropriate certification and/or licensure;

(2) Total amount of teaching experience;

(3) The existence of teaching experience in the required certification area;

(4) Degree level in the required certification area;

(5) Specialized training directly related to the performance of the job as stated in the job description;

(6) Receiving an overall rating of satisfactory in evaluations over the previous two years; and

(7) Seniority.

(e) In filling positions pursuant to subsection (d) of this section, consideration shall be given to each criterion with each criterion being given equal weight. If the applicant with the most seniority is not selected for the position, upon the request of the applicant a written statement of reasons shall be given to the applicant with suggestions for improving the applicant's qualifications.

When one or more permanently employed instructional personnel apply for a position, but do not meet the standards set forth in the posting, the Grievance Board has found that:

> [I]t is also clear that W. Va. Code § 18A-4-7a is not applicable because no candidate "[met] the standards set forth in the job posting." The language of the statute is clear that only when at least one of the applicants meets thestandards set forth in the job posting are the seven criteria required to be utilized in the selection process. When a situation arises that is not specifically governed by the school personnel laws, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 156, 406 S.E.2d 687 (1991); See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-003 (Apr. 25, 1997). *See*, Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-265 (October 15, 2002).

Here, neither applicant met the requirements listed in the posting, in that neither held certification in General Science for grades 7-12. However, Respondent has admitted that this requirement was probably a mistake, since the class was for grades 7-8 and the grade 7-12 certification is no longer given. To remedy the mistake, it re-examined the posting. Reading it narrowly, so as to exclude requirements unnecessary for the position, namely certification in grades other than those taught, it re-interpreted the posting to require the available certification in the subject area for only the grades

taught by the position. Respondent then gave the position to Ms. Haught, the only candidate who did possess that certification. Grievant contends the Board's action was arbitrary and capricious.

County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the best interests of the schools, and in a manner which is neither arbitrary nor capricious. *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 of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned 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). The undersigned cannot perform the roleof a "super-interviewer" in matters relating to the selection of candidates for vacant positions. Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 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." *Id*. (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant, at the time, held neither a certification nor a permit in the subject area. Even if the job posting had correctly required a 5-9 General Science certification from the beginning, the outcome would be no different. When only one of two candidates holds appropriate certification and/or licensure, the Board need not look beyond that to amount of experience. It was not unreasonable nor inappropriate for the Board to consider valid and current certification in the subject area of the class and at the grade level of the class as necessary to perform the job.

Grievant also contends the position should never have been posted at all, and points to W. Va. Code § 18A-4-7a(o)(4), which states, “A position held by a certified and/or licensed teacher who has been issued a permit for full-time employment and is working towardcertification in the permit area shall not be subject to posting if the certificate is awarded within five years[.]” Grievant had been

issued a permit, and was working toward certification, but two factors complicate the matter: Grievant's permit had expired, and Grievant did not hold the position any longer -- she was substituting in the then-vacant position until it could be filled. The section, therefore, is inapplicable to Grievant's situation.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for the position rather than another applicant because she was more qualified, or that there was such a substantial flaw in the selection process that the outcome would have been different if the proper process were used. Black v. Cabell County Bd. of Educ., Docket No. 89-06-707 (1990).

2. When one or more permanently employed instructional personnel apply for a position, but do not meet the standards set forth in the posting:

> [I]t is also clear that W. Va. Code § 18A-4-7a is not applicable because no candidate "[met] the standards set forth in the job posting." The language of the statute is clear that only when at least one of the applicants meets the standards set forth in the job posting are the seven criteria required to be utilized in the selection process. When a situation arises that is not specifically governed by the school personnel laws, the county board has discretion to act in the best interests of the schools, so long as that action is not arbitrary and capricious. Pockl v. Ohio County Bd. of Educ., 185 W. Va. 156, 406 S.E.2d 687 (1991); See Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-003 (Apr. 25, 1997). *See*, Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-265 (October 15, 2002).

3. County boards of education have substantial discretion in matters relating to the hiring of school personnel. The exercise of that discretion must be within the bestinterests of the schools, and in a manner which is neither arbitrary nor capricious. *See* Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991).

4. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned 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). The undersigned cannot perform the role of a "super-interviewer" in matters relating to the selection of candidates for vacant positions.

Stover v. Kanawha County Bd. of Educ., Docket No. 89-20-75 (June 26, 1989).

5. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). 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." *Id*. (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

6. It was not unreasonable nor inappropriate for the Board to consider valid and current certification in the subject area of the class and at the grade level of the class as necessary to perform the job. 7. "A position held by a certified and/or licensed teacher who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years[.]" W. Va. Code § 18A- 4-7a(o)(4).

8. West Virginia Code § 18A-4-7a(o)(4) is not applicable where the teacher's permit is expired, and is not applicable where the teacher is serving as a substitute in the 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 Wetzel 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: March 12, 2003

M. Paul Marteney

Administrative Law Judge