LISA MOLES,

Grievant,

v. **Docket No. 06-18-034**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Lisa Moles ("Grievant"), employed by the Jackson County Board of Education ("JCBE") as a teacher, filed a level one grievance on August 24, 2005, in which she alleged violations of *W. Va. Code* §§ 18A-2-2 and 18A-4-7a when preferred recall guidelines were not followed. For relief, Grievant requests placement at the Ravenswood Middle School as the Sixth Grade Computers/Career Awareness Teacher. After the grievance was denied at levels one through three, appeal to level four was made on January 30, 2006. Grievant's representative Bruce Boston of the West Virginia Education Association, and JCBE counsel, Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, P.L.L.C., agreed to submit the grievance for review based upon the lower-level record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on February 28, 2006.

The following facts have been derived from a preponderance of the evidence admitted in the lower-level record.

Findings of Fact

1. Grievant was first employed by JCBE effective August 23, 2004, and was assigned as the Alternative School and county-wide Safe and Drug Free Resource teacher. Grievant is certified to teach Business Education, grades 5-12 and Math, 5-9. 2. In Spring 2005, JCBE implemented a reduction in force for the 2005-2006 school year in which ten professional positions were eliminated.

3. JCBE Superintendent Ronald Ray notified Grievant by certified letter dated March 2, 2005, that her name would not be submitted to the board for re-employment due to the projected decrease in enrollment. By letter dated April 20, 2005, Superintendent Ray confirmed that she was not rehired for the 2005-2006 school year, but that her name would be placed on the preferred recall list.

4. On July 6, 2005, JCBE posted a job opening for the position of classroom teacher at Ravenswood Middle School. The assignment was for the sixth grade and Computers/Career Awareness. The position required certification in elementary education, and six semester college hours, or equivalent, of computer training.

5. Grievant applied for the Ravenswood position, but was not selected because she does not hold the required certification in elementary education.

6. Although classes are departmentalized, JCBE posts sixth grade positions requiring elementary certification to maintain flexibility in scheduling. The teacher assigned the position in question has taught a supplemental language arts class this year. Grievant would not have been certified to teach anything other than math at the sixth grade level.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 (2004); *Holly v. LoganCounty 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. "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 & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that the posting limited the pool of applicants, in violation of *W. Va. Code* § 18A-4-7a(o), and that she was entitled to placement prior to a new employee, as per *W. Va. Code* § 18A-2-2. JCBE asserts that it has substantial discretion in personnel matters, and that it did not act in an arbitrary and capricious manner. JCBE further asserts that even if the position had been posted to accommodate Grievant, she was not the most senior individual on the preferred recall list with certification in math.

W. Va. Code § 18A-2-2 provides in relevant part:

a continuing contract shall not operate to prevent a teacher's dismissal based upon the lack of need for the teacher's services pursuant to the provisions of law relating to the allocation to teachers and pupil-teacher ratios. . . . In case of such dismissal, the teachers so dismissed shall be placed upon a preferred list in the order of their length of service with that board, and no teacher shall be employed by the board until each qualified teacher upon the preferred list, in order, shall have been offered the

opportunity for reemployment in a position for which they are qualified.

W. Va. Code § 18A-4-7a(o) provides:

(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 tofavor a specific applicant.

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ*., 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with this principle, a county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. *See Cowen v. Harrison County Bd. of Educ.*, 196 W. Va. 377, 465 S.E.2d 648 (1995); *Mounts v. Mingo County Bd. of Educ.*, Docket No. 96-29-479 (June 27, 1997); *Bailey v. Mingo County Bd. of Educ*., Docket No. 95-29-346 (Feb. 21, 1996).
In order for Grievant to prevail on her contention the JCBE improperly stated the qualifications for the position, she must demonstrate that the school board's decision was either arbitrary and capricious, or an abuse of discretion. *See Cowen, supra; Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *McCune v. Kanawha County Bd. of Educ.*, Docket No. 94-20-265 (Oct. 31, 1994). In applying an “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*,at 286.

Ravenswood principal Gary Higginbotham testified at level two that he requested the position be posted with elementary certification required because the school had not met the Annual Yearly

Progress ("AYP") required by the No Child Left Behind Act during the 2003-2004 school year, and he anticipated the goal had not been met for the 2004- 2005 year. Because he knew this teacher would have a free eighteen week block from the computer class, he hoped to assign the teacher an enrichment class in language arts. By the date of the level two hearing his prediction that Ravenswood would not meet the AYP had been substantiated, and the individual employed for the vacancy had been assigned the enrichment class.

Unlike the circumstances in *Hermasella v. Marion County Board of Education*, Docket No. 04-24-281 (Dec. 7, 2004), upon which Grievant relies, JCBE has not required a certification which was unnecessary for the position. Although contrary to Grievant's interests, subject matter certification for elementary/middle schools is more restrictive than elementary certification, and does not allow for a broader pool of applicants. The testimony of Mr. Higginbotham establishes that the decision to follow JCBE procedure and require the general elementary certification for the position was based on reasonable and valid factors, and was not arbitrary and capricious. Because the posting was valid, and Grievant did not hold elementary certification, there was no violation of *W. Va. Code* § 18A-2-2 or § 18A-4-7a, by JCBE when filling the vacancy at Ravenswood Middle School. (See footnote 1)

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 the burden of proving her 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 (2004); *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. *W. Va. Code* § 18A-2-2 requires that teachers dismissed during a reduction in force shall be placed upon a preferred list in the order of their length of service with that board, and no teacher shall be employed by the board until each qualified teacher upon the preferred list, in order, shall have been offered the opportunity for reemployment in a position for which they are qualified.

3. *W. Va. Code* § 18A-4-7a(o) requires that postings for professional vacancies be written so as to ensure that the largest possible pool of qualified applicants may apply, and may not require criteria which are not necessary for the successful performance of the job or be written with the intent

to favor a specific applicant.

4. A county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. *See Cowen v. Harrison County Bd. of Educ.*, 196 W. Va. 377, 465 S.E.2d 648 (1995); *Mounts v. Mingo County Bd. of Educ.*, Docket No. 96-29-479 (June 27, 1997); *Bailey v. Mingo County Bd. of Educ*., Docket No. 95-29-346 (Feb. 21, 1996). 5. In order for Grievant to prevail on her contention the JCBE improperly stated the qualifications for the position, she must demonstrate that the school board's decision was either arbitrary and capricious, or an abuse of discretion. *See Cowen, supra; Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *McCune v. Kanawha County Bd. of Educ.*, Docket No. 94-20-265 (Oct. 31, 1994).

6. In applying an “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*, at 286.

7. Grievant has failed to prove that JCBE posted the position in question in violation of the cited statutes, or that it acted in an arbitrary and capricious manner.

Accordingly, the grievance is **DENIED.**

Either party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Jackson 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 andState 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: APRIL 6, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Even if the position had been posted requiring math certification, it is undisputed that another teacher with math certification, and ahead of Grievant on the preferred recall list, would have been offered the assignment first.