CYNTHIA DODGE,

Grievant,

v. **Docket No. 05-39-268**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent,

and

NANCY TRICKETT, Intervenor.

DECISION

Cynthia Dodge ("Grievant") initiated this proceeding on June 9, 2005, challenging her placement on the transfer list for the 2005-2006 school year. The grievance was denied at level one on June 9, 2005. A level two hearing was held on June 21, 2005, and the grievance was denied in a decision dated June 27, 2005. Subsequent to the level two hearing, Nancy Trickett requested to intervene in the grievance, which motion was granted by the level two hearing evaluator. Level three consideration was bypassed, and Grievant appealed to level four on August 4, 2005. A hearing was held in Westover, West Virginia, on October 12, 2005, at which Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Kimberly S. Croyle. (See footnote 1) This matter became mature for consideration upon receipt of the parties' fact/law proposals on November 16, 2005.

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

Findings of Fact

1. Grievant is employed by Respondent as a classroom aide. During the 2004- 2005 school year, she was assigned to a kindergarten class at Valley Elementary School.

2. In the spring of 2005, projected enrollment for the next year's kindergarten at Valley Elementary was less than 80 students, which is the threshold number for adding a fourth kindergarten

aide. Aides are required for any class of over 10 students.

3. Grievant was the least senior kindergarten aide, so she was placed on the transfer list.

4. After early registration had concluded in late June, it was projected by the school's principal that Valley Elementary would have approximately 78 incoming kindergarten students. However, this number included students who had not yet moved to the area and students who had been recommended to be retained for a repeat year of kindergarten, which can be refused by the child's parents.

5. Despite the school's projections on the expected number of kindergarten students, the "official" number of students enrolled in the county's computer system, as of the level two hearing conducted on June 21, 2005, was 65. The remaining "projected" students had not yet officially registered, due to uncertainties regarding expected moves, retention, and other contingencies.

6. Based upon the projected numbers in June, Valley Elementary requested that a kindergarten aide position be posted for the upcoming school year. However, the posting was rescinded after the actual numbers were verified, showing that only 65 students were actually registered. 7. Because of the projected number of kindergarten students as of June, an additional kindergarten teacher was retained, (See footnote 2) but Grievant remained on the transfer list. With less than 70 students, there would be three classes of 20 students and an additional class of less than 10 students, for which there would be no need for an aide.

8. At the conclusion of "home visits," whereby the kindergarten teachers visit the individual homes of potential students, the final number of registered students was 80, as of August 30, 2005. Home visits are conducted during the three days prior to the start of school, which was August 31, 2005, for kindergarten students.

9. Because the fourth kindergarten class would have 20 students, an aide was needed, and that position was posted on August 30, 2005.

10. Although Grievant applied for the position, Intervenor was the most senior applicant for the kindergarten aide position at Valley Elementary School, and she was placed in the position.

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. 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 argues that Respondent's claim of conflicting information regarding the expected number of kindergarten students at Valley Elementary is spurious and believes that administrators knew well before August 1, 2005, that there would be a need for a fourth kindergarten aide. She points to the fact that the position was even posted in June, and quickly withdrawn. W. Va. Code § 18A-4-8b(k) provides that "If, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular reduction in force or transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the affected employee in writing of his or her right to be restored to his or her former position of employment." [Emphasis added.] Per the provisions of this statute, Grievant claims that, if Respondent knew the expected enrollment still justified the need for her position prior to August 1, she should have been reinstated.

"Three criteria must be met before [W. Va. Code § 18A-4-8b(k)] will allow a displaced employee to return to her position after a RIF or transfer: 1) The county board decides the reason for the reduction in force or transfer [no longer exists]; 2) The county board reaches that decision before the August first next following the RIF or transfer; and 3) no employees on the preferred recall list with more seniority are eligible to be placed in that position." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

The only issue to be decided here is whether or not Respondent's officials knew before August 1 that kindergarten enrollment at Valley Elementary would exceed 79 students. As can be seen from the findings of fact set forth herein, the number of expected students fluctuated throughout the spring and summer, but in actuality, it did not reach the"magic" number of 80 students until the end of August. Although projections in June placed the number *close* to 80, it was still under that number, leaving a very strong possibility--if not certainty--that a fourth kindergarten aide would not be justified. As established in the level four testimony in this grievance, Valley Elementary often only has three kindergarten classes, and it sometimes only barely reaches the numbers needed for a fourth one, as occurred in 2005.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be

exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Cahill v. Mercer County Bd. of Educ., 195 W. Va. 453, 465 S.E.2d 910 (1995), Bd. of Educ. v. Enoch, 186 W. Va. 712, 414 S.E.2d 630 (1992), Egan v Bd. of Educ., 185 W. Va. 302, 406 S.E.2d 733 (1991). Even when, as in this case, the county board is given the authority to make a determination in "its sole and exclusive judgment," that broad grant of discretion must still be exercised reasonably, rather than arbitrarily. 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 Resources, 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 anadministrative law judge may not simply substitute her judgment for that of a board of education." Trimboli, *supra*, Blake, *supra*.

Under the circumstances presented, the undersigned cannot find Respondent's decision not to rescind Grievant's transfer to be unreasonable. As discussed above, the enrollment numbers fluctuated for several months, and as of August 1, 2005, the evidence establishes that it had not yet reached the threshold number for a fourth kindergarten aide. As the saying goes, "hindsight is always 20/20," and, in retrospect, Grievant's position was needed for the 2005-2006 school year. However, Respondent did not have the pertinent information to make this determination prior to August 1, the statutory deadline for rescission of transfers.

The following conclusions of law are consistent with this decision.

Conclusions of Law

1. In a non-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. "Three criteria must be met before [W. Va. Code § 18A-4-8b(k)] will allow a displaced employee to return to her position after a RIF or transfer: 1) The county board decides the reason for the reduction in force or transfer [no longer exists]; 2) The county board reaches that decision before the August first next following the RIF or transfer; and 3) no employees on the preferred recall list with more seniority are eligible to be placed inthat position." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

3. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Cahill v. Mercer County Bd. of Educ., 195 W. Va. 453, 465 S.E.2d 910 (1995), Bd. of Educ. v. Enoch, 186 W. Va. 712, 414 S.E.2d 630 (1992), Egan v Bd. of Educ., 185 W. Va. 302, 406 S.E.2d 733 (1991).

4. As of August 1, 2005, the need for Grievant's transfer--reduced enrollment in the kindergarten class at Valley Elementary School--still existed, and Respondent's determination not to rescind her transfer prior to that time was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Preston 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: November 28, 2005

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Intervenor's representative, Don Craft of the West Virginia Education Association, was unable to attend the level four hearing, but submitted a written argument after being provided with an audio recording of the hearing.

Footnote: 2

Apparently, the least senior kindergarten teacher had also been placed on transfer, but her transfer was rescinded in June.