**BETH PRICHARD,**

**Grievant,**

**v.**

**LINCOLN COUNTY BOARD**

**OF EDUCATION,**

**DOCKET NO. 04-22-241**

**Respondent,**

**and**

**JUDY WARNER,**

**Intervenor.**

## DECISION

Grievant Beth Prichard filed this grievance against her employer, the Lincoln County Board of Education ("Respondent") on June 30, 2004, stating: "During the hiring process of a Kindergarten teaching position at West Hamlin Elementary, I was not chosen for the position which I believe is a violation of W. V. State Code 18A-4-7a specifically subsection[s] d and e." Grievant stated the relief sought as: "Awarded the Kindergarten teaching position at West Hamlin Elementary." Judy Warner, the successful applicant for the position in question, joined the proceedings as Intervenor at level four. (See footnote 1) Having been denied at levels one and two, level three was waived and a level four hearing was held in the Grievance Board's Charleston office on August 2, 2004. Grievant was represented by Kevin Prichard. Respondent was represented by Superintendent William Grizzell. Intervenor was represented by Gary Archer of the West Virginia Education Association. This matter became mature for decision at the close of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

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

## FINDINGS OF FACT

1. Grievant is regularly employed by Respondent at West Hamlin Elementary School as a Title I teacher. William Grizzell is Lincoln County Superintendent of Schools. 2. On May 4, 2004, Respondent posted a job opening for an Early Childhood (Kindergarten) Teacher at West Hamlin Elementary School. There were sixteen applicants for the position, including Grievant and Intervenor.

3. Intervenor, at the time of the posting, was a regularly-employed classroom preschool teacher at West Hamlin Elementary.

4. The hiring matrix for Grievant and Intervenor was completed as follows:

| Applicant | Appropriate Certification | Total Teaching Experience | Existence of teaching experience in required certification area | Degree level in certification area | Specialized Training directly related to job (See footnote 2) | Satisfactory evaluations | Seniority |
|---|---|---|---|---|---|---|---|
| Grievant | Yes | 18 years | 0 | MA + 45 | 7 | Yes | Aug. 26, 1986 |
| Intervenor | Yes | 18 years | 16 years | BA + 15 | 14 | Yes | Aug. 28, 1986 |

5. Superintendent Grizzell compared the factors for Grievant and Intervenor and determined they were tied. He considered their specialized training to be essentially equal, and the two-day difference in seniority to be insignificant.

6. Superintendent Grizzell Recommended to the Board of Education that Intervenor be hired for the position on the strength of her years of experience teaching in the kindergarten classroom. The Board accepted that recommendation.

7. After she was notified that she had not been selected, Grievant requested a meeting with Mr. Grizzell, whereat she pointed out that the matrix was not tied because she had more seniority than Intervenor.

8. Mr. Grizzell asked Dr. Donna Martin to look at the matrices and provide an independent evaluation, without telling her what his outcome had been. Dr. Martin also scored a tie between Grievant and Intervenor, because she gave Grievant credit for more seniority, but Intervenor had more training relative to the position. She reported back that the candidates were tied, and the

decision would therefor be his.

9. Grievant had additional training, but did not list it all on her application. (See footnote 3)

DISCUSSION

"Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she 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 properprocess had been used." *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30- 495 (June 26, 2003). Grievant's argument is that there was no tie when the matrix was first completed, because she had superior seniority to Intervenor. Therefore, Superintendent Grizzell was not free to choose between them based on his judgment, but should have selected Grievant. Respondent argues that he validly chose the candidate with the most experience in the position being selected for.

West Virginia Code § 18A-4-7a lists seven factors to be considered when one or more permanent teachers apply for a posted position. The "second set of criteria" found in section 7a(d) is applicable to this case, and those criteria are as follows:

> 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. Consideration shall be given to each criterion with each criterion being given equal weight.

"With regard to the hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the seven "qualifying factors" set forth in W. Va. Code §18A-4-7a (1992). That Code Section requires that, in applying the second set of criteria, each factor be weighted equally. *Sisk v. Mercer County Bd. of Educ.*, Docket No. 95-27-113 (Sept. 25, 1995)." *Cummings v. Lincoln County Bd. of Educ*. Docket No. 92-22-324 (Dec. 3, 1997).

