KAREN MCCOY,

Grievant,

v. Docket No. 03-38-261

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Karen McCoy ("Grievant"), filed a grievance directly to level four on September 3, 2003, in which she alleged violations of W. Va. Code §§ 18A-2-8, 18A-4-15, 18-29-2 (m) and (o), and West Virginia State Board of Education Policy 5300, and that the Pocahontas County Board of Education ("PCBE") acted in an arbitrary and capricious manner when it terminated her employment as a substitute secretary. For relief, Grievant requests reinstatement and compensation for lost wages, with interest, and benefits, including the opportunity for employment as a regular employee. After settlement negotiations failed, a level four hearing was conducted in the Grievance Board's Elkins office on February 11, 2004. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and PCBE was represented by Gregory W. Bailey, Esq., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before March 8, 2004.

The following findings of fact have been made from a preponderance of the evidence.

Findings of Fact

1. Grievant was first employed by PCBE as a substitute Secretary/Accountant on May 15, 2002. She worked one day during the 2001-2002 school year. Grievant wasre-employed as a substitute by contract dated August 13, 2002, for the 2002-2003 school year. Grievant was simultaneously employed at a local bank, on a part-time basis.

2. PCBE Policy GCC-C, "Substitute Service Personnel List," provides in pertinent part: Substitute service personnel must be available to substitute on at least 75% of the occasions when personal contact has been made by authorized Board employees requesting substitutes. Substitutes who refuse to work at least 25% of those times during any school year will have

their names submitted to the Board of Education with a recommendation for removal from the substitute list. Records of availability of substitutes will be determined on a county wide basis.

3. PCBE does not strictly follow the terms of its own policy. To compensate for any mistakes in record keeping, an employee will be retained if she accepts at least fifty percent of the assignments offered to her.

4. By her own account, Grievant was called to work for PCBE twenty times during the 2002-2003 school year. Grievant accepted work with PCBE five days during the school year.

5. By letters dated August 12, 2003, PCBE Interim Superintendent of Schools Alice R. Irvine notified a number of substitute employees, including Grievant, that their records indicated they had not worked the amount of time required by policy and practice. The substitutes were given until August 18, 2003, to discuss the matter, prior to a recommendation being made to the board to remove their names from the substitute list.

6. Grievant notified Superintendent Irvine by letter of August 17, 2003, that she had been advised by Ken Legg, Executive Secretary of the West Virginia School Service Personnel Association, that PCBE's policy requiring substitutes to work a certainpercentage of the time was not legal. She requested that her name not be removed from the substitute list.

7. Grievant was notified by letter of August 26, 2003, that her name had been removed from the substitute list effective the 2003-2004 fiscal year because of her unavailability to work.

8. Substitute Aides who had not worked the mandatory time during the 2000- 2001 and 2001-2002 school years were re-employed.

9. No substitute who failed to accept at least half of the assignments offered during the 2002-2003 school year was re-employed by PCBE.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more

convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). Grievant argues that PCBE failed to comply with the provisions of W. Va. Code §§ 18A-2-8a or 18A-2-8, and the West Virginia Board of Education Policy 5300, in terminating/nonrenewing her contract of employment. Grievant also argues that PCBE's failure to employ her for the 2002-2003 school year was an erroneous application of the policy because she worked twenty-five percent of the times personal contact was made with her during the 2002-2003 school year. Finally, Grievant argues that PCBE has not uniformly applied its policy, resulting in discrimination and/or favoritism, and that the action was arbitrary and capricious.

PCBE asserts that substitutes are required by policy to work seventy-five percent of the time, and that Grievant failed to meet even the fifty percent criteria. PCBE acknowledges that Ramona Gordon had been in the same situation as Grievant during the 2001-2002 school year, and was re-employed after meeting with the board in executive session. Administrators were directed to keep more accurate records of substitute employment as a result of Ms. Gordon's meeting.

W. Va. Code § 18A-2-8a, provides specific guidelines for the non-retention of probationary employees:

The superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be

notified in writing, by certified mail, return receipt requested, to such persons' last-known addresses within ten days following said board meeting, of their nothaving been rehired or not having been recommended for rehiring.

Because PCBE did not take any action on or before the first Monday in May, this matter must be reviewed as a termination. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-4-8 provides:

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, except that dismissal for the conviction of a felony or guilty plea or plea of nolo contendere to a felony charge is not by itself a grievable dismissal. An employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.

