KIMBERLY COCHRAN,

Grievant,

v. DOCKET NO. 05-27-307

MERCER COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant, Kimberly Cochran, née Osburn, filed this grievance on June 1, 2005, claiming that Respondent, the Mercer County Board of Education (MCBOE), "erred in not renewing her probationary contract, because it based the non-renewal on inaccurate and unfair evaluations." Her stated relief sought is "(a) cessation of harassment & discrimination; (b) reinstatement of her probationary contract; (c) reinstatement of seniority and benefits; [and] (d) compensation for lost wages and benefits with interest."

A level four hearing was held in the Grievance Board's Beckley office on October 19, 2005. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and Respondent was represented by John H. Shott, Esq. The matter became mature for decision on November 18, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant alleges that, while she was employed as a cook at Bluefield Middle School, the cafeteria manager demonstrated personal animosity toward Grievant by falsely reporting her work performance as deficient, resulting in bad performance evaluations and an unneeded improvement plan. She contends Respondent improperly depended on these unreliable documents in reaching its decision not to renew her probationary contract. Respondent's position is that Grievant did not challenge either her performance appraisals or improvement plan, and that they were a valid and reliable basis for its action.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant was regularly employed as a Cook by MCBOE at Bluefield Middle School (BMS) for the 2004-2005 school year, beginning employment on or about September 20, 2004. Prior to that employment, Grievant had been employed by MCBOE as a Substitute Cook since 1999, and had worked at various other schools in both short- term and long-term assignments. While working as a substitute, Grievant never received a negative evaluation.

2. Barbara Lambert is the cafeteria manager at BMS, and her daughter, Barbie Wiley, is employed there as a Cook. (See footnote 1) The Principal at BMS is Dr. Stephen Akers, who is the husband of Superintendent Deborah Akers. 3. In February 2005, Principal Akers completed an evaluation of Grievant that concluded she did not meet standards in eighteen of nineteen applicable indicators. As a result of this evaluation, Grievant was placed on an Improvement Plan. Although she did not agree with the evaluation and filed a rebuttal to it, she did not grieve the evaluation or the improvement plan.

4. On May 6, 2005, Grievant was again evaluated by Principal Akers, and he found little improvement, rating her as not meeting standards in nine of eleven rated areas. Grievant again refuted the evaluation, but did not file a grievance. Although Principal Akers claimed to have authored the evaluation himself, the language and phrasing used is an almost verbatim repeat of a document Grievant purports was written by Ms. Lambert.

5. During Grievant's tenure at BMS, including the times covered by her performance evaluations and improvement plan, she repeatedly complained of the treatment she was subjected to by Ms. Lambert and/or her daughter, Ms. Wiley. Ms. Lambert also claimed Grievant treated her badly and with a lack of respect. Prior to Grievant's employment at BMS, Grievant's mother worked as a Cook supervised by Ms. Lambert, and those two had personal disagreements.

6. Grievant never filed a grievance concerning Ms. Lambert's attitude or treatment of her.

7. Respondent elected not to renew Grievant's contract for the 2005-2006 school year.

Discussion

Because W. Va. Code § 18A-2-8a gives broad discretion to the county board when determining

whether or not to rehire a probationary employee, Grievant must establish, bya preponderance of the evidence, that LCBE's decision in this instance was arbitrary and capricious. *(See footnote 2)* "When a probationary contract is not renewed per the procedure set forth in Code § 18A-2-8a, the board is 'not required to convene a pre-termination hearing because Grievant, in effect, was not terminated; rather, [her] contract, which is probationary and thus affords [her] no property interest in [her] employment, was not renewed.' Even if the reasons for non- renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in W. Va. Code § 18A-2-8a." (See footnote 3)

"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 footnote 4) Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. (See footnote 5) An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." (See footnote 6) "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review isnarrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." (See footnote 7)

Although Grievant argues Respondent's action was a termination, "pure and simple," for which it should bear the burden of proving a justification, this is clearly not the case, and such a finding would be contrary to well-established precedent. In actuality, Respondent's action was really an inaction, as Grievant's probationary contract expired automatically at the end of its term. Respondent does not allege any misconduct on Grievant's part, only unacceptable performance. (See footnote 8) Grievant carries the burden of showing that Respondent's decision not to renew the contract was arbitrary and capricious.

Grievant's argument in that vein is that Respondent should not have relied on her unsatisfactory performance appraisals or the improvement plan, because they were the products of her supervisor's personal enmity rather than actual indicators of her performance. This case does present some interesting conundrums in that regard. If I accept Grievant's argument that Principal Akers could not fairly evaluate Grievant's performance because he did not directly observe Grievant's work, then the logical extension of that argument is that Ms. Lambert, as Cafeteria Manager, was in such a position

and would provide a more reliable evaluation. However, Grievant also argues that Principal Akers should not have relied on Ms. Lambert's input, due to her personal animosity. Grievant has a valid point, and she made it well-known that she and Ms.Lambert were at odds, and that she believed Ms. Lambert's evaluations were colored by her personal views. However, It would be extremely problematic to now find these performance measurement were invalid, given that Grievant never formally challenged them. Respondent did have Grievant's written responses to weigh against them when it made its decision, but now is not the proper time to go back and declare the evaluations invalid and unreliable.