Respondent, using the application materials, completed a matrix showing the qualifications of each candidate in terms of these seven factors. Superintendent Grizzell mistakenly believed Grievant's and Intervenor's seniority was equal, and he also determined that their amount of specialized training relative to the position was equal on the matrix. The Code does not say what to

do in the event of a tie, and SuperintendentGrizzell exercised his professional judgment in awarding the position to the Intervenor, whose classroom teaching experience was all in the kindergarten classroom, the same type of class as the position. Grievant, by contrast, has no kindergarten classroom experience.

That decision should only be overturned if it were an abuse of discretion. Abuse of discretion is evaluated by reviewing an action against the arbitrary and capricious standard. "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 Res.*, 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. " *Trimboli*, *supra* . Under this standard, Superintendent Grizzell's decision to award the position to the teacher with much greater experience doing the actual job being selected for was immanently reasonable.

However, Grievant argues that there actually was no tie: she had greater seniority than Intervenor. While Superintendent Grizzell discounts the two-day difference as insignificant, Grievant is correct. All other things being equal, her seniority would entitle her to the position. However, as Dr. Martin's version of the matrix showed, Grievant and Intervenor were still tied: Intervenor's specialized training was superior, rather than equalas Superintendent Grizzell assumed. Again, they candidates were tied, and the discretionary judgment of Superintendent Grizzell should be upheld. It would be unfair, as Grievant suggests, to only correct the mistake that favors her. If the correct matrix is to be used, it must be entirely correct.

The following conclusions of law support this decision.

## CONCLUSIONS OF LAW

1. "Grievant bears the burden of proving, by a preponderance of the evidence, that she should have been selected for a particular position rather than another applicant, by establishing that she

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." *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 01-30-495 (June 26, 2003).

2. "With regard to the hiring for a classroom teaching position, boards of education must exercise their discretionary authority by considering the seven "qualifying factors" set forth in W. Va. Code §18A-4-7a (1992). That Code Section requires that, in applying the second set of criteria, each factor be weighted equally. *Sisk v. Mercer County Bd. of Educ.*, Docket No. 95-27-113 (Sept. 25, 1995)." *Cummings v. Lincoln County Bd. of Educ*. Docket No. 92-22-324 (Dec. 3, 1997).

3. After applying the second set of criteria to the qualifications of the applicants, Grievant and Intervenor were tied. W. Va. Code § 18A-4-7a does not specify how a tie must be resolved. 4. Abuse of discretion is evaluated by reviewing an action against the arbitrary and capricious standard. "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 and 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)). "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*, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra* ; *Santer v. Kanawha County Bd. of Educ.*, Docket No. 01-20-557 (Aug. 14, 2003).

5. Grievant did not establish there existed such a significant flaw in the selection process that,

but for the flaw, she would have been awarded the position.

6. Superintendent Grizzell's decision to award the position to the candidate with the most experience in the same type of position being posted was neither arbitrary and capricious nor an abuse of discretion.

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 Lincoln 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: August 11, 2004** _____

**M. Paul Marteney**

**Administrative Law Judge**

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Footnote: 1

*Ms. Warner was permitted to intervene over Grievant's objection. Pursuant to W. Va. Code § 18-29-3(u), a teacher employed by a county board of education may intervene in a grievance proceeding at any level if that teacher believes the disposition of the grievance will adversely affect his or her rights or property or if that teacher believes his or her interest is not adequately represented by the existing parties. State of W. Va. ex rel. Monk v. Knight, 205 W. Va. 535; 499 S.E.2d 35 (1997).*

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Footnote: 2

*The actual matrix used listed the specific programs, here the number of individual programs has been substituted as that was the actual measured criteria, rather than the content or titles of the programs.*

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Footnote: 3

*Since this information was not provided prior to the decision being grieved, it cannot be used to invalidate the decision now, and will not be considered. Dr. Martin's matrix, which was completed after Superintendent Grizzell's initial*

*decision, is not post-decision information, but is simply a re-ordering of the data already at hand.*