DENNIS HERMASELLA,

Grievant,

v. **Docket No. 04-24-281**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Dennis Hermasella ("Grievant"), employed by the Marion County Board of Education ("MCBE") as a teacher, filed a level one grievance on May 10, 2004, in which he alleged a posting for a Physical Education/Health teacher at Fairmont Senior High School ("FSHS") was in violation of W. Va. Code §§ 18A-4-7a and 18-29-2, and was arbitrary and capricious. For relief, Grievant requested the position be reposted with only Physical Education certification required. Judd Ashcraft, Principal at FSHS lacked authority to grant the relief at level one. Following an evidentiary hearing, the grievance was denied at level two, and appeal was made to level four on July 27, 2004. A level four hearing was conducted on September 20, 2004, at which time Grievant was represented by Frank Caputo of the American Federation of Teachers, and MCBE was represented by Steven R. Brooks, Esq., of Flaherty, Sensabaugh & Bonasso. The grievance became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on November 8, 2004.

The essential facts of this matter are undisputed, and may be set forth as follows.

Findings of Fact

1. Grievant has been employed by MCBE as a teacher for approximately twenty-four years. Grievant is certified in Social Studies and Physical Education, and last taught Physical Education in either 1985 or 1987. Grievant is not certified in Health. 2. On April 12, 2004, MCBE posted a vacancy for a number of professional positions, including Physical Education/Health teacher at FSHS.

3. MCBE has required dual certifications in Physical Education and Health since 1986, even though Health is taught as a separate subject, and is not part of the Physical Education curriculum.

4. The teacher who previously held the position in question did not teach a Health class.

5. The successful applicant for the position was not assigned to teach a Health class during

the 2004-2005 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 posting requiring multiple certifications was not justified in this situation, given that neither the prior instructor nor the incumbent was assigned to teach Health. MCBE asserts that it has paired the Physical Education and Health certifications for nearly twenty years to ensure flexibility in meeting requirements and scheduling. MCBE relies upon the level four decision of Taylor v. Marion County Board of Education, Docket No. 95-24-047 (Apr. 28, 1995), in support of its practice.

W. Va. Code § 18A-4-7a(o) provides in pertinent part:

Openings in established, existing or newly created positionsshall be processed as follows: (1) Boards shall be required to post and date notices which shall be subject to the following:

* * * (D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant[.]

"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 for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health & Human Res., 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

The Grievance Board has held the imposition of a certification requirement that is not necessary for a vacant posted position, and excludes persons who are fully certifiedto hold the position, is arbitrary and capricious. Harris v. Mingo County Bd. of Educ., Docket No. 01-29-120 (Oct. 26, 2001); Robinson v. Wyoming County Bd. of Educ., Docket No. 90-55-137 (June 22, 1990); Rash v. Wayne County Bd. of Educ., Docket No. 50-87- 263-1 (June 7, 1988). Specifically, in Robinson, the board of education's rationale that a broader classification would provide more flexibility in scheduling, was rejected. The practice was found to unnecessarily and unfairly excluded qualified teachers from being considered, limiting the pool of eligible applicants, perhaps including the most qualified teacher for the job. These considerations were determined to outweigh the possibility that there may be a need in the future to change teaching assignments at a school.

MCBE's reliance on Taylor is misplaced. In that grievance, a specific endorsement in mathematics was required, when a general certification in elementary education would have sufficed. The facts of that situation are easily distinguishable from the present case. Although a general certification could have been accepted, the position was to teach middle school mathematics, and MCBE had adopted a practice of hiring individuals with subject specific endorsements for middle school positions. Requiring a subject specific certification is acceptable. Requiring a certification which is not necessary for the position to be filled is arbitrary and 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 theburden of proving his 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. Postings for professional position vacancies shall be written so as to ensure that the largest possible 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- 7a(o).

3. 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)(citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

4. The imposition of a certification requirement that is not necessary for a vacant posted position, and excludes persons who are fully certified to hold the position, is in violation of W. Va. Code § 18A-4-7a(o), and is arbitrary and capricious. See Robinson v. Wyoming County Bd. of Educ., Docket No. 90-55-137 (June 22, 1990); Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263-1 (June 7, 1988).

Accordingly, the grievance is **GRANTED**, and MCBE Ordered to repost the position at FSHS requiring certification only in Physical Education.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marion County. Any such appeal must be filed within thirty (30) daysof 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: DECEMBER 7, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE