KEVIN S. WORKMAN,

Grievant,

v. **DOCKET NO. 99-DOE-309**

WEST VIRGINIA DEPARTMENT OF EDUCATION/CEDAR LAKES,

Respondent.

D E C I S I O N

Grievant, Kevin S. Workman, filed a grievance on or about May 20, 1999, against his employer, the West Virginia Department of Education/Cedar Lakes ("Department"), protesting his dismissal from employment by letter dated May 17, 1999. As relief, Grievant sought reinstatement with back pay and interest, as well as removal from his personnel file of all documents relied upon by the Department in taking disciplinary action against him.

The level two grievance evaluator and State Superintendent of School's designee, Susan C. Lattimer, granted the grievance and ordered Grievant be reinstated to his position at Cedar Lakes Conference Center. Ms. Lattimer did not award back pay and interest, nor did she order removal of documents from his personnel file. Grievant appealed that portion of the level two decision to level three on July 27, 1999, and the State Board of Education waived participation at level three in accordance with W. Va. Code § 18-29-4(c). Subsequently, both Grievant and the Department appealed to level four, Grievant requesting all of the relief sought in his grievance, and the Department

alleging that the level two decision was clearly wrong and arbitrary and capricious. A level four hearing was held on August 24, 1999, and this matter became mature for decision on September 8, 1999, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Mr. Jerry L. Payne, and the Department was represented by its counsel, Katherine L. Dooley, Esq.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant was hired as a seasonal employee with the Cedar Lakes Conference Center and later became an irregular, hourly employee with the position of Grounds Maintenance. An irregular, hourly employee is an individual who is required to work as a substitute or on certain occasions to augment the regular staff.

2. As an irregular hourly employee, Grievant was paid on an hourly basis and would not work more than one thousand twenty (1,020) hours in any calendar year. He was not eligible to participate in medical and life insurance or retirement benefit plans at Cedar Lakes.

3. Grievant admitted to altering his time card on November 27 and 28, 1998, as well as a co-worker's time card on November 27, 1998.

4. Grievant received and acknowledged a written reprimand on December 3, 1998, from his supervisor, Sharon Ratliff, regarding the time card incident. The letter informed Grievant that reporting the wrong time on a time card was a serious infraction, and that any further abuses could result in termination.

5. Grievant reported to work on three different occasions (Feb. 19, Feb. 26 and Mar. 5) at times he was not scheduled to be at work. Grievant was counseled by one of

his supervisors, Mr. Tim Lowrey, not to work when he was not scheduled or without prior approval. Grievant's other supervisor, Ms. Ratliff, informed Lisa Mahon, General Manager of Cedar Lakes, of the incidents and the counseling.

6. Ms. Mahon witnessed Grievant washing his personal car at the Maintenance building after he was scheduled off work on or about April 24, 1999.

7. Ms. Mahon instructed Ms. Ratliff by memorandum dated April 24, 1999, to speak to Grievant and inform him that he was not to wash his personal vehicle at Cedar Lakes. Ms. Ratliff counseled Grievant about this situation.

8. In May 1999, Grievant greased the steering wheel of a golf car and used a trash can in the office as a spittoon for his smokeless tobacco. He blamed both of these actions on a co-worker.

9. By letter dated May 17, 1999, Ms. Mahon informed Grievant that his employment at Cedar Lakes would be terminated immediately.

10. The Employee Handbook and General Rules and Regulations for Cedar Lakes stipulates that new employees shall report to the Administrative Office on their first day of employment, where they will receive an Employee Handbook. No evidence exists that Grievant received an Employee Handbook until after he was dismissed, and then only after he requested a copy.

11. The Employee Handbook and General Rules and Regulations for Cedar Lakes stipulates that "all support personnel are employed for a probationary period not to exceed 90 calendar days. During the probationary period, the immediate supervisor shall hold one or more conferences with the employee. If the employee's performance is unsatisfactory, he/she should be given an opportunity to improve. Prior to the end of the

probationary period, the immediate supervisor, using the appropriate personnel rating form, shall evaluate the employee and report the evaluation and recommendations to the Superintendent. If a negative evaluation is received, the Superintendent shall review the case and take appropriate action." G. Ex. 1.

