LEIGH ANN HOOD and NANCY FACEMIRE,

Grievants,

v. Docket No. 05-24-440

MARION COUNTY BOARD OF EDUCATION,

Respondent,

and

NANCY TONKERY, Intervenor.

DECISION

Leigh Ann Hood and Nancy Facemire ("Grievants") initiated this proceeding on August 24, 2005, alleging that a Library/English Instructor position at Fairmont Senior High School should have been posted as Library only. Intervenor Nancy Tonkery was joined at level two. After a level two hearing and decision, and waiver of consideration at level three, Grievants appealed to level four on December 8, 2005. Once a level four hearing was scheduled, the parties elected to have a decision rendered based upon the record developed below. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 13, 2006. (See footnote 1)

The following material facts have been proven by a preponderance of the evidence of contained in the record.

Findings of Fact

1. Grievant Hood is employed by Respondent as a Librarian at East Park School. Her certifications are Social Studies 5-12 and School Library/Media K-12. She has been employed by Respondent for approximately 14 years.

2. Grievant Facemire is employed by Respondent as a Librarian at Monongah School. Her certifications are Home Economics 7-12 and School Library/Media K-12. She has been employed by Respondent for approximately 26 years.

3. On August 18, 2005, Respondent posted a vacancy for the position of Library/English Instructor at Fairmont Senior High School.

4. Grievants and Nancy Tonkery applied for the Library/English position. Because she was the only applicant who held both required certifications, Intervenor was selected to fill the position. Intervenor's certifications are English/Language Arts 5-12 and School Library/Media K-12.

5. Since being placed in the position, Intervenor teaches English for two class periods per day and is in the library the remainder of the day to assist students with reference materials.

6. Two other English teachers are assigned to Fairmont Senior High School. Both teach Drama and Speech, in addition to teaching English classes. If these two teachers taught the English courses currently taught by Intervenor, Fairmont Senior High could no longer carry a Drama program.

7. Intervenor is away from the library for three periods per day, two of which are for English classes, and the other being her planning period.

8. During the three periods that Intervenor is absent from the library, three other teachers come to the library to oversee students and to teach other courses, as follows:

> Carol Amos, a certified English teacher, assists students in a basic skills computer class. The computer lab is adjacent to the library, and Ms. Amos has received specific training in order to provide this assistance.
>
> Sally Feltz is a certified Reading instructor, and teaches the “Fast Forward” reading program, which is a program designed to provide remedial assistance to students having problems with literacy and reading. A specific training course must be completed in order to teach this program. Fast Forward uses a computer program, so the students utilize the computer lab adjacent to the library.
>
> Tina Ruggiero, a certified English teacher, oversees the library and assists students during Intervenor's planning period.

9. Neither Grievants nor Intervenor have received Fast Forward training. However, the parties have stipulated that any teacher can teach a basic skills course, so long as their teaching certificate covers the applicable grades.

Discussion

This is a non-disciplinary grievance in which Grievants bear the burden of proof. Grievants' allegations must be proven 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. Grievants contend that the position at issue should have been posted as only requiring Library certification, and it was not necessary to hire a certified English teacher to fill the position. They argue that the position should be reposted accordingly and the most qualified applicant selected. Grievants have made no attempt to compare their own qualifications to Intervenor's, so the selection decision itself is not at issue. A board of education has the discretion to determine the certification requirements of a position, and it does that by determining the duties of the position. *Tye v. McDowell County Bd. of Educ.*, Docket No. 03-33-413 (Apr. 22, 2004). It is then incumbent upon the Board to ensure that its job postings accurately state those requirements. *See Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Feltz v. Marion County Bd. of Educ.*, Docket No. 90- 24-078 (Oct. 19, 1990). However, "[t]he purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position." *Conners*, *supra*; *Rash v. Wayne County Bd. of Educ*., Docket No. 50-87-263 (June 7, 1988). Grievants believe that, in the instant case, English certification was unnecessary. They contend that other English teachers could have taught the two classes Intervenor teaches, and that anyone in the librarian position could have met the library's needs throughout the entire school day.

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). “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.2d1017 (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 Resources*, 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*, 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).

Under the circumstances presented, the undersigned cannot find Respondent's actions to be arbitrary and capricious or an abuse of its broad discretion in personnel matters. Although Code § 18A-4-7a(o) provides that “postings may not require criteria which are not necessary for the successful performance of the job,” that is not what occurred here. Intervenor is, in fact, performing the duties of both a librarian and an English teacher on a daily basis. While Grievants would prefer that Respondent use the librarian position only as that, while forcing the other English teachers to cover the courses currently taught by Intervenor, it has no obligation to assign personnel in this manner. It is understandable that officials at Fairmont Senior High School would desire to provide Drama and Speech options to the school's students, and they assigned duties to theavailable English teachers accordingly. In addition, other employees teaching necessary programs in the computer lab were available to provide library supervision while Intervenor teaches two English classes per day, accomplishing the goal of “killing two birds with one stone.” A board of education is provided with ample discretion in matters of assigning duties, and the undersigned cannot find that any abuse of that discretion occurred here.

The following conclusions of law are consistent with the foregoing.

Conclusions of Law

1. In a non-disciplinary grievance, Grievants bear the burden of proving their claims 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. While a board of education does have the discretion to determine the certification requirements of a position, it is incumbent upon the Board to ensure that its job postings accurately state those requirements. *Tye v. McDowell County Bd. of Educ.*, Docket No. 03-33-413 (Apr. 22, 2004); *See Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000); *Feltz v. Marion County Bd. of Educ.*, Docket No. 90- 24-078 (Oct. 19, 1990).

4. 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 reasonablyexercised, 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).

5. "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997).

6. Respondent's posting of the position at issue as a Library/English Instructor was not arbitrary and capricious or an abuse of discretion.

Accordingly, this grievance is **DENIED.**

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) 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit

court.

Date: March 29, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants were represented by Don Craft of the West Virginia Education Association; Respondent was represented by counsel, Stephen R. Brooks; and Intervenor was represented by Frank Caputo of the American Federation of Teachers.