Grievant argues that her dismissal was improper because PCBE failed to provide her with a performance evaluation and an opportunity to improve, as is required by West Virginia Board of Education Policy 5300. The August 12, 2003, letter from SuperintendentIrvine does not identify a statutory charge for the termination. Board counsel claimed for the first time in his proposed findings of fact and conclusions of law that Grievant's conduct constitutes willful

neglect of duty under the statute.

Grievant apparently assumes that she was terminated due to unsatisfactory performance; however, there is no evidence that her work was anything but acceptable when she was present. Similar cases have been reviewed as willful neglect of duty. Regester v. Harrison County Bd. of Educ., Docket No. 01-17-094 (May 9, 2001); Carr v. Randolph County Bd. of Educ., Docket No. 99-42-086 (Sept. 29, 1999); Dyer v. Lincoln County Bd. of Educ., Docket No. 97-22-246 (Sept. 11, 1997). As the proper focus is whether the charge of misconduct is proven, not the label attached to such conduct, the claim of willful neglect of duty will be addressed. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991)(citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991)).

Although the West Virginia Supreme Court of Appeals has not formulated a precise definition of "willful neglect of duty," it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

Grievant does not allege that she was unfamiliar with Policy GCCC-C, which requires substitute employees be available at least seventy-five percent of the time when personal contact has been made. Grievant's testimony at level four establishes that she knew PCBE expected her to accept substitute assignments as offered, but that she would not accept those which were to be more or less than one day in duration due to heremployment at the bank. Clearly, she was in a difficult position, holding a part-time position while trying to accrue enough substitute seniority to earn a regular, full-time position with PCBE. Unfortunately, she was unable to do both. PCBE has proven that the policy was properly applied to Grievant, and that her failure to accept the minimum number of assignments constituted willful neglect of duty.

Grievant also asserts that PCBE has inconsistently applied the policy, resulting in discrimination and/or favoritism. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by

preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o).

The establish a prima facie case of discrimination or favoritism Grievant must prove by a preponderance of the evidence:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and,

(c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent canthen offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

Grievant has established a prima facie case of discrimination/favoritism by proving that similarly situated substitute employees did not meet even the fifty percent criteria, but were re-employed. PCBE offered a legitimate reason for the actions, stating that poor record keeping had been practiced in prior years, but was corrected by the 2002-2003 school year. Grievant has not identified any individual who was not held to the fifty percent standard for the 2002-2003 school year, and has not shown the offered reason to be pretextual.

Finally, Grievant has failed to prove that PCBE acted in an arbitrary and capricious manner. 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). 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. PCBE's determination not to re-employ Grievant was based upon a correct application of facts and a valid policy and was not arbitrary and capricious in nature.

Consistent with the foregoing, the following conclusions of law are made. (See footnote 1)

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064.

2. A board of education may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. W. Va. Code § 18A-2-8. 3. A charge of willful neglect of duty encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

4. PCBE established that Grievant engaged in willful neglect of duty because she was aware that she was to be available to work, but knowingly and intentionally declined more than fifty percent of the assignments offered to her. Regester v. Harrison County Bd. of Educ., Docket No. 01-17-094 (May 9, 2001); Carr v. Randolph County Bd. of Educ., Docket No. 99-42-086 (Sept. 29, 1999).

5. “Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." 6. “Favoritism" is

defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18-29-2(o).

7. The establish a prima facie case of discrimination or favoritism Grievant must prove by a preponderance of the evidence:

(a) that she is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded her; and, (c) that the difference in treatment has caused a substantial inequity to her and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

8. Grievant established a prima facie case of discrimination/favoritism; however, PCBE offered a legitimate, nondiscriminatory reason for the difference in treatment, and Grievant did not argue that the reason was pretextual.

9. 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).

10. Grievant failed to prove that PCBE acted in an arbitrary and capricious manner.

Accordingly, this grievance is DENIED . Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Pocahontas County, and 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 19, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant did not address the alleged violation of W. Va. Code § 18A-4-15 during the level four proceedings. While that provision awards substitute service employees who have worked thirty days for a school system all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel, it is not applicable to Grievant. Therefore, no further consideration will be given to this issue.