Superintendent Akers made the decision to recommend to the Board of Education that Grievant's contract not be renewed. She relied on Grievant's evaluations and a summary letter written by Principal Akers. She determined from that material that Grievant had been found deficient in several work skills and despite being given clear direction and opportunity, had failed to correct the deficiencies. She noted there were a lot of conferences held to attempt to resolve the problems, and that she had no prior trouble with Ms. Lambert.

W. Va. Code § 18-2-12a (b)(6) states (See footnote 9):

> All school personnel are entitled to know how well they are fulfilling their responsibilities and should be offered the opportunity of open and honest evaluations of their performance on a regular basis and in accordance with the provisions of section twelve of this article. All school personnel are entitled to opportunities to improve their job performance prior to the termination or transfer of their services. Decisions concerning the promotion, demotion, transfer or termination of employment of school personnel, other than those for lack of need or governed by specific statutory provisions unrelated to performance, should be based upon the evaluations, and not upon factors extraneous thereto. All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion. . . .

Grievant appears to contend that she was denied “open and honest” evaluations because her evaluations were based on the input and opinion of Ms. Lambert, who did not like her. There seems to be no dispute that Grievant and Ms. Lambert and Ms. Lambert's daughter did not get along. There is also evidence that Grievant was not entirely innocent in the interplay, but it is the potential abuse of authority by Ms. Lambert that raises red flags with Grievant's treatment. Ms. Lambert did have input in the evaluations that Superintendent Akers relied on, as a direct supervisor normally should. However, there is no evidence that Ms. Lambert was in any way involved in the decision of Superintendent Akers to recommend non-renewal of Grievant's contract, and that decision is the one under review. The validity of the improvement plan and performance evaluations must be assumed,

since they were never grieved and overturned. Such documents become final upon the expiration of the Grievant's time limit for appealing them through the grievance procedure.

There is nothing arbitrary and capricious in the Superintendent's decision, as it was based, as it should have been, on valid indicators of her performance, both before and after a constructive improvement plan. Grievant was clearly told where her performance shortcomings lay, how to improve them, was given an opportunity to improve them, and showed little advance in performance. While Grievant reasonably points out that it would likely have been effective to simply transfer her to another school, where she was not subjected to Ms. Lambert and her daughter, she cited no legal authority that would obligate Respondent to do so.

The following conclusions of law support this discussion:

Conclusions of Law

1. Because W. Va. Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, Grievant must establish, by a preponderance of the evidence, that MCBE's decision in this instance was arbitrary and capricious. *See*, W. Va. Code § 18-29-6; 156 W. Va. C. S. R. 1 § 4.21*; Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991).

2. "When a probationary contract is not renewed per the procedure set forth in Code § 18A-2-8a, the board is 'not required to convene a pre-termination hearing because Grievant, in effect, was not terminated; rather, [her] contract, which is probationary and thus affords [her] no property interest in [her] employment, was not renewed.' [*Cordray v. Wood County Bd. of Educ.*, Docket No. 90-54-267 (Jan. 31, 1991)] (*citing Belota v. Boone Co. Bd. of Educ.*, Docket No. 90-03-252 (Nov. 30, 1990); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)). Even if the reasons for non- renewal are disciplinary in nature, a probationary employee is not entitled to any protections beyond those provided for in W. Va. Code § 18A-2-8a. [Citations omitted.]" *Meredith v. Mercer County Bd. of Educ.*, Docket No. 00-27-247 (Jan. 31, 2001).

3. 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 ofHealth 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).

4. All board of education employees are entitled to know how well they are performing their jobs, and should receive open and honest evaluations on a regular basis. Additionally, employees should receive the opportunity to improve their job performance, prior to disciplinary action. W. Va. Code § 18-2-12a (b)(6); W. Va. Board of Education Policy 5300 at § 2.6.

5. Personnel actions such as improvement plans and performance evaluations become final upon the expiration of the employee's time limit for challenging them through the grievance process, and they are thereafter presumed valid.

6. Grievant did not meet her burden of proving Respondent's decision not to renew her probationary contract was arbitrary and capricious.

For the foregoing reasons, this grievance is hereby **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty 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.

December 21, 2005

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Whether or not this working relationship violates any anti-nepotism policies was not raised as an issue in this matter.

Footnote: 2

See, W. Va. Code § 18-29-6; 156 W. Va. C. S. R. 1 § 4.21; Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

Footnote: 3

Meredith v. Mercer County Bd. of Educ., Docket No. 00-27-247 (Jan. 31, 2001).

Footnote: 4

Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

Footnote: 5

State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Footnote: 6

Id.

Footnote: 7

Trimboli, supra; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Footnote: 8

Grievant was disciplined during the course of her employment following an argument with Ms. Wiley (who was also disciplined) and Ms. Lambert (who was not).

Footnote: 9

W. Va. Board of Education Policy 5300 § 2.6 is substantially similar.