12. Grievant did not receive a performance evaluation for the entire period of his employment at Cedar Lakes.

13. By all accounts, Grievant was a good employee, with no complaints regarding his performance.

14. The level two grievance evaluator found that the Department had failed to follow its own policy and procedures as outlined in the Employee Handbook. Because "management failed to provide the required performance evaluations using the Personnel Rating Form as prescribed in the personnel policies in the handbook", the grievance evaluator ordered Grievant reinstated to his position at Cedar Lakes, but did not award back pay and interest. Nor did the grievance evaluator order Grievant's personnel file be expunged of all references to the cited incidents leading up to his dismissal.

DISCUSSION

Grievant's Appeal

The limited issues of Grievant's appeal to level four are, whether he is entitled to back pay and interest from the date of his dismissal until the date of his reinstatement, and whether the Department must expunge his personnel file of all references to the misconduct cited in the Findings of Fact. Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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 has failed to establish that the level two grievance evaluator erred in not awarding him back pay and interest for his termination. It is clear the grievance evaluator attempted to weigh Grievant's misconduct against the procedural violations of the Department in fashioning the appropriate relief in this grievance. There is no dispute that the cited misconduct occurred as stated, and thus, the level two grievance evaluator acted within her discretion to decide not to award Grievant back pay and interest, while still finding he should be reinstated. Further, as the level two grievance evaluator did not find that the cited incidents of misconduct did not occur as stated, it is entirely appropriate to leave the documentation regarding those incidents in Grievant's personnel file. Further, even if the level two grievance evaluator's decision regarding back pay was found to be erroneous, Grievant has presented no evidence from which the undersigned could calculate a monetary award in this case. Grievant was an irregular hourly employee with

no guarantee of any number of hours per week, and any indication of lost wages would be purely speculative.

Department's Appeal

W. Va. Code § 18-29-4(t) provides that:

> Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator of the governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion.

It is the position of the Department that the level two decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record and was arbitrary and capricious inasmuch as the grievance evaluator did not rely on the factors that were intended to be considered and entirely ignored important aspects of the problems regarding Grievant's actions that led to the termination of his employment at Cedar Lakes.

As is stated above, there is no dispute that Grievant engaged in the conduct cited in the above Findings of Fact. The Department argues that the grievance evaluator focused on the fact that Grievant was not provided with an Employee Handbook when hired, and that he did not receive performance evaluations, to the exclusion of all other evidence, and determined based on those facts alone that his employment could not be terminated. Consequently, the Department concludes that the grievance evaluator's decision was arbitrary and capricious and clearly wrong.

The arbitrary and capricious standard of review 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 decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an action is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).

There is no evidence based upon a review of the record that the level two grievance evaluator failed to consider any of the factors involved in this grievance, or ignored important aspects of the problem. Further, while the Department, or even the undersigned, may have reached a different conclusion, the grievance evaluator's decision to weigh Grievant's misconduct against the procedural violations of the Department is not so implausible that it cannot be ascribed to a difference of view. Therefore, the decision of the level two grievance evaluator will stand.

ADDITIONAL FINDING OF FACT

I make the additional finding of fact based upon a preponderance of the evidence:

Grievant, as an irregular temporary employee at Cedar Lakes, is not guaranteed any set number of hours per week. Grievant never worked 40 hours a week. In 1998, Grievant averaged 16 hours per week; in 1997 he averaged 9 hours per week, and his average hours for 1999 have not been calculated.

CONCLUSIONS OF LAW

1. Grievant has failed to prove by a preponderance of the evidence that he is entitled to back pay and interest, or to the removal of documentation regarding the cited incidents in the Findings of Fact from his personnel file.

2. The Department has failed to prove by a preponderance of the evidence that the decision of the level two grievance evaluator was clearly wrong in view of the probative evidence, or arbitrary and capricious.

The grievance is **DENIED** insofar as Grievant's request for back pay and interest, and the removal of certain documentation from his personnel file. Further, the Department's appeal from the level two decision reinstating Grievant is **DENIED**. Accordingly, the decision of the level two grievance evaluator shall stand, and the Department is hereby **ORDERED** to reinstate Grievant to his position at Cedar Lakes.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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.

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MARY JO SWARTZ
Administrative Law Judge

Dated: September 20, 1999